

SUPREME COURT COPY

SUPREME COURT No. S073205

DEATH PENALTY

SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OCT 11 2007

THE PEOPLE OF THE STATE OF CALIFORNIA,)

Frederick K. Ohlrich Clerk

Plaintiff and Respondent,)

v.)

) Riverside County

) Superior Ct.

) No. CR49662

JACK EMMIT WILLIAMS,)

Defendant and Appellant.)

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE TIMOTHY HEASLETT, JUDGE

SUPPLEMENTAL OPENING BRIEF

R. Clayton Seaman, Jr.
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304
(928) 776-9168
Bar No. 126315

Counsel for Appellant
Jack Emmitt Williams

DEATH PENALTY

TABLE OF CONTENTS

Subject	Page
TABLE OF AUTHORITIES	ii
ISSUE	
THE \$10,000 RESTITUTION FINE WAS INCORRECTLY IMPOSED IN DISREGARD OF THE DEFENDANT'S ABILITY TO PA Y	1
Introduction	1
A. This Error Was Not Waived	2
B. The Trial Court Erred	2
C. The Appropriate Remedy is to Reduce the Amount of the Fine to \$200.00 and Restore Prior Deductions from the Prison Trust Account	4
CERTIFICATE OF WORD COUNT	6
PROOF OF SERVICE BY MAIL AND DECLARATION OF PRINTING ON RECYCLED PAPER	7

TABLE OF AUTHORITIES

Authority	Page
United States Supreme Court Cases	
<i>Gideon v. Wainwright</i> (1963) 372 U.S. 335 [9 L. Ed. 2d 799, 83 S. Ct. 792]	4
<i>United States v. Bajakajian</i> (1998) 524 U.S. 321 [141 L. Ed. 2d 314, 118 S. Ct. 2028]	4
State of California Cases	
<i>People v. Neal</i> (1993) 19 Cal.App.4th 1114	2
<i>People v. Ortiz</i> (1990) 51 Cal. 3d 975	4
<i>People v. Saelee</i> (1995) 35 Cal.App.4th 27	2-4
<i>People v. Vieira</i> (2005) 35 Cal.4th 264	2-4
<i>People v. Walker</i> (1991) 54 Cal.3d 1013	5
State of California Statutes	
Penal Code Section 1202.4	2
Penal Code Section 2933.2(a)	3

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**THE \$10,000 RESTITUTION FINE WAS
INCORRECTLY IMPOSED IN DISREGARD OF
THE DEFENDANT’S ABILITY TO PA Y**

Introduction

At the conclusion of the penalty phase, the trial court ordered the defendant, Jack Williams to pay a \$10,000 restitution fine pursuant to Penal Code section 1202 .4 (19 C.T. 5374.) This fine was imposed in error because appellant is subject to a death sentence and has no reasonably discernable means of paying a

fine of this magnitude.

A. This Error Was Not Waived

The sentence in this case was not authorized by law, so it exceeded the jurisdiction of the trial court. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1120.) Because this error involves an unauthorized sentence that could not statutorily be imposed under any circumstance, the error was not waived by defense counsel's failure to object. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-30; see also *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.)

B. The Trial Court Erred

Penal Code Section 1202.4 governs the imposition of restitution fines. The pertinent parts of the current code section are subdivisions (c) and (d). They provide:

c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. **Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two hundred-dollar (\$200) or one hundred-dollar (\$100) minimum.** The court may specify that funds confiscated at the time of the defendant's arrest, except for funds confiscated pursuant to Section 11469 of the Health and Safety Code, be applied to the restitution fine if the funds are not exempt for spousal or child support or subject to any other legal exemption.

(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred-dollar (\$200) or one hundred-dollar (\$100) minimum, **the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay,** the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime,

the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. **Consideration of a defendant's inability to pay may include his or her future earning capacity.** A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required. [Emphasis added.]

Although it is true that an earlier version of section 1202 .4 - passed in 1983 and in effect at the time of the defendant's trial - did not require courts to consider defendant's ability to pay,¹ the more recently enacted version of section 1204 controls while his case is still on appeal, even if the amended legislation is more lenient and favorable to the defendant. (*People v. Viera, supra*, 35 Cal.3d at pp. 305-306; see also *People v. Saelee, supra*, 35 Cal.App.4th at pp. 30-31.)) "A defendant generally is entitled to benefit from amendments that become effective while his case is on appeal." (*People v. Viera*, 35 Cal.3d at 305.)

In the present case, following his sentencing hearing, appellant remains on death row, subject to a capital sentence. A prisoner housed on death row is not permitted to engage in any prison labor activity to earn wages. (See Penal Code section 2933.2(a) [death row inmate is not entitled to earn work credits].

Regardless of appellant's past work history, at the time of trial, appellant had been

¹ It should be noted that Government Code section 13967(a) was in effect for part of the time that appellant was awaiting trial and that section - as it existed at that time - also required that the trial court take into account the defendant's ability to pay before imposing a restitution fine. (See *People v. Saelee, supra*, 35 Cal.App.4th at pp 30-31.)

in jail for almost five years and possessed no assets. Furthermore, since appellant was being sent to death row, he faced no prospect of being able to earn funds through prison labor. Therefore, there was no evidence to support an implied finding that appellant possessed the ability to pay a \$10,000 restitution fine. (Cf. *People v. Saelee, supra*, 35 Cal.App.4th at p. 31 .) Further evidence of appellant's indigence is indicated by his reliance upon court-appointed counsel for his defense at the trial and appellate levels. (Cf. *Gideon v. Wainwright* (1963) 372 U.S. 335 [9 L. Ed. 2d 799, 83 S. Ct. 792]; *People v. Ortiz* (1990) 51 Cal. 3d 975, 988-989.)

The record is devoid of any evidence of appellant's ability to pay the \$10,000 restitution fine imposed. The trial court exceeded its jurisdiction by imposing the \$10,000 restitution fine in the face of overwhelming evidence that appellant lacked the ability to pay. Therefore, this restitution fine was in excess of the court's jurisdiction. (Cf. *People v. Saelee, supra*, 35 Cal.App.4th at p. 31 .)

More importantly, the United States courts have consistently ruled that restitution fines in excess of the defendant's ability to pay may well be an unconstitutional punishment under the Eighth Amendment. (See, e.g., *United States v. Bajakajian* (1998) 524 U.S. 321, 337-338 [141 L. Ed. 2d 314, 118 S. Ct. 2028].)

C. The Appropriate Remedy is to Reduce the Amount of the Fine to \$200.00 and Restore Prior Deductions from the Prison Trust Account

Under the foregoing statutory analysis, the trial court is required to consider whether the defendant has the ability to pay a restitution fine. (*People v. Viera, supra*, 35 Cal.4th at 306.) Because Mr. Williams has no means of earning income, as death row inmates are not allowed to work, imposing a restitution fine could easily result in the "anomaly of restitution fines costing more money than they

generate, and causing more harm than benefit to victims ." (*People v. Walker* (1991) 54 Cal.3d 1013, 1029.) Thus, this court should reduce the fine to the statutory minimum (*ibid*) **and order that all prior deductions from the defendant's prison trust account above that amount be restored him.**

Defendant also requests that this court grant any other relief that it deems fair and necessary to satisfy the interests of justice in this case.

Respectfully submitted,



R. Clayton Seaman, Jr.
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304

S073205

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OF PRINTING ON RECYCLED PAPER

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, R. Clayton Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 1200, Prescott, AZ 86304. On October 4, 2007 I served the within

Appellant Williams' Supplemental Opening Brief

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Prescott, AZ addressed as follows:

California Appellate Project
Attn: Michael Snedeker
101 Second St., Ste 600
San Francisco, CA 94105

Office of the Attorney General
110 West A Street, Ste 1100
P.O. Box 85266
San Diego, CA 92186-5266

Riverside County District Attorney
Attn Allison Nelson
4075 Main St, First Floor
Riverside CA 92501

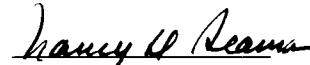
Jack Williams, Jr.
P.O. Box P-11400
San Quentin. CA 94974

Riverside County Superior Court
Criminal Department
Hall of Justice
Attn. Hon. Bernard Schwartz
4100 Main Street
Riverside, CA 92501-3626

Forest Wright, Esq
Jeglin Swanson & Wright LLP
3750 E Florida Ave #A
Hemet, CA 92544

Office of the Public Defender
4200 Orange Ave
Riverside, CA 92501

I declare that the document was printed on recycled paper. Further, I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on October 4, 2007 at Prescott, AZ.


Nancy D. Seaman