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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALBERTO VALENCIA,

Defendant and Appellant.

F061266

(Super. Ct. No. MF47422D)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriwara, Judge.

Joan Isserlis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Luis Alberto Valencia challenges his convictions for kidnapping and first degree murder with special circumstances on the grounds (1) his right to a speedy trial was violated, (2) the testimony of an accomplice, Luis Humberto Vazquez, was not corroborated, (3) there was instructional error relating to accomplice testimony, and (4) the prosecutor committed error pursuant to *People v. Griffin* (1965) 380 U.S. 609 (*Griffin*). Valencia also contends the abstract of judgment should be amended because the restitution ordered pursuant to Penal Code section 1202.4<sup>1</sup> must be jointly and severally payable by all those convicted of the murder of Rosa Avina.

We reject the challenges to the convictions and the abstract of judgment and affirm the judgment.

#### **FACTUAL AND PROCEDURAL SUMMARY**

In October 2007, Vazquez lived at his parents' home on Sycamore in Delhi. Valencia also lived there. Vazquez and Valencia worked together in construction and occasionally smoked methamphetamine.

Valencia told Vazquez that Avina had taken a pound of "weed" from some men, and Valencia and Alvaro Reyes were going to confront her. Reyes knew Avina, so he was to pick up Avina and meet Vazquez and Valencia at a designated place. Before they left, Valencia told Vazquez to bring duct tape and zip ties. Valencia brought a rifle.

After smoking methamphetamine, Vazquez and Valencia left the house and drove in a Pontiac to a residence on Clifford in Turlock. They had been to this house in Turlock many times. They parked the car in a shed near the residence and covered the car with sheets. A man called "Cheque" came out of the house. Vazquez retrieved a two-by-four from the shed.

Reyes drove up in his truck with Avina and the two of them went into the house. Valencia and Vazquez were hiding in the back of the shed at the time. After about a

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

minute, Valencia, Vazquez and Cheque went to the door of the house and knocked. When the door was opened, they shoved inside. Valencia entered first, followed by Cheque and then Vazquez.

Valencia pointed his rifle at Avina's back and ordered the three occupants of the house, Reyes, Avina, and an individual nicknamed Mosca, to lie down on the floor. Valencia and Cheque tied up Avina; Vazquez tied up Mosca. Avina had zip ties on her legs, her hands were tied behind her back, and she had black duct tape around her head. Valencia removed a ring from Avina's finger and placed it on one of his fingers; he also took methamphetamine from her pocket.

Valencia and Cheque did not speak English, so they told Vazquez to ask Avina where the "weed" was that she had taken. Avina kept repeating, "Martha." Valencia kicked Avina four or five times and then told Vazquez to bring the car up to the house. Valencia and Cheque carried Avina to the Pontiac and placed her in the trunk.

Around 10:00 p.m. or so, Vazquez and Valencia left the house in Turlock and drove back to Delhi with Avina in the trunk of the car. Valencia brought his rifle with him. After the two arrived back home, Reyes pulled up in his truck. Valencia and Reyes left, returning about 30 to 45 minutes later with Omar Cebrero and Urbano Ortega.

Valencia told Vazquez to get a bottle or can and gasoline; Vazquez returned with a Coke bottle and the gasoline. Valencia filled the Coke bottle with gasoline. Valencia got into the Pontiac with Cebrero and Ortega; Avina was still in the trunk. Vazquez and Reyes stayed behind to smoke methamphetamine. About 10 minutes after driving away, Valencia, Cebrero, and Ortega returned. Cebrero and Ortega then left.

Valencia, Reyes, Vazquez, and a girl drove to the house in Turlock. Around 3:00 a.m., Vazquez, Valencia and Reyes left in Reyes's truck; Reyes dropped the two men off at their house in Delhi. Valencia told Vazquez he had poured gasoline on Avina and "she kind of jumped when they lit her on fire." Valencia said they used a lighter to set Avina

on fire and left when they heard a car coming. They set her on fire in a boat in the canal and left her there.

In the morning of October 24, 2007, Sheriff's Deputy Frank Swiggert was dispatched to a call and arrived at an address on South Avenue. The area is farm country with several orchards. Swiggert found Avina on her knees with her face in a bush. She was burned on her legs and arms and had black duct tape around her head. The black duct tape had a shield logo that read "Christy's" and "ten mil." She told Swiggert her name was Rosa; she kept asking if she was still alive. Swiggert saw that Avina's legs were tied together and there was a zip tie on one ankle. The black duct tape was wrapped around her head to just above her nostrils; it had "melted into her." Avina had on a lime green sports bra, which was burned. A white foamy substance was coming out of her mouth.

Avina told Sheriff's Detective Charles Hale that she had been burned in an abandoned boat and had walked down the road. The boat was located; it was still smoldering and portions of it were on fire. Avina was found about one-half to three-quarters of a mile from the boat. Shoe impressions and barefoot impressions were found in the dirt area around the boat. The barefoot impressions led to where Avina was found. A 20-ounce plastic Coke bottle was found at the scene, along with a pair of blue jeans, a white K-Swiss shoe, and black duct tape.

After she was found, Avina was transported by medical helicopter to a burn center in Santa Clara. Avina had extensive and severe thermal burns over 60 percent of her body; the most severe burns were on her face and upper body. Something was thrown on her to cause the burn pattern that was present. Avina had inhaled fumes, which caused her larynx and trachea to be burned and charred. She later died from her injuries. The cause of death was described as "adult respiratory distress syndrome and multi-system failure due to extensive thermal burns. Her body shut down."

On October 25, 2007, the day after Avina was found, Sheriff's Detective Corey Gibson and another detective went to the residence on Sycamore in Delhi where Valencia and Vazquez lived. They saw three or four men working on a red Mustang; Valencia was near the car. Valencia was arrested and found to have methamphetamine and marijuana in his possession. The Pontiac was located at another residence; it was registered to Cebrero.

On October 27, Hale and other deputies executed a search warrant at a house on Clifford in Turlock. Black duct tape with the same markings as the tape found on Avina's head was located in trash cans behind the house. Zip ties also were found in the trash cans. A search of the residence resulted in a seizure of a rifle found in a closet.

On November 2, 2007, Gibson assisted with execution of a search warrant at Ortega's residence on Beatty Avenue in Delhi. A shoe was found in a bedroom; the bedroom contained documents with Ortega's name. The shoe was sent for analysis to the Department of Justice. Gibson also obtained DNA samples from Valencia, Reyes, Cebrero, Ortega, and Vazquez; those samples also were sent for analysis.

After Valencia was arrested and booked into the county jail, his conversations with his wife were recorded. Sheriff's Detective Alex Barba listened to the recorded telephone conversations. In his first call to his wife, Valencia told her to call Pedro Vazquez, who lived at the Sycamore address with his son, Luis Vazquez. Valencia also told his wife she needed to locate his wallet and a ring he had buried with his feet at the time of his arrest; the ring was near the Mustang. In a subsequent phone call, Valencia's wife told him she had found the ring. Barba took the ring from her on November 8.

On November 20, 2007, Jason Jones was housed in the same jail facility as Valencia. He overheard Valencia say something about a woman being burned alive. Valencia said they zip tied a woman, threw her in a boat, poured gasoline on her, and burned her.

Senior Criminalist Sarah Yoshida processed the Pontiac for evidence on November 5, 2007. She found blood stains on the trunk that were Avina's blood. Yoshida also detected gasoline on clothing that was submitted. In analyzing the shoe prints at the scene of the crime, she found two that were consistent with the single shoe she had been given, which was a right shoe. There were two other shoe impressions that were a mirror image of the right shoe impressions and likely were made by the matching left shoe, which Yoshida did not have.

Fingerprint expert Richard W. Kinney also examined the Pontiac. He located numerous latent prints on the Pontiac -- two belonged to Cebrero and one belonged to Vazquez. He did not recover any prints belonging to Valencia, Reyes, or Ortega from the Pontiac.

Valencia was charged in count 1 with first degree murder of Avina with special circumstances; count 2 charged Valencia with kidnapping Avina and alleged he personally used a firearm. Codefendants Reyes, Ortega, and Cebrero originally were charged in the same pleading but were tried separately from Valencia.

Trial commenced on August 17, 2010. Vazquez testified against Valencia pursuant to a plea bargain in which Vazquez admitted his role in kidnapping Avina. Vazquez agreed to testify in exchange for a nine-year sentence. Vazquez had not been sentenced at the time of Valencia's trial.

Valencia did not testify or present any defense.

On September 7, 2010, the jury returned a verdict of guilty on both counts and found the special circumstance allegations and personal use of a firearm enhancement true. The trial court sentenced Valencia to a term of life without the possibility of parole for the count 1 murder conviction and to life with the possibility of parole on the count 2 kidnapping conviction, plus 10 years for the enhancement.

## DISCUSSION

### I. Speedy Trial

A defendant's right to a speedy trial is guaranteed by (1) the Sixth Amendment of the federal Constitution, (2) article I, section 15 of the California Constitution, and (3) section 1382. (See *People v. Martinez* (2000) 22 Cal.4th 750, 766 (*Martinez*.) Further, “[t]he statutory speedy trial provisions, ... sections 1381 to 1389.8, are ‘supplementary to and a construction of’ the state constitutional speedy trial guarantee. [Citations.]” (*Ibid.*)

#### *State speedy trial right*

Valencia initially claims an alleged violation of his state right to a speedy trial, as construed by section 1382. This section, in pertinent part, provides:

“(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] ... [¶]

“(2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information, ...”

Valencia has not cited to, and we have not found, any motion for dismissal by Valencia based upon the violation of his statutory right to a speedy trial. The right to a speedy trial must be asserted in the trial court where the matter is pending, prior to commencement of the trial. (*People v. Wilson* (1963) 60 Cal.2d 139, 146.) A defendant cannot raise the issue for the first time on appeal. (*Ibid.*)

Although Valencia, after waiving his right to a speedy trial on multiple occasions, thereafter asserted his right, he never once sought affirmative relief or moved to dismiss the charges on the basis his speedy trial rights were violated. Absent a request for affirmative relief in the form of a dismissal, Valencia has forfeited the contention for purposes of appeal. (*People v. Harrison* (2005) 35 Cal.4th 208, 225.)

Once a defendant waits until after a conviction to seek appellate review of the claim of a violation of the state right to a speedy trial, the defendant “must show that the

delay caused prejudice” in order to obtain a reversal of a conviction. (*Martinez, supra*, 22 Cal.4th at p. 769.) Nowhere does Valencia contend the delay prejudiced him in any way. The record reflects that Valencia’s counsel, David Capron, agreed to the continuances so he could obtain transcripts of codefendants’ statements to officers, file a suppression motion, and move for severance. Consequently, Valencia has failed to demonstrate any violation of his state right to a speedy trial.

***Federal speedy trial right***

Valencia also contends his federal constitutional right to a speedy trial was violated. In *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*), the United States Supreme Court adopted a balancing test for analyzing claims of a violation of the federal right to a speedy trial as set forth in the Sixth Amendment. Among the factors to be considered are the length of the delay, the reason for the delay, the defendant’s assertion of the right, and the prejudice to the defendant. (*Barker*, at p. 530.) The factors must be considered together with other relevant circumstances. (*Ibid.*)

Until there is some delay, there is no need for inquiry into any of the other factors. (*Barker, supra*, 407 U.S. at p. 530.) Valencia was arrested on October 25, 2007, and held to answer on the information on May 18, 2009. Valencia entered a general time waiver on September 23, 2008, and waived time at several subsequent appearances. Valencia waived the right to a continuous preliminary hearing on January 30, 2009. He was held to answer on May 18, 2009, and first refused to waive time on June 12, 2009. Trial commenced on August 17, 2010. Clearly, there was a delay and an analysis of the other factors is required. (*Barker*, at p. 530.)

The next factor is the reason for the delay. Here, the reasons for the delay were the need to obtain transcripts and translations of transcripts of statements made by codefendants, the suppression motion Capron intended to file on Valencia’s behalf, and the severance motion Capron filed, which could not be heard and determined until after the transcripts were available and the suppression motion had been determined.

The third factor, Valencia's assertion of the right to a speedy trial, weighs against him. He repeatedly waived the right to a speedy trial numerous times before first asserting it on June 12, 2009. Delays after that date were largely due to Valencia's need to prepare a defense. Transcripts were completed by November 2, 2009, but it was not until after this date that Valencia's counsel indicated a motion to suppress would be forthcoming. At subsequent hearings in late 2009 and early 2010, one of several factors necessitated a delay -- the suppression motion had not been completed, Valencia's counsel was in another trial, or counsel was ill. Valencia's severance motion was heard on June 8, 2010, and the trial court granted the motion. Trial commenced on August 17, 2010. The delays were for Valencia's benefit. (*People v. Anderson* (2001) 25 Cal.4th 543, 604 (*Anderson*).)

As to the fourth factor, Valencia has failed to establish any prejudice from the delay. There is no assertion Valencia was unable to present witnesses or that evidence was destroyed or compromised as a result of the delay. (*Anderson, supra*, 25 Cal.4th at pp. 603-604.)

Unlike the case of *Doggett v. United States* (1992) 505 U.S. 647, 656-658, where much of the eight-year delay was attributable to governmental negligence, no such negligence is present in Valencia's case.

Here, Valencia waived his right to a speedy trial on multiple occasions. After asserting the right, he then contributed to the further delay. Valencia also has not demonstrated any prejudice. We conclude Valencia's federal constitutional right to a speedy trial was not violated. (*Barker, supra*, 407 U.S. at p. 533; *Anderson, supra*, 25 Cal.4th at p. 604 & fn. 21.)

#### ***Delayed ruling on severance motion***

In a related argument, Valencia contends the trial court abused its discretion in granting repeated continuances of the hearing on the severance motion, which caused or

contributed to the delay, in derogation of his speedy trial rights. He maintains his severance motion should have been granted when it was made on June 26, 2009.

Trial courts may grant a continuance upon a showing of good cause. (§ 1050, subd. (a).) Whether or not to grant continuances rests within the trial court's discretion. (*People v. Beames* (2007) 40 Cal.4th 907, 920.) What constitutes a showing of good cause for a continuance is a question for the trial court. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

Here, the trial court was cognizant of Valencia's speedy trial rights but found good cause to continue the severance motion because Valencia's counsel wanted transcripts and wanted to file a suppression motion before the trial court ruled on the severance motion. The trial court agreed that the suppression motion needed to be heard before the severance motion.

“What constitutes ‘good cause’ for the delay of a criminal trial is a matter within the discretion of the trial court, and its determination in the premises, absent a showing of any abuse of that discretion, will not be disturbed on appeal. [Citations.]” (*People v. McFarland* (1962) 209 Cal.App.2d 772, 776-777.) “In reviewing trial courts’ exercise of that discretion, the appellate courts have evolved certain general principles. The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for the defendant’s benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses, constitutes good cause to avoid dismissal. Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause. Neither does delay caused by improper court administration. [Citation.]” (*People v. Johnson* (1980) 26 Cal.3d 557, 570 (*Johnson*), fns. omitted.) Additionally, in *People v. Wright* (1990) 52 Cal.3d 367, 389, the California Supreme Court stated, “A continuance granted at the request of counsel normally constitutes ... good cause.”

Delays were for Valencia's benefit in that Capron needed transcripts to file a suppression motion and wanted a ruling on the suppression motion before proceeding with the severance motion. Other delays were the result of illness or unavailability of Capron. All these reasons constitute good cause. (*Johnson, supra*, 26 Cal.3d at p. 570.) Valencia simply has failed to establish that the trial court abused its discretion in continuing the hearing on the severance motion.

## **II. Corroboration of Accomplice Testimony**

Valencia contends his convictions must be overturned because the testimony of Vazquez, an accomplice, was not corroborated. We disagree.

Section 1111 prohibits conviction on the testimony of an accomplice without corroboration by other evidence tending to connect the defendant with the commission of the crime. (See *People v. Zapien* (1993) 4 Cal.4th 929, 982.) "In enacting section 1111, the Legislature intended to eliminate the danger of a defendant being convicted solely upon the suspect, untrustworthy and unreliable evidence coming from an accomplice, who is likely to have self-serving motives that affect his credibility." (*People v. Belton* (1979) 23 Cal.3d 516, 526.)

To corroborate the testimony of an accomplice, the prosecution must present "independent evidence," that is, evidence that "tends to connect the defendant with the crime charged" without aid or assistance from the accomplice's testimony. (*People v. Perry* (1972) 7 Cal.3d 756, 769.) Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. (*Ibid.*; accord, *People v. Lewis* (2001) 26 Cal.4th 334, 370 (*Lewis*).) "[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]" (*Perry*, at p. 769.) In addition, the corroborating evidence must come from a witness who is not also an accomplice. (*People v. Davis* (2005) 36 Cal.4th 510, 543 (*Davis*).) Corroborating evidence can be a defendant's own admissions. (*People v. Williams* (1997) 16 Cal.4th 635, 680.)

The trial court instructed the jury that Vazquez was an accomplice to the crimes of kidnapping and murder and his testimony had to be corroborated by supporting evidence that connected Valencia to the crimes. There was ample evidence, other than Vazquez's testimony, connecting Valencia to Avina's kidnapping and murder.

Vazquez testified Valencia had a rifle with him when Avina was kidnapped; Avina told officers one of the men had a "big" gun. Vazquez testified the men knocked on the door before entering the house where Avina was kidnapped; Avina told officers there was a "Knock, knock, knock" before the men entered. Vazquez testified Avina was tied up with zip ties. When Avina was found, there was a zip tie on her ankle. Vazquez testified duct tape was wrapped around Avina's face. There was duct tape around Avina's face when she was found, which had melted into her. Vazquez testified he filled a Coke bottle with gasoline at Valencia's request; a Coke bottle smelling of gasoline was found at the scene where Avina was set on fire. Zip ties and black duct tape with the same markings as the tape wrapped around Avina's head were seized from the property in Turlock where Avina was kidnapped. Valencia's conversations with his wife after his arrest led to the discovery of the ring Valencia removed from Avina's finger.

The independent evidence, consisting of Avina's statements to officers, Valencia's conversations with his wife, and physical evidence all substantiated portions of Vazquez's testimony sufficiently to establish his credibility. The corroborating evidence need not corroborate every fact to which an accomplice testified; it is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury the accomplice is telling the truth. (*Lewis, supra*, 26 Cal.4th at p. 370; *People v. Fauber* (1992) 2 Cal.4th 792, 834).

Section 1111 requires nothing more than accomplice testimony "be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." (§ 1111.) That evidence was present in this case. (*Davis, supra*, 36 Cal.4th at p. 543.)

### III. Instructional Error

Valencia contends the trial court erred in instructing the jury on accomplice testimony because the pattern CALCRIM instructions refer to the “testimony” of an accomplice and not to pretrial statements. He essentially argues the instructions were incomplete in that they also should have referred to pretrial statements. Valencia has forfeited any claim that the instructions were incomplete, or required clarification or amplification, by failing to raise this issue in the trial court. (*People v. Riggs* (2008) 44 Cal.4th 248, 309.)

The California Supreme Court addressed a similar issue in *People v. Andrews* (1989) 49 Cal.3d 200. In that case, the trial court instructed the jury using pattern CALJIC instructions on accomplice testimony; the instructions did not mention out-of-court statements. *Andrews* concluded a trial court has no sua sponte duty to modify the instructions to include a reference to out-of-court statements by an accomplice. (*Andrews*, at p. 214.) The *Andrews* court also found that the gist of the accomplice corroboration instructions was that accomplice testimony was to be distrusted, the testimony of an accomplice could not furnish the sole basis of a conviction, and the jury was not likely to misunderstand its obligation to find independent corroboration for the accomplice’s statement. (*Id.* at pp. 214-215.)

The same is true here. The pattern CALCRIM instructions make it clear that an accomplice’s testimony by itself is insufficient to convict a defendant. There must be evidence independent of the testimony of the accomplice connecting the defendant to the crime. Valencia has not specified what, if any, material comments were made by Vazquez in the pretrial statements that were not made in his testimony. We could find none. Vazquez’s testimony was quite detailed and covered 121 pages of the reporter’s transcript.

Furthermore, the corroborating evidence included statements from the victim, Avina, statements from Valencia, and physical evidence. In closing argument, the

prosecutor repeatedly correlated Vazquez's testimony with the corroborating evidence, clearly indicating to the jury the requirement that accomplice testimony be corroborated. A reasonable jury would not have interpreted the language of the instruction in a way that violated Valencia's rights. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 938.)

#### **IV. *Griffin* Error**

Valencia claims the prosecutor committed error pursuant to *Griffin, supra*, 380 U.S. 609 when he stated in closing argument that there "is only one person in this room who really knows what happened to the prints on this bottle," a reference to the lack of prints on the Coke bottle filled with gasoline.

It is well settled that a defendant's failure to object to alleged *Griffin* error waives his right to challenge the issue on review. (*People v. Hughes* (2002) 27 Cal.4th 287, 372; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1050-1051.) Here, there was no objection to the prosecutor's remark. Because an objection and admonition would have cured any potential harm, Valencia has forfeited his right to challenge the prosecutor's comment on appeal. (*People v. Memro* (1995) 11 Cal.4th 786, 873-874.)

Even if we were to address the issue on the merits and presume *Griffin* error, any error would be harmless. The one remark from the prosecutor was "[i]ndirect, brief, and mild" and did not indicate in any way that the jury should infer guilt from the failure to testify or explain. (*People v. Boyette* (2002) 29 Cal.4th 381, 455-456.)

#### **V. Abstract of Judgment**

Valencia contends the abstract of judgment must be amended to reflect that the amount ordered paid to the victim compensation fund, pursuant to section 1202.4, subdivision (f), is the joint and several responsibility of all the defendants convicted of murdering Avina and not his sole responsibility. Once again, Valencia has forfeited the issue.

At the October 21, 2010 sentencing hearing, the trial court indicated it was imposing restitution in the amount of \$7,468.45, payable to the victim compensation

fund. Valencia's attorney responded, "Your Honor, I'm not opposing that ...." By failing to object to the restitution as ordered by the trial court at sentencing, Valencia has forfeited the ability to object in this appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.)

Even if the issue had been preserved, Valencia's claim fails. In *People v. Madrana* (1997) 55 Cal.App.4th 1044, the codefendants were ordered to pay, jointly and severally, a restitution fine pursuant to section 1202.4 and a penalty pursuant to Health and Safety Code section 11374.5. We determined that a joint and several restitution order pursuant to section 1202.4 "is proper." (*Madrana*, at pp. 1050, 1052.) In reaching this conclusion, we relied in part on *People v. Arnold* (1994) 27 Cal.App.4th 1096 (*Arnold*). In *Arnold*, the appellate court held that a defendant could be ordered to pay the full amount of victim restitution even though a codefendant had been ordered to reimburse the same loss. (*Id.* at p. 1099.)

Section 1202.4 does not reference joint and several liability either to compel such an order or to prohibit it. Valencia relies on *People v. Blackburn* (1999) 72 Cal.App.4th 1520 to support his contention. *Blackburn*, however, does not hold that restitution *must* be joint and several; it merely states that "[t]he trial court had the authority to order direct victim restitution paid by both defendants jointly and severally. [Citations.]" (*Id.* at p. 1535.)

We are unaware of any case in which the reviewing court determined that the sentencing court was compelled by law to order joint and several liability. *Arnold* even mentioned that "joint and several liability may not be preferable in all cases involving codefendants." (*Arnold, supra*, 27 Cal.App.4th at p. 1100.) We conclude, therefore, that the decision whether to order a restitution fine as a joint and several liability is a discretionary sentencing choice and the requested modification would be a substantive change in the judgment.

**DISPOSITION**

The judgment is affirmed.

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CORNELL, Acting P.J.

WE CONCUR:

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DAWSON, J.

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KANE, J.