IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,
v.

FELIX CORRAL RUIZ II,

Defendant and Appellant.

S235556

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

Hon. Joseph Kalashian, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

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APPELLANT'S OPENING BRIEF ON THE MERITS

INTRODUCTION

This court has limited briefing to the following issue:

> May a trial court properly impose a criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and a drug program fee (Heath & Saf. Code, § 11372.7, subd. (a)) based on a defendant's conviction for conspiracy to commit certain drug offenses?

This question has been answered in the negative by the sole published Court of Appeal decision to have considered the issue. (*People v. Vega* (2005) 130 Cal.App.4th 183, 194.) Rejecting the *Vega* holding, which squarely held that these fees cannot be imposed where the only conviction is for conspiracy, the Court of Appeal in the instant case opted to follow the holding in *People v. Sharett* (2011) 191 Cal.App.4th 859, where the court under

distinguishable circumstances found that these fees are "punishment." From this, the court here concluded that they were properly imposed under Penal Code section 182, subdivision (a).

Since the filing of the petition for review, another Court of Appeal has held in a different context that the fees imposed under Health and Safety Code section 11372.5 do not constitute punishment. (*People v. Watts* (2016) 2 Cal.App.5th 223, 234.) An examination of both the plain language of Health and Safety Code sections 11372.5 and 11372., as well as the clearly expressed legislative purpose behind those statutes, demonstrates that *Vega* and *Watts* are correctly decided. Appellant thus respectfully requests that this court reverse the holding of the Court of Appeal and strike the order requiring him to pay fees and assessments under Health and Safety Code sections 11372.5 and 11372.7.

STATEMENT OF THE CASE AND FACTS

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

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

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

On July 28, 2010, several Norteno gang members shot different caliber weapons toward an apartment complex where rival gang members were known to congregate. A 59-year-old person was shot in the chest, and a 17-year-old person was shot in the leg. (Conf. CT 13.)

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

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

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

Code, § 664/187) of K.S. and D.S., respectively, on the same dates, with the same special allegations. (CT 762-765.) Count four charged them with shooting at an inhabited dwelling (Pen. Code, § 246), with the same firearm special allegations, as well as a gang allegation under Penal Code section 182.22, subdvision (b)(4). (CT 766.) Counts five and six charged them with conspiracy to violate Health and Safety Code sections 11379, subdivision (a), and 11378, respectively, with special allegations under Penal Code section 186.22, subdivision (b)(1)(a). (CT 767-770.) These two counts were alleged to have occurred on or about June 1, 2010. (CT 767-769.) Count seven charged appellant with participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) on or about June 1, 2010. (CT 770-771.)[3] The information further alleged as to each count that appellant had served a prior prison term (Pen. Code, § 667.5, subd. (b)) on March 5, 2003, for a violation of Health and Safety Code section 11378. (CT 761-771.)

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

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

and 12022.53, subdivision (c), as to counts two and three. (CT 865.) He admitted the prior prison term under Penal Code section 667.5, subdivision (b). (CT 865.) As part of the plea agreement, appellant agreed to waive his presentence credits and his right to appeal.(RT 183-184.) The prosecution also agreed to dismiss a pending misdemeanor child endangerment charge in Tulare County case number VCF207169. (RT 191.)

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

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

ARGUMENT

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

At sentencing, the court imposed $600 in fees and penalty assessments under Health and Safety Code sections 11372.5 and 11372.7. (RT 204; see Conf. CT 24.)[4] On appeal, appellant argued that these fees were unauthorized because the fees imposed by Health and Safety Code sections 11372.5 and 11372.7 do not apply to a conspiracy conviction. (See *People v. Vega* (2005) 130 Cal.App.4th 183, 194.) Appellant further argued that counsel's failure to object to the unauthorized fees deprived him of effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [104 S.Ct. 2052; 80 L.Ed.2d 674].) The Court of Appeal declined to follow *Vega* and instead followed the conflicting holding in *People v. Sharret* (2011) 191 Cal.App.4th 859. Because the plain statutory language as well as the clearly discernible legislative intent indicate that the fees in question are not "punishment" and are thus not authorized by Penal Code section 182, subdivision (a), appellant asks this court to order that the unauthorized fines be stricken.

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

This court's task is to determine whether the relevant statutes authorize the fees imposed. As in any case involving statutory interpretation, the court must determine the Legislature's intent so as to effectuate the law's purpose. (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.) The court first looks to the statutory language, giving it a plain and commonsense meaning. (*Ibid.*) If the statutory language is clear, the court need go no further. But where a statute's terms are unclear or ambiguous, the court may "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Ibid*, citations omitted.) The court reviews issues of statutory interpretation de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

Health and Safety Code section 11372.5 assesses a "criminal laboratory analysis fee" on defendants who are convicted of specified drug offenses. Health and Safety Code section 11372.7 likewise imposes a "drug program fee" on defendants convicted of specified offenses. Neither statute mentions conspiracy convictions.[5]

Penal Code section 182, subdivision (a), holds that where criminal defendants have been convicted of conspiring to commit a

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[5]The majority of the cases discussed herein address only Health and Safety Code section 11372.5. The relevant language of the two statutes is virtually identical; the differences will be discussed as necessary.

felony, "they shall be punished in the same manner and to the same extent as is provided for the punishment of that felony." (Pen. Code, § 182, subd. (a); see also *People v. Athar* (2005) 36 Cal.4th 396, 404-405; *People v. Superior Court* (*Kirby*) (2003) 114 Cal.App.4th 102, 105-106.)

Courts have grappled with the limitations of conspiracy sentencing, and have generally concluded that "punishment" as contemplated in Penal Code section 182, subdivision (a), includes *all* forms of punishment provided for the target offense, and that the determinative issue is whether a particular consequence is "punishment," and not where it appears in the statutory scheme. This this court in *Athar* held that the punishment proscribed under Penal Code section 182, subdivision (a), includes not only the base term for the target offense, but also applicable enhancements. (*People v. Ashtar, supra,* 36 Cal.4th at p. 405.) The defendant in *Athar* was convicted of conspiracy to commit money laundering, in violation of Penal Code section 182, subdivision (a)(1), and was subjected to a sentencing enhancement under Penal Code section 186.10, subdivision (c)(1)(D). The defendant argued on appeal that the enhancement should not apply because the statute authorizing the enhancement did not specifically mention conspiracy, while other enhancement statutes (e.g., Health & Saf. Code, § 11370.4, subd. (a)) did enumerate conspiracies among the offenses to which they applied. (*People v. Ashtar, supra*, 36 Cal.4th at p. 405.) This court was not persuaded by that comparison, noting that "[t]he general plain meaning

expressed in section 182, subdivision (a), that a conspirator will be punished in the same manner and to the same extent as one convicted of the underlying felony, does not require additional legislative clarity." (*Ibid.*)[6]

The court in *Kirby*, by contrast, was faced with the question of whether Penal Code section 1203.065, which prohibits a grant of probation to persons convicted of violations of Penal Code sections 266h or 266i (pimping and pandering), similarly prohibited probation for a defendant convicted of conspiracy to violate those provisions. The court undertook a painstaking review of the applicable statutes, beginning with the language of the conspiracy statute. (Pen. Code, § 182, subd. (a).) "While it is unquestionable that the length of the state prison term provided

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[6]In *People v. Villela* (1994) 25 Cal.App.4th 54, the court extended the registration requirement for narcotics offenders under Health and Safety Code section 11590 to those convicted of conspiracy to commit a drug offense. (*People v. Villela, supra*, 25 Cal.App.4th at pp. 59–60.) The court reasoned that the registration requirement, though not an enhancement, was a punishment and concluded that the Legislature intended to subject conspirators to the same punishment as that imposed for perpetrators of the underlying felony. (*Id.* at pp. 60–61.) In *People v. Castellanos* (1999) 21 Cal.4th 785, however, this court held that sex offender registration is not punishment for ex post facto purposes. This court noted in *Athar*, however, that "even if we assume the court incorrectly called the additional registration requirement a punishment, the court was correct in reasoning that section 182 requires sentencing to the same extent as the underlying target offense, and that the sentencing is not limited to the base term of that offense." (*People v. Athar, supra*, 36 Cal. 4th at p. 406.)

as punishment for the underlying felony is encompassed within section 182's reference to the 'manner' and 'extent' of the 'punishment,' the question we must resolve is whether probation ineligibility is encompassed in the 'manner' or 'extent' of the 'punishment' for an underlying felony." *People v. Superior Court, supra*, 114 Cal.App.4th at p. 105.) Holding that "it has long been accepted that probation is not punishment but is instead an 'act of clemency in lieu of punishment' that is 'rehabilitative in nature,'" the court rejected the People's argument that the probation preclusion was necessarily included in the "punishment" contemplated by the language in Penal Code section 182, subdivision (a). (*People v. Superior Court, supra*, 114 Cal.App.4th at pp. 105-106.)

The question here, then, is whether the fees levied under Health and Safety Code sections 11372.5 and 11372.7 are "punishment" within the meaning of Penal Code section 182. No published decision to date has addressed whether the drug program fee under section 11372.7 may be imposed on a conspiracy charge. The only published decision to directly address the question of whether a crime lab fee under Health and Safety Code section 11372.5 may be imposed on conspiracy convictions answered that question in the negative. (*People v. Vega, supra*, 130 Cal.App.4th at pp. 194-195.) The *Vega* court held that fees imposed under Health and Safety Code section 11372.5 are not "punishment," and that thus where a defendant is convicted only of conspiracy to commit drug offenses, but not of the target

offenses themselves, the criminal laboratory analysis fee was unauthorized. (*People v. Vega, supra,* 130 Cal.App.4th at p. 194.)

The court in *Vega* applied a multilevel analysis of the statutory language and the purpose of the crime lab fee. The court declined to defer entirely to the language of the statute: "the label the Legislature places on a charge, whether 'fee' or 'fine,' is not determinative, especially where as here the Legislature used both terms." (*People v. Vega, supra*, 130 Cal.App. 4th at p. 195.) Acknowledging that other courts have developed multipart tests for determining whether something is a "punishment," the *Vega* court declined to undertake an exhaustive analysis, noting that in most cases the determination can be made by looking to the purpose of the charge imposed. "Fines are imposed for retribution and deterrence; fees are imposed to defray administrative costs." (*People v. Vega, supra*, 130 Cal.App.4th at p. 195.) The court concluded:

> It is clear to us the main purpose of Health and Safety Code section 11372.5 is not to exact retribution against drug dealers or to deter drug dealing (given the amount of money involved in drug trafficking a $50 fine would hardly be noticed) but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his conviction. The legislative description of the charge as a "laboratory analysis fee" strongly supports our conclusion, as does the fact the charge is a flat amount, it does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special "criminalistics laboratories fund" maintained in each county by the county treasurer.

(*People v. Vega, supra*, 130 Cal.App.4th at p. 195.) Having concluded that the fee imposed under Health and Safety Code section 11372.5, subdivision (a), was not punishment, the court found that it could not be imposed upon a conviction of conspiracy. (*Ibid.*)

The *Vega* decision is in line with a body of case law delineating which financial penalties qualify as penal punishment and which do not. Much of this case law has been developed in the context of the ex post facto clause, or in the context of determining whether particular fees are subject to penalty assessments. In general, the courts of this state have held that penalties and assessments qualify as punishment if they have a punitive effect. (See, e.g., *People v. High* (2004) 119 Cal.App.4th 1192, 1198.)

Any discussion of this line of cases must begin with this court's holding in *People v. Alford* (2007) 42 Cal.4th 749, in which this court held that the court security fee in Penal Code section 1465.8 could be imposed retroactively without running afoul of the ex post facto clauses of the state and federal constitutions. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758.) As this court noted, "Fines arising from convictions are generally considered punishment. (Citation.) However, several countervailing considerations undermine a punitive characterization." (*Ibid.*)

The court looked to the intent and language of the statute to determine that the purpose of Penal Code section 1465.8 was not to impose punishment, but rather to fund court security. (*Id.* at p.

758.) The court noted that the amount of the fee is not dependent upon the seriousness of the offense, that it applies to civil as well as criminal cases, and that its purpose was to increase revenues rather than to impose punishment. (*Ibid.*) The court also noted that the fee was in fact called a "fee" in the statute. (*Id.* at p. 757.)

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

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

that the section 76104.6 penalty was similar to the penalty at issue in *High*, and noted in particular that:

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

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

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

Courts of Appeal have divided on the issue of whether the fees under Health and Safety Code sections 11372.5 and 11372.7 qualify as punishment under the above framework. *People v. Vega*, as noted, found that the fee imposed under Health and Safety Code section 11372.5 is not punishment but is instead an administrative fee, because the main purpose of the fee is neither retribution nor deterrence, but merely to offset the costs of laboratory tests involved in prosecuting drug cases. (*People v. Vega, supra*, 130 Cal.App.4th at p. 195.)

The court in *People v. Watts* (2016) 2 Cal.App.5th 223 reached the same conclusion in a different context. There, the court delineated three classes of monetary charges that may be imposed as a result of criminal convictions: monetary charges intended to punish the defendant for the crime committed (see *People v. Sorenson* (2005) 125 Cal.App.4th 612, 617); monetary charges intended to fund government programs (see *People v. Alford, supra*, 42 Cal.4th at p. 756); and penalty assessments, "which, when applicable, inflate the total sum imposed on the defendant by increasing certain charges by percentage increments." *(People v. Watts, supra*, 2 Cal. App. 5th at p. 228.) The question before the court in *Watts* was whether the $50 crime lab fee under Health and Safety Code section 11372.5 was a "fine, penalty, or forfeiture" subject to penalty assessments. (*Id.*, at p. 229.) The court in *Watts* broke with the weight of authority and found that the crime lab fee was not subject to such assessments. (*Ibid.*)

The *Watts* court examined in detail the language of section 11372.5, subdivision (a), highlighting the "internal inconsistency" of section 11372.5 and noting that the first paragraph of subdivision (a) characterizes the fee as a "criminal laboratory analysis *fee*," while the second paragraph characterizes the $50 charge as a "*fine*." (Health & Saf. Code, § 11372.5, subd. (a); see *People v. Watts, supra*, 2 Cal.App.5th at p. 231.) In spite of this inconsistency, the court concluded that "the most sensible interpretation is that the Legislature intended the crime-lab fee to

be exactly what it called it in the first paragraph, a fee, and not a fine, penalty, or forfeiture subject to penalty assessments." (*Ibid.*) The court emphasized: "we fail to perceive how the fact that the crime-lab fee increases the 'total fine' necessarily means the fee is itself a 'fine' subject to penalty assessments." (*Id.* at p. 234.) The court further noted that amendments to the statute had changed the description of the crime lab fee from a "increment" to a "fee," suggesting a legislative intent that the fee not be considered a "fine, penalty, or forfeiture. (*Ibid.*)

In contrast to *Vega* and *Watts*, the court in *People v. Sharret* (2011) 191 Cal.App.4th 859 concluded that the criminal lab fee in Health and Safety Code section 11372.5 was punishment, and thus subject to a stay under Penal Code section 654. While applying the same general analysis as that employed in *Vega* and *Watts*, the court reached the opposite conclusion. Among other considerations, the court relied on the fact that the fee is imposed only upon a criminal offense, and does not apply in any civil context, that separate fees are imposed for each conviction and thus the fee "is assessed in proportion to a defendant's culpability," and that the fee is mandatory and has no ability to pay requirement. (*People v. Sharret, supra,* 191 Cal.App.4th at p. 870.) The court further noted that the fund into which the fee is deposited is earmarked for criminal investigations and has no civil purpose, and that there exists no evidence that the enacting legislation was a budget measure. (*Ibid.*)

The *Sharret* decision simply cannot be reconciled with the decisions in *Watts* and *Vega*. But the holding in *Sharret* rests on some clearly erroneous reasoning. Most egregiously, the court in *Sharret* reasoned that because separate fees are assessed for each count of conviction, the fee is assessed in proportion to the defendant's culpability and is therefore punishment. (*People v. Sharret, supra,* 191 Cal.App.4th at p. 870.) But separate fees are assessed under Penal Code section 1465.8 and Government Code section 70373 for each conviction, as well, and those fees have been held to not constitute punishment. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758; *People v. Fleury, supra*, 182 Cal.App.4th at p. 1492.) Fines that have been found to be punitive are those that are imposed as a percentage on other fines that are calculated as an exercise in discretion at sentencing. (See, e.g., *People v. High, supra*, 119 Cal.App.4th at p. 1198.) Similarly, the fact that a fee is mandatory and not subject to an ability to pay assessment does not mean that the fee is punitive. Again, both Penal Code section 1465.8 and Government Code section 70373 are mandatory and not subject to an ability to pay requirement; courts have nonetheless held that neither is punishment. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758; *People v. Fleury, supra*, 182 Cal.App.4th at p. 1492.)[7]

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[7]Health and Safety Code section 11372.7, which is in most respects very similar to section 11372.5, differs in that it does include a requirement that a defendant have an ability to pay the fee. (Health & Saf. Code, § 11372.7, subd. (b).)