

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT  
**FILED**

NOV - 9 2009

Frederiek K. Ohlrich Clerk

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Deputy

**THE PEOPLE OF THE STATE  
OF CALIFORNIA,**

Plaintiff and Respondent,

**DANIEL SANCHEZ COVARRUBIAS,**

Defendant and Appellant.

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Case No. S075136  
(Monterey Superior Court  
No. SC942212(C))

AUTOMATIC APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA, COUNTY OF MONTEREY

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

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**APPELLANT'S SUPPLEMENTAL BRIEF**

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Under Appointment by the Supreme  
Court of California

DEATH PENALTY

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**THE PEOPLE OF THE STATE  
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**TABLE OF CONTENTS**

REMAND SHOULD BE ORDERED FOR RECONSIDERATION OF THE  
RESTITUTION FINE ..... 1

CONCLUSION ..... 2

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>Mary M. v. City of Los Angeles</i> (1991) 54 Cal.3d 202 .....	2
<i>People v. Chavez</i> (1980) 26 Cal.3d 334 .....	2
<i>People v. Hill</i> (1998) 17 Cal.4th 800 .....	2
<i>People v. Vieira</i> (2005) 35 Cal.4th 264 .....	1, 2
<i>People v. Williams</i> (1976) 16 Cal.3d 663 .....	2
<u>Statutes</u>	
Government Code § 13967(a) .....	1
Penal Code § 1202.4 .....	1
Penal Code § 1202.4(c) .....	2

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Case No. S075136**

Plaintiff and Respondent,

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Defendant and Appellant.

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**APPELLANT'S SUPPLEMENTAL BRIEF**

**REMAND SHOULD BE ORDERED FOR RECONSIDERATION OF THE RESTITUTION FINE**

When the judge sentenced appellant on October 21, 1998 he imposed a restitution fine pursuant to Government Code section 13967, subdivision (a) without making any finding that appellant had the ability to pay. (RT 14221: 22-24.) The judge simply stated: "The Court will also order a restitution fine under Government Code Section 13967 in the amount of 10,000 dollars." This order was erroneous and unauthorized because appellant is subject to a death sentence and has no reasonably discernable means of paying a fine of this magnitude.

The offenses in the present case were committed on November 16, 1994. (AOB Guilt Phase: Statement of Facts, pp. 19-28.) At that time the statute regarding restitution fines, California Government Code § 13967(a) was not subject to the defendant's ability to pay.<sup>1</sup> This version of § 13967(a) was still in effect when the judge sentenced appellant in 1998. Accordingly, the judge was not authorized to consider appellant's ability to pay.

However, in 2003 § 13967 was repealed in its entirety, leaving Penal

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<sup>1</sup> Effective September 29, 1994 an amendment of the statute deleted a provision which had made the statute subject to the defendant's ability to pay. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

Code § 1202.4 as the controlling statute with respect to the restitution fine (Stats 2003, ch 230, § 2). In pertinent part, § 1202.4(c) states that “a defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine” but “inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two-hundred-dollar (\$200) . . . minimum.” (Cal. Pen. Code § 1202.4(c) (2006), incorporating 1996 Amendments (Stats 1996, ch 629, § 3).)

Accordingly, “the question of restitution should be considered under the current version of Penal Code § 1202.4, which provides detailed guidance to the trial court in setting a restitution fine, including consideration of a defendant’s ability to pay.” (*People v. Vieira, supra*, 35 Cal.4th at 306.)

Nor should the absence of an objection below because the statute did not authorize the judge to consider ability to pay and, thus, any objection by trial counsel on this ground would have been futile. Under these circumstances any failure of defense counsel to make such a request did not waive the claim. (See *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Chavez* (1980) 26 Cal.3d 334, 350 fn 5; *People v. Williams* (1976) 16 Cal.3d 663, 667 fn 4; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-13.)

Accordingly, as this Court did in *Vieira*, the present case should be remanded to the trial court “for reconsideration of the question of a restitution fine under the currently applicable statute.” (*Id.* at 306.)

### CONCLUSION

For the foregoing reasons, as well as those set forth in appellant's opening and reply briefing, the judgment should be reversed.

Dated: October \_\_\_\_\_, 2009

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT FOR SUPPLEMENTAL BRIEF**

As attorney of record herein, and pursuant to California Rules of Court, Rule 8.630, I hereby declare and certify that the Appellant's Supplemental Brief which was received by the Court on October 29, 2009 contains 749 words in *WordPerfect* computerized format.

I declare the foregoing is true and correct to the best of my knowledge under penalty of perjury this 6<sup>th</sup> day of November, 2009, at Santa Rosa, California.

---

Thomas Lundy  
Attorney for Appellant  
DANIEL COVARRUBIAS.

**PROOF OF SERVICE**

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California. I am over the age of eighteen and not a party to the within action. My business address is: 2777 Yulupa Avenue, PMB 179, Santa Rosa, CA 95405. On November 6, 2009, I served **CERTIFICATION OF WORD COUNT FOR SUPPLEMENTAL BRIEF** in People v. Covarrubias Case No. S075136 on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

**Daniel Sanchez Covarrubias**  
**P.O. Box P-19600**  
**San Quentin State Prison**  
**San Quentin, CA 94974**  
**[not served per waiver]**

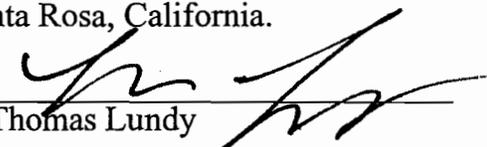
**Office of the District Attorney**  
**Monterey County**  
**Post Office Box 1131**  
**Salinas, California 93902**

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**101 Second Street, Suite 600**  
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**San Francisco, CA 94102-7004**

**The Honorable Robert F. Moody**  
**Salinas Courthouse**  
**240 Church Street**  
**3rd Floor, West Wing**  
**Salinas, CA 93901**

I declare under penalty of perjury that the foregoing is true and correct and executed on November 6, 2009, at Santa Rosa, California.

  
Thomas Lundy