

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS R. CHAVEZ,

Defendant and Appellant.

B190270

(Los Angeles County  
Super. Ct. No. VA092864)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed with modifications.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Pursuant to California Rules of Court, rules 8.1100 and 8.1110(a), this opinion is certified for publication with the exception of part II (D).

## I. INTRODUCTION

Defendant, Jesus R. Chavez, appeals from his cocaine possession conviction (Health & Saf. Code § 11350, subd. (a)) and the trial court's finding that he was previously convicted of a serious felony and served four prior prison terms. (Pen. Code,<sup>1</sup> §§ 667, subd. (b)-(i), 667.5, subd. (b), 1170.12.) Defendant contends the trial court should have dismissed his prior conviction finding. In the published portion of this appeal, we discuss the effects of the section 1465.7, subdivision (a) state surcharge and Government Code section 70372, subdivision (a) state court construction penalty on the fines typically imposed in a cocaine possession case. We modify the fines imposed but otherwise affirm the judgment.

## II. DISCUSSION

### A. Drug Laboratory Fee

The trial court did not impose a Health and Safety Code section 11372.5, subdivision (a) laboratory fee. The Attorney General argues that the trial court erroneously failed to impose the Health and Safety Code section 11372.5, subdivision (a) drug laboratory fine and two penalty assessments, one surcharge, and a construction penalty. We largely are in agreement. Health and Safety Code section 11372.5, subdivision (a), provides in relevant part: "Every person who is convicted of a violation of Section 11350 . . . shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense." The drug laboratory fee is mandatory and should have been imposed. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1413; see *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519.)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

But that is not where matters end. First, the trial court was obligated to impose penalty assessments pursuant to section 1464, subdivision (a) in the sum of \$50 and Government Code section 76000, subdivision (a) in the amount of \$35 on the Health and Safety Code section 11372.5, subdivision (a) drug laboratory fee. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153; *People v. Martinez, supra*, 65 Cal.App.4th at p. 1519.)

Second, the trial court was obligated to impose a 20 percent state surcharge on the drug laboratory fine. Section 1465.7, subdivisions (a) and (b) state: “(a) A state surcharge of 20 percent shall be levied on the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. [¶] (b) This surcharge shall be in addition to the state penalty assessed pursuant to Section 1464 of the Penal Code and may not be included in the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464.” The language utilized by the Legislature is mandatory and contains no exceptions. Thus, as in similar situations, the failure to impose the mandatory 20 percent state surcharge is a jurisdictional error which may be corrected for the first time on appeal. (*People v. Talibdeen, supra*, 27 Cal.4th at pp. 1153-1154 [§ 1464, subd. (a) and Gov. Code, § 76000, subd. (a) penalty assessments]; *People v. Smith* (2001) 24 Cal.4th 849, 853 [§ 1202.45 parole revocation fine]; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456-457 [§1465.7, subd. (a) state surcharge]; *People v. Martinez, supra*, 65 Cal.App.4th at pp. 1519-1520 [drug laboratory fee].) Thus, the \$50 Health and Safety Code section 11372.5, subdivision (a) fine is subject to a \$10 state surcharge. The section 1465.7, subdivision (a) state surcharge does not apply though to the section 1464, subdivision (a) and Government Code section 76000, subdivision (a) penalty assessments. The 20 percent state surcharge is only imposed on the base fine—the Health and Safety Code section 11372.5, subdivision (a) laboratory fee. (§1465.7, subd. (a).)

Third, the drug laboratory fee is subject to the state court construction penalty set forth in Government Code section 70372, subdivision (a) which states in relevant part, “[T]here shall be levied a state court construction penalty, in addition to any other state or

local penalty including, but not limited to, the penalty provided by Section 1464 of the Penal Code and Section 76000 of the Government Code, in an amount equal to five dollars (\$5) for every ten dollars (\$10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . . .” The state court construction penalty applies to all fines which includes the Health and Safety Code section 11372.5, subdivision (a) laboratory fee. Health and Safety Code section 11372.5, subdivision (a) refers to the fee as an increment of the total fine.<sup>2</sup> The laboratory fee is an increment of the total fines imposed by the trial court. (*People v. Martinez, supra*, 65 Cal.App.4th at p. 1522; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332.) Hence, the \$25 state court construction penalty is to be added to the Health and Safety Code section 11372.5, subdivision (a) laboratory fee. (*People v. Taylor, supra*, 118 Cal.App.4th at pp. 456-457.)

Fourth, the Government Code section 70372, subdivision (a) state court construction penalty extends to the section 1464, subdivision (a) and Government Code section 76000 subdivision (a) penalty assessments as well. Thus, on the \$50 section 1464, subdivision (a) penalty assessment, an additional \$25 state court construction penalty must be imposed. As to the Government Code section 76000, subdivision (a) penalty assessment, the issue is somewhat more complex because, as noted, that sum in this case is \$35. Government Code section 70372, subdivision (a) refers to a penalty equal to “five dollars (\$5) for every ten dollars (\$10) or fraction thereof” on a fine or

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<sup>2</sup> Health and Safety Code section 11372.5, subdivision (a) states: “Every person who is convicted of a violation of Section 11350, 11351, 11351.5, 11352, 11355, 11358, 11359, 11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, or 11550 or subdivision (a) or (c) of Section 11357, or subdivision (a) of Section 11360 of this code, or Section 4230 of the Business and Professions Code shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.”

penalty that is imposed. Common sense tells us that the “or fraction thereof” language means that the state court construction penalty on the Government Code section 76000, subdivision (a) penalty assessment in this case is \$17.50. (\$15 for the first \$30 and \$2.50 for the final \$5 which is the “fraction thereof.”)

There is one problem that remains to be resolved. In *People v. Taylor, supra*, 118 Cal.App.4th at pages 457-460, our colleagues in the Third Appellate District held that the state court construction penalty must be imposed but is subject to reduction depending on the amount of county funding provided to the Government Code section 76100 local Courthouse Construction Fund and the Government Code section 70401 Transitional State Court Facilities Construction Fund. In *Taylor*, the court held, as we do, that the Health and Safety Code section 11372.5, subdivision (a) drug laboratory fee is subject to the Government Code section 70372, subdivision (a) state court construction penalty. (*Id.* at pp. 456-459.) But the court in *Taylor* concluded that the state court construction penalty was subject to reduction pursuant to Government Code section 70375, subdivision (b) which states in part: “(b) In each county, the amount authorized by Section 70372 shall be reduced by the following: [¶] (1) The amount collected for deposit into the local courthouse construction fund established pursuant to Section 76100. [¶] (2) The amount collected for transmission to the state for inclusion in the Transitional State Court Facilities Construction Fund established pursuant to Section 70401 to the extent it is funded by money from the local courthouse construction fund.”<sup>3</sup>

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<sup>3</sup> Government Code section 70375 states in its entirety: “(a) This article shall take effect on January 1, 2003, and the fund, penalty, and fee assessment established by this article shall become operative on January 1, 2003, except as otherwise provided in this article. [¶] (b) In each county, the amount authorized by Section 70372 shall be reduced by the following: [¶] (1) The amount collected for deposit into the local courthouse construction fund established pursuant to Section 76100. [¶] (2) The amount collected for transmission to the state for inclusion in the Transitional State Court Facilities Construction Fund established pursuant to Section 70401 to the extent it is funded by money from the local courthouse construction fund. [¶] (c) The authority for all of the following shall expire proportionally on the June 30th following the date of transfer of responsibility for facilities from the county to the Judicial Council, except so long as

The Court of Appeal held the state court construction penalty must be reduced by amounts deposited by the county treasurer in the local Courthouse Construction Fund or the Transitional State Court Facilities Construction Fund. (*People v. Taylor, supra*, 118 Cal.App.4th at p. 459.) As a result, the court concluded: “We are unable to determine whether Sacramento County has established a local courthouse construction fund under Government Code section 76100 or whether Sacramento County is participating in the Transitional State Court Facilities Construction Fund under Government Code section 70401. Therefore, we are unable to determine whether this surcharge should be reduced in accordance with Government Code section 70375. We shall remand the case to the trial court to make these factual findings.” (*Id.* at p. 460.)

We respectfully disagree with that portion of the *Taylor* opinion which held the state court construction penalty must be reduced depending on whether a county contributes to the local Courthouse Construction Fund or the Transitional State Court Facilities Construction Fund. As noted, Government Code section 70375, subdivision (b) requires that the amount “authorized by Government Code section 70372” be “reduced” by the amounts collected for deposit into two separate funds. The first fund is the local Courthouse Construction Fund established by Government Code section

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money is needed to pay for construction provided for in those sections and undertaken prior to the transfer of responsibility for facilities from the county to the Judicial Council: [¶] (1) An additional penalty for a local courthouse construction fund established pursuant to Section 76100. [¶] (2) A filing fee surcharge in the County of Riverside established pursuant to Section 70622. [¶] (3) A filing fee surcharge in the County of San Bernardino established pursuant to Section 70624. [¶] (4) A filing fee surcharge in the City and County of San Francisco established pursuant to Section 70625. [¶] (d) For purposes of subdivision (c), the term ‘proportionally’ means that proportion of the fee or surcharge that shall expire upon the transfer of responsibility for a facility that is the same proportion as the square footage that facility bears to the total square footage of court facilities in that county.”

76100.<sup>4</sup> (Gov. Code, § 70375, subd. (b)(1).) The second fund is the Transitional State Court Facilities Construction Fund established pursuant to Government Code section 70401.<sup>5</sup> In *Taylor*, the court held that the amount of the state court construction penalty was to be reduced by the sums paid into these two funds.

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4 When the 20 percent surcharge in Government Code section 70372, subdivision (a) became effective, Government Code section 76100 provided: “(a) Except as provided in Article 3 (commencing with Section 76200), for the purpose of assisting any county in the acquisition, rehabilitation, construction, and financing of courtrooms or of a courtroom building or buildings containing facilities necessary or incidental to the operation of the justice system, the board of supervisors may establish in the county treasury a Courthouse Construction Fund into which shall be deposited the amounts specified in the resolutions adopted by the board of supervisors in accordance with this chapter. The moneys of the Courthouse Construction Fund shall be payable only for the purposes set forth in subdivision (b) and at the time necessary therefor. [¶] (b) In conjunction with the acquisition, rehabilitation, construction, or financing of court buildings referred to in subdivision (a), the county may use the moneys of the Courthouse Construction Fund for either of the following: [¶] (1) To rehabilitate existing courtrooms or an existing courtroom building or buildings for other uses if a new courtroom or a courtroom building or buildings are acquired, constructed, or financed. [¶] (2) To acquire, rehabilitate, construct, or finance excess courtrooms or an excess courtroom building or buildings, if that excess is anticipated to be needed at a later time. [¶] (c) Any excess courtroom or excess courtroom building or buildings that are acquired, rehabilitated, constructed, or financed pursuant to subdivision (b) may be leased or rented for uses other than the operation of the justice system until the excess courtrooms or excess courtroom building or buildings are needed for the operation of the justice system. Any amount received as lease or rental payments pursuant to this subdivision shall be deposited in the Courthouse Construction Fund. [¶] (d) The fund moneys shall be held by the county treasurer separate from any funds subject to transfer or division pursuant to Section 1463 of the Penal Code.” (Stats. 2002, ch. 1082, § 6.)

5 Government Code section 70401, which was adopted at the same time the 20 percent state surcharge, was enacted states: “There is hereby established in the State Treasury the Transitional State Court Facilities Construction Fund. For each facility transferred to the state that is subject to bonded indebtedness and for which a revenue source is also transferred to the state, pursuant to subdivision (b) of Section 70325, a separate account shall be established in the fund to receive and disburse moneys for that facility. The county shall continue to collect and transmit to the Controller for deposit in

We believe the reduction specified in Government Code section 70375, subdivision (b) refers not to the state court construction penalty but to the funds transferred by a county treasurer to the State Controller as required by Government Code section 70372, subdivision (f). Government Code section 70372, subdivision (f) states, “Within 45 days after the end of the month that moneys are deposited in the county treasury pursuant to subdivision (a) or (b), the county treasurer shall transmit the moneys to the State Controller, to be deposited in the State Court Facilities Construction Fund.” As noted, Government Code section 70372, subdivision (a) enacted the state court construction penalty. Government Code section 70372, subdivision (b), enacted a state court construction penalty for parking offenses. Both Government Code section 70372, subdivisions (a) and (b) require that the clerk of the court transmit the state court construction penalties collected to the county treasury.<sup>6</sup> Within 45 days after the end of

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the fund the moneys transferred to service the debt on the facility. The fund shall cease to exist when all debt transferred to the state pursuant to Section 70325 has been paid.”

<sup>6</sup> Government Code section 70372, subdivisions (a) and (b) state: “(a) Except as otherwise provided in this article, there shall be levied a state court construction penalty, in addition to any other state or local penalty including, but not limited to, the penalty provided by Section 1464 of the Penal Code and Section 76000 of the Government Code, in an amount equal to five dollars (\$5) for every ten dollars (\$10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses, including, but not limited to, all offenses, except parking offenses, as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Fish and Game Code, the Health and Safety Code, or the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. Any bail schedule adopted pursuant to Section 1269b of the Penal Code may include the necessary amount to pay the state penalties established by this section, by Section 1464 of the Penal Code, and Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code for all matters where a personal appearance is not mandatory and the bail is posted primarily to guarantee payment of the fine. After a determination by the court of the amount due, the clerk of the court shall collect the penalty and transmit it immediately to the county treasury and the county treasurer shall transmit these sums as provided in subdivision (f). [¶] (b) In addition to the penalty provided by subdivision (a), for every parking offense where a parking penalty, fine, or forfeiture is imposed, an added state court construction



the month that the moneys are deposited in the county treasury, the county treasurer is to transmit the penalties collected to the State Controller who in turns deposits the funds in the State Court Facilities Construction Fund as required by Government Code section 70372, subdivision (f). It is this payment by the county treasurer to the State Controller made pursuant to Government Code section 70372, subdivision (f) that is reduced pursuant to Government Code section 70375, subdivision (b)—not the state court construction penalty itself. The reduction occurs because the amounts collected for the Government Code section 76100 local Courthouse Construction Fund or the Government Code section 70401 Transitional State Court Facilities Construction Fund go for courthouse maintenance and construction.

Further, there is no evidence the Legislature intended the state court construction penalty be reduced by the amounts collected for deposit into the Government Code section 76100 local Courthouse Construction Fund or the Government Code section 70401 Transitional State Court Facilities Construction Fund. No method for calculating the reduction is specified by the Legislature. No time frame has been specified for calculating when the reductions are to occur. It would be an insurmountable bureaucratic task to calculate the reduction given the fluctuating sums collected for the two funds and the dates the moneys are transmitted by the county treasurer to the State Controller. To reduce the state court construction penalty as suggested by *Taylor* would create the

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penalty of one dollar and fifty cents (\$1.50) shall be included in the total penalty, fine, or forfeiture. These moneys shall be taken from fines and forfeitures deposited with the county treasurer prior to any division pursuant to Section 1462.3 or 1463.009 of the Penal Code. In those cities, districts, or other issuing agencies which elect to accept parking penalties, and otherwise process parking violations pursuant to Article 3 (commencing with Section 40200) of Chapter 1 of Division 17 of the Vehicle Code, that city, district, or issuing agency shall observe the increased bail amounts as established by the court reflecting the added penalty provided for by this section. Each agency which elects to process parking violations shall pay to the county treasurer one dollar and fifty cents (\$1.50) for the parking penalty imposed by this section for each violation which is not filed in court. Those payments to the county treasurer shall be made monthly, and the county treasurer shall transmit these sums as provided in subdivision (f).”

oddest fine, penalty, fee, or other assessment ever imposed in our state's history. Finally, none of the legislative committee reports prepared in connection with the passage of Senate Bill No. 1732 (2001-2002 Reg. Sess.) indicate any reduction of the Government Code section 70372, subdivision (a) state court construction penalty was to occur under any circumstances. (Rep. prepared for Sen. Judiciary Com. on Sen. Bill No. 1732 (2001-2002 Reg. Sess.) Apr. 16, 2002; Appropriations Com. Fiscal Summary for Sen. Bill No. 1732 (2001-2002 Reg. Sess.) May 13, 2002; Sen. Rules Com., 3d reading analysis of Sen. Bill No. 1732 (2001-2002 Reg. Sess.) as amended May 24, 2002; Appropriations Com. Fiscal Summary for Sen. Bill No. 1732 (2001-2002 Reg. Sess.) May 23, 2002; Rep. prepared for Assem. Com. on Judiciary on Sen. Bill No. 1732 (2001-2002 Reg. Sess.) June 25, 2002; Rep. prepared for Assem. Appropriations Com. on Sen. Bill No. 1732 (2001-2002 Reg. Sess.) as amended June 28, 2002; Sen. Rules Com., 3d reading analysis of Sen. Bill No. 1732 (2001-2002 Reg. Sess.) Aug. 29, 2002; Sen. Rules Com., unfinished business analysis of Sen. Bill No. 1732 (2001-2002 Reg. Sess.) as amended Aug. 29, 2002.) We are convinced the reduction in the "amount authorized by Section 70372" specified in Government Code section 70375, subdivision (b) is from the Government Code section 70372, subdivision (f) payment by the county treasurer to the State Controller for deposit in the State Court Facilities Construction Fund; not the state court construction penalty specified in Government Code section 70372, subdivision (a). To sum up, the drug laboratory fee must be modified to also impose: the section 1464, subdivision (a) and Government Code section 76000, subdivision (a) penalty assessments; the state surcharge on the drug laboratory fee and the penalty assessments; and the state court construction penalty.

## B. Restitution Fines

The trial court imposed a \$200 section 1202.4, subdivision (b)(1) restitution fine and stayed the \$200 section 1202.45 parole revocation restitution fine. These two restitution fines are not subject to section 1464, subdivision (a) and Government Code section 76000, subdivision (a) penalty assessments. Section 1202.4, subdivision (e) states, “The restitution fine shall not be subject to penalty assessments as provided in Section 1464, and shall be deposited in the Restitution Fund in the State Treasury.” (*People v. Sorenson* (2005) 125 Cal.App.4th 612, 617 [“While it attaches to almost all other fines, this state penalty assessment does not attach to restitution fines under section 1202.4”]; *People v. McHenry* (2000) 77 Cal.App.4th 730, 734 [same].)

However, the additional penalty or surcharge applicable to the sections 1202.4 subdivision (b)(1) and 1202.45 restitution fines are slightly different from those that apply to the drug laboratory fine. As to the section 1465.7 twenty percent state surcharge, we conclude that does not apply to the restitution fines. As noted, section 1465.7, subdivision (a) states, “A state surcharge of 20 percent shall be levied *on the base fine used to calculate the state penalty assessment* as specified in subdivision (a) of Section 1464.” (Italics added.) As can be noted, the 20 percent state surcharge only applies to a base fine used to calculate the section 1464, subdivision (a) penalty assessment. As we have explained, the restitution fines are not used to calculate a section 1464, subdivision (a) penalty assessment. This is because no section 1464, subdivision (a) penalty assessment is imposed on a restitution fine. (*People v. Sorenson, supra*, 125 Cal.App.4th at p. 617; *People v. McHenry, supra*, 77 Cal.App.4th at p. 734.) The section 1465.7, subdivision (a) state surcharge does not apply to the sections 1202.4, subdivision (b)(1) and 1202.45 restitution fines because no section 1464, subdivision (a) assessment may be imposed.

Nothing in Government Code section 76000, subdivision (a) changes matters. Section 1465.7, subdivision (a) makes no reference to the Government Code section

76000, subdivision (a) penalty assessment. Government Code section 76000, subdivision (a) states in part, “In each county there shall be levied an additional penalty of seven dollars (\$7) for every ten dollars (\$10) or fraction thereof which *shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code*, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . . .” (Italics added.) The Government Code section 76000, subdivision (a) penalty assessment is collected in the same manner as the section 1464, subdivision (a) penalty assessment. It would seem that if the section 1464, subdivision (a) penalty assessment cannot be collected, then the same is true of the Government Code section 76000, subdivision (a) penalty assessment. Any doubt though on this matter is resolved by the application of the well established rule that when a penal statute is susceptible to two different interpretations, that favorable to the accused must be adopted. (*People v. Avery* (2002) 27 Cal.4th 49, 57 [“we have repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable” to the accused]; *In re Tartar* (1959) 52 Cal.2d 250, 257 [“The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute”].) For these reasons, we discern no legislative intent that section 1465.7 twenty percent state surcharge applies to section 1202.4, subdivision (b)(1) and 1202.45 restitution fines.

However, the case is different in terms of the Government Code section 70372, subdivision (a) state court construction penalty which, as noted, states in part, “[T]here shall be levied a state court construction penalty, in addition to any other state or local penalty including, but not limited to, the penalty provided by Section 1464 of the Penal Code and Section 76000 of the Government Code, in an amount equal to five dollars (\$5) for every ten dollars (\$10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . . .” The state court construction penalty applies to “every fine, penalty, or forfeiture imposed and collected

by the courts for criminal offenses . . .” which includes restitution fines. Therefore, a state court construction penalty of \$100 is to be added to both the section 1202.4, subdivision (b)(1) and 1202.45 restitution fines. (Needless to note, the additions to the section 1202.45 parole revocation restitution fines are stayed.)

### C. The Court Security Fee

The trial court imposed a \$20 court security fee pursuant to section 1465.8, subdivision (a)(1) which states, “To ensure and maintain adequate funding for court security, a fee of twenty dollars (\$20) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code.” What we have said in connection with the drug laboratory fee previously applies to the section 1465.8, subdivision (a)(1) \$20 court security fee. Thus, there must be imposed on the 1465.8, subdivision (a)(1) \$20 court security fee: a section 1464, subdivision (a) penalty assessment of \$20; a \$14 Government Code section 76000, subdivision (a) penalty assessment; a \$4 section 1465.7, subdivision (a) state surcharge; and a \$10 Government Code section 70372, subdivision (a) state court construction penalty. And, as noted the two penalty assessments in section 1464, subdivision (a) and Government Code section 76000, subdivision (a), are subject to the Government Code section 70372, subdivision (a) state court construction penalty. Accordingly, on the section 1464, subdivision (a) penalty assessment of \$20, there is imposed a \$10 state court construction penalty. On the \$14 Government Code section 76000, subdivision (a) penalty assessment, there is to be imposed a \$7 Government Code section 70372, subdivision (a) state court construction penalty. The trial court is to personally insure the abstract of judgment is corrected to comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

[Part II(D) of this opinion is deleted from publication.] See post at page 17 where publication is to resume.]

#### D. Prior Conviction

Defendant argues the trial court abused its discretion in refusing to exercise its section 1385, subdivision (a) discretion to strike his 13-year-old prior serious felony conviction. While the trial judge's order is subject to review for abuse of discretion, the California Supreme Court has made clear: “. . . A court's discretion to strike [or vacate] prior felony conviction allegations [or findings] in furtherance of justice is limited. Its exercise must proceed in strict compliance with [Penal Code] section 1385[, subdivision] (a), and is subject to review for abuse. . . . [¶] “The trial court's power to dismiss an action under [Penal Code section 1385, subdivision (a)], while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be ‘in furtherance of justice.’”” (*People v. Williams* (1998) 17 Cal.4th 148, 158-159, 162, quoting *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531; see also *People v. Garcia* (1999) 20 Cal.4th 490, 499-500.) The *Romero* court noted that a trial court abuses its discretion if it strikes a sentencing allegation merely on the basis of the effect on defendant: “Nor would a court act properly if ‘guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,’ while ignoring ‘defendant's background,’ ‘the nature of his present offenses,’ and other ‘individualized considerations.’ [Citation.]” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531; see *People v. Williams* (2005) 35 Cal.4th 817, 831.) The Supreme Court further clarified the standard for reviewing a ruling on whether to strike a prior serious felony conviction: “[T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the

defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. . . ." (*People v. Williams, supra*, 17 Cal.4th at p. 161; see *People v. Carmony* (2004) 33 Cal.4th 367, 377; *People v. Garcia, supra*, 20 Cal.4th at pp. 498-499.) "[Section 667] not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*People v. Carmony, supra*, 33 Cal.4th at p. 378; see *People v. Philpot* (2004) 122 Cal.App.4th 893, 904-905.)

Defendant's criminal history dates back to July 21, 1992, when he was convicted of being under the influence of a controlled substance, a misdemeanor. Defendant entered a three-year drug diversion program. On September 7, 1993, defendant was convicted of second degree robbery. He was sentenced to three years in state prison. Defendant was released on parole on February 19, 1995. On March 12, 1996, defendant was convicted of cocaine base possession. He was sentenced to 32 months in state prison. Defendant was again paroled on December 16, 1997. On March 20, 1998, he was convicted of second degree burglary, found to be in violation of parole and sentenced to 32 months in state prison. Defendant was again released on parole on March 23, 2000. However, on December 6, 2000, defendant's parole was revoked and he was returned to state prison. On July 3, 2001, defendant was paroled. He was discharged from parole on August 10, 2003. The instant offense occurred on December 11, 2005.

At the time the section 1385, subdivision (a) motion was heard, defense counsel argued that defendant's robbery conviction was 13 years old. Defense counsel further asserted defendant's ongoing criminality was the result of drug addiction. The prosecutor argued: defendant had not remained crime free between 1993 and 2006; he had numerous convictions and had been sentenced to state prison; and, in case

No. FWV021477, the San Bernardino Superior Court had granted a section 1385, subdivision (a) motion and placed defendant on probation. The prosecutor concluded, “So I believe the defendant, because of his prior performance on parole and even probation, that he’s not a suitable – he falls within the spirit of the three-strikes law, and the Court should not strike the defendant’s robbery conviction as a strike conviction.”

Thereafter, the trial court denied the section 1385, subdivision (a) motion, noting that defendant’s 1998 burglary conviction was fairly recent. The trial court struck three of defendant’s four prior prison term enhancements at sentencing. In light of defendant’s recidivism, record of parole violations, and absence of any legitimate expression of remorse, the trial court’s factually based decision not to strike defendant’s prior serious felony conviction finding pursuant to section 1385, subdivision (a) was not an abuse of discretion. (*People v. Cole* (2001) 88 Cal.App.4th 850, 874; *People v. Strong* (2001) 87 Cal.App.4th 328, 346.)



[Resume publication.]

### III. DISPOSITION

The judgment is modified to impose the fines, surcharges, and penalties discussed in the body of this opinion. A corrected abstract of judgment is to be forwarded to the Department of Correction and Rehabilitation by the superior court clerk. The judgment is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.