SUPREME COURT
FILED
JAN - 6 2012
Frederick K. Ohlrich Clerk
Deputy

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTOINE MCCULLOUGH,

Defendant and Appellant.

Case No. S192513

Appellate District Third, Case No. C064982
Sacramento County Superior Court, Case No. 09F08232
The Honorable Steve White, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
JANET E. NEELY
Deputy Attorney General
MICHAEL A. CANZONERI
Supervising Deputy Attorney General
State Bar No. 131649
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5514
Fax: (916) 324-2960
Email:
Michael.Canzoneri@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Penal Code

ISSUE PRESENTED

Did defendant forfeit his claim that he was unable to pay the $270.17 jail booking fee (Gov. Code, § 29550.2) imposed by the trial court at sentencing, because he failed to object at the time?

INTRODUCTION

On the day appellant entered a no contest plea to two felony counts, his request for immediate sentencing was granted. The trial court imposed a 4-year prison sentence along with several fines and fees, including a jail booking fee of $270.17. Appellant did not object to the imposition of the fines and fees. On appeal, appellant claimed that the jail booking fee was not supported by sufficient evidence. The Third District Court of Appeal rejected his challenge to the booking fee, determining that his claim was forfeited by his failure to object at the time of sentencing. Appellant argues that his claim of insufficient evidence was not subject to forfeiture by failure to object. Respondent disagrees. This Court granted review.

STATEMENT OF THE CASE

On January 13, 2010, appellant Antoine J. McCullough pled no contest to unlawful possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)), and he admitted having served a prior prison term. (Pen. Code, § 667.5, subd. (b).) (CT 5.)[1] On the day he entered his no contest plea, he waived preparation of a probation report and requested immediate sentencing. (RT 3-36.) The trial court acceded to his request and imposed a 4-year prison sentence. The court also imposed several fines

[1] The Abstract of Judgment indicates that appellant was also sentenced for unlawful possession of marijuana for sale (Health & Saf. Code, § 11360) in Case No. 09F02272. (CT 28-29.) He was given concurrent time on this pre-existing Prop. 36 case (RT 37) and, as such, it has no bearing on the instant issue on appeal.

and fees, including a $270.17 jail booking fee, pursuant to Government Code, section 29550.2 [hereinafter, "section 29550.2"]. Appellant raised no objection to the fines and fees imposed except when the court imposed an $800 restitution fine, to which counsel requested the minimum restitution fine amount of $200, indicating that appellant was "on a fixed income." (CT 6; RT 36-37.)

On June 3, 2010, appellant's notice of appeal was deemed operative. (CT 36.)

On March 22, 2011, the Court of Appeal for the Third District filed a published opinion denying appellant's request to reverse the imposition of the jail booking fee based on insufficiency of the evidence.[2] The court determined that failure to object to the imposition of the booking fee constituted forfeiture of the claim on appeal, relying on prior holdings in *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 (*Crittle*) [failure to object to crime prevention fine (Pen. Code, § 1202.5, subd. (a)) forfeited claim on appeal]), *People v. Hodges* (1999) 71 Cal.App.4th 1348, 1357 (*Hodges*) [failure to object to jail booking fee (Pen. Code, § 29550.2) forfeited claim on appeal]) and *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 (*Gibson*). (Opn. at pp. 3-6.) The court distinguished this Court's holding in *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*) [permitting appeal of AIDS testing probation term despite failure to object below], and distinguishing the holdings by the Court of Appeal for the Sixth District in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*) [permitting challenge to sufficiency of evidence as to order of attorney's fees reimbursement (Pen. Code, § 987.8) despite failure to object], *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*) [same], and *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*) [permitting challenge to

[2] The opinion was previously published at 193 Cal.App.4th 864.

sufficiency of evidence as to imposition of attorneys fees reimbursement (Pen. Code, § 987.8), booking fees (Govt Code § 29550, subd. (c) & § 29550.2), and probation cost fees (Pen. Code, § 1203.1b)[3], despite failure to object].) (Opn. at pp. 6-13.) Consequently, the court affirmed the trial court's order imposing the jail booking fees.

On June 29, 2011, this Court granted appellant's petition for review.

SUMMARY OF ARGUMENT

In *People v. Scott* and *People v. Welch*, and their progeny, this Court has repeatedly held that errors made at sentencing hearings should be raised and corrected at the hearing itself rather than for the first time on appeal. This Court has stated that a timely objection below not only permits a trial court to correct simple errors quickly and efficiently but also permits a trial court to develop the record factually to permit meaningful review on appeal. Consequently, this Court has routinely applied the doctrine of "forfeiture" to preclude a defendant from pursuing claims of sentencing error on appeal to which he did not object nor develop a factual record in the trial court below. To the extent that the holding in *Butler* can be interpreted to permit a challenge to sentencing errors, such as ability to pay findings, based on insufficiency of evidence, this Court should expressly limit that holding to its unique facts. Moreover, to the extent that the holdings in *Viray*, *Lopez*, and *Pacheco*, can be interpreted to permit challenges to the sufficiency of ability-to-pay findings as to fines and fees, beyond the reimbursement of attorney's fees, this Court should explicitly disapprove any extension of those holdings. This Court should adhere to its long-standing practice of requiring objection by litigants contemporaneously as errors happen rather than waiting to challenge such

[3] All further undesignated statutory references are to the California Penal Code.

lower court actions on appeal in the first instance. Requirement of contemporaneous objection, and the risk of forfeiture for failing to do so, is more efficient and fair because it encourages appropriate development of the record, if needed, by the parties who are already present before the court, and because adequate development of the record below allows a reviewing court to consider the record and legal issues more completely on appeal.

ARGUMENT

I. APPELLANT FORFEITED HIS CHALLENGE ON APPEAL TO THE IMPOSITION OF A $270.17 JAIL BOOKING FEE BY FAILING TO OBJECT IN THE TRIAL COURT

Contrary to the decision by the Third District Court of Appeal, appellant asserts that his challenge to the imposition of the jail booking fee, pursuant to section 29550.2, based on sufficiency of the evidence is cognizable on appeal and not forfeited despite his failure to object to the fee's imposition in the trial court. (AOB 6.) He argues that the holdings of *Pacheco*, *Viray*, *Lopez*, and *Butler*, support his contention that such a fee is not forfeited by a failure to object. (AOB 8-25.) Respondent disagrees and submits that the Third District Court of Appeal's analysis from *Gibson* and *Hodges*, the First District Court of Appeal's analysis in *Valtakis*, as well as this Court's opinions in *Scott*, *Welch*, and *Butler,* state the better rule that the forfeiture doctrine applies to a failure to object to the imposition of a jail booking fee.

Government Code section 29550.2 provides for the imposition of a fee to recover "administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking." (Gov. Code, § 29550.2, subd, (a).) The section further provides that "[t]he fee which the county is entitled to recover pursuant to this subdivision *shall not exceed the actual*

administrative costs . . . incurred in booking or otherwise processing arrested persons. If 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 fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt." (*Ibid.*, italics added.)[4]

---

[4] Government Code section 29550.2 provides:

(a) Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c), including applicable overhead costs as permitted by federal Circular A 87 standards, incurred in booking or otherwise processing arrested persons. *If 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 fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee.

(b) All fees collected by a county as provided in this section and Section 29550, may be deposited into a special fund in that county which shall be used exclusively for the operation, maintenance, and construction of county jail facilities.

(c) As used in this section, "actual administrative costs" include only those costs for functions that are performed in order to receive an arrestee into a county detention facility. Operating expenses of the county jail facility including capital costs and those costs involved in the housing, feeding, and care of inmates shall not be included in calculating "actual administrative costs." "Actual administrative costs" may include any one or more of

(continued...)

Forfeiture of a claim on appeal based on failure to object to the imposition of "ability to pay" fines and fees has been firmly established.

(...continued)

the following as related to receiving an arrestee into the county detention facility:

(1) The searching, wristbanding, bathing, clothing, fingerprinting, photographing, and medical and mental screening of an arrestee.

(2) Document preparation, retrieval, updating, filing, and court scheduling related to receiving an arrestee into the detention facility.

(3) Warrant service, processing, and detainer.

(4) Inventory of an arrestee's money and creation of cash accounts.

(5) Inventory and storage of an arrestee's property.

(6) Inventory, laundry, and storage of an arrestee's clothing.

(7) The classification of an arrestee.

(8) The direct costs of automated services utilized in paragraphs (1) to (7), inclusive.

(9) Unit management and supervision of the detention function as related to paragraphs (1) to (8), inclusive.

(d) It is the Legislature's intent in providing the definition of "actual administrative costs" for purposes of this section that this definition be used in determining the fees for the governmental entities referenced in subdivision (a) only. In interpreting the phrases "actual administrative costs," "criminal justice administration fee," "booking," or "otherwise processing" in Section 29550 or 29550.1, it is the further intent of the Legislature that the courts shall not look to this section for guidance on what the Legislature may have intended when it enacted those sections.

(Emphasis added.)

This Court has established in a long line of cases that non-jurisdictional sentencing issues not raised in the trial court are forfeited. (*People v. Nelson* (2011) 51 Cal.4th 198, 227["At the time of his 1995 crime and his 2000 sentencing, the law called for the court to consider a defendant's ability to pay in setting a restitution fine, and defendant could have objected at the time if he believed inadequate consideration was being given to this factor"]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [claim that trial court failed to consider ability to pay restitution fine forfeited]; *People v. Gonzalez* (2003) 31 Cal.4th 745, 755 [claim that that the trial court relied on the use of firearms in imposing the upper term and as a sentencing enhancement and claim that the court imposed restitution without a hearing both forfeited]; *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [state's claim that trial court failed to state reasons for not imposing restitution fine forfeited]; *People v. Scott* (1994) 9 Cal.4th 331, 353 [claims that the trial court failed "to properly make or articulate its discretionary sentencing choices" must be raised first in the trial court or they are forfeited]; *People v. Welch* (1993) 5 Cal.4th 228, 235, 237 [failure to object to probation conditions forfeits a challenge on appeal]; *People v. Walker* (1991) 54 Cal.3d 1013, 1023 [failure to advise that restitution fines would be a consequence of a guilty plea forfeited].)

The reasons for the forfeiture rule in the context of a trial court's sentencing choices have been well-articulated:

> The parties have ample opportunity to influence the court's sentencing choices under the determinate scheme. As a practical matter, both sides often know before the hearing what sentence is likely to be imposed and the reasons therefor. Such information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing. ([Pen. Code,]§§ 1191, 1203, subds. (b) & (g), 1203c, 1203d, 1203.10; [Cal. Rules of Court,] rules 411, 411.5(a)(8), (9); People v. Edwards (1976) 18 Cal.3d 796, 801 & fn. 8 [].) In anticipation of the hearing, the defense

> may file, among other things, a statement in mitigation urging specific sentencing choices and challenging the information and recommendations contained in the probation report. (§ 1170, subd. (b); rule 437.) Relevant argument and evidence also may be presented at sentencing. (§ 1204; rule 433.)
>
> . . .
>
> Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.

(*People v. Scott*, *supra*, 9 Cal.4th at pp. 350-351, 353-354.)[5]

Other Courts of Appeal have similarly held that challenges to the imposition of fines and fees must be raised first in the trial court and will not be entertained for the first time on appeal. (See, e.g., *People v. Crittle*, *supra*, 154 Cal.App.4th at p. 371 [claim that trial court failed to consider ability to pay crime prevention fines forfeited]; *Valtakis, supra,* 105 Cal.App.4th at pp. 1068-1076 [claim that the trial court failed to consider ability to pay a Penal Code section 1203.1b probation costs fee, inform the defendant of his statutory right to a hearing, or hold a hearing, all forfeited]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [challenge to imposition of section 29550.2 booking fee forfeited]; *People v. Gibson*,

---

[5] There is a "narrow exception" for an "unauthorized sentence." (*People v. Scott*, *supra*, 9 Cal.4th at p. 354.) A sentence is "'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate 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." (*Ibid.*) Appellant's claims do not fall within this exception.

supra, 27 Cal.App.4th at pp. 1468-1469 [claim that trial court failed to consider ability to pay restitution fine forfeited].)

In *Valtakis*, the court highlighted the importance of such fees being collected:

> To put the matter in context, [Penal Code section 1203.1b] concerns recoupment of probation-related assessment and supervision costs [] and mandates that all sums paid by a defendant "be allocated for the operating expenses of the county probation department" (§ 1203.1b, subd. (g)). "Section 1203.1b and other recoupment statutes reflect a strong legislative policy in favor of shifting the costs stemming from criminal acts back to the convicted defendant" and """replenishing a county treasury from the pockets of those who have directly benefited from county expenditures."""" (*People v. Phillips* (1994) 25 Cal.App.4th 62, 69 [].) In an "age of expanding criminal dockets and the resulting heightened burden on public revenues[,] [r]ecoupment laws reflect legislative efforts to recover some of these added costs and conserve the public fisc." (*Id.* at pp. 69-70.)

(*Valtakis*, *supra*, 105 Cal.App.4th at p. 1073.) Consequently, the *Valtakis* court pointed out that exempting Penal Code section 1203.1b from the requirements of *People v. Tillman*, *supra*, 22 Cal.4th 300, *People v. Scott*, *supra*, 9 Cal.4th 331, and *People v. Welch*, *supra*, 5 Cal.4th 228, and progeny, "would work results horribly at odds with the overarching cost conservation policy of the section." *Valtakis*, *supra*, 105 Cal.App.4th at p. 1075.) "To allow a defendant and his counsel to stand silently by as the court imposes a $250 fee, as here, and then contest this for the first time on an appeal that drains the public fisc of many thousands of dollars in court and appointed counsel costs, would be hideously counterproductive." (*Id.* at p. 1076.) The same is true for the section 29550.2 booking fee.

In an opinion that predated this Court's holding in *Scott*, Justice Scotland in *Gibson* forcefully explained the importance and efficiencies of

requiring an objection in the trial court in order to preserve the issue for appeal:

> As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. (*People v. Saunders* [(1993)] 5 Cal.4th [580], at p. 590, 20.) Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal. [Citations]. A challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial.
>
> Equally important, the need for orderly and efficient administration of the law—i.e., considerations of judicial economy—demand that defendant's failure to object in the trial court to imposition of the restitution fine should preclude him from contesting the fine on appeal. (See, e.g., *People v. Welch* (1993) 5 Cal.4th 228, 235 (*Welch*); [other citations omitted].) Defendants routinely challenge on appeal restitution fines to which they made no objection in the sentencing court. In virtually every case, the probation report put the defendant on notice that a restitution fine would be imposed. *Requiring the defendant to object to the fine in the sentencing court if he or she believes it is invalid places no undue burden on the defendant and ensures that the sentencing court will have an opportunity to correct any mistake that might exist, thereby obviating the need for an appeal.* Conversely; allowing the defendant to belatedly challenge a restitution fine in the absence of an objection in the sentencing court results in the undue consumption of scarce judicial resources and an unjustifiable expenditure of taxpayer monies. It requires, in almost all cases, the appointment of counsel for the defendant at taxpayers' expense and the expenditure of time and resources by the Attorney General to respond to alleged errors which could have been corrected in the trial court had an objection been made. Moreover, it adds to the already burgeoning caseloads of appellate courts and unnecessarily requires the costly depletion

> of appellate court resources to address purported errors which could have been rectified in the trial court had an objection been made. This needless consumption of resources and taxpayer dollars is unacceptable, particularly since it greatly exceeds the amount of the fine at issue. Statewide, taxpayers are spending hundreds of thousands of dollars on challenges to relatively minuscule restitution fines.

(*Gibson, supra*, 27 Cal.App.4th at pp. 1468-1469, emphasis added.)

Even most recently, this Court reasserted its adherence to the forfeiture of claims on appeal for failure to object to the imposition of a $10,000 restitution fine. (*People v. Nelson, supra*, 51 Cal.4th at p. 227 ["At the time of his 1995 crime and his 2000 sentencing, the law called for the court to consider a defendant's ability to pay in setting a restitution fine, and defendant could have objected at the time if he believed inadequate consideration was being given to this factor."].) The Court also went on to reiterate that there is no requirement that the sentencing court make an express finding of an "ability to pay" and that the absence of specific findings does not demonstrate that the court failed to properly consider the issue. (*Id.* at p. 227.)

These same concerns apply with equal force to imposition of the jail booking recoupment fee.[6]

---

[6] Curiously, appellant asks this Court to conclude that the booking fee recoupment statute requires that a defendant have the "present ability" to pay the fee. (AOB 7-8, 16-17.) Such a determination appears to be beyond the issue presented in the lower court on appeal or by the grant of review by this Court. That being said, respondent agrees with appellant's citation to the Court's precedent regarding statutory interpretation, however it appears that appellant then ignores the very precedent he cites. The section as quoted above (see fn. 4, *supra*) does not include the term "present" with respect to ability to pay. Moreover, the Legislature knows how to include the term "present ability" or how to limit the court's consideration of future earnings, when it so intends. (See Penal Code, § 987.8, subd. (b) [court may consider the defendant's "*present* ability . . . to

(continued...)

In stark contrast to the decisions upholding the forfeiture of sentencing errors cited above are the analyses and holdings of the Court of Appeal for the Sixth District in *People v. Pacheco*, and two cases it relied on, *People v. Lopez*, and *People v. Viray*, which appellant asks this Court to follow (AOB 8-24), In *Pacheco*, the defendant claimed for the first time on appeal that the sentencing court's imposition of a booking fee of $259.59, imposition of a probation fee of $64 per month, and imposition of attorneys' fees of $100, were not supported by evidence of his ability to pay. The court held, with no additional analysis, that the defendant's claims were not forfeited, relying on its earlier holdings in *Viray* and *Lopez*. (*Id.* at p. 1397.) Turning to the merits, the court then found no evidence in the record identifying the basis for the determination of the fees, nor did it find any evidence supporting an implied finding of the defendant's ability to pay the fines. Consequently the court remanded the case to the superior court to develop the record on both the actual costs of the fees in question and the defendant's ability to pay those fees. (*Id.* at pp. 1397-1404.)

Problematic in the court's decision in *Pacheco* is the absence of any discussion of *Hodges*, which was contrary and directly on point, applying forfeiture to a booking fee, and *People v. Valtakis*, which was contrary and directly on point, applying forfeiture to a probation fee. Instead, the *Pacheco* court merely grouped the statutory schemes of the booking fee and probation fee into the same "ability to pay" framework applicable to attorneys fees reimbursement, and then uncritically applied *Viray* and *Lopez*, to determine that forfeiture was inapplicable. Close examination of

---

(...continued)
pay all or portion of cost" of counsel], (emphasis added).) Respondent submits that the ability to pay covers both present and future, since the statute does not limit the court's consideration in either direction.

these prior cases, however, demonstrates that the underpinnings of the court's decision in *Pacheco* are unsound.

In *Lopez*, an attorneys' fees reimbursement case, the court determined that forfeiture of the claim was unwarranted, because a defendant may challenge "the sufficiency of evidence to support a finding is an objection that can be made for the first time on appeal." (*Lopez*, *supra*, 129 Cal.App.4th at p. 1537, relying on *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [defendant challenging sufficiency of evidence proving GBI allegation of prior strike conviction], and *People v. Jones* (1988) 203 Cal.App.3d 456, 461 [upholding challenge to sufficiency of evidence of charged enhancement as not foreclosed based on failure to object at trial], rev'd on other grounds, *People v. Tenner* (1993) 6 Cal.4th 559, 566, fn. 2.) Both of the cases relied on in *Lopez,* however, did not involve sentencing findings, but were challenges to the sufficiency of the evidence to the prior conviction enhancements charged. Thus, reliance on these authorities is not logical and frankly completely ignores the watershed holding of *Welch* and *Scott*, which sought to foreclose sentencing challenges absent a fair opportunity for the sentencing court to address and rectify the situation at the first opportunity. Cf. *Gibson*, *supra*, 27 Cal.App.4th at pp. 1468-1469 ["A challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial"].)

In *Viray*, another challenge to the imposition of costs to reimburse the county for attorneys' fees, the court articulated a much narrower justification for not applying forfeiture to the facts before it. The court in *Viray* observed,

> At the threshold, we must consider respondent's contention that defendant has failed to preserve her challenge to the reimbursement order for appeal because she lodged no predicate objection in the trial court. We recognize that such a view has been adopted by published authority, but we find that authority distinguishable, and do not believe it can be rationally extended to bar objections to an order for reimbursement of counsel fees, for the reason that unless the defendant has secured a new, independent attorney when such an order is made, she is effectively unrepresented at that time, and cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his own fees.

(*Viray, supra*, 134 Cal.App.4th at p. 1215.) The court proceeded to examine the specific facts with respect to ordering of the attorneys' fees, and it determined that as to those fees, the defendant was essentially without counsel since her public defender had a conflict of interest to the extent that award of those fees benefitted him, to his client's detriment. (*Id.* at pp. 1215-1216.)[7] Given that this analysis is so fact specific and intertwined with the specific type of fee being imposed, the attorneys' fees, respondent submits that it has no practical application to booking fees or jail administrative fees applicable before this Court, or that were before the court in *Lopez*.

The court in *Viray* also supported its finding that the defendant's claim was not forfeited on appeal by observing, without analysis, that a challenge to the sufficiency of a sentencing order required no predicate objection at trial. (*Viray*, 134 Cal.App.4th. at p. 1217, citing *People v.*

---

[7] While the court in *Viray* characterizes the defendant as essentially unrepresented because his or her appointed attorney has a financial interest in collection of the fees, the court offered no reasonable way out of this perceived dilemma beyond mentioning an exception if there is "independent counsel." (*Viray, supra*, 134 Cal.App.4th at p. 1216, fn. 15.) Given the fact that any appointed "independent counsel" would be paid from county funds, respondent cannot conceive of a way out of the perceived dilemma.

Butler, *supra*, 31 Cal.4th 1119, 1126.) Appellant also supports his position by relying on *Butler*. However, respondent submits that reliance on *Butler* for such a broad holding is misplaced.

In *Butler*, this Court was faced with a challenge to the imposition of an AIDS testing condition to a sentence. Although not objected to at the sentencing hearing, the defendant complained on appeal that the AIDS testing order was improper because there was no evidence to support the necessary predicate factual finding that there was a transfer of bodily fluids from the defendant to the victim. The Court determined that given the particular nature of the testing requirement, and that the statute required the predicate finding of fluids transfer need only be supported by probable cause, a finding uniquely familiar to, and commonly made by, appellate courts when reviewing a variety of findings made by trial courts, appellate review in the first instance was warranted, even without objection in the court below. (*Id.* at pp. 1127-1128.) Importantly, Justice Brown articulated that the Court's holding was extremely narrow, based on the particular statute before it, and that its opinion was not to be perceived as a departure from the more general rules of forfeiture that the Court had developed in *Scott*. (*Id.* at p. 1128, fn. 5 ["nothing in our analysis should be construed to undermine the forfeiture rule of *People v. Scott*, *supra*, 9 Cal.4th 331, that absent timely objection sentencing determinations are not reviewable on appeal, subject to the narrow exception articulated in *People v. Smith* (2001) 24 Cal.4th 84"].)

Despite Justice Brown's narrowing of the application of the holding in *Butler*, appellant sees the rule vastly differently. His reading of *Butler* results in the conclusion:

> Therefore a challenge to the sufficiency of the evidence to support a trial court's implied finding of ability-to-pay is appealable in the absence of an objection below, because a finding of ability-to-pay must be supported by substantial

> evidence and, without evidentiary support, the order is fatally compromised. (*Butler*, *supra*, 31 Cal.4th at pp. 1123, 1127; *In re K.F.* (2009) 173 Cal.App.4th 655, 660-661.)

(AOB 21-22.) Of course such a broad interpretation would make *all* ability-to-pay findings subject to review on appeal despite being otherwise forfeited by absence of an objection so long as the defendant articulated the claim as a "sufficiency of the evidence" error rather than some other type of error. Respondent submits that such an interpretation would create an exception to forfeiture that would swallow the rule.

Certainly, the concurring opinion by Justice Baxter in *Butler*, joined by Justice Chin, did not envision the creation of such a gaping hole in the forfeiture doctrine. Justice Baxter highlighted the narrowness of the court's holding:

> [D]espite our ruling today, it remains the case that other sentencing determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the evidence. This includes claims that the record fails to demonstrate the defendant's ability to pay a fine (e.g., *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469; *People v. McMahan* (1992) 3 Cal.App.4th 740, 750; see generally *People v. Scott*, *supra*, 9 Cal.4th at p. 352, fn. 15) . . . . * * * All of these cases are consistent with *Scott's* observation that "claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or *factually flawed* manner." (*Scott*, *supra*, 9 Cal.4th at p. 354, italics added.) A "narrow exception" to this general rule exists only for "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings." (*People v. Smith*, *supra*, 24 Cal.4th at p. 852.)
>
> Our decision today also confirms that, except for HIV testing ordered under Penal Code section 1202.1, we generally will not extend the rules governing challenges to the factual sufficiency of criminal convictions or civil judgments to challenges to the factual sufficiency of orders made at

> sentencing. As the Court of Appeal has explained, "[a] challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of the evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial." (*People v. Gibson*, *supra*, 27 Cal.App.4th at pp. 1468–1469.)

(*People v. Butler*, *supra*, 31 Cal.4th at pp. 1130-1131.)

Justice Baxter and the Court of Appeal in *Gibson* were correct. A challenge to the sufficiency of the evidence to support a *conviction* invokes the defendant's Fourteenth Amendment due process protection against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) This right is the very heart of a criminal trial, and that is one reason that many courts review sufficiency of the evidence on appeal in the absence of an objection. (See *State v. Hayes* (2004) 681 N.W.2d 203, 212-214 [examining the policy considerations involved in applying a forfeiture rule to claims of insufficient evidence].) Pacheco's claims and appellant's claims here, on the other hand, involve only statutory rights as granted by California's fee statutes. Simply calling them "insufficiency of the evidence" (AOB 25) cannot elevate these claims to the stature of claims governed by *In re Winship*, 397 U.S. 358, and *Jackson v. Virginia* (1979) 443 U.S. 307.

In addition to his reliance on *Pacheco*, *Viray*, *Lopez* and *Butler*, appellant attempts to distinguish the jail booking fee provision from the Court's numerous holdings applying forfeiture by arguing that the jail booking fee is not "discretionary" nor is it a "sentence" within the purview of *Scott*. Appellant supports his conclusion by relying on the companion case to *Butler*, *People v. Stowell* (2003) 31 Cal.4th 1107. (AOB 21-25.) Appellant's analysis is flawed.

Appellant's first premise is that imposing the booking fee is not an exercise of discretion. He reasons that once the "ability to pay" is found, then the trial court imposes the booking fee pursuant to section 29550.2. Appellant contends that the factual determination of ability-to-pay is factually straightforward and something readily reviewable on appeal. (AOB 15-17.) Respondent disagrees. Unlike the factual predicate to the HIV testing provision at issue in *Butler* [whether bodily fluids were transferred], absent an objection at the sentencing hearing, there may not necessarily be a significant factual record generated regarding ability to pay. In the HIV testing situation, the factual predicate will actually be the underlying facts of the criminal charge. Presumably, those facts related to the transfer of bodily fluids will be readily apparent in the charging document or documents, preliminary hearing and/or trial transcript, any factual basis supplied by the parties in event of plea of guilty or no contest, or in a probation report if one was prepared. In contrast, an ability to pay determination may be based on a defendant's current age and health, education, prospects of future earnings in prison, assets, and any other sources of funds, as well as other fines and fees ordered. Absent a contemporaneous objection and development of the record, the wide range of factors that could be considered in determining an ability to pay do not lend themselves to simple review by appellate court about how a trial judge reached its implied conclusion. (Compare, *Valtakis*, *supra*, 105 Cal.4th at p. 1076 [considered defendant's cash in possession upon arrest, health, absence of addiction or incapacity in affirming ability to pay finding]; *Viray*, *supra*, 134 Cal.App.4th at p. 1218 [considered defendant's equity in home, age, prior employment and training, health in reversing ability to pay finding]; *People v. Staley* (1992) 10 Cal.App.4th 782, 786 [considered defendant's age, lack of health or disabling factors, prior work history in affirming ability to pay finding].)

Appellant's second premise is that because a recoupment fee, such as that imposed by section 29550.2, is not punishment, its imposition is not a "sentencing" decision as that phrase was used in *Scott*. (AOB 23 ["it does not fall within *Scott*'s rule that 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to appellate review. (*Scott*, *supra*, 9 Cal.4th at p. 353.)"].) Appellant also supports this premise by this Court's observation in *People v. Stowell*, *supra*, noting that since the HIV testing requirement was punishment, the general forfeiture rules for failure to object, rather than *Scott's* rule of forfeiture for failure to object to "sentencing choices" applied. (AOB 36, citing *Stowell*, *supra*, 31 Cal.4th at p. 1113.) Not so.

As noted above, *Stowell* was the companion case of *Butler*, as both cases dealt with a trial court's order of HIV testing after conviction of certain sex offenses, under section 1202.1. While *Butler* dealt with the sufficiency of the evidence of a probable cause determination to support the order, *Stowell* addressed a challenge to the trial court's failure to state on the record its finding of probable cause and the trial court's failure to note such a finding on the court minutes or docket. (*Stowell*, *supra*, 31 Cal.4th at p. 1111.) As explained above, the *Butler* decision declined to invoke forfeiture on the sufficiency of a probable cause determination. However, in *Stowell*, the Court determined that failure to state its express finding of probable cause in support of the HIV testing either on the record or in the court minutes or docket could both be forfeited. (*Id.* at p. 1113.) The majority opinion declined to invoke the *Scott* "sentencing choices" rationale, observing that since HIV testing was not a punishment, it was not a sentencing choice. However, the majority proceeded to apply a "general forfeiture" principle that foreclosed review of challenges to the trial court's

failure to express or note its probable cause findings. (*Id.* at pp. 1113-1116.)

Justice Baxter in a concurring opinion predicted the likely confusion that would ensue by the majority's use of "punishment" as a litmus test for application of *Scott's* "sentencing choice" forfeiture. He observed:

> In my view, the premise does not support the conclusion. Scott nowhere limited itself to punishment and instead referred broadly to "sentencing decisions" (*Scott, supra*, 9 Cal.4th at p. 348), "sentencing choice[s]" (*id.* at p. 352), and just plain old "sentences." (*Id.* at p. 354.)
>
> Moreover, the Scott rule has regularly been applied to bar a defendant from challenging for the first time on appeal other nonpunitive sentencing decisions, such as a trial court's failure to commit a defendant to the California Rehabilitation Center (e.g., *People v. Lizarraga* (2003) 110 Cal.App.4th 689, 692; *People v. Planavsky* (1995) 40 Cal.App.4th 1300, 1311–1315) or a trial court's imposition of rehabilitative probation conditions (e.g., *In re Josue S.* (1999) 72 Cal.App.4th 168, 170–173; *People v. Torres* (1997) 52 Cal.App.4th 771, 782–783). Indeed, *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060–1061—which is cited by the majority—applied *Scott* to bar a defendant from challenging for the first time on appeal a requirement that he register as a sex offender. Sex offender registration, like HIV testing, is nonpunitive. (*People v. Ansell* (2001) 25 Cal.4th 868, 886; see generally *Smith v. Doe* (2003) 538 U.S. 84, ——, 123 S.Ct. 1140, 1154, 155 L.Ed.2d 164.)
>
> Accordingly, the line drawn by the majority is illusory. And, inasmuch as the parties agreed at oral argument that the framework set forth in *Scott* applied to this case, it is unnecessary. Finally, in light of the majority's acknowledgement that *Scott* is merely an application of "the general forfeiture doctrine" (maj. opn., ante, 31 Cal.4th at p. 1113), the distinction it purports to draw between the two is mystifying. I therefore concur only in the result.

(*Stowell, supra*, 31 Cal.4th at p. 1118.) Respondent agrees with Justice Baxter that the distinction between "sentencing choices" of *Scott* being based on whether they constitute "punishment" as opposed to "general

forfeiture" is an unworkable distinction which poses particular mischief when applied to fees based on ability to pay.

Butler and *Stowell* notwithstanding, this Court's precedent overwhelmingly supports applying forfeiture to a failure to object to the imposition of ability-to-pay fees. The clear import of the *Scott* and *Welch* decisions was the ease and efficiency of handling errors occurring at the sentencing hearing when they arise, rather than standing silently by and waiting to handle them, inefficiently, for the first time on appeal. (*Stowell, supra*, 31 Cal.4th at p. 1114 ["Strong policy reasons support this rule: 'It 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. [Citations.]'"].) Under appellant's premise, important decisions like selection of the aggravated term from a sentencing triad, imposing a restitution fine above the minimum of $200, even up to $10,000, and other punishment related choices, can be forfeited, absent an objection,[8] but more nominal recoupment fees can be raised on appeal without preserving them by objection. Appellant does not explain why such an illogical hierarchy of forfeiture should be created in the first place, and how countenancing such a hierarchy of forfeiture would further the underlying concerns raised in *Scott* and *Welch*, and their progeny. Why permit forfeiture of such potentially serious discretionary choices, like more lengthy incarceration or significantly more costly fines, but prohibit forfeiture on more nominal fees?

The bizarre results of appellant's hierarchical approach to forfeiture actually are demonstrated in this very case. In addition to the $270.17 jail

---

[8] See e.g., *People v. de Soto* (1997) 54 Cal.App.4th 1, 8 [imposition of aggravated term]; *People v. Welch, supra*, at p. 236 [imposition of probation conditions]; and *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060–1061[imposition of sex offender registration condition].)

booking fee, the court imposed an $800 restitution fine under section 1202.4. (RT 36.) Per statute, the trial court was not permitted to impose an amount above the minimum of $200, unless the court determined appellant had the ability to pay. (§ 1202.4, subd. (c).) Appellant did not object to the court's imposition of the higher fine nor did he raise the issue on appeal.[9] Under existing authority, appellant is foreclosed from challenging the imposition of the $800 fine based on "ability to pay" because he did not interpose an objection in the trial court. (See *People v. Nelson*, *supra*, 51 Cal.4th at p. 227.)[10] Thus, the same "ability to pay" determination would be forfeited with respect to the imposition of the restitution fine, but under appellant's rubric, it would not be forfeited for the "ability to pay" the much lower jail booking fee. Such a result, which inexorably flows from appellant's argument, is illogical and should not be sanctioned by this Court.

In sum, respondent submits that this Court should follow the holdings and rationale articulated in *Valtakis*, *Gibson* and *Hodges*, finding that challenges to "ability-to-pay" determinations are forfeited if not objected to at the sentencing court level. This Court should decline appellant's invitation to adopt the reasoning of *Pacheco*, as that decision's foundations are not well-reasoned based on the uncritical application of *Viray* and *Lopez*. In *Scott* and its progeny, this Court was demanding that defendants

---

[9] See respondent's argument II for further discussion of appellant's failure to object to this fine below.

[10] Respondent is aware that section 1202.4 was amended post-*Nelson* to require the court to consider a defendant's "inability to pay." (*Nelson*, *supra*, 51 Cal.4th at p. 227, fn. 22.) The statutory amendment does not undermine respondent's position that it is illogical that consideration of facts related to the defendant's "inability to pay" would be forfeited while presumably the same consideration of facts related to the defendant's "ability to pay" would not.

raise challenges to permissible choices made at the sentencing proceeding. Any other interpretation results in some trial court choices being forfeited, while other permissible choices are not. Undoubtedly such a result will lead to confusion and to more, rather than fewer, appellate claims that could be readily resolved in the trial court in the first instance. To the extent that the holdings in *Butler* and *Stowell* are read to circumvent the efficiencies and fairness of *Scott* and the cases that followed, they should be expressly limited or overruled, or alternatively not applied to the recoupment fees at issue here.

Appellant failed to object to, or develop in any way, the contention that the trial court's implied finding of ability to pay was unsound. Appellant's claim should be deemed forfeited and his argument to the contrary rejected.

II. APPELLANT DID NOT OBJECT TO THE COURT'S ABILITY TO PAY DETERMINATION TO AVOID FORFEITURE OF HIS CHALLENGE TO THE SECTION 29550.2 FEE; SUCH A CLAIM WAS NOT RAISED BELOW, AND IS BEYOND THE ISSUE PRESENTED BY THIS PETITION

In his second argument, appellant insists that his request for a reduced restitution fine, under section 1202.4, was an objection to the court's determination of his ability to pay and that this Court therefore should consider this request also as an implied objection to the booking fee under section 29550.2. He then concludes that this implied objection preserved his challenge to the booking fee on appeal. (AOB 42-43.) For several reasons, respondent disagrees.

First, and foremost, this contention that appellant actually objected was never raised or addressed until his opening brief on the merits before this Court. In his briefing before the Third District Court of Appeal, appellant essentially conceded that there was no objection to the booking fee in the trial court. (See Appellant's Opening Brief [3 DCA] at 4

["Appellant recognizes that his failure to object at the sentencing hearing to the trial court's imposition of this order may be viewed as a waiver of his argument. [Citation.] However, appellant's argument here is that because there was no hearing on his ability to pay, there was no evidence that he was able to pay the fee and therefore the trial court's order must be reversed"].) Since appellant did not assert this argument below, the Court of Appeal did not have occasion to address it. As such, respondent submits that the claim here is beyond the grant of the petition before this Court and it should be stricken.

Second, appellant's request at the trial court could not and did not constitute an objection to any finding, let alone a finding an unrelated fee. When the trial court imposed the $800 restitution fine under section 1202.4, the following colloquy occurred:

> DEFENSE COUNSEL: Your honor, we would ask the Court to impose the minimum $200 restitution amount. [¶] Mr. McCullough indicated he is on a fixed income.
>
> THE COURT: If it turns out he is unable to pay that, he will not be required to pay that if he can't make the payment. However, it first needs to be determined whether he can make the payment. The amount I've set will remain. That is a relatively low amount.

(RT 36.) Appellant's request for a lower restitution fine amount was just that: a request. He did not assert that he couldn't pay the amount, or that his "fixed income" would not support paying such a fine over the four-year prison commitment; only that he preferred not to pay that amount. By requesting immediate sentencing and waiving preparation of a probation report (RT 34-35), and by failing to further elaborate on what the "fixed income" amount was, appellant did not fairly present the issue of his ability to pay to the trial court, which this Court's decisions in *Scott* and its progeny demand.

This Court should reject appellant's belated attempt to avoid forfeiture by considering his request for a minimum restitution fine.

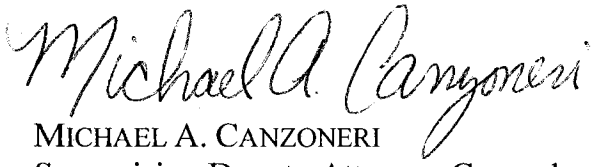
CONCLUSION

For the above-stated reasons, respondent requests that this Court affirm the Third District Court of Appeal's decision affirming the judgment of the trial court, and this Court reject appellant's challenge to the $270.17 main jail booking fee as forfeited based on his failure to object at the sentencing hearing.

Dated: January 4, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
JANET E. NEELY
Deputy Attorney General



MICHAEL A. CANZONERI
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

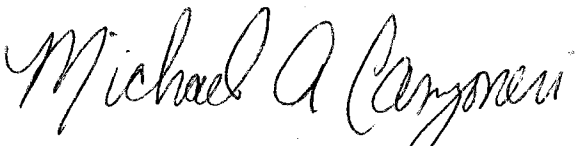
SA2010302746
10807042.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 6,866 words.

Dated: January 4, 2012

KAMALA D. HARRIS
Attorney General of California



MICHAEL A. CANZONERI
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE

Case Name: **People v. McCullouogh**
No.: **S192513**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 5, 2012, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

The Honorable Jan Scully
Sacramento County District Attorney
P.O. Box 749
Sacramento, CA 95814-0749

County of Sacramento
Gordon D. Schaber Downtown Courthouse
Superior Court of California
720 9th Street
Sacramento, CA 95814-1398

CCAP
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

Danalynn Pritz
Attorney at Law
3625 E. Thousand Oaks Blvd., #176
Westlake Village, CA 91362
Attorney for Appellant - 2 Copies

On January 5, 2012, I caused the original and thirteen (13) copies of the **ANSWER BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister, 1st Floor, San Francisco, CA 94102 by overnight mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 5, 2012, at Sacramento, California.

_____
Declarant