

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

IRVING ALEXANDER RAMIREZ

Defendant and Appellant.

No. S155160

(Alameda County Superior Court
No. 151080)

Death Penalty Case

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

On 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**

Appellant and respondent agree that at the time appellant was sentenced on August 3, 2007, Penal Code section 1202.4, subdivision (d) stated:¹

(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

¹ All statutory references are to the Penal Code unless otherwise stated.

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.

Further, both appellant and respondent agree that this Court reviews the trial court's actions under an abuse of discretion standard. (SAOB 8, SRB 9.)

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

Appellant contends that the record demonstrates that the trial court did not consider appellant's ability to pay under section 1202.4, subdivision (d) before imposing the maximum restitution fine. (SAOB 6-10.)

Respondent claims that there is no indication in the record that the trial court did not consider appellant's ability to pay. (SRB 7.) Respondent is wrong.

At sentencing, defense counsel specifically addressed the conclusion on page five of the probation report that appellant had the ability to pay fines and fees. (14 RT 3000-3001; Confidential CT, p. 5.) Defense counsel stated: "I don't believe that's accurate. He's been in custody almost two years now, has no resources, and being that he will be on death row, he won't even be eligible for a job in prison, so I would ask the court to consider not assigning any fines or restitution." (14 RT 3001.) A few moments later, prior to pronouncing judgment, the trial court stated: "And along that subject, it's my intention to impose the recommended restitution fund fine, recommended by the probation officer of \$10,000, and I will order that, at this time." (14 RT 3002.) Defense counsel objected again, "Your honor, we would object to any fine, again, in view of Mr. Ramirez's inability to work or have any money from this point forward." (14 RT

3002-3003.) The court then responded: “I understand. Interestingly 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.)

Respondent alleges that the court’s statement reflects the court’s observation that appellant’s inability to pay would not be a sufficient basis on which to forego imposition of the restitution fine *altogether*. (SRB 10.) Further, respondent contends that the court did not indicate it would refrain from considering ability to pay. (SRB 10; 14 RT 3003.) Respondent ignores the context surrounding the court’s statement.

The court’s statement was made in response to defense counsel’s objection to the probation report’s recommendation to impose the *maximum* restitution fine and the trial’s courts indication that it planned to impose the *maximum* restitution fine. The court’s reference to the language in section 1202.4 that inability to pay is not a ground for not making the order reflected the court’s unquestioning acceptance of the recommendation of the probation department and a singular focus on imposing the maximum fine as opposed to considering the factors requiring consideration in assessing the amount to impose.

Appellant is mindful that the trial court does not have to make express findings as to the factors bearing on the amount of the fine under subdivision (d) of section 1202.4. And this Court generally presumes that the trial court knew and followed the law. (SRB 10, *People v. Diaz* (1992) 3 Cal.4th 495, 567.) While generally true, here, the court’s statements reflect that it did not follow the law or consider ability to pay in imposing a restitution fine above the statutory minimum. This was an abuse of discretion because the trial court was expressly required to consider ability to pay in imposing the maximum restitution fine.

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. (SAOB 10.) Respondent’s characterization of appellant’s argument regarding prejudice is incorrect. (SRB 10.) Appellant does not suggest that a restitution fine is automatically invalid if a defendant is unable to pay it. Of course, a trial court is permitted to conclude that other considerations outweigh any monetary burden to the defendant in imposing restitution. (*People v. Potts* (2019) 6 Cal.5th 1012, 1057 (*Potts*.) Appellant does not dispute this. The salient point is that the trial court must also, indeed *shall*, consider ability to pay in its restitution determination *in addition to* these other considerations.

Respondent further claims that the trial court is *required* to impose a restitution fine “commensurate with the seriousness of the offense” and that factor alone may support the maximum restitution fine. (SRB 11; *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505 (*DeFrance*.) Section 1202.4, subdivision (b)(1) states: “[t]he restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. . . .” Respondent’s reading of the statute suggests that the trial court does not have discretion to set the restitution fine below the maximum restitution amount if the crime is serious. This is incorrect. Section 1202.4, subdivision (d) provides that in imposing a restitution fine above the minimum amount, the trial court *shall* consider ability to pay *in addition to* seriousness of the offense.

Respondent contends that the record shows that appellant was not unable to pay the maximum restitution fine. (SRB 12.) Respondent refers to appellant’s future earning capacity under sections 2700 and 2700.1 requiring every able-bodied prisoner to work. (SRB 12.) As appellant has

explained in his supplemental appellant's opening brief, despite the language of these provisions, the practical reality is that condemned inmates are unable to work in prison. (SAOB 11-12.) Moreover, in *Potts*, *supra*, 6 Cal.5th at p. 1055, after the enactment of section 2700.1, this Court accepted the People's concession that capital inmates are not permitted to work while incarcerated.

Prior to 2016, the California Department of Corrections and Rehabilitation (CDCR) did not apply section 2700 to condemned inmates. This was so because of an exception that applied to inmates who posed too great a security risk to participate in work programs. In 2016, the legislature enacted section 2700.1, expressly stating that section 2700 now applies to condemned inmates. By its language, it can be inferred that prior to 2016, the CDCR was not assigning work to condemned inmates because of general security concerns. Now, after the enactment of section 2700.1, condemned inmates may be assigned work in prison. (Pen. Code, § 2700.1.) The reality, however, is that any work remains at the discretion of the CDCR. Regulations implementing section 2700, and by extension section 2700.1, give the CDCR quite a bit of discretion in deciding who works, when they work and how they work, including whether they get paid to work. Under the California Code of Regulations, title 15, section 3040, every able-bodied inmate is obligated to work as *assigned by staff*. "Assignment may be up to a full day of work, education, other programs, or a combination of work, education, or other programs." (Cal. Code Regs., tit. 15, § 3040, subd. (a).) Thus, an inmate may be assigned to participate in education rather than to work.

Further, under title 15 of the regulations, section 3040, subdivision (e), "[i]nmates assigned to clerical duties and office work positions, requiring an extensive amount of staff/inmate interaction, such as clerks and teachers' aides, shall be rotated at regular intervals to other positions

within the institution even though that may result in lower pay, or no pay at all, to the inmate being rotated out of the position.” (Cal. Code Regs., tit. 15, § 3040, subd. (e).) This regulation shows that the CDCR may assign an inmate to an unpaid position. Further, under subdivision (j) of section 3040, the availability of paid inmate jobs is contingent on institutional budgets. Under subdivision (k), being paid to work is considered a privilege depending on available funding, job performance, seniority and conduct. Under subdivision (l), inmates do not get paid for participating in education or substance abuse treatment. (Cal. Code Regs., tit. 15, § 3040.) These regulations make clear that it is not guaranteed that any given inmate will have the ability to earn any money during his or her incarceration and that access to paid positions is controlled entirely by the institution and not the inmate.

Respondent also argues that appellant can pay the maximum restitution fine because 70 percent of any deposits made into appellant’s trust account is deductible to pay the restitution fine. (SRB 12.) The trial court cannot just assume that monies will be deposited in a defendant’s trust account after sentencing as a form of ability to pay any fines. The amount in appellant’s trust account or the possibility of deposits in his account was not before the trial judge in this case.

Finally, respondent contends that appellant must demonstrate an “absolute inability to pay” citing *DeFrance, supra*, 167 Cal.App.4th 486. (SRB 13.) Respondent is wrong. In *DeFrance*, the defendant argued that the trial court abused its discretion in imposing a \$10,000 restitution fine under section 1202.4 because he lacked the ability to pay. (*DeFrance, supra*, 167 Cal.App.4th at pp. 504-505.) The Court of Appeal held that the defendant did not meet his burden to “show an absolute inability to ever pay the fine,” and thus there was no abuse of discretion. (*DeFrance, supra*, 167 Cal.App.4th at p. 505.) In his argument the defendant put forth figures

to show, that using the prison wages in effect at that time, it would be very difficult for him to pay the fine; it would take a very long time and the fine might never be paid; the defendant having been sentenced to life in prison plus one year. (*Ibid.*) As a prisoner incarcerated for life, unlike capital inmates, DeFrance would have the ability to work in prison. (See *Potts, supra*, 6 Cal.5th at p. 1055.)

Moreover, the standard iterated in *DeFrance* that a defendant must “show an absolute inability to ever pay the fine” is not correct. While the burden to demonstrate inability to pay is on the defendant under section 1202.4, subdivision (d), the statute does not require a showing of absolute inability to ever pay. This Court should clarify that this part of the holding in *DeFrance* misstates the applicable standard.

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

Imposition of the maximum restitution fine without consideration of appellant’s ability to pay violated appellant’s constitutional rights under the Eighth and Fourteenth Amendments and the California Constitution. (SAOB 14-16.)

Respondent, in apparent disagreement with the Court of Appeal’s decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), contends that appellant has no constitutional right to an ability-to-pay hearing and that the proper framework for analyzing restitution claims is the Excessive Fines Clause of the Eighth Amendment rather than using due process principles articulated in *Dueñas*, citing *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069-1071 (*Aviles*). (SRB 7, 14.) Respondent argues that because the Excessive Fines Clause of the Eighth Amendment specifically addresses punitive fines and restitution fines are a form of punishment (*People v. Hanson* (2000) 23 Cal.4th 355, 361-362) appellant’s

claim must be analyzed under the Excessive Fines Clause rather than substantive due process. (SRB 14.) As previously addressed by appellant, under either due process or the excessive fines clause, the analysis is the same. (SAOB 14.)

Assuming analysis under the Eighth Amendment's excessive fines clause, appellant and respondent agree that in determining whether a fine is excessive, the Court considers the four factors enumerated under *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 (*Lockyer*): "(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. (SAOB 14; SRB 14-15.) Inexplicably, respondent focuses on only two of these factors. All four factors, however, must be equally considered.

Appellant did not dispute his guilt at the time of trial. Further, there is no relationship between the harm and the fine where appellant did not commit a financial crime and there is no other correlation apparent from the record between the amount of the fine and the offense. Moreover, it was undisputed at trial that appellant had no ability to work and was indigent. Appellant was incarcerated since he was 23 years old with very little work history. (Confidential CT, p. 5.)

Respondent's analysis disregards this final criterion, ability to pay. (SRB 15.) When a trial court or an appellate court considers an Eighth Amendment challenge to restitution fines the analysis must include consideration of all four *Lockyer* factors, not just the two factors the *Aviles* court considered and upon which respondent focuses: appellant's level of culpability and the harm he caused. (SRB 15; *Aviles, supra*, 39 Cal.App.5th at p. 1072.) A defendant's culpability and the seriousness of the offense are often not at issue with respect to a trial court's imposition of fines following a conviction. These factors were not at issue in this case. But the

defendant's ability to pay is critical to the analysis and should have been considered in appellant's case. (*Dueñas, supra*, 30 Cal.App.5th at p. 1171, fn. 8 [imposition of restitution fines without consideration of ability to pay violates the bans on excessive fines in the United States and California Constitution].)

Even if the factors under the excessive fines clause are resolved against appellant, ratification of the maximum fine would still allow him to be punished for his indigency in violation of the due process clause, since he could still be required to pay unpayable fines without a determination regarding his ability to pay. In *Dueñas*, the Court of Appeal held that imposing a restitution fine without considering a primary criterion – ability to pay – is not procedurally fair and therefore a due process violation. (*Dueñas, supra*, 30 Cal.App.5th at p. 1171.) Thus, the court held that “the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1172.)

In its response, respondent addresses the constitutionality of section 1202.4, arguing that the restitution statute mandating a fine does not violate due process because it is a form of punishment rationally related to the state's interest in punishing criminal defendants and deterring unlawful conduct. (SRB 16.) Respondent's argument conflates the test for reviewing whether the statute itself is constitutional with the application of the statute. (SRB 17.) In the end, respondent fails to counter appellant's claim that in imposing the maximum restitution fine without considering a primary criterion, ability to pay, the trial court violated appellant's constitutional rights under the Eighth and Fourteenth Amendments and the California Constitution.

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: December 20, 2019

Respectfully submitted,

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/s/ Maria Morga
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Senior Deputy State Public Defender

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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 2,749 words in length.

DATED: December 20, 2019

/s/ Maria Morga
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, **Lauren Emerson**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, CA 95814. I served a true copy of the following document:

APPELLANT’S SUPPLEMENTAL REPLY BRIEF

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Robert Graff Deputy District Attorney Office of the District Attorney 1225 Fallon Street, Room 900 Oakland, CA 94612	

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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 **December 20, 2019**, at Sacramento, CA.

/s/ Lauren Emerson

LAUREN EMERSON

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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