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IN THE
SUPREME COURT OF THE UNITED STATES

PHIET THE DOAN
Petitioner,

v.

CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari
to the California Court of Appeal
Sixth Appellate District

APPENDICES TO THE
PETITION FOR WRIT OF CERTIORARI

SIXTH DISTRICT APPELLATE PROGRAM
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APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PHIET THE DOAN,

Defendant and Appellant.

H048975
(Santa Clara County
Super. Ct. No. C1775955)

Phiet The Doan pleaded no contest to a felony charge of stalking (Pen. Code, § 646.9, subd. (a)).¹ The trial court sentenced Doan to 120 days in county jail and ordered Doan to pay a total of \$63,926.48 in victim restitution.

On appeal, Doan challenges the restitution order on several grounds. He argues that there was insufficient evidence to support the victim's request for lost wages, which the court included in its restitution order. He also contends that the restitution award violated his right to a jury trial under both the United States and California Constitutions. He further argues that the restitution amount constituted an excessive fine, which violated his due process and equal protection rights based on his inability to pay the amount ordered. Finally, Doan claims, to the extent that his trial counsel failed to object to the restitution order on the above-listed grounds, he received ineffective assistance of counsel.

¹ Undesignated statutory references are to the Penal Code.

For the reasons below, we find no merit to Doan's claims and affirm the restitution order.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background²

In October 2017, the victim, D.H., filed a police report with the San Jose Police Department regarding allegations of stalking. D.H. stated that she and Doan were former high school acquaintances and teammates. She stated that Doan tried to pursue a relationship with her in high school, but she declined his advances. D.H. indicated that after Doan's graduation, he was not in contact with her for approximately six to eight years.

D.H. stated that in 2017, after she returned from an extended trip abroad for one-and-a-half years, she received a call and threatening voicemail from Doan. After receiving this voicemail, D.H. discovered that Doan had left her a number of voicemails over the course of 2016, many of which included profanities, screaming, and cursing. Between September and October 2017, Doan continued to leave threatening voicemails on D.H.'s phone, including a potential death threat and a voicemail in October 2017, saying "[f]uck you and your family. You all need to die!" D.H. also reported that Doan had been observed vandalizing her car with a large rock around October 12, 2017.

Shortly after making her first report, D.H. subsequently informed police that she had captured surveillance footage of Doan coming to her home on October 25, 2017, and slashing her front and back car tires several times.

B. Procedural Background and Restitution Hearing

On October 25, 2017, the Santa Clara County District Attorney filed a felony complaint against Doan, charging him with stalking by repeated following or malicious

² The following facts are drawn from a psychiatric evaluation of Doan, which quotes the police report.

harassing (§ 646.9, subd. (a); count 1) and vandalism in the amount of \$400 or higher (§ 594, subds. (a), (b)(1); count 2).

On October 29, 2018, the trial court found Doan not competent to stand trial. The court deemed Doan's competency restored on January 9, 2020. On February 11, 2020, Doan pleaded no contest to stalking and the vandalism charge was dismissed, with sentencing continued to a further date.

Prior to sentencing, the District Attorney filed a written request for a specific restitution order in the total amount of \$163,899.31. This amount encompassed various expenses that D.H. indicated she had incurred as a result of Doan's conduct as follows: (1) Past psychiatric appointments: \$650; (2) Future psychiatric appointments: \$100,000; (3) Medication: \$15.46; (4) Acupuncture: \$617.11; (5) Sleeping aid drops: \$187; (6) Victim's car tires: \$694.19; (7) Victim's car body/paint: \$710.43; (8) Victim's father's car: \$271.82; (9) Security system improvements: \$884.73; (10) Temporary relocation: \$494.57; (11) Lost wages: \$11,250; (12) Reduced wages: \$45,874; (13) Life coaching: \$2,250.

With respect to her lost wages, D.H. stated that she had to delay her employment start date to deal with the repercussions of Doan stalking her. D.H. provided a paycheck and a calculation using this paycheck to support her request.

In a written response, Doan's trial counsel objected to many of D.H.'s requests, including her request for lost wages.³ Doan's counsel claimed that D.H. was requesting lost wages from September 2017 through November 2017 but had only provided a paycheck from March 2018 with no employer name listed. Doan's counsel claimed that this paystub was insufficient to establish the requested lost wages, because it did not confirm that D.H. had been working for the same employer and earning the same amount for the time period in question.

³ Appellant's motion to augment the record to include Doan's brief concerning victim restitution was granted on May 26, 2022.

On January 29, 2021, prior to imposing sentence, the trial court held a restitution hearing. At the hearing, Doan’s counsel again objected to a number of the items requested by D.H., including her reduction in wages, future psychiatric appointments, and relocation expenses, but did not mention the request for lost wages. The district attorney briefly addressed the issue of lost wages, stating that D.H.’s written statement to the court should be enough to explain the lost wages and delay in starting the job. D.H. also spoke briefly at the hearing, where she discussed the psychological and mental health challenges she had faced as a result of Doan’s actions, and the effect these challenges had on her behavior, including her ability to perform her job and her interactions with new people.

The trial court ultimately ordered Doan to pay D.H. a total amount of \$63,926.48 in restitution. In reaching this amount, the court did not award a number of items requested by D.H. The court only included half the cost of repairing D.H.’s father’s vehicle since the requested amount was for two tires, and only the damage to one tire was attributable to Doan’s actions. The court also did not include the request for temporary relocation costs, finding there was no nexus between the relocation, which took place prior to September 2017, and Doan’s actions. The court also declined to include future counseling costs, finding that there was insufficient information demonstrating that the costs had been incurred or were likely to be incurred in the future. The court granted the remaining amounts requested, including lost wages of \$11,250, noting that the amount reflected “a period from the time that [D.H.] started to report these crimes all the way through November and perhaps a little bit thereafter. And I believe case law is clear that if there’s an interference with employment to deal with court issues, testifying as a . . . witness, reporting it to the police, et cetera, there can be a claim for lost wages as part of those economic losses.”

Doan timely appealed.

II. DISCUSSION

Doan contends the restitution order should be reversed for a number of reasons.

First, he claims that there was insufficient evidence presented to support D.H.’s claim for lost wages. Second, he argues he was entitled to a jury trial on restitution under both the United States and California Constitutions. Third, he claims that the trial court erred in ordering significant restitution without first assessing his ability to pay, and the award therefore constitutes excessive punishment and violates his due process and equal protection rights. For the reasons below, we reject these claims as meritless.

A. Sufficiency of Evidence Regarding Lost Wages

1. Applicable law and standard of review

The California Constitution provides that crime victims have a right to receive “restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Section 1202.4 implements this constitutional mandate and requires full victim restitution in criminal cases. (§ 1202.4, subd. (f).)

Section 1202.4, subdivision (f), provides in relevant part that “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court” (*id.*, subd. (f)), and that the restitution order “shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct.” (*Id.*, subd. (f)(3).)

Wages lost by a victim due to a crime are compensable under section 1202.4, subdivision (f), in a variety of circumstances. (See § 1202.4, subd. (f)(3)(E) [“[w]ages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution”]; *People v. Moore* (2009) 177 Cal.App.4th 1229, 1233 [court did not abuse

its discretion in ordering defendant to pay burglary victim \$6,250 for the wages lost while attending court proceedings]; *In re K.F.* (2009) 173 Cal.App.4th 655, 665-666 [sick leave used by victim was compensable loss].)

We review a restitution order for abuse of discretion. (See *People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*).) “ ‘ ‘ ‘Where there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.’ ’ ’ ” (*Ibid.*) “ ‘In reviewing the sufficiency of the evidence [to support a factual finding], the ‘ ‘power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the trial court’s findings.’ ’ ’ ” (*Ibid.*)

“ ‘Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the [trial court’s] findings,” the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact.’ ’ ” (*Millard, supra*, 175 Cal.App.4th at p. 26.) “ ‘[T]he court’s discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole.’ ’ ” (*Ibid.*)

2. *There was sufficient evidence to support D.H.’s claims for lost wages*

Doan contends that the court’s award of lost wages was speculative and based on insufficient information provided by D.H. He claims that D.H. provided inconsistent accounts about how long she had to delay her start date, initially claiming that it was a six-week delay and later stating it was approximately nine weeks. He also argues that she provided no information on when exactly she had planned to start working after being abroad for “a year and half.”

The Attorney General asserts that the information provided was sufficient to establish a *prima facie* case for D.H.’s lost wages between September 2017 and November 2017. The Attorney General points to D.H.’s written statement, where she indicated that she had planned to begin working on September 11, 2017, but was forced to delay her start date until mid-November 2017, after Doan was in custody, in order to work with detectives, police officers, and courthouse officials to ensure her safety. The Attorney General also notes that Doan did not object to the amount of lost wages requested or make any attempts to rebut the evidence at the restitution hearing, including asking D.H. any questions to clarify relevant dates or how she arrived at her estimate for lost wages.

In reply, Doan claims that he did object to the lost wages request in his written brief opposing restitution. He further contends that there was no *prima facie* showing to support D.H.’s request from either her statements or the paystub provided, as she did not provide any evidence of when she was supposed to start working or for whom; additionally, the paystub was only from 2018 and did not have the name of the employer listed. Doan argues, therefore, that he had no way of confirming the delay in her start date or that this paystub was for the same employer she began working for in 2017.

In reviewing D.H.’s written statement and the paystub provided, we find that this information reasonably supported the trial court’s decision to award D.H. six weeks of lost wages. While there certainly could have been other information provided in support of D.H.’s claim, such as a letter confirming her original start date or a paystub from her actual start date, there is no requirement that a restitution award be based on the *best* evidence available, so long as there is a rational basis for the inference drawn by the trial court in making the award. (See *Millard, supra*, 175 Cal.App.4th at p. 26; *People v. Baker* (2005) 126 Cal.App.4th 463, 469-470.) Here, while the paystub was dated for February 2018, D.H.’s written statement indicated that this paystub also reflected her biweekly pay in November 2017. Accordingly, we conclude that there was sufficient

evidence to establish a *prima facie* case for D.H.’s lost wages, and the trial court did not abuse its discretion in awarding the amount requested.

B. Right to Jury Trial for Restitution

Doan contends that he is entitled to a jury trial on the issue of restitution. While he acknowledges he did not raise this issue in the trial court, he claims that he should not be barred from raising it because it involves a pure issue of law. Alternatively, he claims that it would have been futile to raise the issue at the trial court level in light of binding case law to the contrary.

The Attorney General maintains that Doan forfeited his claim by failing to raise this objection at the trial court. The Attorney General further argues that even if Doan did not forfeit his claim, case law clearly establishes that he has no right to a jury trial on the issue of restitution under either state or federal law.

“ ‘[R]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.’ ” (*People v. Brooks* (2017) 3 Cal.5th 1, 92 (*Brooks*).) Doan correctly notes that the Courts of Appeal have held that there is no right to a jury trial regarding restitution. As the trial court in this case would have therefore been bound to reject his argument, Doan may properly raise the claim in this court. (See *ibid.*)

Turning to the substance of Doan’s claim, he primarily relies on *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Southern Union Co. v. United States* (2012) 567 U.S. 343. In *Apprendi*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, at p. 490.) In *Southern Union*, the United States Supreme Court held that a jury must determine “any fact, other than the fact of a prior conviction, that increases a criminal defendant’s maximum potential sentence,” and applied this rule to criminal fines. (*Southern Union, supra*, at p. 346; see *id.* at p. 349 [explaining that

“[c]riminal fines, like . . . other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses”].)

However, as explained by the court in *People v. Pangan* (2013) 213 Cal.App.4th 574, neither *Southern Union* nor *Apprendi* “have any application to direct victim restitution, because direct victim restitution is not a criminal penalty. . . . [D]irect victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits. It is not increased ‘punishment.’ ” (*Id.* at p. 585.) The appellate court in *Pangan* ultimately ruled that the defendant was not entitled to a jury trial regarding victim restitution. (*Id.* at pp. 576, 586.) Other decisions have reached the same conclusion that there is no right to a jury trial regarding victim restitution. (See, e.g., *Millard, supra*, 175 Cal.App.4th at pp. 35-36; *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1183-1184; *People v. Wasbotten* (2014) 225 Cal.App.4th 306, 308-309; *People v. Foalima* (2015) 239 Cal.App.4th 1376, 1397-1399.)

Doan argues that victim restitution is “part of a defendant’s punishment,” noting that restitution hearings are a part of the sentencing hearing, and failure to pay a restitution award can result in probation being revoked. However, as explained in *Millard, supra*, 175 Cal.App.4th 7, “the primary purpose of a victim restitution hearing is to allow the People to prosecute an expedited hearing before a trial court to provide a victim with a civil remedy for economic losses suffered, and not to punish the defendant for his or her crime. To the extent a victim restitution order has the secondary purposes of rehabilitation of a defendant and/or deterrence of the defendant and others from committing future crimes, those purposes do not constitute increased punishment of the defendant” (*Id.* at pp. 35-36.)

Lastly, Doan claims that “[e]ven if restitution were civil, [he] has a constitutional right to a jury trial to determine the amount of the loss” under article I of the California Constitution. He argues that the amount of damages is an issue of fact that must be tried by a jury.

We are not persuaded by this contention. Although “the restitution order and the civil jury award produce the same result (an enforceable judgment against the defendant [citation]), they are a different means to that end, one based in the civil law, with its protections and requirements, and the other in criminal law, with its own protections and requirements. The restitution hearing . . . is a criminal sentencing hearing, not a civil trial.” (*People v. Smith* (2011) 198 Cal.App.4th 415, 434.)

Further, the California Constitution generally provides that “[t]rial by jury is an inviolate right and shall be secured to all . . .” (Cal. Const., art. I, § 16.) With respect to civil trials, “[g]enerally, ‘if the action is essentially one in equity and the relief sought “depends upon the application of equitable doctrines,” the parties are *not* entitled to a jury trial.’” (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 121, italics added.) As a general matter, restitution is a remedy available in an equitable action (see *People v. Superior Court* (1973) 9 Cal.3d 283, 286) to which there is no right to a jury trial. While Doan attempts to argue that an award of criminal restitution does not rest on equitable factors, he provides no persuasive legal authority that supports this contention. Doan also provides no legal authority that clearly establishes the right to a jury trial for victim restitution in this case. (See *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1159-1161 [rejecting the contention that a defendant has the right to a jury trial on the issue of restitution under Cal. Const., art. I, § 16].)

In conclusion, we find that Doan had no right to a jury trial under the United States or California Constitution.

C. Excessive Fine, Equal Protection, and Due Process Claims

Doan argues that the total amount of restitution ordered of \$63,500 should be considered an excessive fine under the Eighth Amendment of the United States Constitution. He further claims that the award violated his equal protection and due process rights due to his indigent status. He again argues that his failure to raise these objections at the trial court did not forfeit his right to raise them on appeal as they involve

pure issues of law, and it would have been futile to raise the issues at the trial court level in light of binding case law to the contrary.

The Attorney General again argues that these claims should be forfeited because Doan did not raise these objections at the trial court. The Attorney General further argues that, to the extent that these claims are not forfeited, the order remains valid as direct victim restitution is non-punitive and does not implicate the Eighth Amendment's restriction against cruel and unusual punishment. The Attorney General additionally argues that victim restitution is fundamentally different from the fines and assessments associated with criminal sentences such that it should not be subject to an ability to pay analysis.

As discussed above, reviewing courts will excuse failure to raise an objection at the trial level if doing so would have been futile in light of case law to the contrary. (*Brooks, supra*, 3 Cal.5th at p. 92.) As Courts of Appeal have previously held that victim restitution is not considered a fine, and therefore, do not require an ability-to-pay determination, the trial court would have been bound to reject Doan's argument. Therefore, Doan may properly raise his claims in this court. (See *ibid.*)

As correctly noted by the Attorney General, Doan's claims primarily rest on his contention that victim restitution is punitive in nature and should be treated in the same manner as the fines, fees, and assessments that are included in a criminal sentence. In essence, Doan asks us to extend the ruling in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which only addressed the aforementioned fines and fees, to direct victim restitution. For the reasons explained below, we decline to do so.

In *Dueñas*,⁴ the appellate court held that the imposition of a court operations assessment and a court facilities assessment without a determination of the defendant's

⁴ We acknowledge that the Courts of Appeal have conflicting opinions on whether *Dueñas* was decided correctly and that the issue is currently before the California (continued)

ability to pay was “fundamentally unfair” and violated due process under the federal and state Constitutions. (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) The court also concluded that the execution of a restitution fine under section 1202.4 “must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine.” (*Dueñas, supra*, at p. 1164.)

However, the court in *Dueñas* distinguished restitution fines from direct restitution to the victim, explaining that a restitution fine is “set at the discretion of the court in an amount commensurate with the seriousness of the offense and within a range set by statute,” and therefore “is intended to be, and is recognized as, additional punishment for a crime.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1169.) In contrast, the *Dueñas* court noted that direct restitution is to compensate the victim for any losses suffered because of the defendant’s crime. (*Ibid.*) Further, as discussed above, it is well-established that victim restitution is not considered part of a criminal punishment and is non-punitive in nature. (*Millard, supra*, 175 Cal.App.4th at pp. 35-36; *People v. Harvest* (2000) 84 Cal.App.4th 641, 649-650.)

Other appellate courts have relied on this distinction in declining to extend the *Dueñas* ability-to-pay analysis to direct victim restitution. (See *People v. Evans* (2019) 39 Cal.App.5th 771, 776-777; *People v. Allen* (2019) 41 Cal.App.5th 312, 326.) In addition, one appellate court relied on the difference in purpose between direct victim restitution and fines and assessments in concluding that direct victim restitution was not punishment, and therefore would not be considered a fine under the Eighth Amendment. (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1071, fn. 27.)

Supreme Court. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, 95 [agreeing with *Dueñas* that due process requires an ability-to-pay determination before imposition of court operations or court facilities assessments], review granted Nov. 13, 2019, S257844.) However, this conflict does not affect our analysis and decision herein.

More importantly, section 1202.4, subdivision (g) explicitly states that a defendant’s inability to pay “shall not be a consideration in determining the amount of a restitution order.” Notably, Doan does not cite this subdivision in his argument, and he fails to cite any legal authority that provides an exception to this subdivision.

Given the difference in the fundamental purposes behind restitution fines and direct restitution, we agree that direct victim restitution should not be viewed in the same light as fines and fees, and therefore, is not subject to the restriction against excessive fines under the Eighth Amendment. For the same reasons, as well as the express direction provided in section 1202.4, subdivision (g), we agree with the holdings in *Evans* and *Allen*, and decline to extend the holding in *Dueñas* to direct victim restitution.

D. Ineffective Assistance of Counsel

Doan alternatively contends that, to the extent that his trial counsel forfeited any of his claims above by not raising them at the trial level, he received ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his or her counsel’s performance was deficient and that he or she suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The deficient performance component of an ineffective assistance of counsel claim requires a showing that “counsel’s representation fell below an objective standard of reasonableness” under prevailing professional norms. (*Id.* at p. 688.) Regarding prejudice, a “defendant must show that there is a reasonable probability”—meaning “a probability sufficient to undermine confidence in the outcome”—“that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.)

As explained above, many of Doan’s claims above would have been futile in the trial court due to binding case law. Accordingly, Doan cannot demonstrate a reasonable probability that the results of the restitution hearing would have been different if his trial counsel had raised the same objections addressed herein. We therefore find no merit in

defendant's claim of ineffective assistance of counsel based on the failure to object (see *People v. Lopez* (2008) 42 Cal.4th 960, 966 [ineffective assistance of counsel claim requires a showing of prejudice]).

III. DISPOSITION

The restitution order is affirmed.

Wilson, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Danner, J.

People v. Doan
H048975

APPENDIX B

SUPREME COURT
FILED

MAY 31 2023

Jorge Navarrete Clerk

Court of Appeal, Sixth Appellate District - No. H048975

S279639

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PHIET THE DOAN, Defendant and Appellant.

The petition for review is denied.

GUERRERO

Chief Justice

APPENDIX C

California Penal Code section 672:

Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.

California Penal Code section 1202.4 (2017):

(a)(1) It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.

(2) Upon a person being convicted of a crime in the State of California, the court shall order the defendant to pay a fine in the form of a penalty assessment in accordance with Section 1464.

(3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay both of the following:

(A) A restitution fine in accordance with subdivision (b).

(B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment.

(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.

(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars (\$300) and not more than ten thousand dollars (\$10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars (\$150) and not more than one thousand dollars (\$1,000).

(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of

imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.

(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 minimum fine pursuant to paragraph (1) of subdivision (b). The court may specify that funds confiscated at the time of the defendant's arrest, except for funds confiscated pursuant to Chapter 8 (commencing with Section 11469) of Division 10 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 minimum fine pursuant to paragraph (1) of subdivision (b), 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 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.

(e) The restitution fine shall not be subject to penalty assessments authorized in Section 1464 or Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, or the state surcharge authorized in Section 1465.7, and shall be deposited in the Restitution Fund in the State Treasury.

(f) Except as provided in subdivisions (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution. The court may specify that funds confiscated at the time of the defendant's arrest, except for funds confiscated pursuant to Chapter 8 (commencing with Section 11469) of Division 10 of the Health and Safety Code, be applied to the restitution order if the funds are not exempt for spousal or child support or subject to any other legal exemption.

(1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion. A victim at a restitution hearing or modification hearing described in this paragraph may testify by live, two-way audio and video transmission, if testimony by live, two-way audio and video transmission is available at the court.

(2) Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of a third party. Restitution ordered pursuant to this subdivision shall be ordered to be deposited in the Restitution Fund to the extent that the victim, as defined in subdivision (k), has received assistance from the California Victim Compensation and Government Claims Board pursuant to Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code.

(3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following:

(A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.

(B) Medical expenses.

(C) Mental health counseling expenses.

(D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor. Lost wages shall include commission income as well as base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

(E) Wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include commission income as well as base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

(F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288, 288.5, or 288.7.

(G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.

(H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim.

(I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.

(J) Expenses to install or increase residential security incurred related to a violent felony, as defined in subdivision (c) of

Section 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

(K) Expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime.

(L) Expenses for a period of time reasonably necessary to make the victim whole, for the costs to monitor the credit report of, and for the costs to repair the credit of, a victim of identity theft, as defined in Section 530.5.

(4)(A) If, as a result of the defendant's conduct, the Restitution Fund has provided assistance to or on behalf of a victim or derivative victim pursuant to Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code, the amount of assistance provided shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered.

(B) The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim Compensation and Government Claims Board reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the victim or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement.

(C) If the defendant offers evidence to rebut the presumption established by this paragraph, the court may release additional information contained in the records of the board to the defendant only after reviewing that information in camera and finding that the information is necessary for the defendant to dispute the amount of the restitution order.

(5) Except as provided in paragraph (6), in any case in which an order may be entered pursuant to this subdivision, the defendant shall prepare and file a disclosure identifying all assets, income, and liabilities in which the defendant held or controlled a present or future interest as of the date of the defendant's arrest for the crime

for which restitution may be ordered. The financial disclosure statements shall be made available to the victim and the board pursuant to Section 1214. The disclosure shall be signed by the defendant upon a form approved or adopted by the Judicial Council for the purpose of facilitating the disclosure. A defendant who willfully states as true a material matter that he or she knows to be false on the disclosure required by this subdivision is guilty of a misdemeanor, unless this conduct is punishable as perjury or another provision of law provides for a greater penalty.

(6) A defendant who fails to file the financial disclosure required in paragraph (5), but who has filed a financial affidavit or financial information pursuant to subdivision (c) of Section 987, shall be deemed to have waived the confidentiality of that affidavit or financial information as to a victim in whose favor the order of restitution is entered pursuant to subdivision (f). The affidavit or information shall serve in lieu of the financial disclosure required in paragraph (5), and paragraphs (7) to (10), inclusive, shall not apply.

(7) Except as provided in paragraph (6), the defendant shall file the disclosure with the clerk of the court no later than the date set for the defendant's sentencing, unless otherwise directed by the court. The disclosure may be inspected or copied as provided by subdivision (b), (c), or (d) of Section 1203.05.

(8) In its discretion, the court may relieve the defendant of the duty under paragraph (7) of filing with the clerk by requiring that the defendant's disclosure be submitted as an attachment to, and be available to, those authorized to receive the following:

(A) A report submitted pursuant to subparagraph (D) of paragraph (2) of subdivision (b) of Section 1203 or subdivision (g) of Section 1203.

(B) A stipulation submitted pursuant to paragraph (4) of subdivision (b) of Section 1203.

(C) A report by the probation officer, or information submitted by the defendant applying for a conditional sentence pursuant to subdivision (d) of Section 1203.

(9) The court may consider a defendant's unreasonable failure to make a complete disclosure pursuant to paragraph (5) as any of the following:

(A) A circumstance in aggravation of the crime in imposing a term under subdivision (b) of 1170.

(B) A factor indicating that the interests of justice would not be served by admitting the defendant to probation under Section 1203.

(C) A factor indicating that the interests of justice would not be served by conditionally sentencing the defendant under Section 1203.

(D) A factor indicating that the interests of justice would not be served by imposing less than the maximum fine and sentence fixed by law for the case.

(10) A defendant's failure or refusal to make the required disclosure pursuant to paragraph (5) shall not delay entry of an order of restitution or pronouncement of sentence. In appropriate cases, the court may do any of the following:

(A) Require the defendant to be examined by the district attorney pursuant to subdivision (h).

(B) If sentencing the defendant under Section 1170, provide that the victim shall receive a copy of the portion of the probation report filed pursuant to Section 1203.10 concerning the defendant's employment, occupation, finances, and liabilities.

(C) If sentencing the defendant under Section 1203, set a date and place for submission of the disclosure required by paragraph (5) as a condition of probation or suspended sentence.

(11) If a defendant has any remaining unpaid balance on a restitution order or fine 120 days prior to his or her scheduled release from probation or 120 days prior to his or her completion of a conditional sentence, the defendant shall prepare and file a new and updated financial disclosure identifying all assets, income, and liabilities in which the defendant holds or controls or has held or controlled a present or future interest during the defendant's period of probation or conditional sentence. The financial disclosure shall be made available to the victim and the board pursuant to Section 1214. The disclosure shall be signed and prepared by the defendant on the same form as described in paragraph (5). A defendant who willfully states as true a material matter that he or she knows to be false on the disclosure required by this subdivision is guilty of a misdemeanor, unless this conduct is punishable as perjury or another provision of law provides for a greater penalty. The financial disclosure required by this paragraph shall be filed with the clerk of the court no later than 90 days prior to the defendant's scheduled release from probation or completion of the defendant's

conditional sentence.

(12) In cases where an employer is convicted of a crime against an employee, a payment to the employee or the employee's dependent that is made by the employer's workers' compensation insurance carrier shall not be used to offset the amount of the restitution order unless the court finds that the defendant substantially met the obligation to pay premiums for that insurance coverage.

(g) A defendant's inability to pay shall not be a consideration in determining the amount of a restitution order.

(h) The district attorney may request an order of examination pursuant to the procedures specified in Article 2 (commencing with Section 708.110) of Chapter 6 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure, in order to determine the defendant's financial assets for purposes of collecting on the restitution order.

(i) A restitution order imposed pursuant to subdivision (f) shall be enforceable as if the order were a civil judgment.

(j) The making of a restitution order pursuant to subdivision (f) shall not affect the right of a victim to recovery from the Restitution Fund as otherwise provided by law, except to the extent that restitution is actually collected pursuant to the order. Restitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained against the defendant arising out of the crime for which the defendant was convicted.

(k) For purposes of this section, "victim" shall include all of the following:

(1) The immediate surviving family of the actual victim.

(2) A corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime.

(3) A person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions:

(A) At the time of the crime was the parent, grandparent,

sibling, spouse, child, or grandchild of the victim.

(B) At the time of the crime was living in the household of the victim.

(C) At the time of the crime was a person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to a relationship listed in subparagraph (A).

(D) Is another family member of the victim, including, but not limited to, the victim's fiance or fiancee, and who witnessed the crime.

(E) Is the primary caretaker of a minor victim.

(4) A person who is eligible to receive assistance from the Restitution Fund pursuant to Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code.

(5) A governmental entity that is responsible for repairing, replacing, or restoring public or privately owned property that has been defaced with graffiti or other inscribed material, as defined in subdivision (e) of Section 594, and that has sustained an economic loss as the result of a violation of Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7

(l) At its discretion, the board of supervisors of a county may impose a fee to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid, to be added to the restitution fine and included in the order of the court, the proceeds of which shall be deposited in the general fund of the county.

(m) In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation. Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied.

(n) If the court finds and states on the record compelling and extraordinary reasons why a restitution fine should not be required, the court shall order, as a condition of probation, that the defendant perform specified community service, unless it finds and states on the record compelling and extraordinary reasons not to require

community service in addition to the finding that a restitution fine should not be required. Upon revocation of probation, the court shall impose the restitution fine pursuant to this section.

(o) The provisions of Section 13963 of the Government Code shall apply to restitution imposed pursuant to this section.

(p) The court clerk shall notify the California Victim Compensation and Government Claims Board within 90 days of an order of restitution being imposed if the defendant is ordered to pay restitution to the board due to the victim receiving compensation from the Restitution Fund. Notification shall be accomplished by mailing a copy of the court order to the board, which may be done periodically by bulk mail or email.

(q) Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in a case in which a victim has suffered economic loss as a result of the defendant's conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or another showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim.

(r)(1) In addition to any other penalty or fine, the court shall order a person who has been convicted of a violation Section 350, 653h, 653s, 653u, 653w, or 653aa that involves a recording or audiovisual work to make restitution to an owner or lawful producer, or trade association acting on behalf of the owner or lawful producer, of a phonograph record, disc, wire, tape, film, or other device or article from which sounds or visual images are derived that suffered economic loss resulting from the violation. The order of restitution shall be based on the aggregate wholesale value

of lawfully manufactured and authorized devices or articles from which sounds or visual images are devised corresponding to the number of nonconforming devices or articles involved in the offense, unless a higher value can be proved in the case of (A) an unreleased audio work, or (B) an audiovisual work that, at the time of unauthorized distribution, has not been made available in copies for sale to the general public in the United States on a digital versatile disc. For purposes of this subdivision, possession of nonconforming devices or articles intended for sale constitutes actual economic loss to an owner or lawful producer in the form of displaced legitimate wholesale purchases. The order of restitution shall also include reasonable costs incurred as a result of an investigation of the violation undertaken by the owner, lawful producer, or trade association acting on behalf of the owner or lawful producer. "Aggregate wholesale value" means the average wholesale value of lawfully manufactured and authorized sound or audiovisual recordings. Proof of the specific wholesale value of each nonconforming device or article is not required.

(2) As used in this subdivision, "audiovisual work" and "recording" shall have the same meaning as in Section 653w.