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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DONNA MARIE TRUJILLO,

Defendant and Appellant.

No. _____

Court of Appeal No. H038316

Santa Clara County
Superior Court No. C1199870

ANSWER TO PETITION FOR REVIEW
(Cal. Rules of Ct., Rule 8.500)

After Decision by the Court of Appeal
Sixth Appellate District
Filed August 22, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

STATUTES — PAGE(S)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DONNA MARIE TRUJILLO,** Defendant and Appellant.	No. _____ Court of Appeal No. H038316 Santa Clara County Superior Court No. C1199870

ANSWER TO PETITION FOR REVIEW

Defendant Donna Marie Trujillo answers the petition for review filed by respondent to the decision of the Court of Appeal for the Sixth Appellate District reversing and remanding the case for purposes of determining defendant's ability to pay probation supervision and presentencing fees. The Court of Appeal filed its opinion on August 22, 2013. (Appendix A.) Neither party sought rehearing. This answer is timely. (Cal. Rules of Court, rule 8.500(e)(4).) Defendant requests that this Court deny review.

STATEMENT

A witness found defendant in possession of two stolen Russian icons, defendant having offered to sell them at her garage sale. (IV RT 80-81, 88, 179-180.) On November 17, 2011, a jury found defendant guilty of receiving stolen property (Pen. Code,[1] § 496, subd. (a).) (V RT 328-330, CT 127.) The Santa Clara County Superior Court ordered defendant to appear for sentencing on February 3, 2011. (V RT 333.)

[1] Further statutory citations are to this code unless otherwise specified.

In a report dated February 3, 2012, the probation officer recommended that the court order defendant to pay, among other fines and fees, a presentence investigation fee not to exceed $300, and a probation supervision fee not to exceed $110 per month. (CT 158-159.) The report contained no facts indicating defendant's ability to pay any fines or fees. (CT 153-169.) Defendant failed to appear for sentencing on February 3, 2011. (CT 136.)

On April 20, 2012, the Santa Clara County Superior Court suspended imposition of sentence, placed defendant on probation, and imposed the following fines and fees: a $240 restitution fund fine with a $24 (ten percent) administrative fee (§ 1202.4), an identical probation revocation fine (§ 1202.44) (stayed pending violation of probation), a $129.75 criminal justice administration fee (Gov. Code, § 29550.1), a $40 court security fee (§ 1465.8), a $30 criminal conviction assessment (Gov. Code, § 70373), a presentencing investigation fee "not to exceed $300" and a probation supervision fee "not to exceed $110 per month" (§ 1203.1b.) (V RT 357-358, CT 171.) The court ordered defendant to report to the Department of Revenue within 30 days for completion of a plan to pay the fines and fees imposed. (V RT 356-357.) Defendant did not object to the fines and fees, and the court made no findings regarding defendant's ability to pay them. (V RT 357-358.)

The record documented the following facts relevant to defendant's income. Defendant, age 52, lived in the garage of a home occupied by numerous other persons. (IV RT 224-225, 246-247.) At sentencing, trial counsel indicated that defendant trained service dogs for disabled persons. (V RT 354.) The Santa Clara County Superior Court ordered defendant to seek and maintain gainful employment vocational or educational training, as directed by adult probation, and

ordered that such employment "may of course include continuation of her participation in the canine training activities." (V RT 357.) The court made no findings with respect to any income generated by any canine training activities. (V RT 357.)

The record also indicated that defendant suffered from mental health issues. The Santa Clara County Superior Court warned defendant that it would order her removal if she failed to control herself. (V RT 352-353.) Defendant failed to control herself and the court ordered her removed from the courtroom. (V RT 353-354.) In pronouncing sentence, the court commented on defendant's issues as follows:

> I've also considered what to this Court is the defendant's very obvious emotional issues, whether or not they are psychiatrically related, or I don't know obviously, but it is very clear to the Court that the defendant's behavior here in court today, during the trial and also as I believe is reflected in her conduct when she was encountered by the police – [defendant interjection] – shows some degree of mental health concern on the part of this Court. (V RT 356.)

On defendant's appeal, the Court of Appeal for the Sixth Appellate District found that under *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), her failure to object had forfeited her challenge to the $129.75 criminal justice administration fee imposed pursuant to Government Code section 29550.1.[2] (Typed opn. at pp. 9-10.) However, the appellate court found *McCullough* inapplicable to the trial court's order for payment of probation-related fees. The court explained that "in part, the *McCullough* court distinguished the booking fees statutes from other fees statutes, including the statute dealing with probation

[2] The appellate court also ordered unrelated corrections to the sentencing minutes. (Typed opn. at pp. 8-9.)

related costs such as the one at issue here – section 1203.1b. The *McCullough* court noted that in contrast to the booking fees statues, these statues have procedural safeguards, which indicated to the *McCullough* court that the Legislature considered the financial burden of the booking fees to be de minimus. [Citation.] The *McCullough* court concluded that since the Legislature 'interposed no procedural safeguards or guidelines' for imposition of a booking fee the 'rationale for forfeiture is particularly strong. [Citation.]'" (Typed opn. at p. 5.)

The appellate court then explained that section 1203.1b – unlike booking fee statutes – "sets forth a procedure that must be followed before a trial court may impose fees for the cost of supervised probation or for the preparation of the probation report." (Typed opn. at p. 5.) The court found that this procedure (1) requires the sentencing court to order a defendant to report to the probation officer; (2) requires the probation officer to determine the defendant's ability to pay probation-related costs; and (3) requires the court to inform the defendant of his or her right to a hearing, during which the court will make a determination of defendant's ability to pay. (*Ibid.*) While a defendant may waive his or her right to a hearing, the statute required that the waiver be made knowingly and intelligently. (Typed opn. at pp. 5-6.) And, if a defendant does not waive his or her right to a hearing, "the matter will be remanded to the trial court that will then determine defendant's ability to pay." (Typed opn. at p. 6.)

The appellate court then reviewed its opinion in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), in which it had struck a $64 per month probation supervision fee. (Typed opn. at p. 6.) *Pacheco* had found that (1) no evidence indicated that a determination had been made of the defendant's ability to pay the fee, (2) no evidence indicated that the probation department had advised the

defendant of his right to a hearing, (3) no evidence indicated that the defendant had waived his right to a hearing, and (4) that the statute did not permit the court to impose the fee as a condition of probation. (Typed opn. at p. 6.) The appellate court concluded from this review that "imposition of the probation related costs in *Pacheco* was erroneous regardless of whether substantial evidence supported an ability to pay." (*Ibid.*)

As in *Pacheco*, the appellate court found that imposition of probation related costs in the instant case was erroneous regardless of whether substantial evidence supported defendant's ability to pay them. (Typed opn. at p. 6.) Even if *McCullough* required the court to deem defendant's sufficiency of evidence argument forfeited, reversal of the fees was required because no evidence indicated that the trial court or the probation officer had complied with the statute's procedural safeguards. (Typed opn. at pp. 6-7.) The court rejected respondent's argument that the trial court had implicitly determined defendant's ability to pay by granting probation and ordering defendant to seek and maintain gainful employment. (Typed opn. at p. 7.) The court found that this position "ignores the statutory language of section 1203.1b; and the condition alone reveals nothing about [defendant's] current financial position, her earning ability, or her expenses, all of which should be considered in determining appellant's ability to pay probation related costs." (*Ibid*, citing § 1203.1b, subd. (e)(1)-(4).) Therefore, the court reversed and remanded with directions to the trial court to follow the statutory procedure in section 1203.1b before imposing probation related costs of the presentence investigation and probation supervision. (Typed opn. at p. 10.)

BRIEF IN SUPPORT OF ANSWER

I. THIS COURT SHOULD DENY REVIEW BECAUSE THE SIXTH DISTRICT'S OPINION DID NOT MISINTERPRET THIS COURT'S OPINION IN *PEOPLE V. MCCULLOUGH*

Respondent seeks review by suggesting that the Sixth District's unpublished opinion misinterprets the *McCullough* forfeiture rule. (Petition for Review, pp. 4-6.) This Court should deny review because the Sixth District's opinion applied *McCullough* correctly.

McCullough affirmed a decision of the Third District that the inability to pay a booking fee must be first asserted in the trial court. In that case, this Court assumed that the applicable statute was Government Code section 29550.2, and not related sections 29550 or 29550.1. (*McCullough, supra,* 56 Cal.4th at p. 592.) In pertinent part, Government Code section 29550.2, subdivision (a), states "'[i]f the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration [booking] fee by the convicted person....'" Unlike section 1203.1b, Government Code section 29550.2 does not direct the trial court to consider any particular circumstances in evaluating a defendant's ability to pay. (§ 1203.1b; Gov. Code, § 29550.2.)

McCullough explained that "neither forfeiture nor application of the forfeiture rule is automatic" and that "[o]ur application of the forfeiture bar to sentencing matters is of recent vintage." (*McCullough, supra,* 56 Cal.4th at pp. 593-594.) This Court acknowledged that "[p]arties may generally challenge the sufficiency of the evidence to support a judgment for the first time on appeal...." (*Id.* at p. 596.) This Court was thus required to decide whether determining a defendant's ability to pay a fine was the kind of sentencing error that can be forfeited. (*Ibid.*)

The defendant in *McCullough* argued that booking fee orders result from application of "'an objective legal standard'" akin to orders for involuntary HIV testing under section 1202.1 and *People v. Butler* (2003) 31 Cal.4th 1119. (*McCullough, supra,* 56 Cal.4th at pp. 596-597.) This Court held that "because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*Id.* at p. 597.) A "defendant's ability to pay the booking fee here does not present a question of law...." (*Ibid.*)

Parts of the *McCullough* decision indicate that this Court intended a narrow holding. This Court stated, "Given that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally here, we see no reason to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal 'should apply to a finding of' ability to pay a booking fee under Government Code section 29550.2. [Citation.]" (*McCullough, supra,* 56 Cal.4th at p. 599.) This Court disapproved *Pacheco* "to the extent it holds the contrary." (*Ibid*; fn. omitted.)

This Court distinguished the booking fee from other statutes that require trial courts to consider a defendant's ability to pay before imposing a fee or costs. In reaching its conclusion about the booking fee, *McCullough* reviewed nine other statutes and pointed out that, "[i]n contrast to the booking fee statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay determination." (*McCullough, supra,* 56 Cal.4th at p. 598.) "We note these other statutes because they indicate that the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no

procedural safeguards for its imposition. In this context, the rationale for forfeiture is particularly strong." (*Id.* at p. 599.)

Among the statutes discussed in *McCullough,* this Court noted that sections 1203.1b [payment of cost of probation supervision] and 987.8 [payment of cost of court-appointed counsel] "require defendants to be apprised of their right to a hearing on ability to pay and afford them other procedural safeguards." (*McCullough, supra,* 56 Cal.4th at p. 598.) *McCullough* disapproved of *Pacheco* as to the ability to pay a booking fee but left intact *Pacheco's* holding as to the ability to pay probation supervision fees under section 1203.1b and attorney fees under section 987.8. (*Id.* at p. 599.)

Notably, this Court did not disapprove of the Court of Appeal's decision in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*). *Viray* stated, "We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*" (*id.* at p. 1215) and concluded that "no predicate objection in the trial court ..." (*id.* at p. 1217) was required to assert on appeal the "dearth of evidence that defendant would be able to pay $9,200 in defense costs over the six months following the hearing." (*Ibid.*) *McCullough* distinguished *Viray,* stating that the case "merely references the general rule that an appellate challenge to the sufficiency of the evidence 'requires no predicate objection in the trial court.'" (*McCullough, supra,* 56 Cal.4th at p. 599, fn. 2.)

In *McCullough,* this Court also noted that "[e]ven Health and Safety Code section 11372.7, which mandates that individuals convicted under the California Uniform Controlled Substances Act [citation] pay a drug program fee '[i]f the court determines that the person has the ability to pay,' provides more guidance to courts in imposing fees than does Government Code section 29550.2: a court shall impose a drug program fee if it 'is reasonable and compatible with the person's

financial ability,' including the financial impact of 'any fine imposed upon that person and any amount that person has been ordered to pay in restitution.' (Health & Saf. Code, § 11372.7, subd. (b).)" (*McCullough, supra,* 56 Cal.4th at p. 599.) Section 1203.1b contains language similar to the three quoted provisions of Health and Safety Code section 11372.7. It provides that the court's determination of the defendant's ability to pay probation-related costs must take into account "any amount that the defendant is ordered to pay in fines, assessments, and restitution, ..." (§ 1203.1b, subd. (a).) It also provides that following an ability to pay hearing, "if the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (§ 1203.1b, subd. (b)(2).)

In summary, *McCullough* identified Government Code section 29550.2 as involving a fee the Legislature must have regarded as de minimis, given the lack of procedural safeguards. (*McCullough, supra,* 56 Cal.4th at p. 599.) By negative implication, the rationale for forfeiture is weaker when the Legislature does provide procedural safeguards. The Court of Appeal correctly applied *McCullough* when, in the instant case, it found the rationale for forfeiture insufficiently compelling when the trial court had ordered payment of significant probation related fees without complying with the procedural safeguards required by section 1203.1b.

II. THIS COURT SHOULD DENY REVIEW BECAUSE THE SIXTH DISTRICT'S OPINION DID NOT CONFLICT WITH CASES APPLYING *PEOPLE V. MCCULLOUGH*

Respondent also seeks review by suggesting that the Sixth District's unpublished opinion conflicts with cases in the First and Third Districts that have

applied *McCullough's* forfeiture rule. (Petition for Review, pp. 3-4.) This Court should deny review because the decision in the instant case does not conflict with cases in the First and Third Districts.

In *People v. Aguilar* (Aug. 28 2013, A135516) __ Cal.App.4th __ [2013 WL 5290314] (*Aguilar*)), the trial court had imposed, inter alia, the following fees: (1) Attorney fees of $500 (§ 987.8, subd. (b)), (2) a probation supervision fee not to exceed $75 per month (§ 1203.1b, subd. (a)), and (3) a "Criminal Assessment fee" of $564 that the Court of Appeal for the First Appellate District deemed a "criminal justice administration" fee found in the Government Code at sections 29550 to 29550.3. (*Ibid.*) The defendant conceded that under *McCullough*, his failure to object had forfeited his challenge to the criminal justice administration fee. (*Id.* at * 2.)

The First District found that defendant had also forfeited his challenge to the attorney's fees and probation costs orders. The court interpreted *McCullough* to have found that the rationale for forfeiture was both "particularly strong" in the case of booking fees and "still strong" as to other fees and costs. (*Aguilar, supra,* 2013 WL 5290314*3.) The court rejected the defendant's argument that he was not advised of, and did not waive, his due process hearing rights with respect to the probation supervision fees, finding that *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068 had "held a defendant's failure to object at sentencing to noncompliance with the probation fee procedures of section 1203.1b waives any claim of error on appeal." (*Aguilar, supra,* 2013 WL 5290314*3.)

Contrary to respondent's suggestion, *Aguilar* is distinguishable on its facts from the instant case, and for that reason, does not conflict with it. In *Aguilar*, the trial court, when it imposed the fees and costs at issue, noted that the defendant might not be required to pay them in full. (*Aguilar, supra,* 2013 WL 5290314*1.) The trial court had stated: "Many of these fees are going to be based on his ability

to pay. When he contacts the probation office, he'll fill out [a] fiscal financial assessment form and he can talk with the probation deputy about his ability to pay these various fees." (*Ibid.*)

In short, while the trial court had not fully complied with the procedural safeguards set forth in section 1203.1b, it had notified the defendant that (1) its order to pay probation supervision fees would be subject to the defendant's ability to pay, and (2) that the probation officer would determine defendant's ability to pay. (*Aguilar, supra,* 2013 WL 5290314*1.) On defendant's appeal of the probation supervision fees, following defendant's failure to object to them, the *Aguilar* court aptly reasoned that "any claim by appellant that the probation department failed to follow the procedures set forth in section 1203.1b would rely on facts outside the record on appeal, making habeas corpus or some other post-conviction proceeding the proper way to raise the issue." (*Aguilar, supra,* 1213 WL5290314*3.) Under these facts, the *Aguilar* court did not err when it found that the defendant had forfeited a challenge to the probation costs order by failing to object.

Aguilar and the instant case do not conflict because the instant case has different facts that required a different conclusion. In the instant case, unlike in *Aguilar*, the probation officer interviewed the defendant *prior* to the sentencing hearing, and failed to assess defendant's ability to pay, and failed to advise defendant of her right to an ability to pay hearing. (Typed opn. at pp. 6-7.) At the sentencing hearing that followed the probation officer's failure to assess defendant's ability to pay, the court also failed to assess defendant's ability to pay, and failed to advise defendant of her right to an ability to pay hearing. (*Ibid.*) Given these facts, the Court of Appeal for the Sixth Appellate District aptly found that even if *McCullough* required the court to deem defendant's sufficiency of evidence argument forfeited, reversal of the fees was required because no evidence

indicated that the trial court or the probation officer had complied with the statute's procedural safeguards. (Typed opn. at pp. 6-7.) The failures of the probation officer and the trial court to comply with the statute's procedural safeguards was, unlike in *Aguilar*, part of the appellate record.

Similarly, in *People v. Snow* (Aug. 26, 2013, C068833) __ Cal.App.4th ___ [2013 WL 5308726] (*Snow*)), the trial court had ordered the defendant to pay, among other fees, a $736 presentence investigation report fee and $164 per month probation supervision fee. (*Id.* at *1.) The Court of Appeal for the Third Appellate District found that "defendant had adequate notice that the costs of the report and supervision would be imposed but objected to neither in writing or orally and never requested a hearing. He now contends insufficient evidence supports a finding of his ability to pay the report and supervision fees. Based on the reasoning of *McCullough,* we conclude that defendant forfeited his challenge to the cost of the probation report ($736) and monthly supervision ($164 per month for 60 months) imposed pursuant to Penal Code section 1203.1b." (*Id.* at *2.)

Again, contrary to respondent's suggestion, *Snow* is distinguishable from the instant case, and for that reason, does not conflict with it. In *Snow*, following the defendant's change of plea, the probation officer accompanied his recommendations for fees and costs with his assessment that defendant was "able-bodied with marketable job skills, and therefore, he should have the ability to pay all fines, fees, and restitution, as ordered by the Court." (*Snow, supra,* 2013 WL 5308726*1.) The defendant did not object to the probation officer's assessment: to the contrary, in a written statement of probation eligibility and mitigation, "defendant sought a grant of probation, stating that he was willing to pay restitution, had set aside several thousand dollars to do so, and had the ability to comply with the terms and conditions of probation. He stated that he had always

been the provider for his family. He did not state that he had no ability to pay fees or fines." (*Ibid.*)

At sentencing, following a supplemental probation report in which the probation officer had reiterated the recommendations for fees, fines and restitution, defense counsel stated that defendant was "prepared to pay $5,000 toward restitution" immediately and would "commit to an O/R order at $1,000 a month of continual payment to court compliance in addition to the [$]5,000 today." (*Snow, supra,* 2013 WL 5308726*1.) Defense counsel stated that defendant was employed, and did not state that defendant did not have the ability to pay the recommended fees and fines, and did not object to court's imposition of restitution, fines, and fees, including the presentence investigation report fee and the monthly supervision fee. (*Ibid.*)

Like *Aguilar* and the instant case, *Snow* and the instant case do not conflict. Given defendant's affirmation of his ability to pay significant sums in restitution, the Third District correctly reasoned that under *McCullough*, defendant's failure to object to the probation costs orders required application of the forfeiture doctrine. But in the instant case, the probation officer did not assess defendant as able-bodied with marketable job skills, and the defendant did not assure the court at sentencing that she could pay substantial sums towards her court-ordered obligations. Both *Snow* and the instant case interpreted *McCullough* correctly.

For similar reasons, the instant case does not conflict with *Valtakis*, the case that *Aguilar* relied upon to find forfeiture. In *Valtakis*, following defendant's change of plea, the probation officer recommended that defendant pay (among other fees) a probation fee of $250 (§ 1203.1). (*Valtakis, supra,* 105 Cal.App.4th at p. 1069.) The report contained no determination of ability to pay and no advisement of a right to a separate hearing on that issue, but noted that defendant had since moved to Susanville with his mother, who worked as a correctional

officer for the California Department of Corrections, and that he was attending Lassen Community College in an effort to obtain a certificate in steam power operations. (*Ibid.*) At sentencing, the 22-year-old defendant represented to the court, through counsel, that he remained enrolled in college, had "straightened out his life substantially" since the offense, was working part-time for the H.L. Power Company, and had gotten "excellent recommendations" from the college and the company. (*Ibid.*) The court placed defendant on probation and ordered him to pay fees that included a $250 probation services fee. (*Ibid.*) Defendant did not object to this fee. (*Ibid.*)

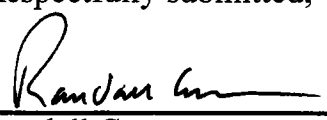
As in *Snow*, the probation officer in *Valtakis* accompanied his recommendation for payment of fees and costs with his assessment that defendant had advantages relevant to his ability to pay fees and costs: here, a stable living environment in the home of an employed parent. (*Valtakis, supra,* 105 Cal.App.4th at p. 1069.) At the sentencing following this assessment, defendant validated the assessment, reporting that he had obtained part-time employment. (*Ibid.*) As the appellate court described, "[t]he record shows that he had $255 on him when arrested and, by the time of sentencing, was working part-time, was not addicted to drugs or otherwise incapacitated, was living with his mother (herself employed), and was given a three-month stay of his jail term in order to complete his current school semester." (*Id.* at p. 1076.) In the instant case, no such facts were found. *Valtakis* correctly found forfeiture and the instant case correctly found no forfeiture.

CONCLUSION

Accordingly, defendant Donna Marie Trujillo requests that this Court deny respondent's petition for review.

Dated: October 15, 2013

Respectfully submitted,



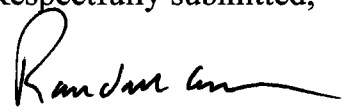
Randall Conner
Attorney for Donna Marie Trujillo

CERTIFICATE OF WORD COUNT

I, Randall Conner, counsel for Donna Marie Trujillo, certify pursuant to the California Rules of Court that this document contains 4,161 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(1). I prepared this document in Microsoft Word 2003, and this program generated the word count stated above. I certify under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed in Oakland, California, on October 15, 2013.

Respectfully submitted,



Randall Conner
Attorney for Donna Marie Trujillo

Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONNA MARIE TRUJILLO,

Defendant and Appellant.

H038316
(Santa Clara County
Super. Ct. No. C1199870)

A jury found Donna Trujillo (appellant) guilty of one count of receiving, concealing, selling, or withholding stolen property (Pen. Code, § 496). The court suspended imposition of sentence and placed appellant on probation on various terms and conditions. Relevant to the issues in this appeal, the court ordered that appellant pay a $240 restitution fund fine plus a 10 percent administrative fee (§ 1202.4),[1] a probation revocation fine in the same amount (§ 1202.44), which the court imposed but stayed, a $129.75 criminal justice administration fee (booking fee) payable to the City of San Jose (Gov. Code, § 29550.1), a $40 court operations assessment (§ 1465.8), a $30 criminal conviction assessment fee (Gov. Code, § 70373), a presentence investigation fee not to exceed $300 (§ 1203.1b, subd. (a)), and a probation supervision fee not to exceed $110 per month (§ 1203.1b, subd. (a)).

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1 All unspecified section references are to the Penal Code.

Appellant filed a timely notice of appeal. On appeal, appellant challenges the orders to pay several of the fines and fees that the court imposed on various grounds, which we shall outline later. For reasons that follow, we order that the sentencing minutes be modified to reflect imposition of a $200 restitution fund fine plus a 10 percent administrative fee and a probation revocation fine of $200. (§ 1202.44) However, as we shall explain, we are required to remand this case to the superior court.

Given the issues on appeal, we do not recount the substantive facts and procedural history underlying appellant's conviction.

Discussion

Presentence Investigation Fee and Probation Supervision Fee

As noted at appellant's sentencing hearing the court ordered that appellant pay a presentence investigation fee and a monthly probation supervision fee. (§ 1203.1b, subd. (a).)

The probation officer recommended that the court impose a presentence investigation fee not to exceed $300 and a probation supervision fee not to exceed $110 per month. The probation officer made no recommendation on appellant's ability to pay either fee.

Section 1203.1b, subdivision (a) provides as relevant here, " In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report . . . . , of conducting any presentence investigation and preparing any presentence report . . . . The reasonable cost of these

services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing[] that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." "[A]lthough section 1203.1b permits a separate hearing on a defendant's ability to pay probation costs, the statute does not prohibit a sentencing court from conducting the hearing as part of the sentencing process." (*People v. Phillips* (1994) 25 Cal.App.4th 62, 70.)

Appellant claims that in her case the court failed to determine her ability to pay the probation related costs, and there is insufficient evidence to support an implied finding that she does have such ability. Appellant did not object to the fees below, but asserts that due to the nature of the claim—insufficiency of the evidence— she did not need so to do to preserve this issue for review.

Respondent argues that appellant has forfeited this issue on appeal because she failed to object below. Respondent concedes that previously this court held in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), that claims based on insufficiency of the evidence to support an order for probation related costs, similar to the argument appellant makes here, do not need to be raised in the trial court to preserve the issue on

appeal. (*Id.* at p. 1397.) Other appellate courts have disagreed. (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072 [claim regarding insufficient evidence to support probation supervision fee forfeited on appeal].) However, during the pendency of this appeal, in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), the California Supreme Court disapproved of our holding in *Pacheco* that challenges to the sufficiency of the evidence to support an ability to pay finding may be raised for the first time on appeal. (*McCullough, supra,* 56 Cal.4th at p. 599.)

In *McCullough,* the Supreme Court granted review to determine whether a defendant who failed to object that the evidence was insufficient to support a finding of his ability to pay a booking fee (Gov. Code, § 29550.2) when the court imposed it forfeited his right to challenge the fee on appeal. (*McCullough, supra,* 56 Cal.4th at p. 591.)

The *McCullough* court distinguished "between an alleged factual error that had necessarily not been addressed below or developed in the record because the defendant failed to object, and a claimed legal error, which 'can be resolved without reference to the particular sentencing record developed in the trial court.' [Citation.]" (*McCullough, supra,* at p. 594.) The Supreme Court observed, "we may review an asserted legal error in sentencing for the first time on appeal where we would not review an asserted factual error." (*Ibid.*) "In the case of an asserted legal error, '[a]ppellate courts are willing to intervene in the first instance because such error is "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.]" (*Ibid.*)

The *McCullough* court concluded that a defendant's ability to pay a booking fee does not present a question of law. The court stated that a "[d]efendant may not 'transform . . . a factual claim into a legal one by asserting the record's deficiency as legal error.' [Citation.] By 'failing to object on the basis of his [ability] to pay,' [a] defendant forfeits both his [or her] claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*McCullough, supra,* at p. 597.)

Finally, the Supreme Court noted that in *People v. Scott* (1994) 9 Cal.4th 331, the court had already determined "that the requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advanced the goals of proper development of the record and judicial economy." (*McCullough, supra,* 56 Cal.4th at p. 599.) Accordingly, the court concluded, "[g]iven that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally" the *McCullough* court saw "no reason to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal 'should apply to a finding of' ability to pay a booking fee . . . ." (*Ibid.*) The *McCullough* court explicitly disapproved of this court's decision in *Pacheco* insofar as it held to the contrary. (*Ibid.*)

Nonetheless, in part, the *McCullough* court distinguished the booking fees statutes from other fees statutes, including the statute dealing with probation related costs such as the one at issue here—section 1203.1b. The *McCullough* court noted that in contrast to the booking fees statutes, these statutes have procedural safeguards, which indicated to the *McCullough* court that the Legislature considered the financial burden of the booking fee to be de minimus. (*McCullough, supra,* at pp. 598-599.) The *McCullough* court concluded that since the Legislature "interposed no procedural safeguards or guidelines" for imposition of a booking fee the "rationale for forfeiture is particularly strong." (*Id.* at p. 599.)

As outlined *ante* section 1203.1b sets forth a procedure that must be followed before a trial court may impose fees for the cost of supervised probation or for the preparation of the probation report. We reiterate that the statute requires that a court must first order a defendant report to the probation officer, who will then make a determination of a defendant's ability to pay. (§ 1203.1b, subd. (a).) The court must then inform the defendant of his or her right to a hearing, during which the court will make a determination of defendant's ability to pay. (*Ibid.*) A defendant may waive his or her

right to this hearing, but this waiver must be made knowingly and intelligently. (*Ibid.*) If a defendant does not waive his or her right to a hearing, the matter will be remanded to the trial court that will then determine defendant's ability to pay. (*Ibid.*)

Notably, in *Pacheco, supra*, 187 Cal.App.4th 1392, the defendant not only appealed the imposition of a booking fee but also appealed the imposition of a probation supervision fee, which he argued was imposed without a determination of his ability to pay. (*Id.* at p. 1400.) With respect to this probation related cost we struck the probation supervision fee imposed under section 1203.1b because we found there was "no evidence in the record that anyone, whether the probation officer or the court, made a determination of [defendant's] ability to pay the $64 per month probation supervision fee." (*Pacheco, supra*, 187 Cal.App.4th at p. 1401.) Further, we did not find that there was "any evidence that probation advised" the defendant "of his right to have the court make this determination or that he waived this right." (*Ibid.*) Thus, we concluded "that the statutory procedure provided at section 1203.1b for a determination of [defendant's] ability to pay probation related costs was not followed. Moreover, these costs, which are collectible as civil judgments," could not be made a condition of probation. (*Ibid.*) "For all these reasons," we concluded the "$64 monthly probation supervision fee [could] not stand." (*Ibid.*) As can be seen, imposition of the probation related costs in *Pacheco* was erroneous regardless of whether substantial evidence supported an ability to pay.

The same is true in this case. Even if we were to conclude that under *McCullough* appellant's sufficiency of the evidence argument as to probation related costs is forfeited, there is nothing in the record to support the conclusion that anyone, whether the probation officer or the court, *made a determination of appellant's ability to pay* the probation supervision fee or cost of preparing the presentence investigation report. In other words, there is nothing in the record to support the conclusion that the court or the

probation officer complied with the procedural safeguards.[2] We reject respondent's assertion that the court implicitly found that appellant had the ability to pay when the court granted probation and ordered appellant to seek and maintain gainful employment. Respondent's position ignores the statutory language of section 1203.1b; and the condition alone reveals nothing about appellant's current financial position, her earning ability, or her expenses, all of which should be considered in determining appellant's ability to pay probation related costs. (§ 1203.1b, subd. (e) (1)-(4) [ability to pay includes a consideration of a defendant's present financial position, future financial position, likelihood the defendant can obtain employment within a one year period and any other factor or factors that may bear upon the defendant's financial ability to reimburse the county for costs].)

The statutory procedure provided at section 1203.1b for a determination of appellant's ability to pay probation related costs was not followed in this case. Accordingly, we must remand this matter to the trial court. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1063 [assuming for the purposes of review that remand is the proper remedy when a court orders a defendant to pay attorney fees under section 987.8 without substantially complying with procedural safeguards enumerated in that section].)

Fees as Conditions of Probation

Appellant asserts that in ordering her to pay a court operations assessment, a criminal conviction assessment, the presentence investigation fee and the probation supervision fees, the court made these fees conditions of her probation. Appellant contends that we must either modify the judgment to delete the court facilities assessment and the criminal conviction assessment and clarify that imposition of these two

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[2] We note that the court referred appellant to the "Department of Revenue . . . for completion of a payment plan for the fines and fees" that the court intended to impose, but there was no requirement that the plan be worked out depending on appellant's ability to pay.

assessments are separate orders. Or remand the matter to the trial court to make findings regarding her ability to pay the costs of probation and to clarify that any orders to pay fees and assessments are not conditions of probation.

Appellant is incorrect that the court made these fines and assessments conditions of her probation. The record supports the conclusion that these fees and assessments were not made conditions of probation. Following recitation of a number of standard probation conditions, the court announced that it was going to impose the foregoing fees and assessments. The probation officer's report, which the court considered, explicitly stated that these fees and assessments were "not conditions of probation." Further, the minute order from the sentencing hearing does not list the fees and assessments as conditions of probation. More importantly, the court did not expressly condition successful completion of probation upon payment of the fees and assessments.

Restitution Fund Fine

At the sentencing hearing, the court indicated that it was imposing a restitution fund fine of $200 with a 10 percent administrative fee under section 1202.4. The probation officer interrupted the court to point out that the minimum fine was $240. The court then acknowledged that it was now $240 and stated that the court would impose "the minimum under 1202.4." The court addressed appellant as follows: "The Court [is] required to impose a minimum fine, and I'm in fact giving you the minimum fine." The sentencing minutes indicate that the court imposed a $240 fine plus a 10 percent administrative fee.

Appellant asserts that the court's order was erroneous because she committed her offense on January 25, 2011, at which time the minimum fine was $200.

Effective January 1, 2012, the minimum restitution fine in section 1202.4, subdivision (b)(1), increased from $200 to $240. (Stats.2011, ch. 358, § 1.) The trial court in this case imposed a $240 fine, although the minimum restitution fine was $200 at the time appellant committed her offense. (Stats.2010, ch. 351, § 9, eff. Sept. 27, 2010.)

The prohibition against ex post facto laws applies to restitution fines. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248; *People v. Souza* (2012) 54 Cal.4th 90, 143 [it is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions].) Nevertheless, the rule of forfeiture is applicable to ex post facto claims (see *People v. White* (1997) 55 Cal.App.4th 914, 917), particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing.

On the other hand, given that the record shows a commitment by the court to impose the minimum fine, and in order to avoid an ineffective assistance of counsel challenge, we will order that the court modify the sentencing minutes to reflect the imposition of a $200 restitution fund fine plus a 10 percent administrative fee and a probation revocation fine of $200. (§ 1202.44 [the court shall impose a probation revocation fine in the same amount as that imposed pursuant to section 1202.4, subdivision (b)].) Although section 1202.4, subdivision (*l*) allows the court to impose a fee "to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid," there is no such provision in section 1202.44.

Booking Fee

Appellant challenges the order that she pay a criminal justice administration fee or booking fee of $129.75 to the City of San Jose on the ground that there is insufficient evidence that she has the ability to pay the fee. Appellant did not object when the court ordered that she pay the booking fee, which the court imposed pursuant to Government Code section 29550.1.[3]

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[3] We note in passing that Government Code section 29550.1 does not contain an explicit or implicit ability to pay finding. Appellant's challenge to the booking fee raises the initial question of whether equal protection principles require Government Code

Appellant has forfeited this claim by failing to challenge imposition of the booking fee. As noted *ante*, during the pendency of this appeal, the California Supreme Court ruled that "a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits [a] challenge to the propriety of venue by not timely challenging it." (*McCullough, supra*, 56 Cal.4th at p. 598.) The *McCullough* court held that "because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*Id.* at p. 597.) We are bound by this determination. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Accordingly, since appellant raised no objection to the booking fee when it was imposed, her challenge to the fee is forfeited.

Disposition

The judgment (order of probation) is reversed and the matter is remanded with directions to the trial court to follow the statutory procedure in section 1203.1b before imposing probation related costs. The court is ordered to correct the sentencing minutes

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section 29550.1 to be interpreted as including an ability-to-pay requirement. The forfeiture doctrine has been applied to unpreserved equal protection claims. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.) As the *McCullough* court observed," ' " 'a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " ' [Citation.] 'Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.' [Citation.] ' "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" ' [Citation.] Additionally, '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citation.]" (*McCullough, supra*, 56 Cal.4th at p. 593.)

to reflect imposition of a $200 restitution fund fine (§ 1202.4) plus a 10 percent administrative penalty and a probation revocation fine of $200 (§ 1202.44).

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

People v. Trujillo

H038316

DECLARATION OF SERVICE BY MAIL

Re: People v. Donna Marie Trujillo

Case No._____

Appellate Case No. H038316

I, the undersigned, declare that on October 15, 2013, I filed in this court the original and thirteen copies of this answer to petition for review by U.S.P.S. priority mail service to the following address: Office of the Clerk, Supreme Court of California, 350 McAllister Street, San Francisco, CA 94102-4797.

I served a true and correct copy of the enclosed answer to petition for review by U.S.P.S. first-class delivery service to the following:

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I declare under penalty of perjury that the foregoing is true.

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