

No. S155160

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____	)	
PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	(Alameda County
	)	Superior Court
IRVING ALEXANDER RAMIREZ,	)	No. 151080)
	)	
Defendant and Appellant.	)	
_____	)	

**APPELLANT’S SUPPLEMENTAL OPENING BRIEF**

Appeal from the Judgment of the Superior Court  
of the State of California for the County of Alameda

HONORABLE JON R. ROLEFSON, Presiding

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**X.**  
**THE TRIAL COURT VIOLATED THE PENAL CODE AND  
APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT  
IMPOSED THE MAXIMUM RESTITUTION FINE**

The Alameda County Superior Court sentenced appellant to death on August 3, 2007. (14 RT 2985.) In doing so, the superior court ordered appellant to pay the maximum restitution fine of \$10,000 under Penal Code section 1202.4, subdivision (b). (14 RT 3003; 4 CT 1087.)<sup>1</sup> The court abused its discretion under section 1202.4 when it imposed the maximum restitution fine without considering appellant's ability to pay and despite evidence that he was unable to pay. The trial court did not appear to understand that it could factor appellant's ability to pay when imposing restitution greater than the minimum fine amount. In addition, the imposition of the maximum restitution fine without a determination of appellant's ability to pay and despite evidence that appellant was unable to pay violated appellant's due process rights and constituted an unconstitutionally excessive fine. (U.S. Const., Amends. 8, 14; Cal. Const., art. I, §§ 7, 15 & 17.)

**A. The Trial Court Erred When It Imposed the Maximum  
Restitution Fine Without Considering Appellant's Ability  
to Pay In Violation of the Penal Code**

Section 1202.4, subdivision (b)(1) authorized the trial court to impose a mandatory minimum restitution fine of \$200 against appellant.<sup>2</sup>

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

<sup>2</sup> The statute in effect at the time of the offense, in pertinent part, provided:

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

This section also granted the trial court the discretion to increase the fine up to \$10,000, after considering certain factors, including appellant's inability to pay the fine, the seriousness and gravity of the offense, and the circumstances of its commission. (§ 1202.4, subd. (d).) The trial court did not have to make express findings as to the factors bearing on the amount of the fine nor conduct a separate hearing on the issue. (§ 1202.4, subd. (d).) Here, the trial court imposed the maximum restitution fine of \$10,000 pursuant to section 1202.4.<sup>3</sup>

Defense counsel for appellant objected to the fine imposed. An objection is required to preserve a claim that the trial court failed to consider the defendant's ability to pay. (*People v. Gamache* (2010) 48 Cal.4th 347, 409.) Defense counsel explained that appellant would not be able to work on death row or otherwise pay the fine. (14 RT 3002-3003.) The issue is therefore preserved.

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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.

<sup>3</sup> The trial court, as part of the judgment and sentence, also ordered appellant to pay the probation investigation fee of \$250.00. (14 RT 3003.) Defense counsel also objected to imposition of the probation investigation fee. (14 RT 3003.) Finally, the trial court imposed a court security fee of \$20.00. (14 RT 3003.) There was no claim for direct victim restitution. (14 RT 3002.) The trial court reserved jurisdiction over the restitution issue. (14 RT 3002.)

Even when a proper objection has preserved the issue, a challenge to a restitution fine is evaluated under an “abuse of discretion” standard. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664; *People v. McGhee* (1988) 197 Cal.App.3d 710, 715-717.) The Court of Appeal in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, best explained the abuse of discretion standard:

Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be ‘reasonable’, i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law. [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred. . . . The pertinent question is whether the grounds given by the court . . . are consistent with the substantive law . . . and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under [the statute], read in light of the purposes and policy of the statute.

(*Id.*, at pp. 1297-1298; see also *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773.)

In challenging the imposition of a fine, a defendant must identify something in the record indicating that the trial court has breached its duty to consider his ability to pay. (*People v. Miracle* (2018) 6 Cal.5th 318, 356.) The record in this case demonstrates that the trial court abused its discretion when it concluded that it did not have to consider appellant’s inability to pay and imposed the maximum restitution fine. The trial court stated, “[i]nterestingly enough, the code expressly says that inability to pay is not a ground for not making the order, and -- but I’m going to. I’m making the order.” (14 RT 3003.) While the trial court was correct that inability



to pay did not deter imposition of the minimum fine, the statute directed that the court *shall* consider appellant's inability to pay amongst other factors in increasing the amount of the restitution fine in excess of the two hundred-dollar (\$200) minimum. (§ 1202.4, subd. (c) ["[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 trial court did not adhere to the statute's clear mandate in imposing the maximum restitution fine. (14 RT 3003.)

In deciding the amount of restitution to impose, the trial court shall consider other factors in addition to the defendant's inability to pay and future earning capacity: (1) the seriousness, gravity and circumstances of the offense, (2) any economic gain derived by the defendant, (3) the extent to which any other person suffered losses, and (4) the number of victims involved in the crime. (§ 1202.4, subd. (d).) These factors, however, do not preclude consideration of the inability to pay. Although the trial court did not have to make express findings as to the factors bearing on the amount of the fine, it plainly stated that it would not consider inability to pay. As such, having failed to consider inability to pay when imposing the maximum restitution fine pursuant to the statute, the trial court abused its discretion. "[W]hen a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction. . . ." [Citations.]” (*Rodman v. Superior Court* (1939) 13 Cal.2d 262, 269; *Los Angeles County Dept. of Children and Family Servs. v. Superior Court* (2005) 126 Cal.App.4th 144, 152.)

**B. The Trial Court’s Error Was Not Harmless Where Appellant Was Unable to Pay and Lacked Future Earning Capacity**

The trial court’s error was not harmless where evidence showed that appellant was unable to pay and lacked any future earning potential.

(*People v. Johnson* (2019) 35 Cal.App.5th 134, 139–140; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1030–1031, petn. for review pending, petn. filed July 31, 2019.)

Under the restitution statute, appellant had the burden of demonstrating an inability to pay the \$10,000 fine. (§ 1202.4, subd. (d).) “‘Ability to pay does not necessarily require existing employment or cash on hand.’ [Citation.] ‘[I]n determining whether a defendant has the ability to pay a restitution fine, the court is not limited to considering a defendant’s present ability but may consider a defendant’s ability to pay in the future.’ [Citation.] This include[s] the defendant’s ability to obtain prison wages and to earn money after his release from custody. [Citation.]” (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487; *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377; §1202.4, subd. (d) [trial court able to consider appellant’s future earning capacity].)

Here, as underscored by defense counsel and outlined in the presentencing report, appellant was unable to pay the maximum restitution fine. At the time of committing the murder, July 25, 2005, appellant had just turned 23 years old. (13 RT 2821.) The trial court sentenced him to death on August 3, 2007. (14 RT 2985.) Appellant had been in continuous custody since July 26, 2005. (12 RT 2402.) Appellant was indigent. He qualified for and was represented by court appointed counsel. (1 CT 37, 57.) The probation officer had documented that appellant lacked income or assets. (Confidential CT, p. 5.) Appellant dropped out of high school in the

11th grade and had failed to secure his GED. (*Ibid.*) Appellant lived with his mother in Newark. (*Ibid.*) Prior to his arrest, appellant worked part-time for Adecco Temporary Agency, where, when employed, he worked as a forklift operator. Appellant worked at the agency for two to three years, earning \$10 per hour. Prior to that employment, appellant worked short stints with Tyco Electronics as a spooler and as a server for various fast food restaurants. (*Ibid.*)

Nevertheless, the trial court indicated that it was imposing the maximum restitution fine of \$10,000 as recommended by the probation officer. (14 RT 3002.) Notwithstanding his investigation and documentation of appellant's inability to pay, the probation officer recommended imposing the maximum \$10,000 restitution fund fine. The trial court referenced the probation officer's recommendation to impose the maximum restitution fine but did not refer to other factors noted by the probation officer relevant to the ability to pay evaluation. (14 RT 3003.)<sup>4</sup>

At the time of sentencing, appellant also lacked any future earning capacity to pay the maximum restitution fine. The superior court sentenced appellant to death. A condemned prisoner in San Quentin cannot work to earn the money needed to pay the maximum restitution fine. The Department of Corrections and Rehabilitation has recognized that it does not have the resources and staff to offer employment to all the state's prison

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<sup>4</sup> Section 1203 requires that a probation officer evaluate a defendant's ability to pay a restitution fine and recommend a restitution fine. (§ 1203, subd. (g) & (j).) The statutory requirement that a probation officer evaluate a defendant's ability to pay in all cases suggests that the Legislature intended that a person who lacks the ability to pay the maximum fine should not be ordered to pay an unaffordable fine. Indeed, it would be a waste of time and resources to require the probation officer to conduct such an investigation in all cases where a trial court could order payment of the maximum fine despite evidence of a defendant's inability to pay.

inmates and has given its lowest priority to provide jobs for inmates in maximum security prisons, including condemned inmates at San Quentin. (*In re Barnes* (1985) 176 Cal.App.3d 235, 237-238.) Pursuant to Proposition 66, passed by the California voters in 2016, a new addition to the Penal Code, section 2700.1, requires all condemned inmates to work. There is no indication whatsoever that the new section is anything other than aspirational, as there are numerous prisoners throughout the Department of Corrections and Rehabilitation already wait-listed for jobs. Because condemned inmates like appellant are given the lowest priority, they are effectively barred from having jobs and earning any income. As pointed out by defense counsel at sentencing, without an ability to work, appellant had no future earning capacity or ability to pay the maximum restitution fine while incarcerated.

Here, the record contained uncontradicted evidence that appellant lacked the ability to pay the maximum restitution fine before the offense, at the time of his sentencing, and in the future. (14 RT 3002; Confidential CT.) The trial court abused its discretion in imposing the maximum \$10,000 restitution fine and its error is not harmless where appellant had no ability to pay because he lacked assets, only earned minimal income before he was incarcerated, and the Department of Corrections and Rehabilitation continues to deny him the possibility of working and earning any income in the future.

The appropriate remedy is to remand the case to the superior court for a hearing regarding ability to pay. (*People v. Dueñas* (*Dueñas*) (2019) 30 Cal.App.5th 1157, 1170 [execution of any restitution fine imposed under the statute must be stayed until the trial court holds a hearing and concludes that the defendant has the present ability to pay the restitution]; see also *People v. Castellano* (2019) 33 Cal.App.5th 485, 488 [remanding for hearing in light of *Dueñas*].)

**C. Imposing the Maximum Restitution Fine Without Considering Appellant's Ability to Pay Is a Violation of Appellant's Constitutional Rights**

The trial court imposed an unconstitutionally excessive fine and violated appellant's right to due process under the Eighth and Fourteenth Amendments and the California Constitution, Article I, Sections 7, and 17 when it ordered appellant to pay restitution without considering his ability to pay as mandated by section 1202.4, and that he simply cannot pay during his lifetime.

Under the law as it existed at the time of appellant's sentencing, the courts had previously rejected due process challenges to the imposition of restitution fines without a finding of ability to pay. (*People v. McGhee* (1988) 197 Cal.App.3d 710, 715; *People v. Long* (1985) 164 Cal.App.3d 820, 827-828.) Thus, any objection on due process grounds likely would have been denied under controlling law, and thus would have been futile. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.) Regardless, the lack of a due process objection does not forfeit the right to appeal the deprivation of "fundamental constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

Whether due process and/or the excessive fines clause require a finding that appellant had the ability to pay prior to the imposition of the restitution fine is a question of law to be reviewed independently by this Court. (See *In re Hogan* (1986) 187 Cal.App.3d 819, 823; *United States v. Bajakajian* (1998) 524 U.S. 321, 336, fn.10 [*de novo* review whether a fine is excessive under the Eighth Amendment].)

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The Due Process Clause of the Fourteenth Amendment to the Federal Constitution ... makes the Eighth

Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States. [Citation.] The Due Process Clause of its own force also prohibits the States from imposing ‘grossly excessive’ punishments ....” (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 433-434.) The California Constitution contains similar protections. Article I, section 17, prohibits “cruel or unusual punishment” and “excessive fines;” article I, section 7, prohibits the taking of property “without due process of law.”

The seminal United States Supreme Court case on the Eighth Amendment’s prohibition of excessive fines is *United States v. Bajakajian* (1998) 524 U.S. 321, (*Bajakajian*). In *Bajakajian*, the high court pointed out that “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.” (*Bajakajian, supra*, 524 U.S. at p. 334.) It then set out four considerations: (1) the defendant’s culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant’s ability to pay. (*Id.* at pp. 337-338.) The California Supreme Court has adopted the same four factors to analyze whether a fine is constitutionally disproportionate. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.)

It makes no difference however whether this Court examines this issue under the due process or excessive fines clause, because the analysis under either clause is identical. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., supra*, 37 Cal.4th at p. 728.) Moreover, the United States Supreme Court recently held that the due process clause of the Fourteenth Amendment has incorporated the Eighth Amendment’s proscription on excessive fines. (*Timbs v. Indiana* (2019) \_\_ U.S. \_\_, 139 S.Ct. 682.) Under either due process or the excessive fines clause, this Court considers the following four factors: “(1) the defendant’s culpability; (2) the relationship

between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 728, citing *Bajakajian*, *supra*, 524 U.S. at pp. 337-338.)

Here, appellant was found guilty of killing a police officer. As punishment, he was sentenced to death. Direct evidence showed that appellant was not able, nor would he be able to pay the maximum fine imposed. The trial court indicated that it would not consider appellant's ability to pay in imposing the maximum fine in violation of the Penal Code. As both the United States and California Supreme Courts have held, a defendant's ability to pay is one factor to consider. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 728; *Bajakajian*, *supra*, 524 U.S. at p. 338.) Although these other factors, culpability and harm, may provide for imposing the fine, failing to consider appellant's ability to pay the fine by itself renders imposition of the restitution fine unconstitutional. (See *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1169-1172.)

As the court in *Dueñas* found, imposing a restitution fine without considering a primary criterion in ensuring constitutionally appropriate fines is neither procedurally fair nor reasonably related to any proper legislative goal and therefore a due process violation. (*Dueñas*, *supra*, 30 Cal.App.5th 1171.) The court in *Dueñas* additionally commented that the imposition of such fines without consideration of ability to pay also violates the bans on excessive fines in the United States and California Constitutions. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1171, fn. 8.) It noted that in this context, the exercise of state power to impose penalties must be "procedurally fair and reasonably related to a proper legislative goal." (*Ibid.*, citing *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 728.) Although the First District Court of Appeal in *Dueñas* addressed the imposition of the minimum restitution fine on a defendant

who lacks the ability to pay, the analysis is the same and more compelling for imposition of the maximum restitution fine. Where the trial court imposed the maximum restitution fine without considering appellant's ability to pay necessarily violates due process and the excessive fines clause.

As addressed above, imposition of the maximum restitution fine on a defendant without considering ability to pay is procedurally unfair. Defense counsel and the presentencing report documented appellant's inability to pay. Despite this and with the incorrect understanding that it did not have to consider appellant's ability to pay, the trial court imposed the maximum \$10,000 restitution fine without considering this primary criterion. In addition, imposing debt upon an indigent person sentenced to execution without consideration of ability to pay is not reasonably related to any proper legislative goal. Defense counsel below explained to the trial court that appellant was unable to pay or work on death row.

Finally, as outlined above in section B, *ante*, the trial court's error was not harmless where appellant had no income and under a sentence of death is unable to earn future income.

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## CONCLUSION

This Court should remand the case for the trial court to assess imposition of the fine and consider appellant's ability to pay.

DATED: October 14, 2019

Respectfully submitted,

MARY K. MCCOMB  
State Public Defender

/s/ Maria Morgia  
Maria Morgia  
Senior Deputy State Public Defender

Attorneys for Appellant

**CERTIFICATE OF COUNSEL**  
**(Cal. Rules of Court, rule 8.630(b)(2))**

I am the Deputy State Public Defender assigned to represent appellant, IRVING ALEXANDER RAMIREZ in this automatic appeal. I conducted a word count of this brief using our office's computer software. Based on the computer-generated word count, I certify that this brief, excluding tables and certificates is 3,403 words in length.

DATED: October 14, 2019

/s/ Maria Morga

## DECLARATION OF SERVICE

Case Name: *People v. Irving Alexander Ramirez*  
Case Number: **Alameda County Superior Ct. No. 151080**  
**Cal. Supreme Court No. S155160**

I, Kecia Bailey, declare as follows: I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a true copy of the following document(s):

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The envelopes were addressed and mailed on **October 15, 2019**, as follows:

Irving Alexander Ramirez, F-82088  
CSP-SQ  
3-EB-41  
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The Honorable Morris Jacobson  
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**ELECTRONIC SERVICE VIA TRUEFILING  
ON OCTOBER 15, 2019**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **October 15, 2019**, at Oakland, California.

**/s/Kecia Bailey**

Declarant

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **PEOPLE v. RAMIREZ (IRVING ALEXANDER)**  
Case Number: **S155160**  
Lower Court Case Number:

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10/15/2019

Date

/s/Kecia Bailey

Signature

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Office of the State Public Defender

Law Firm