SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL FREDERICKSON, Defendant and Appellant.	Capital Case No. S067392 Orange County Superior Court No. 96CF1713

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange
Honorable William R. Froeberg, Judge

DOUGLAS WARD
State Bar No. 133360
P.M.B. #199
350 Bay Street
San Francisco, California 94133
Phone (415) 494-9252

Attorney for Appellant

DEATH PENALTY

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ARGUMENT

THE $10,000 RESTITUTION FINE IMPOSED BY THE TRIAL COURT IS UNLAWFUL BECAUSE THE FINE WAS IMPOSED IN APPELLANT'S ABSENCE AND WITHOUT ADEQUATE NOTICE, THE RECORD FAILS TO SHOW THAT THE TRIAL COURT FULLY AND FAIRLY CONSIDERED APPELLANT'S INABILITY TO PAY THE FINE, AND THE AMOUNT OF THE FINE ABOVE THE STATUTORY MINIMUM SHOULD HAVE BEEN DETERMINED BY THE JURY

A. Procedural Background

On February 18, 1997, an information was filed charging appellant with a single count of murder and one special circumstance, murder in the commission or attempted commission of robbery. (Pen. Code, §§ 187 & 190.2, subd. (a)(17)(i); 1 CT 68-69.) [1] As appellant was indigent, the public defender was initially appointed to represent him. (Municipal Court RT 4-5;

1. All statutory references made herein are to the Penal Code, unless otherwise specified.

Municipal Court CT 1.) He subsequently exercised his right under *Faretta v. California* (1975) 422 U.S. 806, and represented himself at the capital trial; the trial court appointed a private attorney as advisory counsel. (Municipal Court RT 34-39.)

On December 3, 1997, the jury returned a verdict of death on the murder count and found the sole special circumstance allegation to be true. (3 CT 1084; 16 RT 3220.) On that date, the trial court ordered the Orange County Probation Department to prepare a pre-sentence report, and informed appellant of the following with respect to that report: "You have the right to remain silent, that means you do not need to discuss anything with the probation officer if you do not wish to do so." (16 RT 3228.) When appellant asked the court about the purposes of the pre-sentence report, the court responded:

> The probation report is prepared for many, many reasons besides sentencing. It follows you with your prison packet. It's referred to for many purposes other than sentencing. *Obviously, if the court determines that the death penalty is appropriate, whatever is said in the probation report is not going to have much relevance.* If I determine it's not appropriate, maybe it will, maybe it won't.

(16 RT 3228-3229, emphasis added.) The court did not mention the pre-sentence report may be relevant to restitution issues.

The pre-sentence report was filed on January 9, 1998, the same date as the sentencing hearing. The report noted that letters had been sent to members of the victim's family requesting information concerning possible losses incurred, and requests for restitution, but that written responses had not been received. During telephone calls with the family, the victim's mother stated that she had "no financial expenses for which she would request restitution." The victim's brother stated that "he would like restitution for his out-of-pocket expenses" related to counseling. (4 CT 1162-1163.) However,

the prosecutor did not mention victim restitution to the probation officer, either in writing or during a telephone conversation. (4 CT 1164.) With regard to appellant's employment history, the report stated:

> The defendant's employment history includes several casual labor jobs such as a gas station attendant and machine operator helper. He related that he worked for some time for his uncle in Costa Mesa as a fumigator's helper. He also claimed to work as a commercial artist for a company in Costa Mesa, however, this information to date has been unverified and there is no record of such employment in previous Probation files.

(4 CT 1173.) Appellant had been "institutionalized" for much of his life. (4 CT 1174.) [2] The report observed that "[t]here may be restitution owing to the survivors of the victim," but that "restitution could be handled through the Department of Corrections." (4 CT 1177.) The report recommended that appellant "be ordered to pay a restitution fine pursuant to Section 1202.4 (b) of the Penal Code, in the amount of $5,000." (4 CT 1178.) At that time, the maximum permissible amount for a restitution fine under that statute was $10,000. The report made no recommendation with respect to victim restitution. The record does not indicate that appellant was served with or received a copy of the pre-sentence report before or at the sentencing hearing.

As noted, the sentencing hearing occurred on the same date that the pre-sentence report was filed. After the trial court denied appellant's automatic motion to modify the sentence (§ 190.4, subd. (e); 16 RT 3233-3247), the victim's brother made a brief statement, but made no mention of restitution. (16 RT 3247-3248.) The prosecutor also made a brief argument,

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2. The psychological reports filed in this case confirm that appellant had been institutionalized for much of his adolescence and adult life, and had rarely if ever been employed other than as a day laborer. (2 CT 568-635, 640-653.)

but did not mention restitution. (16 RT 3248.) The trial noted that it had reviewed the pre-sentence report, but did not ask appellant whether he had received or reviewed the report. The court sentenced appellant to death on the single murder count; and to four years imprisonment for a firearm use allegation. The court then ordered that appellant be remanded to the custody of the Sheriff for transportation to San Quentin State Prison. (16 RT 3248-3252; CT 1193-1196.) The reporter's transcript of the sentencing hearing contains no mention of a restitution fine or victim restitution. Restitution was not addressed by the victims, the prosecution, the defense, or the trial court. (16 RT 3230-3252.)

However, the abstract of judgment, under a section for "Other Orders," states that appellant is to "pay restitution fine of $10,000. (4 CT 1179.) And the clerk's minute order for the sentencing hearing states that a restitution fine in the amount of $10,000 was imposed. (4 CT 1196.)

One month later, after appellant had arrived at San Quentin, he sent two hand-written letters to the trial court: the first letter requested a copy of the final abstract of judgment; the second complained that the $10,000 restitution fine had been imposed "in absentia." (I Supp CT 44-45.) On March 13, 1998, a record correction hearing occurred at which appellant was not present (I Supp CT 52 [minute order]), but his advisory counsel was. The trial court stated:

> At the sentencing hearing, I had fully intended but did not, on the record, impose a $10,000 restitution fine. Once I discovered that I had not done it on the record, I instructed the clerk to put that in the abstract of judgment. ¶ I received a letter from Mr. Frederickson complaining bitterly about the insertion of that $10,000 restitution fine. I feel as a matter of law I'm required to impose a restitution fine.
>
> Since it is the maximum amount, I suppose there's some room for argument, but at this point, I didn't really see that there was any need to bring Mr. Frederickson down just to

> resentence him for the purpose of putting in the restitution fine. If counsel feel it's necessary, I will get him shipped back down.

(March 13, 1998 RT 3254.) Advisory counsel stated that he had not researched the issue but offered to advise appellant "of this discussion," to review the issue and advise appellant, and to advise the court if appellant had any objections to it." (March 13, 1998 RT 3255.) The minute order for the hearing that occurred on March 13, 1998, states that the "Court clarified record and orders Restitution fine of $10,000 which was ordered at time of sentencing but not on record." No further mention of the restitution fine occurred; the record was certified by the trial court one month later. (I Supp. CT 53-54.)

B. The Trial Court's Imposition of the $10,000 Restitution Fine Violated Appellant's Right to Adequate Notice and a Meaningful Opportunity to be Heard, and His Right to Be Present and Contest the Imposition and Amount of the Fine

Section 1202.4, subdivision (b), provides that a restitution fine must be imposed in every criminal case in which a conviction is obtained, unless the trial court finds compelling and extraordinary reasons for not doing so. At the time that the capital crime was committed in appellant's case, the minimum restitution fine for a felony conviction was two hundred dollars ($200), and the maximum was ten thousand dollars ($10,000). Restitution fines are deposited in the Restitution Fund in the State Treasury. (§ 1202.4, subd. (e).) A separate form of restitution, direct victim restitution, is provided for by section 1202.4, subdivision (f), is not limited in its amount, and is paid by the defendant directly to the victim. (*People v. Villalobos* (2012) 54 Cal.4th 177, 180-181; *People v. Millard* (2009) 175 Cal.App.4th 7, 35.) Restitution fines and victim restitution are "distinct, nonoverlapping penalties" (*People v. Villalobos*, *supra*, 54 Cal.4th at p. 185), and are "qualitatively different" from each other (*People v. Harvest* (2000) 84 Cal.App.4th 641, 647).

In this case, no direct victim restitution was requested by the prosecution or imposed by the trial court. With respect to a restitution fine, it was not mentioned at the sentencing hearing, when appellant was present. Instead, the then-maximum amount for a restitution fine, $10,000, was inserted in to the abstract of judgment by the clerk at the trial court's instructions, and filed after the sentencing hearing. As soon as appellant became aware of the trial court's actions, he objected by letter sent from San Quentin to the trial court. At the proceeding that occurred on March 13, 1998, in appellant's absence, the trial court informed appellant's advisory counsel of what had occurred.

What had occurred is that the trial court attempted to impose the maximum restitution fine in appellant's absence and without affording him a meaningful opportunity to contest the fine. This was error. [3]

The sentencing process of a criminal trial must satisfy the requirements of the Due Process Clause. (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) Due Process requires that a defendant receive notice and a reasonable opportunity to contest a judicial determination. (See *Matthews v. Eldridge* (1976) 424 U.S. 319, 335; *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1108.) In particular, a defendant must be afforded a reasonable opportunity to be heard on the issue of restitution. (See § 1202.4, subd. (d); *People v Sandoval* (1989) 206 Cal.App.3d 1544, 1550; cf. *People v. Carbajal* (1995) 10 Cal.4th 1114, 1125 ["defendant is entitled to notice that restitution for the property damage may be considered as a condition of probation and must be given a

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3. Appellant is not questioning a trial court's "inherent power to correct clerical errors in its records so as to make these records reflect the true facts[.]" (*People v. Mitchell, supra*, 26 Cal.4th at p. 185.) His complaint is that, inter alia, he was not present when the trial court "imposed" the fine and was denied a meaningful opportunity to be heard on the issue.

meaningful opportunity to controvert the information to be considered and relied on by the court in sentencing"]; § 1214, subd. (b) [restitution order is deemed a money judgment if the defendant was informed the right to a judicial determination and provided with a hearing].)

Here, the record does not affirmatively show that appellant received adequate notice of the trial court's intention to impose a restitution fine at sentencing, much less the maximum permitted by statute. Although the pre-sentence report recommended that appellant be ordered to pay a restitution fine in the amount of $5,000" (4 CT 1178), that report was not filed until the day of the sentencing hearing, January 9, 1998. The record does not show that appellant received a copy of the pre-sentence report or was made aware of its recommendations prior to the sentencing hearing. As noted, the court had informed appellant before the sentencing hearing: "Obviously, if the court determines that the death penalty is appropriate, whatever is said in the probation report is not going to have much relevance." (16 RT 3228-3229.) This statement by the trial court effectively advised appellant that if he were sentenced to death, the pre-sentence report was irrelevant; i.e., it was unnecessary for appellant to review the report.

Nor was appellant given a meaningful opportunity to be heard regarding the trial court's imposition of the maximum allowable restitution fine. The fine was not mentioned during the sentencing hearing, when appellant was present and could have been heard. It was imposed by way of the abstract of judgment, filed in appellant's absence. The trial court admitted as much at the hearing that occurred on March 13, 1998, several months after the sentencing hearing: "At the sentencing hearing, I had fully intended but did not, on the record, impose a $10,000 restitution fine. Once I discovered that I had not done it on the record, I instructed the clerk to put that in the abstract of judgment."

Further, the amount of the fine imposed by the trial court ($10,000) vastly exceeded the amount recommended in the pre-sentence report ($5,000). When a trial court imposes a restitution fine in excess of that recommended in the pre-sentence report, without first bringing that prospect to a defendant's attention and affording him an opportunity to contest it, the defendant has been deprived of any meaningful opportunity to be heard. (Cal. Judges Benchguides, *Restitution* 83 (CJER 2014 rev.), § 83.47, p. 83-34.)

The imposition of the restitution fine also violated appellant's right to be present at all critical stages of the proceedings. A defendant has a state and federal constitutional right to be present and defend himself at every critical stage of a criminal trial. (U.S. Const., Amends. V, VI & XIV; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *Illinois v. Allen* (1970) 397 U.S. 337, 338; Cal. Const., art. I, § 15; *People v. Frye* (1998) 18 Cal.4th 894, 1010.) The sentencing hearing in a criminal case is the proceeding at which a trial court orally pronounces sentence and judgment is rendered. (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9.) It is a critical stage of the proceedings at which a defendant has the right to appear in person and to present evidence with respect to mitigation of sentence. (See *Mempa v. Rhay* (1967) 389 U.S. 128, 133-135; *People v. Frye*, *supra*, 18 Cal.4th at p. 1010; *People v. Robertson* (1989) 48 Cal.3d 18, 60.) The pronouncement of judgment that occurs at a sentencing hearing is also "a critical stage in the criminal prosecution" at which a defendant has the right to be present. (*In re Cortez* (1971) 6 Cal.3d 78, 88; see also *People v. McGraw* (1981) 119 Cal.App.3d 582, 594, fn. 1.) And, any fine that is imposed is an element of the judgment that is pronounced. (See § 1445 ["When the defendant pleads guilty, or is convicted, either by the court, or by a jury, the court shall render judgment thereon of fine or imprisonment, or both, as the case may be"]; *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [a restitution fine is part of the judgment]; *People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9).

A defendant's right under the state and federal constitutions to be present at every critical stage of a trial, including sentencing and the pronouncement of judgment, is guaranteed by statute in California. Sections 977 and 1043 provide that in a felony case, the defendant must be present at all proceedings, absent a written waiver or disruptive behavior. Section 977 specifically mandates that a defendant shall be present "at the time of the imposition of sentence." In addition, section 1193, subdivision (a) states that, absent an explicit waiver, a defendant convicted of a felony "shall be personally present when judgment is pronounced against him or her."

Appellant's right to be present at the sentencing hearing and at the pronouncement of judgment is not affected by section 1202.4, subdivision (d), which states that a "separate hearing for the [restitution] fine shall not be required." This provision does not state that no hearing is required; it states that a "separate" hearing is not required. The question is, separate from what? The answer is, separate from the sentencing hearing. This is the understanding of the Judges Benchguide relating to restitution: "The defendant is not entitled to a hearing apart from the sentencing hearing with respect to the restitution fine." (Cal. Judges Benchguides, *supra*, § 83.14, p. 83-19.)

Here, appellant was present at the sentencing hearing and the oral pronouncement of judgment, but the $10,000 restitution fine was neither mentioned nor imposed during that proceeding. As the trial court subsequently acknowledged, the fine was "imposed" in the abstract of judgment prepared and filed after the hearing, when appellant was not present. His right to be present at the imposition of the restitution fine, guaranteed by the state and federal constitutions, and by statute, was violated.

These claims are fully preserved for appeal. Insofar as the trial court did not mention the restitution fine during the sentencing hearing, there was

nothing against which appellant could object. In *People v. Martinez* (2002) 95 Cal.App.4th 581, where the trial court's oral imposition of restitution and parole revocation fines differed from the amounts stated in the clerk's minute order, the court of appeal rejected the Attorney General's argument that the error was forfeited: "we can see no reason to apply waiver of the error, the significant part of which was committed outside of the defendant's presence and presumably when he did not have an opportunity to address it." (*Id.* at pp. 586-587.) In appellant's case, more than a "significant part" of the error occurred outside his presence; the entire error occurred outside his presence.

Moreover, appellant objected to the imposition of the fine at the first available opportunity to do so: he first became aware of the restitution order while he was at San Quentin, and immediately wrote to the trial court and voiced his objections. His objections were noted by the trial court at the hearing that occurred on March 13, 1998. It is true that advisory counsel stated that he would advise appellant of his rights and stated that he would advise the court if appellant "still has objections to it." But the record does not reveal whether advisory counsel advised appellant of his rights; and there are no further mentions of the restitution fine in the record before the trial court certified the record, one month later. Appellant's letters to the trial court regarding restitution leave no room for equivocation on the matter: in the trial court's words, "Mr. Frederickson complain[ed] bitterly about the insertion of that $10,000 restitution fine." It would be contrary to the record to infer that Mr. Frederickson had no objections to the imposition of the maximum restitution fine. Finally, advisory counsel's comments cannot supplant appellant's right to be present and be heard when the fine is imposed; no written waiver of the right to be present exists in the record.

Nor can a duty to object be inferred from the recommendation of a $5,000 fine made in the pre-sentence report: the report was filed on the day

of the sentencing hearing; the record does not show that appellant received a copy of the report or was made aware of its recommendations prior to that hearing; and, as noted, the trial court effectively advised appellant that if he were sentenced to death, the pre-sentence report was irrelevant; i.e., not necessary to review. Even had appellant known of the recommendation, he could reasonably have assumed that the court had decided not to impose the fine in light of its imposition of the ultimate punishment, the death sentence.

Finally, the trial court erred when it instructed the clerk to insert the maximum restitution fine in the abstract of judgment. An abstract of judgment cannot add to or modify the oral pronouncement of judgment: "An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell*, *supra*, 26 Cal.4th at p. 185.) Here, with respect to the restitution fine, the abstract of judgment added to and thereby modified the oral pronouncement of judgment; the latter contained no mention of a restitution fine; the former imposed the maximum amount.

A defendant may be entitled to relief related on due process grounds "if the hearing procedures are fundamentally unfair." (*People v. Peterson* (1973) 9 Cal.3d 717, 726.) Here, the hearing procedures relating to the imposition of the restitution fine violated appellant's rights to adequate notice and a meaningful opportunity to be heard. The fine must be reduced to the statutory minimum, or the case must be remanded to the trial court for a proceeding at which appellant is present and provided a meaningful opportunity to be heard.

With respect to the violation of appellant's right to be present when the restitution fine was imposed, this Court has concluded that such errors are evaluated under the "harmless beyond a reasonable doubt" standard. (See

People v. Davis (2005) 36 Cal.4th 510, 532; *Chapman v. California* (1967) 386 U.S. 18, 23.) The violation of appellant's statutory right to be present is evaluated under the standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, for state law errors, and is reversible only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Davis*, *supra*, 36 Cal.4th at pp. 532-533.)

Under any standard of review, the violation of appellant's right to notice of, to be present at, and to be heard when the restitution fine was imposed was prejudicial. In the context of restitution, that error is particularly prejudicial when a trial court exceeds the pre-sentence recommendations without first bringing that prospect to the defendant's attention and affording the defendant an opportunity to contest it. (See *People v Sandoval*, *supra*, 206 Cal.App.3d at p. 1550.) Here, the trial court exceeded the probation department's recommended restitution fine by $5,000. Appellant was effectively denied the opportunity to argue against that substantial increase, or to argue that only the statutory minimum fine should be imposed. And there were good and sufficient reasons for the court not to exceed the amount recommended by the probation department: appellant's indigency, his inability to pay, and his lack of any future earning capacity. (See subsection C., *post.*) The "appropriateness of a restitution fine is fact-specific" inquiry. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) It is impossible to determine on appeal how the trial court may have reacted to those arguments in setting the fine. The court imposed the maximum fine allowed by statute; any reduction of that amount would constitute a result more favorable to appellant.

Moreover, although a restitution fine under section 1202.4, subdivision (b) is mandatory in all criminal cases, a trial court may waive the fine if, in the words of the statute, there are "compelling and extraordinary reasons" to do

so. By imposing the fine in appellant's absence, appellant was denied the right to persuade the court that the reasons listed above constituted compelling and extraordinary reasons to waive the fine.

Most importantly, at the proceeding that occurred on March 13, 1998, the trial court noted: "Since it is the maximum amount, I suppose there's some room for argument[.]" This statement is an express acknowledgement that the court's decision to impose the maximum fine may have been changed had appellant been afforded an opportunity to be heard. Thus, these errors should not be found harmless based on a belief that a new hearing would be "idle." Long ago, this Court noted:

> It is obviously impossible in the usual case to discern the inner workings of the original sentencing judge's mind and determine in which cases a hearing would be a perfunctory proceeding. It seems equally obvious that the question whether the defendant should be accorded a hearing should not turn upon an empirical predetermination of the likelihood of its success.

(*In re Cortez, supra*, 6 Cal.3d at p. 86, fn. 8.) In other words, the right to be heard "does not depend upon an advance showing that one will surely prevail at the hearing." (*People v. Hernandez* (2009) 172 Cal.App.4th 715, 722, internal quotation marks omitted.)

Finally, this is not a case where this Court can correct the error on appeal. The error is not clerical; the erroneous imposition of the restitution fine was the result of fundamentally unfair procedures, the lack of adequate notice, the right to be present, and the right to be heard. The imposition of the fine in this case violated appellant's rights and must be reduced to the statutory minimum. Alternatively, appellant must have an opportunity to be heard by the trial court, and to contest the imposition of the fine and the amount thereof.

C. The Record Fails To Show That the Trial Court Fully and Fairly Considered Appellant's Inability To Pay The Maximum Restitution Fine

Section 1202.4, subdivision (b) requires a trial court to impose a restitution fine where a felony conviction is obtained, unless compelling and extraordinary reasons exist to waive it. (§ 1202.4, subd. (b); *People v. Tillman* (2000) 22 Cal.4th 300, 302.) A defendant's inability to pay a restitution fine is not an adequate reason for a trial court to waive the fine. (§ 1202.4, subd. (c).) However, when a trial court sets the amount of the fine above the $200 minimum, it must take into consideration, among other factors, the defendant's "inability to pay" and "his or her future earning capacity." (§ 1202.4, subd. (d).) In other words, a defendant's inability to pay cannot constitute a reason to waive a restitution fine, but it must be considered if the amount of the fine imposed exceeds the statutory minimum. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1486.)

A defendant is presumed to be able to pay a restitution fine, but the presumption is rebuttable. (§ 1202.4, subd. (d); *People v Romero* (1996) 43 Cal.App.4th 440, 448-449.) In this case, appellant was effectively disbarred from rebutting the presumption of an ability to pay the maximum fine by the denial of his rights to adequate notice and a meaningful opportunity to be heard on that issue. A party can hardly rebut a presumption when s/he is denied the right to be heard on the issue.

Where a trial court imposes a fine above the statutory minimum, express findings by the court regarding its consideration of the relevant statutory factors, including the ability to pay, is not required. (§ 1202.4, subd. (d).) This Court has held that the absence of an express finding regarding an ability to pay, as in this case, does not demonstrate that a trial court failed to consider that factor, unless there is evidence indicating that the court breached its duty to consider the factor. (*People v. Nelson* (2011) 51 Cal.4th 198, 227;

People v. Gamache (2010) 48 Cal.4th 347, 409.) In *Gamache* and *Nelson*, the restitution was imposed in open court in the defendant's presence and, presumably, the defendant in each case was given an opportunity to be heard on the issue. In such circumstances, it is reasonable to assume that the trial court fairly considered the defendant's ability to pay, notwithstanding the absence of express findings. However, when a fine is imposed in absentia, as the trial court acknowledged occurred in this case, it cannot be said with assurance that the court fully and fairly considered the defendant's ability to pay. A full and fair consideration of a statutory factor requires that the defendant be afforded an opportunity to be heard on the factor.

Had the trial court conducted its statutorily mandated consideration of appellant's ability to pay a $10,000 restitution fine, appellant could have established that he did not and would not have the ability to pay any fine greater than the $200 minimum.

First, appellant had no ability to pay for an attorney at the beginning of the trial because he was indigent: the trial court itself made a determination that appellant was indigent when it appointed the Orange County Deputy Public Defender as counsel at state expense after appellant's arrest. (Municipal Court RT 4-5.)

Second, the record shows that appellant had been institutionalized for much of his life, part of it in Atascadero. There is nothing in the record to show that he ever owned a car, real property, or any significant property.

Third, the pre-sentence report provides substantial evidence that appellant did not have the ability to pay a $10,000 fine. The California Rules of Court requires a pre-sentence report to include a "reasoned discussion of the defendant's ability to make restitution, pay any fine or penalty that may be recommended[.]" (Cal. Rules of Ct., rule 4.411.5 (a)(9)(E).) The report in appellant's case does not contain an express, reasoned discussion of his ability

to pay restitution. Therefore, the trial court did not have access to this information when it imposed the maximum restitution fine. But the report's recitation of appellant's lack of any meaningful employment, the fact that he never finished high school, his near life-long history of institutionalization, and a recommendation of a restitution fine in the amount of one-half of the maximum allowed by statute is equivalent to a recognition of an inability to pay the maximum $10,000 fine.

Fourth, a trial court's consideration of a defendant's inability to pay may include his or her future earning capacity. (§ 1202.4, subd. (d); *People v Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) However, as a condemned inmate on Death Row at San Quentin, appellant would have virtually no opportunity to work, much less to earn $10,000. In *In re Barnes* (1985) 176 Cal.App.3d 235, 239, the court noted that the Department of Corrections and Rehabilitation gives lowest priority for work assignments to condemned prisoners and prisoners in security housing units. Section 2933.2 provides that "any person convicted of murder, as defined in Section 187, shall not accrue any [worktime] credit." A federal district court has noted that on California's death row, being "indigent is essentially a foregone conclusion. Of the 670 inmates on California's Death Row in 2008, each was indigent[.]" (*Jones v. Chappell* (N.D. Cal. 2014) 31 F.Supp.3d 1050, 1056, fn. 10, reversed on other grounds in *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538.) Appellant is unaware of any fact or law showing that any significant percentage of death row inmates are allowed to work for wages. He should have been permitted to show this at a hearing.

This Court has rejected claims that a defendant's inability to pay can be substantiated by "the bare fact of his impending incarceration[.]" (*People v. Nelson*, *supra*, 51 Cal.4th at p. 227; see also *People v. Gamache*, *supra*, 48 Cal.4th at p. 409.) Here, however, appellant's inability to pay a $10,000 restitution fine is

substantiated by a number of facts. Appellant has pointed to the trial court's determination of his indigency, the record, the pre-sentence report, and the likelihood that the vast majority of condemned inmate have little if any future earning capacity.

This Court has held that a defendant's failure to object to the imposition of a restitution fine during sentencing forfeits an "ability to pay" objection to the imposition of the fine. (See *People v. Gamache*, *supra*, 48 Cal.4th at p. 409; see also *People v. Gibson*, *supra*, 27 Cal.App.4th at pp. 1467-1469.) However, as argued above, appellant cannot be found to have forfeited these claims: at the oral imposition of the sentence, the trial court made no mention of the restitution fine; appellant was not present when the fine was inserted in to the abstract of judgment. When he first became aware of the imposition of the fine, after having arrived at San Quentin, he objected by letter.

In sum, there is no substantial evidence in the record regarding appellant's ability to pay a $10,000 fine, or his future earning capacity. Appellant was legally indigent at the outset of the criminal proceedings, and, having been sentenced to death, will effectively remain so. And, having been denied the opportunity to be heard on the issue, the record does not show that the trial court fully and fairly considered the issue.

Normally, the amount of a restitution order imposed by a trial court is reviewed for abuse of discretion, and is upheld when supported by the record. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664; *People v McGhee* (1988) 197 Cal.App.3d 710, 715-717.) But a restitution order resting upon a demonstrable error of law constitutes an abuse of a court's discretion. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) In this case, the order rests upon several demonstrable errors of law: it was imposed in appellant's absence, without adequate notice, and without affording him the right to be heard and contest the order. A trial court cannot reliably and fairly consider the statutory

factors in section 1202.4 used in determining the amount of a restitution fine, including the defendant's ability to pay, when it has imposed the fine in the defendant's absence, and increases the amount recommended by the pre-sentence report. As noted, the "appropriateness of a restitution fine is fact-specific" inquiry. (*People v. Gibson*, *supra*, 27 Cal.App.4th at p. 1468.)

Not having heard from appellant, the trial court apparently believed that the statutory maximum restitution fine, $10,000, was appropriate in this case: at the hearing that occurred on March 13, 1998, held in appellant's absence, the court did state that it had intended to impose the $10,000 fine at the sentencing hearing. However, it also recognized that there was "some room for argument." That room for argument should have been afforded to appellant.

Victim restitution orders may not be based solely upon the trial court's subjective belief regarding the appropriate amount: there must be a factual and rational basis for the amount ordered, and the defendant must be permitted to dispute the amount or manner in which restitution is to be made. (§ 1202.4, subd. (f); *People v. Carbajal*, *supra*, 10 Cal.4th at p. 1125.) The same must be true for restitution fines above the statutory minimum: a defendant must be permitted to dispute the amount of a restitution fine; and the trial court must fairly consider the statutory factors relevant to determining the amount of the fine. Accordingly, appellant respectfully requests this Court to modify the restitution fine to the statutory minimum of $200, or to remand the cause for a proper determination of the amount of restitution in light of his inability to pay.

D. The Restitution Fine Violates *Apprendi* and Its Progeny Because the Determination of the Amount of the Fine Above the Statutory Minimum Should Have Been Made by the Jury

A restitution fine under section 1202.4 is a penalty. (See *People v. Villalobos*, *supra*, 54 Cal.4th at p. 185.) It is also punishment: "It is well

established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions." (*People v. Souza* (2012) 54 Cal.4th 90, 143; see also *People v. Hanson* (2000) 23 Cal.4th 356, 361 [Legislature intended restitution fines as a criminal penalty]; *People v. Walker* (1991) 54 Cal.3d 1013, 1024 ["[a]lthough the purpose of a restitution fine is not punitive, we believe its consequences to the defendant are severe enough that it qualifies as punishment"]; Note, *Victim Restitution in the Criminal Process: A Procedural Analysis* (1984) 97 Harv. L.Rev. 931, 933-934 [restitution has historically been understood as punishment].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held: "Other 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." (*Id.* at p. 490.) Twelve years later, in *Southern Union Co. v. United States* (2012) 567 U.S. __ [132 S.Ct. 2344, 2357, 183 L.Ed.2d 318], the high court held that *Apprendi* applied to the imposition of criminal fines. In the high court's view:

> *Apprendi's* "core concern" is to reserve to the jury "the determination of facts that warrant punishment for a specific statutory offense." That concern applies whether the sentence is a criminal fine or imprisonment or death.

(*Id.* at p. 2350, internal citation omitted.) The following year, in *Alleyne v. United States* (2013) 570 U.S. __ [133 S.Ct. 2151, 2158], the high court concluded that any fact that increases the mandatory minimum sentence for crime is an "element" of the crime, not a "sentencing factor," and must be submitted to the jury. (*Id.* at pp. 2158-2161.)

In this case, the trial court, not the jury, determined that appellant should pay the then-applicable maximum $10,000 restitution fine allowed by section 1202.4, subdivision (b). A restitution fine, being punishment, is part

of the penalty for a crime. Because *Apprendi* and its progeny require that the jury decide any fact that increases the amount of the fine above the mandatory minimum -- $200 under section 1202.4, subdivision (b) -- the trial court erred by failing to submit the matter to the jury for decision beyond a reasonable doubt.

This Court has not decided whether *Apprendi* and its progeny require that a jury determine the amount of a restitution fine imposed under section 1202.4, subdivision (b) that is above the statutory minimum. However, in *People v. Kramis* (2012) 209 Cal.App.4th 346, the court of appeal held that *Apprendi* and *Southern Union* do not apply to restitution fines imposed under section 1202.4, subdivision (b). (*Id.* at pp. 349-352; see also *People v. Pangan* (2013) 213 Cal.App.4th 574, 585-586.) Nevertheless, in light of the United States Supreme Court's decisions in *Southern Union* and *Alleyne*, *Kramis* was mistaken. *Apprendi* and *Southern Union* apply to the imposition of restitution fines that exceed the statutory minimum.

In *Kramis*, the court observed that under section 1202.4, subdivision (b), the minimum fine for a felony conviction was $200, and the maximum fine was $10,000, and concluded that "[i]t is the fact of the conviction that triggers imposition of a section 1202.4, subdivision (b)(1) restitution fine." (*People v. Kramis*, *supra*, 209 Cal.App.4th at pp. 349-350.) The *Kramis* court also noted that because the trial court in *Southern Union*, and not the jury, made a factual finding as to the number of days the defendant violated the applicable statute, and the amount of the fine was tied to the number of days, *Apprendi* was violated. (*Id.* at p. 351.) The court then concluded that *Apprendi* and *Southern Union* did not pertain to the case before it because in imposing a fine of $10,000 under section 1202.4, subdivision (b), "the trial court exercises its discretion within a statutory range." (*Ibid.*) The court added that "[t]he trial court did not make any factual findings that increased the potential fine

beyond what the jury's verdict – the fact of the conviction – allowed." (*Id.* at p. 352.)

The *Kramis* court's analysis of *Apprendi* and its progeny is flawed. In *Alleyne*, the high court concluded:

> In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. . . . *Apprendi's* definition of elements necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

(*Alleyne v. United States*, *supra*, 570 U.S. __ [133 S.Ct. at p. 2158], internal quotation marks omitted.) In other words, "[j]uries must find any facts that increase either the statutory maximum or minimum penalty because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty." (*Id.* at p. 2161, fn. 2, italics in original; see also *People v. Nunez* (2013) 57 Cal.4th 1, 39, fn. 6 [*Alleyne* held that the Sixth Amendment entitles a defendant to a jury trial on any fact that increases a crime's mandatory minimum sentence].) *Kramis* erred in concluding that a trial court's exercises of sentencing discretion within a statutory range in imposing a restitution fine immunizes that determination from the strictures of *Apprendi* and its progeny, including *Southern Union.* Moreover, a trial court does make the equivalent of factual findings when it considers the enumerated statutory factors, including an ability to pay, in determining the amount of a restitution fine above the statutory minimum.

Here, section 1202.4, subdivision (b) established a mandatory minimum fine of $200. Under subdivision (d), various factors may increase that minimum, including factors relating to the defendant and the crime, and

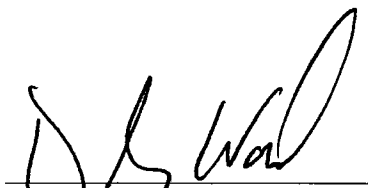
those factors must be considered. Because the trial court imposed more than the statutory minimum fine, and the jury did not decide the factors prescribed in subdivision (d), the imposition of the $10,000 fine by the trial court violated *Apprendi* and its progeny.

Accordingly, the $10,000 restitution fine imposed on appellant must be reduced to the statutory minimum.

CONCLUSION

The $10,000 restitution fine imposed by the trial court cannot stand because the fine was imposed in appellant's absence, the evidence in the record is insufficient to support a finding that appellant had the ability to pay the fine, and the jury, not the judge, should have determined the amount of the fine over $200. The restitution fine must be reduced to the statutory minimum. Alternatively, the matter must be remanded to the trial court for an appropriate hearing.

DATED: September 8, 2016.



DOUGLAS G. WARD
State Bar No. 133360

Attorney for Appellant
DANIEL FREDERICKSON

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of my word processing software, that this brief, excluding the tables, contains approximately 6,900 words.

DATED: September 8, 2016.

DOUGLAS G. WARD

Attorney for Appellant
DANIEL FREDERICKSON

DECLARATION OF SERVICE

Re: *People v. Frederickson*, No. S054372

I, the undersigned, declare as follows:

I am a citizen of the United States over the age of 18 years, and not a party to the within action; my business address is 363 Dimaggio Ave, Pittsburg, California 94607.

On September 12, 2016, I served a copy of the following document:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by placing one copy of the document in a sealed envelope addressed to each person or entity listed below, placing first class postage on each envelope, and depositing said envelopes with the United States Postal Service in Pittsburg, California.

The Honorable Kamala Harris
Attorney General of the State of California
Attn. Ms. Tami Falkenstein Hennick
110 W. "A" Street, Suite 1100
San Diego, California 92101

Clerk of Superior Court
Attn: Death Penalty Appeals
Superior Court of Orange County
700 Civic Center Drive West
Santa Ana, California 92702

Mr. James Tanizaki
Orange County District Attorney
P.O. Box 808
Santa Ana, California 92702

Mr. Daniel Frederickson
K-81800
San Quentin State Prison
Tamal, California 94974

California Appellate Project
Attn.: Sarah Chester
101 Second Street, #600
San Francisco, California 94105

Office of the State Public Defender
Attn.: Peter Silten
1111 Broadway, 10th Floor
Oakland, California 94607

Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, California 94107

I declare under penalty of perjury that the foregoing is true and correct.

Signed on September 12, 2016, at Pittsburg, California.

NEVA WANDERSEE