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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FELIX CORRAL RUIZ, Defendant and Appellant.

CRC 8.25(b)

SUPREME COURT
FILED

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Deputy

Court of Appeal, Fifth Appellate District, No. F068737
Tulare County Superior Court No. VCF241607J

Hon. Joseph Kalashian, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

Pursuant to California Rules of Court, rule 8.500(a), appellant Felix Corral Ruiz hereby petitions for review of the May 19, 2016, opinion of the Court of Appeal, Fifth Appellate District, affirming his conviction and sentence. A copy of the opinion is attached to this petition as Exhibit A. Appellant requests that this court grant review, and upon full consideration, remand with an order permitting him to withdraw his plea.

QUESTION PRESENTED AND NECESSITY FOR REVIEW

This petition presents the following important question of statewide significance and constitutional magnitude for the court's resolution:

1. Is a defendant who has obtained a certificate of probable cause estopped under *People v. Hester* (2000) 22 Cal.4th 290 from challenging a plea agreement where the plea included an unauthorized enhancement under Penal Code section 186.22, subdivision (b)(1), and the People have conceded that the sentence was unauthorized?

2. May drug and lab fees be imposed under Health and Safety Code sections 11372.5 and 11372.7 where a defendant is not convicted of any of the offenses specified under those sections, but only of conspiracy to commit a specified offense?

First, the Court of Appeal here agreed at the outset that the ten-year term under Penal Code section 186.22 was unauthorized, because where a person is sentenced to an enhancement term under Penal Code section 12022.53 under circumstances where the person did not personally use or discharge the firearm, the court cannot also impose a gang enhancement. (Pen. Code, § 12022.53, subd. (e); see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12, fn. 2.) Section 12022.53, subdivision (c), applies on its face to those who "personally and intentionally" discharge a firearm. (Pen. Code, § 12022.53, subd. (c).) Appellant did not admit personal and intentional discharge of a firearm, however; he

admitted only that a *principal* personally discharged a firearm. (RT 187-188.)

The appellate court agreed with the Attorney General, however, that the issue was forfeited by the plea bargain in this case. (Slip opn., pp. 4-11.) The Fifth District relied on this court's holding in *People v. Hester*, *supra*, 22 Cal.4th 290, extending that holding to bar a challenge to the unauthorized sentence in the instant case.

In so holding, the court extended the ruling in *Hester* – a narrow holding that rested in part on the unique circumstances of a claim under Penal Code section 654 – to situations in which a defendant unknowingly enters into a plea bargain to an unlawful sentence, and then is estopped from challenging that unlawful plea agreement on appeal. (Cf. *People v. Miller* (2012) 202 Cal.App.4th 1450, 1452-1453.) This court should grant review to clarify the scope of the *Hester* rule.

Second, the Court of Appeal identified a split of authority on the question of whether drug and lab fees under Health and Safety Code sections 11372.5 and 11372.7 constitute "punishment." Rejecting the on-point holding of the court in *People v. Vega* (2005) 130 Cal.App.4th 183, which squarely held that these fees cannot be imposed where the only conviction is for conspiracy, the court here opted to follow the holding in *People v. Sharett* (2011) 191 Cal.App.4th 859, where the court under distinguishable circumstances found that these fees are "punishment." From this, the court here concluded that they were

properly imposed under Penal Code section 182, subdivision (a). (Slip opn., pp. 13-16.)

This court should grant review to resolve this explicit split of authority and ensure statewide uniformity in imposition of fees under Health and Safety Code sections 11372.5 and 11372.7.

STATEMENT OF THE CASE AND FACTS

Information gleaned from surveillance and court-approved electronic interception between the dates of July 27, 2010, and July 29, 2010, showed that Felix Corral Ruiz received phone calls from Joe Dominguez regarding activities of a Norteno street gang. (Conf. CT 13.)[1] Ruiz appeared to be higher ranking in the gang than Dominguez, and on July 27, 2010, following a shooting of Norteno gang members by a rival gang, Ruiz and Dominguez were heard discussing plans for a retaliatory shooting. (Conf. CT 13.) On that evening, Dominguez was overheard telling Ruiz about a heavy police presence in the area, and Ruiz told Dominguez to call off the retaliatory shooting until the next day. (Conf. CT 13.) Calls were then intercepted from Dominguez telling other gang members to call off the shooting that night. (Conf. CT 13.)

The following day, Dominguez was overheard telling Ruiz the status of the plans for the shooting, and reporting that one of their gang members had been shot that morning. Ruiz told Dominguez to get more information and report back. (Conf. CT 13.) Dominguez was overherad telling another gang member that he would be meeting with Ruiz later that day to see what he wanted done. (Conf. CT 13.)

On July 28, 2010, several Norteno gang members shot different caliber weapons toward an apartment complex where

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[1]"CT" refers to the clerk's transcript on appeal; "RT" refers to the reporter's transcript. The confidential clerk's transcript will be designated as "Conf. CT."

rival gang members were known to congregate. A 59-year-old person was shot in the chest, and a 17-year-old person was shot in the leg. (Conf. CT 13.)

Department of Justice crime reports concluded that Dominguez played a dominant role over other Norteno gang members who were responsible for the shooting. (Conf. CT 13.) Dominguez gave instructions to his gang members to obtain weapons and ammunition, and to recruit other gang members to fire distraction rounds to divert law enforcement officers from the intended scene of the crime. (Conf. CT 13.) Department of Justice information indicated that Dominguez reported to Ruiz within the hierarchy of the gang and that Ruiz played a dominant role over Dominguez. (Conf. CT 14.)

On December 18, 2012, Tulare County information number VCF241607D charged appellant Ruiz and Dominguez[2] with multiple felonies. (CT 756-787.) Count one charged both defendants with conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1); Pen. Code, § 187) between the dates of July 27 and July 29, 2010. (CT 760.) This count included special allegations under Penal Code section 12022.53, subdivisions (c), (d), and (e)(1), and Penal Code section 186.22, subdivisions (b)(1)(C) and (b)(5). (CT 760-761.) Counts two and three charged them with attempted willful, deliberate, and premeditated murder (Pen. Code, § 664/187) of K.S. and D.S., respectively, on the same dates, with the same special allegations. (CT 762-765.) Count four charged

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[2]Dominguez is not a party to this appeal.

them with shooting at an inhabited dwelling (Pen. Code, § 246), with the same firearm special allegations, as well as a gang allegation under Penal Code section 182.22, subdvision (b)(4). (CT 766.) Counts five and six charged them with conspiracy to violate Health and Safety Code sections 11379, subdivision (a), and 11378, respectively, with special allegations under Penal Code section 186.22, subdivision (b)(1)(a). (CT 767-770.) These two counts were alleged to have occurred on or about June 1, 2010. (CT 767-769.) Count seven charged appellant with participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) on or about June 1, 2010. (CT 770-771.)[3] The information further alleged as to each count that appellant had served a prior prison term (Pen. Code, § 667.5, subd. (b)) on March 5, 2003, for a violation of Health and Safety Code section 11378. (CT 761-771.)

On August 15, 2013, appellant agreed to plead no contest to counts two and three, two counts of attempted murder (Pen. Code, § 664/187, subd. (a)), as well as count five, conspiracy (Pen. Code, § 182, subd. (a)(1)). (CT 864-865.) The prosecution agreed to strike the allegation that the attempted murder counts were willful, deliberate, and premeditated. (RT 187.) He admitted special allegations under Penal Code sections 186.22, subdivision (b)(1)(c), and 12022.53, subdivision (c), as to counts two and three. (CT 865.) He admitted the prior prison term under Penal Code section

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[3] Counts eight through twenty-six applied only to the codefendant. (CT 771-787.)

667.5, subdivision (b). (CT 865.) As part of the plea agreement, appellant agreed to waive his presentence credits and his right to appeal.(RT 183-184.) The prosecution also agreed to dismiss a pending misdemeanor child endangerment charge in Tulare County case number VCF207169. (RT 191.)

On September 26, 2013, the court denied probation and sentenced appellant to the lower term of five years for count two, with an additional 20 years under Penal Code section 12022.53, subdivision (c), and an additional ten years under Penal Code section 186.22, subdivision (b)(1)(c). (CT 868, RT 203.) The court imposed concurrent time on counts three and five and stayed the sentence on the prior prison term. (CT 868, 870, RT 203-204.) The court imposed various fines and fees, including a total of $600 under Health and Safety Code sections 11372.5 and 11372.7. (Confidential CT 24-25, RT 204.)

Appellant filed notice of appeal on January 8, 2014, and the court granted his request for certificate of probable cause. (CT 873-874.) On May 19, 2016, the Court of Appeal affirmed the judgment with minor modifications to the abstract of judgment.

ARGUMENT

I.

THE BARGAINED-FOR TERM WAS UNAUTHORIZED AND APPELLANT WAS NOT ESTOPPED FROM CHALLENGING IT ON APPEAL

The plea agreement in this case called for a stipulated term of 35 years in state prison. (RT 183.) Appellant agreed to waive his right to appeal and to waive all accrued time credits. (RT 183.) At sentencing, the court reached the 35-year term by imposing an unauthorized ten-year term for an enhancement under Penal Code section 186.22, subdivision (b)(1). (RT 203.) Because this term was statutorily barred under the circumstances of this case (see Pen. Code, § 12022.53, subd. (e)(2)), appellant should be permitted to withdraw his plea.

The Court of Appeal, while finding that the enhancement was indeed unauthorized and that appellant did not knowingly waive his right to challenge it on appeal, nonetheless concluded that the claim was forfeited by the terms of the stipulated plea. (Slip opn., pp. 4-11.) The Court of Appeal's holding was erroneous, and this court should grant review to resolve the issue.

A. Procedural Background

Appellant admitted two counts of attempted murder (Pen. Code, § 664/187), two allegations that "a principal personally and intentionally discharged a firearm, to wit, a handgun, in the commission" of those offenses, under Penal Code section 12022.53,

subdivision (c),[4] and two allegations that the attempted murders were committed for the benefit of a criminal street gang. (RT 187-188.) He also pled no contest to a charge of conspiracy to violation Health and Safety Code section 11379, but as part of the plea agreement did not admit the charged gang allegation as to that count. (RT 189.) The parties neither stated nor stipulated to a factual basis at the time of the plea agreement, but the facts as described in the probation report unambiguously describe appellant's conduct as that of an aider and abettor, with no suggestion that he personally used or discharged a firearm at any time. (Conf. CT 12-14.)

The court sentenced appellant to the low term of five years for attempted murder, with a consecutive term of twenty years for the Penal Code section 12022.53, subdivision (c), allegation, and an additional ten years for the section 186.22, subdivision (b)(1) allegation. (RT 203.) The court imposed concurrent terms for the remaining counts. (RT 204.)

B. The Sentence Imposed Was Unauthorized, and Appellant Should Be Permitted to Withdraw His Plea

The ten-year term under Penal Code section 186.22, subdivision (b), was unauthorized, because where a person is

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[4]As to the first of the attempted murder counts, the court actually phrased the allegation as "a handgun was *used* by a principal in the commission of that offense," but specified that the allegation was under Penal Code section 12022.53, subdivision (c). (RT 187; emphasis added.)

sentenced to an enhancement term under Penal Code section 12022.53 under circumstances where the person did not personally use or discharge the firearm, the court cannot also impose a gang enhancement. Section 12022.53, subdivision (c), applies on its face to those who "personally and intentionally" discharge a firearm. (Pen. Code, § 12022.53, subd. (c).) Appellant did not admit personal and intentional discharge of a firearm,however; he admitted only that a *principal* personally discharged a firearm. (RT 187-188.) The Court of Appeal, as well as respondent, agreed that the enhancement was unauthorized. (RB 6, Slip opn., p. 4.)

Where a court imposes a sentence that is unauthorized by law, the sentence cannot stand even if it is the result of a negotiated plea. (Cf. *People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567; see also *People v. Ramirez* (1995) 33 Cal.App.4th 559, 574; *People v. Baries* (1989) 209 Cal.App.3d 313.) The appropriate remedy on appeal is to reverse the conviction and remand with instructions to allow appellant to withdraw his plea. (*Id.*, at p. 319.)

"'To be valid, guilty pleas must be based upon a defendant's full awareness of the relevant circumstances and the likely consequences of his action. [Citations.]'" (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1356.) Further, the defendant must be aware of "'the actual value of any commitments made to him by the court, prosecutor, or his own counsel. . . .' [Citation.]" (*Ibid.*)

Although the plea in this case did not specify how the court would reach the agreed upon 35-year term, it is plain that under the law and the facts of the case, the sentence as imposed was unauthorized. Appellant should be permitted to withdraw his plea.

C. This Issue Is Not Forfeited

As part of the plea agreement, appellant waived accrued time credits and waived his right to appeal. (RT 183.) Nonetheless, he filed a notice of appeal and the court issued a certificate of probable cause to permit him to raise issues regarding wiretaps. (CT 874.)

The Court of Appeal correctly held that the appeal waiver could not be read to encompass any errors that occurred after the waiver was taken, such as errors that occurred at sentencing. (Slip opn., p. 4, see also *People v. Orozco* (2010) 180 Cal.App.4th 1279, 1285.) The court further correctly held that the trial court's handwritten notation on the order granting the certificate of probable cause did not limit the issues that can be raised on appeal. (Slip opn., p. 4; see also *People v. Hoffard* (1995) 10 Cal.4th 1170, 1177.) The court incorrectly concluded, however, that appellant's contention was forfeited by the plea.

An unauthorized sentence is subject to correction on appeal even if there was no objection in the court below. (*People v. Dotson* (1997) 16 Cal.4th 457, 554, fn. 6.) The plea here was for a specified term, but did not indicate how the court was to reach that agreed-upon term. Not only was the term imposed

unauthorized, it does not appear that the agreed-upon term can be lawfully imposed. Thus, the proper remedy is to permit the defendant to withdraw his plea. (Cf. *People v. Superior Court (Sanchez), supra*, 223 Cal.App.4th 567.)

In finding that the issue was forfeited, the Court of Appeal relied on this court's decision in *People v. Hester* (2000) 22 Cal.4th 290. The decision in *Hester*, however, addressed the issue of raising a Penal Code section 654 challenge for the first time on appeal following a plea agreement. (*People v. Hester, supra*, 22 Cal.4th at p. 294.) A claim under Penal Code section 654 is governed by a different body of law than the instant claim, and raising such a claim for the first time on appeal following a plea bargain is specifically precluded by Rule 4.412, subdivision (b), of the California Rules of Court:

> By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.

(Rule. 4.412(b).)[5] In *Hester,* the Court of Appeal had held that a prior version of rule 4.412(b) was invalid to the extent that it permitted trial courts to violate section 654 in the absence of an implicit or explicit waiver by the defendant. (*People v. Hester, supra,* 22 Cal.4th at p. 294.) This court reversed and upheld the validity of Rule 4.412(b).

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[5]Formerly Rule 412(b), and so referred to in *Hester*.

The distinction between claims raised under Penal Code section 654 and other types of unauthorized sentences is underscored by the difference between Rule 4.412(b) and 4.412(a). The latter states:

> It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. *This section does not authorize a sentence that is not otherwise authorized by law.*

Subdivision (a), then, states the general law, that a plea agreement does not automatically validate an otherwise unauthorized term, while subdivision (b) states an exception to that rule for claims under Penal Code section 654.

The court in *Hester* noted that the rule permitting a challenge to an unauthorized sentence on appeal even in the absence of an objection below does not apply where the defendant has pleaded guilty in return for a specified sentence. (*People v. Hester, supra,* 22 Cal.4th at p. 295.) "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (*Ibid.*)

Appellant, however, is not asking this court to reduce his sentence. He requests a remand to determine whether, as the Attorney General suggested in the Court of Appeal, he can be lawfully sentenced within the terms of the plea bargain. If that

cannot be accomplished, he should be permitted to withdraw his plea. (Cf. *People v. Hester, supra,* 22 Cal.4th at p. 296.)[6]

This court should grant review and, upon full consideration, remand so that the trial court can determine whether a lawful sentence may be reached that is agreeable to the People and does not exceed the terms of the plea agreement. If this cannot be accomplished, the court should permit appellant to withdraw his plea.

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[6]In suggesting a remand, respondent did not suggest a method by which appellant could lawfully be sentenced to the agreed upon term. It does not appear to appellant that a 35-year term can lawfully be crafted given the charges to which appellant pled; it appears that the maximum term available is 33 years, 4 months. (See Pen. Code, § 667/187, subd. (a); Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379, subd. (a)); Pen. Code, § 12022.53, subd. (c); Pen. Code, § 667.5, subd. (b).)

II.

THE FEES AND ASSESSMENTS IMPOSED UNDER HEALTH AND SAFETY CODE SECTIONS 11372.5 AND 11372.7 WERE UNAUTHORIZED AND SHOULD BE STRICKEN; COUNSEL'S FAILURE TO OBJECT DEPRIVED APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL

At sentencing, the court imposed $600 in fees and penalty assessments under Health and Safety Code sections 11372.5 and 11372.7. (RT 204; see Conf. CT 24.)[7] On appeal, appellant argued that this fee was unauthorized because although appellant pleaded no contest to conspiracy to violate Health and Safety Code section 11379, the fees authorized by Health and Safety Code sections 11372.5 and 11372.7 do not apply to a conspiracy conviction. (See *People v. Vega* (2005) 130 Cal.App.4th 183, 194.) Appellant further argued that counsel's failure to object to the unauthorized fees deprived him of effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [104 S.Ct. 2052; 80 L.Ed.2d 674].) The Court of Appeal declined to follow *Vega* and instead followed the conflicting holding in *People v. Sharret* (2011) 191 Cal.App.4th 859. Because *Sharret* was wrongly decided, this court should grant review and, upon full consideration, strike the unauthorized fines.

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[7]The court ordered appellant to pay $600 "as set forth in Paragraph 8 of Page 16 of the probation report." (RT 204.) This page of the probation report is in the appellate record at page 24 of the Confidential Clerk's Transcript ("Conf. CT") and refers to fees and assessments under the above code sections.

Health and Safety Code section 11372.5 assesses a "criminal laboratory analysis fee" on defendants who are convicted of specified drug offenses. Health and Safety Code section 11372.7 likewise imposes a "drug program fee" on defendants convicted of specified offenses. Neither statute mentions conspiracy convictions. (Cf. *People v. Vega, supra,* 130 Cal.App.4th at p. 194.)

Although Penal Code section 182, subdivision (a), holds that where criminal defendants have been convicted of conspiring to commit a felony "they shall be punished in the same manner and to the same extent as is provided for the punishment of that felony," the *Vega* court found this unpersuasive, because the fees imposed under Health and Safety Code section 11372.5 are not "punishment." (*People v. Vega, supra,* 130 Cal.App.4th at p. 194.) The court thus held that, where defendants were convicted only of conspiracy to commit drug offenses, but not of the target offenses themselves, the criminal laboratory analysis fee was unauthorized. (*Ibid.*) The *Vega* analysis applies equally to the drug program fee. Thus, these fees and assessments are unauthorized and should be stricken.

Although the Court of Appeal opted to follow the decision in *Sharett* rather than the more pertinent decision in *Vega*, the *Vega* opinion makes the more persuasive case. In *Sharett*, the Court of Appeal held that a Health and Safety Code section 11372.5 laboratory analysis fee constitutes punishment and must be stayed under Penal Code section 654 if the count to which it is attached is so stayed. (*People v. Sharett, supra,* 191 Cal.App.4th at

p. 869.) The court was not presented with the issue of whether fees under Health and Safety Code sections 11372.5 and 11372.7 should be imposed where the defendant is convicted of a drug-related conspiracy.

Certainly, penalties and assessments may qualify as punishment, if they have a punitive effect. (*People v. High* (2004) 119 Cal.App.4th 1192, 1198.) But the fees and assessments under Health and Safety Code sections 11372.5 and 11372.7 do not have such an effect, as the court found in *Vega*.

In *High*, the appellate court found that retroactive application of Government Code section 70372 violated the ex post facto clause, because that "penalty is calculated on 'every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses' at the rate of $ 5 for every $ 10. The penalty imposed tracks the seriousness of the underlying offense and its base penalty. The prospect of its imposition therefore has a similar deterrent effect to that of punitive statutes generally." (*People v. High, supra*, 119 Cal.App.4th at p. 1198.) The court found that the penalty in section 70372 thus promoted "the traditional aims of punishment—retribution and deterrence." (*Ibid.*, internal quotation marks omitted.) Moreover, the Legislature had labeled the fee imposed under section 70372 a "penalty," indicating that it was intended to be punitive. (*Id.* at p. 1199.)

Similarly, in *People v. Batman* (2008) 159 Cal.App.4th 587, the court found that the DNA penalty imposed under Government Code section 76104.6 was subject to the constitutional ban on ex

post facto laws. The court found that the section 76104.6 penalty was similar to the penalty at issue in *High*, and noted in particular that:

> The statute denominates the assessment a penalty: it applies to every criminal fine, penalty, and forfeiture; it is assessed in proportion to the defendant's criminal culpability; and it is to be collected and processed using the same statute that authorizes the state penalty assessment. In addition, the assessment will be used primarily for law enforcement purposes.

(*People v. Batman, supra,* 159 Cal.App.4th at p. 590.)

By contrast, in *People v. Fleury* (2010) 182 Cal.App.4th 1486, the court found that the $30 court facilities assessment under Government Code section 70373 did *not* constitute punishment, and could thus be applied retroactively. (*People v. Fleury, supra*, 182 Cal.App.4th at p. 1492.) The factors relied on by the court in distinguishing *High* were that the aim of the statute was nonpunitive, i.e., to maintain funds for court facilities, and that the Legislature had labeled the fee in that statute as an "assessment" rather than as a "penalty." (*Ibid.*)

The court in *Fleury* relied on the California Supreme Court holding in *People v. Alford* (2007) 42 Cal.4th 749, which found that the court security fee in Penal Code section 1465.8 could be imposed retroactively without running afoul of the ex post facto clauses of the state and federal constitutions. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758.) The Supreme Court, like the court in *High, Batman*, and *Fleury*, looked to the intent and language of the statute to determine that the purpose of Penal

Code section 1465.8 was not to impose punishment, but to fund court security. (*Ibid.*) The court noted that the amount of the fee is not dependent upon the seriousness of the offense, that it applies to civil as well as criminal cases, and that its purpose was to increase revenues rather than to impose punishment. (*Ibid.*)

The fees imposed under Health and Safety Code sections 11372.5 and 11372.7 are more similar in every respect to the penalties at issue in *Fleury* and *Alford* than to the fees in *High* and *Batman*. Each statute refers to the imposition as a "fee" rather than as a "penalty" or a "fine." (See Health & Saf. Code, § 11372.5, subd. (a); § 11372.7, subd. (a).) Moreover, unlike the penalties in *Batman* and *High*. the amount of the penalty does not increase with the seriousness of the offense.

Finally, the aim of each fee appears to be nonpunitive. Section 11372.5, subdivision (b), indicates that the purpose of the fees is to fund drug laboratories and to provide for training of technicians. Section 11372.7, subdivision (c), describes the purpose of that section as providing for drug abuse education programs.

This court should follow the holding in *People v. Vega* and hold that fees and assessments under Health and Safety Code sections 11372.5 and 11372.7 may not be imposed upon convictions of conspiracy. Appellant was entitled to a lawful sentence and to effective assistance of counsel at sentencing. This court should grant review and, upon full consideration, strike the drug fees and assessments.