

No. S165195 - CAPITAL CASE

**In the Supreme Court of the State of California**

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*

v.

ANTHONY R. NAVARRO, JR.,  
*Defendant and Appellant.*

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County Superior Court, Case No. 02NF3143  
The Honorable Francisco Briseño, Judge

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**RESPONDENT'S THIRD  
SUPPLEMENTAL BRIEF**

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January 11, 2021

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## INTRODUCTION

On December 23, 2020, Navarro filed a third supplemental brief. In his brief, Navarro raises a new claim that the trial court's imposition of a \$10,000 restitution fine under Penal Code<sup>1</sup> section 1202.4, subdivision (b) and a \$10,443.80 victim restitution payment,<sup>2</sup> without a finding of Navarro's ability to pay, violated the excessive fines provision of the Eighth Amendment. In addition, Navarro contends that the trial court abused its discretion when it imposed the \$10,000 restitution fine under section 1202.4, subdivision (b) without considering his ability to pay.

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

<sup>2</sup> The trial court stated that there was a request by the Victim's Compensation Board for restitution in the amount of \$10,443.80, and after "finding that to be the amount," ordered Navarro to pay this amount. (39 RT 6832.) Respondent will refer to this ordered payment as the "victim restitution payment." Navarro asserts that the payment was ordered pursuant to section 1203.1, subdivision (b). However, that section applies to payment of restitution to the victim or the Restitution Fund *as a condition of probation*. It appears that the court ordered the payment under section 1202.4, subdivision (f), which provides that in every case where 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. Section 1202.4, subdivision (f)(2) explains that to the extent that the victim has received assistance from the California Victim Compensation Board, the court shall order the restitution to be deposited in the Restitution Fund.

Navarro forfeited his claim because he had the opportunity below to object to the restitution fine and victim restitution payment but failed to do so. This claim also fails because the imposed amounts were not unconstitutionally excessive in light of the gravity of Navarro's offenses and the lack of any evidence in the record that Navarro would be unable to pay the amounts.<sup>3</sup> Moreover, the trial court did not abuse its discretion in selecting the maximum amount for the \$10,000 fine.

## ARGUMENT

### I. NAVARRO FORFEITED HIS CLAIM OF EXCESSIVE FINES BY FAILING TO INDICATE AN INABILITY TO PAY IN THE TRIAL COURT

Penal Code section 1202.4, subdivisions (c) and (d) allow a trial court to consider a defendant's ability to pay a restitution fine imposed in excess of the statutory minimum. (Pen. Code, § 1202.4, subds. (c) and (d).) In addition, with respect to victim restitution, the probation report noted that Navarro was notified of his right to a financial hearing under section 1203.1b. (8 CT 2246.) When the trial court imposed the \$10,000 restitution fine and \$10,443.80 victim restitution payment at sentencing, Navarro had the opportunity to raise an objection that he was unable to pay the amounts. Because he did not, this Court should find that he has forfeited the issue. (*People v. Jenkins*

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<sup>3</sup> This Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47 (*Kopp*), review granted Nov. 13, 2019, S257844, on the issue of whether a trial court must "consider a defendant's ability to pay before imposing or executing fines, fees, and assessments," and if so, "which party bears the burden of proof regarding defendant's inability to pay."



(2019) 40 Cal.App.5th 30, 39–41; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1073 (*Aviles*); *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1154; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1033.)

Contrary to Navarro’s claim (Supp. Third AOB 20-22), the constitutional nature of Navarro’s claim does not justify a deviation from the general forfeiture rule. (See *People v. Trujillo* (2015) 60 Cal.4th 850, 859 [stating that no “core autonomy interests or constitutional rights are implicated by the waiver of a judicial hearing on a defendant’s ability to pay”]; *In re Sheena K.* (2007) 40 Cal.4th 875, 880–881 [a constitutional right, or a right of any other sort, may be forfeited in criminal and civil cases, by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it].)

Navarro argues, alternatively, that if his challenges to the restitution fine and victim restitution payment are forfeited, his trial counsel provided ineffective assistance by failing to preserve these claims. (Third Supp. AOB 22-23.) However, Navarro has failed to establish that his trial counsel performed deficiently in not objecting and that he was prejudiced as a result.

To establish ineffective assistance of trial counsel, Navarro must show that (1) counsel’s performance was deficient, such that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s performance was prejudicial such that there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668,

694.) A defendant “cannot automatically obtain merit review of a noncognizable issue by talismanically asserting ineffective assistance of counsel.” (*People v. Riel* (2000) 22 Cal.4th 1153, 1202; *People v. Memro* (1995) 11 Cal.4th 786, 834 [defense counsel has no duty to make futile or frivolous objections].) This Court is required to “give great deference to counsel’s tactical decisions.” (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

Here, Navarro has not shown how his counsel’s failure to object fell below an objective standard of reasonableness. This Court can only speculate as to counsel’s reasons for not objecting to the restitution fine and victim restitution payment. As the appellate record fails to reveal why he acted or failed to act on the matter, “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1069.) Nothing in the record reveals counsel’s strategy, and Navarro fails to show there could be no satisfactory explanation. For example, counsel might not have objected because he knew there was no evidence Navarro was unable to pay. Nor can Navarro establish prejudice since, as discussed next, there is no indication in the record that he was unable to pay the imposed amounts or that other circumstances rendered the amounts constitutionally disproportionate.

**II. IF THIS COURT FINDS THAT NAVARRO’S CLAIM IS PRESERVED, IT SHOULD ALSO FIND THAT THE RESTITUTION FINE AND VICTIM RESTITUTION PAYMENT ARE CONSTITUTIONAL**

In the event this Court decides to reach the merits of Navarro’s claim, it should conclude that the imposition of the

restitution fine and victim restitution payment did not violate the Excessive Fines Clause.

**A. The *Dueñas* opinion**

The defendant in *Dueñas* was an indigent, homeless mother of two, who subsisted on public aid while suffering from cerebral palsy. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1160-1161 (*Dueñas*)). Before pleading no contest to driving with a suspended license in 2015, *Dueñas* had a long history of being unable to pay court-ordered assessments which led to jail time and suspended licenses. (*Ibid.*) At sentencing, *Dueñas* was placed on probation and again ordered to pay \$70 in court assessments and a \$150 restitution fine. (*Id.* at p. 1162.) After *Dueñas* requested a hearing to determine her ability to pay the fees, the court concluded that it had no discretion to waive the two assessments or the restitution fine. (*Id.* at p. 1163.)

The Court of Appeal held that “due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant’s present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1164; see *id.* at p. 1168.) While acknowledging that the restitution fine under section 1202.4 was “additional punishment for a crime,” the *Dueñas* court nevertheless determined that it was fundamentally unfair to impose the fine on those who could not afford to pay it. (*Id.* at pp. 1169-1170.)

**B. The imposed restitution fine and victim restitution payment were not unconstitutionally excessive**

*Dueñas* analyzed the issue of the defendant's fines and fees under due process principles (*Dueñas, supra*, 30 Cal.App.5th at pp. 1166-1172); however, as Navarro asserts (Third Supp. AOB 9-14), the proper analytical framework is furnished by the Eighth Amendment's excessive fines clause.

Where a particular amendment provides "an explicit textual source of constitutional protection against" a specific harm alleged, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (*Graham v. Connor* (1989) 490 U.S. 386, 395; see also *United States v. Lanier* (1997) 520 U.S. 259, 272, fn. 7.) The excessive fines clause of the Eighth Amendment is a specific provision that explicitly addresses punitive fines and is applicable to the States under the Fourteenth Amendment's Due Process Clause. (*Timbs v. Indiana* (2019) U.S. [139 S.Ct. 682, 686-687.]

Restitution fines are a form of punishment. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-362.) Accordingly, Navarro's constitutional challenge to the restitution fine under section 1202.4, subdivision (b) must be analyzed under the excessive fines clause, rather than substantive due process. (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1072; *Kopp, supra*, 38 Cal.App.5th at pp. 96-97.)

In contrast, the victim restitution payment is not punitive in nature. The purpose of victim restitution is fundamentally different than other assessments, fines or fees because its

purpose is not to punish the defendant or raise funds, but to make the victim reasonably whole by reimbursing the victim for economic losses caused by the defendant's criminal conduct. (*People v. Evans* (2019) 39 Cal.App. 5th 771, 775-777.) Thus, victim restitution, i.e., restitution ordered to be paid to the California Victim Compensation Board, "is intended 'as a civil remedy rather than a criminal punishment.'" (*Evans, supra*, at p. 776, quoting *People v. Harvest* (2000) 84 Cal.App.4th 641, 649–650.) For that reason, a defendant's ability to pay is not a proper factor to consider in setting victim restitution. (*Evans, supra*, at p. 777.)

Nevertheless, even assuming the victim restitution payment is punitive and subject to the excessive fines clause, neither it nor the restitution fine is unconstitutionally excessive. A fine is excessive under the Eighth Amendment "if it is grossly disproportional to the gravity of a defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) A court considers four factors when analyzing whether a fine is constitutionally disproportionate: "(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." (*Aviles, supra*, 39 Cal.App.5th at p. 1070, citing *Bajakajian, supra*, 524 U.S. at pp. 337-338 and *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) An inability to pay a fine does not, by itself, render a fine unconstitutionally excessive. (See *Aviles, supra*, at p. 1070, citing *Bajakajian*,

*supra*, at pp. 337-338 [ability to pay is not the only factor to consider].)

Here, the imposed restitution fine and victim restitution payment were not grossly disproportionate to the gravity of Navarro's offense. Navarro was sentenced to death for the murder of David Montemayor. As set forth in detail in the Respondent's Brief, Navarro was the mastermind behind the plot to kill Montemayor in exchange for a large sum of money that was allegedly stored in Montemayor's garage. Navarro, a shot-caller in the Pacoima Flats criminal street gang, formed a plan to recruit his junior gang members, and he supplied them with the critical information to carry out the killing. The circumstances surrounding the crimes—ambushing a vulnerable Montemayor as he arrived to work that morning and then shooting the one-armed man as he tried to run away—demonstrate the callousness of the killing. The jury convicted Navarro of first-degree murder, conspiracy to commit murder and street terrorism, and also found true three special circumstances that the murder was committed while engaged in a kidnapping and attempted robbery and the murder was gang-related. The seriousness of Navarro's crimes is reflected in the death sentence that Navarro received. When compared to the gravity of Navarro's offenses, the \$10,000 restitution fine and \$10,443.80 victim restitution payment are not excessive.

With respect to ability to pay, the defendant has the burden not only to raise the issue of inability to pay a fine, but also to “present evidence of his or her inability to pay the amounts.”

(*People v. Castellano* (2019) 33 Cal.App.5th 485, 490 (*Castellano*); accord, § 1202.4, subd. (d) [“A defendant shall bear the burden of demonstrating his or her inability to pay”]; *Kopp, supra*, 38 Cal.App.5th at p. 96; *People v. Santos* (2019) 38 Cal.App.5th 923, 934.)

Here, the record here does not suggest that Navarro would be unable to pay the restitution fine or victim restitution payment. Unlike the defendant in *Dueñas*, there is no evidence that Navarro suffers from a disability, that he has a past history of being unable to pay court assessments, that he lacks savings or sellable assets, or that he needs to devote all of a limited supply of assets and income to vital child-care needs. According to Navarro, until July 2002, he had been working as a paid informant for law enforcement, and he was selling drugs. (See 18 RT 3334, 3340, 3347-3348, 3382-3383, 3454-3455; 19 RT 3481, 3627-3628; 21 RT 3965-3969, 3971-3972.) He also fixed up vintage cars and sold them to make money. (18 RT 3454-3455.) Navarro said he lived in several houses in 2002, including one in Sun Valley and another in Canyon Country; it is unclear from the record whether he owned any of the houses. (18 RT 3342-3345, 3371-3372.) At the time of his arrest, Navarro owned at least two cars, one of which he kept in a garage at the Canyon Country house. (18 RT 3372, 3440-3441; 8 CT 2220.)

In addition, Navarro had worked with his brother on film sets as a grip and a consultant. (35 RT 6299-6301.) At trial Navarro testified that around 2001, he worked for Warner Brothers Studio, making about \$19 an hour and working 40 or 50

hours a week. (18 RT 3443-3445.) And according to one of Navarro's daughters, he used to buy her clothes and other items, like a bicycle. (36 RT 6343.) Thus, the record in this case does not establish that Navarro would be unable to pay the restitution fines.

Furthermore, future earnings, including prison wages,<sup>4</sup> are also relevant to appellant's ability to pay as a constitutional matter and under state law. (*Aviles, supra*, 39 Cal.App.5th at p. 1076 [ability to pay fines includes consideration of wages that appellant may earn in prison]; *Kopp, supra*, 38 Cal.App.5th at p. 96 [same]; *Castellano, supra*, 33 Cal.App.5th at p. 490 [same]; see *Fuller v. Oregon* (1974) 417 U.S. 40, 46-47 [rejecting equal protection challenge to statute requiring recoupment of counsel fees from convicted defendants who are indigent at time of criminal proceedings but who subsequently gain ability to pay legal representation expenses]; § 1202.4, subd. (d) [in considering a defendant's inability to pay as a factor in setting the amount of the fine in excess of the minimum fine, "[c]onsideration of a defendant's inability to pay may include his or her future earning capacity"].)

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<sup>4</sup> State prison inmates are compensated for assigned work. Prison wages range from \$12 to \$56 per month, depending on the prisoner's skill level. (*Aviles, supra*, 39 Cal.App.5th at p. 1076, citing Cal. Code Regs., tit. 15, § 3041.2; see Cal. Dept. of Corr. & Rehab. Operations Manual, § 51120.6 (2019).) The state may garnish between 20 and 50 percent of those wages to pay the section 1202.4, subdivision (b), restitution fine. (*Aviles, supra*, at p. 1076, citing § 2085.5, subs. (a), (c).)



As Navarro acknowledges (Third Supp. AOB 18), section 2700.1, which became effective on October 25, 2017, requires capital inmates “to work as many hours of faithful labor each day he or she is so held.” While Navarro complains that he is barred from working because the opportunity for work is limited for capital inmates (Third Supp. AOB 18), the fact remains that he is apparently eligible to work and has not shown that a job will never be available to him. Navarro was sentenced to death and faces a lengthy and indeterminate prison term. When Navarro was sentenced, he was 41 years old, suggesting that he was able-bodied and capable of performing work. (See 8 CT 2219.)

Nothing in the record points to circumstances, such as a disability, casting doubt on Navarro’s ability to obtain the funds for payment in the future. Accordingly, it can be presumed that Navarro had the ability to satisfy the imposed fine through his prison wages and future earnings. (See *People v. Castellano*, *supra*, 33 Cal.App.5th at p. 490; *Frye*, *supra*, 21 Cal.App.4th at p. 1487; see also *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) Indeed, so long as the defendant’s prison wages allow him to “begin paying at least some of the imposed” fines and assessments, these monetary orders do not violate the excessive fines clause. (*People v. Lowery* (2020) 43 Cal.App.5th 1046, 1061.)

In sum, the imposed restitution fine and victim restitution payment were not constitutionally excessive. (See *Aviles*, *supra*, 39 Cal.App.5th at p. 1072 [\$10,000 restitution fine was not excessive under *Bajakajian* factors]; *People v. Gutierrez* (2019) 35

Cal.App.5th 1027, 1040-1041 (conc. opn. of Benke, J.) [same]; see also *People v. Torres* (2019) 39 Cal.App.5th 849, 860, fn. 4.)

**C. The trial court did not abuse its discretion by imposing the \$10,000 restitution fine under Penal Code section 1202.4**

Navarro further contends that the trial court abused its discretion by imposing the \$10,000 restitution fine under section 1202.4, subdivision (b), without considering his ability to pay. (Third Supp. AOB 14-20.) The trial court, however, properly exercised its discretion when ordering the maximum amount under the statute. The trial court had discretion to impose a restitution fine that exceeded the minimum amount set by statute. As stated above, section 1202.4 provides that fines should be set “at the discretion of the court and commensurate with the seriousness of the offense.” (§ 1202.4, subd. (b)(1); *People v. Urbano* (2005) 128 Cal.App.4th 396, 406 [“Within the range authorized by statute, the court has wide discretion in determining the amount” of fine].) Relevant factors to consider in setting the fine above the minimum include:

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.

(§ 1202.4, subd. (d).)

Further, a court is not required to make express findings as to the factors bearing on the amount of the fine (§ 1202.4, subd. (d)), and because the defendant bears the burden of demonstrating an inability to pay, the defendant is impliedly

presumed to have an ability to pay unless the defendant adduces contrary evidence. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) The trial court may consider the defendant's ability to pay in the future, including the defendant's ability to obtain wages in prison. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487 (*Frye*); see § 2700.1.)

On appellate review, the court must apply all presumptions in favor of the lower court's exercise of sentencing discretion, and the trial court's sentence "must be affirmed unless there is a clear showing the sentence choice was arbitrary or irrational." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Thus, "a decision will not be reversed merely because reasonable people might disagree. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978, internal quotation marks and citations omitted.) The court is presumed to be aware of and to follow the law, including when exercising its discretion at sentencing. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497; accord *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178-1179.)

That presumption applies here. (*Valenti, supra*, 243 Cal.App.4th at pp. 1178-1179.) Here, the trial court's order was based on the probation report's recommendation that Navarro be ordered to pay the maximum restitution fine of \$10,000 under section 1202.4, subdivision (b)(1). (39 RT 6832; 8 CT 2245.)

Under section 1202.4, subdivision (d), appellant's inability to pay is but one factor for the court to consider in setting the maximum fine. As discussed above, the gravity of Navarro's offenses against Montemayor warranted the maximum fine. Further, the record does not suggest that Navarro would be unable to pay the restitution fine. And, as also set forth above, Navarro has an opportunity to work during his lengthy indeterminate prison term. Accordingly, it can be presumed that Navarro had the ability to satisfy the imposed fine through his prison wages and future earnings. (See *Castellano, supra*, 33 Cal.App.5th at p. 490; *Frye, supra*, 21 Cal.App.4th at p. 1487.)

Accordingly, the trial court did not abuse its discretion in ordering Navarro to pay the \$10,000 restitution fine.

## CONCLUSION

For the foregoing reasons and the reasons set forth in Respondent's Brief, this Court should affirm the judgment in its entirety.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S THIRD SUPPLEMENT BRIEF uses a 13 point Century Schoolbook font and contains 3,538 words.

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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.

1/11/2021

Date

/s/Walter Hernandez

Signature

Bergman, Christine (225146)

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Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

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