

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

**THE PEOPLE OF THE STATE OF CALIFORNIA,**  
  
**Plaintiff and Respondent,**  
  
**v.**  
  
**IRVING ALEXANDER RAMIREZ,**  
  
**Defendant and Appellant.**

**CAPITAL CASE**

Case No. S155160

Alameda County Superior Court Case No. 151080  
The Honorable Jon Rolefson, Judge

## **SUPPLEMENTAL RESPONDENT'S BRIEF**

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## ARGUMENT

### X. IMPOSITION OF THE MAXIMUM RESTITUTION FINE WAS PROPER UNDER STATE AND FEDERAL LAW

Appellant Irving Alexander Ramirez claims that the trial court violated state law and his federal and state constitutional rights by imposing the maximum \$10,000 restitution fine without first determining his ability to pay.<sup>1</sup> (SAOB 6.) Ramirez’s claim fails. The record does not support his assertion that the trial court failed to consider his ability to pay and Ramirez had no constitutional right to an ability-to-pay hearing.

#### A. Relevant Proceedings

The trial court ordered Ramirez to pay a \$10,000 restitution fine pursuant to Penal Code section 1202.4.<sup>2</sup> (14RT 3003.) Both the version of that statute in effect at the time of Ramirez’s offense,<sup>3</sup> and the current version, provide that, “[i]n 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.” (§ 1202.4, subd. (b).) Subdivision (c) specifies that “[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. (§ 1202.4, subd. (c).)

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<sup>1</sup> This Court recently granted review on this issue in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844. This Court framed the issues for review as follows: “Must a court consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant’s inability to pay?”

<sup>2</sup> Further undesignated statutory references are to the Penal Code.

<sup>3</sup> The restitution fine must be based on the law in effect at the time the offense was committed. (*People v. Souza* (2012) 54 Cal.4th 90, 143.)

However, subdivision (d) provides that in setting the restitution fine above the statutory minimum, “the court shall consider any relevant factors including, but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime.” (§ 1202.4, subd. (d).)

The probation officer’s report, prepared in anticipation of sentencing, noted that for “two to three years” prior to his arrest, Ramirez worked part-time as a forklift operator, earning \$10 per hour. (CCT 5.) Before that, he worked “short stints” as a spooler for Tyco Electronics and as a server for various fast food restaurants. (CCT 5.) According to the report, Ramirez denied owning any assets or having any debts. (CCT 5.) He did not finish high school, having dropped out in 11th grade, and had not obtained his GED. (CCT 5.)

The probation officer recommended the maximum restitution fine, explaining that the “impact of [Ramirez’s] offense and the void created are far too great to realize,” and “[i]n keeping with the very serious nature of the offense, it is recommended that [he] pay a restitution fine of \$10,000.” (CCT 8.) At Ramirez’s sentencing hearing on August 3, 2007, the trial court indicated that it would impose the recommended \$10,000 fine. (14RT 3002.) Defense counsel objected “in view of [Ramirez’s] inability to work or have any money from this point forward.” (14RT 3002-3003.) In response, the court stated: “I understand. Interestingly enough, the code expressly says that inability to pay is not a ground for not making the order, and—but I’m going to. I’m making the order.” (14RT 3003.) Over



defense counsel's objection, the court also ordered a probation investigation fee of \$250.<sup>4</sup> (14RT 3003.)

**B. The Trial Court Properly Imposed the Maximum Restitution Fine Pursuant to Penal Code Section 1202.4**

Section 1202.4, subdivision (b), requires the trial court to impose a restitution fine “[i]n every case where a person is convicted of a crime,” absent “compelling and extraordinary reasons for not doing so.” The statute “impliedly presumes a defendant has the ability to pay and expressly places the burden on a defendant to prove lack of ability.” (*People v. Romero* (1996) 43 Cal.App.4th 440, 449.) Ramirez’s claim that the court failed to consider his ability to pay the maximum fine is reviewed for abuse of discretion. (See *People v. Nelson* (2011) 51 Cal.4th 198, 227.) A court abuses its discretion “when its determination is arbitrary or capricious or “exceeds the bounds of reason, all of the circumstances being considered.”” (*People v. Welch* (1993) 5 Cal.4th 228, 234.)

Ramirez’s claim fails because it is premised on a flawed reading of the record. Citing the trial court’s comment that inability to pay is not a “compelling and extraordinary” reason for declining to impose the restitution fine (14RT 3003), Ramirez asserts that the court “plainly stated that it would not consider inability to pay” in imposing a fine above the statutory minimum. (SAOB 8-9.) On this reading of the record, Ramirez argues the court breached its duty to consider his ability to pay and, therefore, abused its discretion in imposing the \$10,000 fine. (SAOB 9.) The record, however, does not support the factual premise of Ramirez’s claim. Instead, it reflects the court’s observation that Ramirez’s purported

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<sup>4</sup> Notably, the probation officer determined that Ramirez “has the ability to pay a probation investigation fee of \$250” and “has been advised of the amount and of the right to have a Court hearing with counsel concerning his ability to pay pursuant to Section 1203.1b of the Penal Code.” (CCT 5.)

inability to pay would not be a sufficient basis on which to forego imposition of the restitution fine *altogether*. (14RT 3003.) Nothing the court said indicated that it would refrain from considering Ramirez’s ability to pay a fine above the minimum amount when imposing the restitution fine.

Importantly, the trial court is presumed to have known and properly followed the established law, which at the time required it to consider Ramirez’s ability to pay a fine exceeding the statutory minimum. (*People v. Diaz* (1992) 3 Cal.4th 495, 567; § 1202.4, subd. (d) [in setting the restitution fine above the minimum, “the court shall consider any relevant factors, including . . . the defendant’s inability to pay”].) The court’s cited comment should be viewed with this presumption in mind, rather than in the light most favorable to Ramirez. Ramirez fails to identify anything else in the record indicating that the court breached its duty to consider his ability to pay. And, as the court “was not obligated to make express findings concerning his ability to pay, the absence of any findings does not demonstrate it failed to consider this factor.” (*People v. Gamache* (2010) 48 Cal.4th 347, 409; § 1202.4, subd. (d) [“Express findings by the court as to the factors bearing on the amount of the fine shall not be required”].) Accordingly, on this record, Ramirez fails to demonstrate that the court abused its discretion in imposing the \$10,000 restitution fine.

Ramirez argues that he was prejudiced by the trial court’s ruling, and in so arguing appears to suggest that a restitution fine is automatically invalid if a defendant is unable to pay it (as Ramirez claims to be). (See SAOB 10-12.) This Court, however, has held to the contrary, explaining that a trial court is “permitted to conclude that the monetary burden the restitution fine impose[s] on [a] defendant [is] outweighed by other considerations.” (*People v. Potts* (2019) 6 Cal.5th 1012, 1057; see also *id.* at p. 1056.) Thus, in *Potts*, this Court concluded that the trial court lawfully

imposed the maximum fine on a condemned inmate, explaining that “[i]nability to pay is a factor for the court to consider in setting the amount of a restitution fine, alongside ‘any relevant factors including, but not limited to . . . 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.’” (*Id.* at p. 1057.)

Indeed, the trial court is required to impose a restitution fine “commensurate with the seriousness of the offense” (§ 1202.4, subd. (b)(1)), and that factor alone may support the maximum \$10,000 restitution fine (see *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505). Even if the probation report showed that Ramirez was unable to pay the maximum restitution fine as he claims, the court nonetheless properly imposed that fine based on the “seriousness and gravity” of Ramirez’s offense. (§ 1202.4, subd. (d).) Ramirez murdered Officer Nels Niemi for the selfish purpose of avoiding his own potential arrest, shooting him once in the back of the head and then five more times as the officer lay helpless on the ground. (9RT 1871-1876, 1896, 1915, 1917; 10RT 2037, 2058, 2062.) After ensuring Niemi’s death, Ramirez showed no remorse for his crime, taking multiple steps to eliminate the evidence against him and even contemplating the murder of his friends, who were witnesses to the crime. (12RT 2351-2352.) His actions had a profoundly negative impact on Niemi’s family, as evidenced by the testimony of three of its members during the penalty phase. (13 RT 2744.) Thus, not only did the “seriousness and gravity” of Ramirez’s offense justify imposition of the maximum fine, but the “circumstances of its commission” and the loss suffered by Niemi and his family—including “intangible losses, such as psychological harm”—also justified the fine. (§ 1202.4, subd. (d).)

Although the foregoing factors supported imposition of the maximum restitution fine, the record also demonstrates that Ramirez was not unable to pay the fine. Under the restitution statute, “[c]onsideration of a defendant’s inability to pay may include his or her future earning capacity.” (§ 1202.4, subd. (d).) “This include[s] the defendant’s ability to obtain prison wages . . . .” (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.)

Condemned inmates are not only permitted to work, but under sections 2700 and 2700.1, they are required to work. Section 2700 requires “every able-bodied prisoner” to perform “as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.” Section 2700.1 makes that requirement applicable to condemned inmates, and further provides:

In any case where the condemned inmate owes a restitution fine or restitution order, the Secretary of the Department of Corrections and Rehabilitation shall deduct 70 percent or the balance owing, whichever is less, from the condemned inmate’s wages and trust account deposits, regardless of the source of the income, and shall transfer those funds to the California Victim Compensation and Government Claims Board according to the rules and regulations of the Department of Corrections and Rehabilitation, pursuant to Sections 2085.5 and 2717.8.

In light of these provisions, even if Ramirez were correct that for practical purposes he cannot earn any wages while incarcerated (SAOB 11-12), 70 percent of *any* deposits made into his trust account—“regardless of the source”—will still be deducted to pay the outstanding restitution fine. (See § 2700.1; see also § 2085.5, subd. (a); Cal. Code Regs., tit. 15, § 3097, subd. (f).) “Indeed, [Ramirez]—unlike prisoners whose release is anticipated—would seem to be subject to deduction rules governing prisoners for the rest of his life.” (*Potts, supra*, 6 Cal.5th at p. 1056, fn. omitted.)

In *People v. DeFrance*, *supra*, 167 Cal.App.4th 486, the Court of Appeal upheld a \$10,000 restitution fine over defendant's argument that he would not have the ability to pay the fine from prison wages, noting that, while it may "be very difficult for him to pay the fine," it may "take a very long time," and "the fine might never be paid," defendant did not "show an absolute inability to ever pay the fine." (*Id.* at pp. 504-505.) The court also observed that "defendant was convicted of a special circumstance murder, so the seriousness of the crime supported the maximum fine." (*Id.* at p. 505.) Similarly, in *People v. Lewis* (2009) 46 Cal.4th 1255, this Court found that funds given to a condemned inmate by his family "to purchase personal items such as toothpaste" could support a determination that the inmate had the ability to pay the maximum restitution fine. (*Id.* at p. 1321.) It further concluded that "the amount of \$10,000 was appropriate" in light of the defendant's offenses and the harm he caused to the victim and her children. (*Ibid.*) Here, too, Ramirez fails to demonstrate an "absolute inability" to pay the restitution fine and the maximum amount of that fine is likewise an appropriate accompaniment to his crime and sentence. (See *DeFrance*, at p. 505)

In sum, there is no indication that the trial court failed to consider Ramirez's ability to pay the \$10,000 fine and Ramirez's "assertion that he was unable to pay the fine did not compel the court to impose a lesser fine." (*Lewis*, *supra*, 46 Cal.4th at p. 1321.) That a portion of Ramirez's income will be seized to satisfy his restitution fine is a minimal burden compared to the incredible loss he inflicted on Officer Nels Niemi and his family. Accordingly, imposition of the maximum restitution fine should be upheld.

**C. Ramirez's Punitive Restitution Fine Is Not Unconstitutionally Excessive**

Ramirez also claims that imposing the maximum restitution fine without considering his ability to pay violates his constitutional rights.

(SAOB 13-16.) The Court of Appeal in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 held that due process of law requires the court to stay execution of the restitution fine unless and until the court holds an ability-to-pay hearing and concludes the defendant has the ability to pay the fine. (*Id.* at pp. 1164, 1171-1172.) Although *Dueñas* analyzed the defendant’s restitution fine using due process principles (*ibid.*), the proper analytic framework is that of the Excessive Fines Clause of the Eighth Amendment.<sup>5</sup> (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069-1071; *Kopp, supra*, 38 Cal.App.5th at pp. 96-97.)

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, fn. omitted; 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. Restitution fines are a form of punishment. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-362.) Accordingly, analysis of Ramirez’s challenge to the restitution fine must be analyzed under the Excessive Fines Clause, rather than general substantive due process. (*Aviles, supra*, 39 Cal.App.5th at pp. 1069-1071; *Kopp, supra*, 38 Cal.App.5th at pp. 96-97; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1040-1041 (conc. opn. of Benke, J.).)

A fine is excessive under the Eighth Amendment “if it is grossly disproportional to the gravity of a defendant’s offense.” (*United States v.*

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<sup>5</sup> The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Article I, section 17 of the California Constitution states: “Cruel or unusual punishment may not be inflicted or excessive fines imposed.”

*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.” (*Kopp, supra*, 38 Cal.App.5th at p. 97, citing *Bajakajian*, at pp. 337-338 and *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; accord, *Aviles, supra*, 39 Cal.App.5th at p. 1070.) An inability to pay a fine does not, by itself, render a fine unconstitutionally excessive. (See *Kopp*, at pp. 97-98 [ability to pay is not the only factor to consider].)

As explained, the record does not support Ramirez’s contention that the trial court failed to consider his ability to pay. In setting the amount of the fine in excess of the minimum, the court was required to “consider any relevant factors, including . . . [Ramirez’s] inability to pay,” and there is no indication that it did not do so. (§ 1202.4, subd. (d).) Moreover, Ramirez does not, and cannot, claim that the \$10,000 restitution fine is “grossly disproportional” to the gravity of his offense. (*Bajakajian, supra*, 524 U.S. at p. 334.) Ramirez murdered an officer in the line of duty in order to avoid his potential arrest and resulting probation violation. He fired his gun at Officer Niemi until it was empty, demonstrating his callous determination to ensure the officer’s death. After the murder, he took multiple steps to eliminate the evidence against him, disposing of the murder weapon and other evidence, collecting potentially incriminating items from his house, and exploring the possibility of eliminating witnesses through the commission of additional murders. In light of all these circumstances, Ramirez’s restitution fine was not “grossly disproportional” to his crimes and not constitutionally excessive. (See *Aviles, supra*, 39 Cal.App.5th at p. 1072 [\$10,000 restitution fine not excessive under *Bajakajian* factors]; see also *People v. Torres* (2019) 39 Cal.App.5th 849, 860, fn. 4.)

#### **D. Ramirez's Punitive Restitution Fine Does Not Violate Due Process**

Even if analyzed under due process principles, Ramirez's restitution fine was constitutionally imposed. Because the fine does not impact a fundamental liberty interest, the fine must be analyzed under rational basis review. Restitution is a form of punishment that is rationally related to the state's interest in punishing criminal defendants and deterring unlawful conduct. (See *Hanson, supra*, 23 Cal.4th at pp. 361-362.)

There is no fundamental liberty interest in avoiding punishment in the form of a fine. (Cf. *United States v. Kras* (1973) 409 U.S. 434, 445 [no due process violation resulted from fee imposed on bankruptcy applicant who lacked the ability to pay because the alleged interest in eliminating debt and obtaining a new start in life did not implicate a fundamental interest].) Rather, due process is implicated only where a defendant, who has no ability to pay, is imprisoned for failure to pay a punitive fine. (See *Bearden v. Georgia* (1983) 461 U.S. 660; *Tate v. Short* (1971) 401 U.S. 395; *Williams v. Illinois* (1970) 399 U.S. 235; *In re Antazo* (1970) 3 Cal.3d 100.) Although *Dueñas* relied on *Bearden* and *Antazo* in its analysis (see *Dueñas, supra*, 30 Cal.App.5th at pp. 1166-1168), those cases have no application here because Ramirez is not subject to and cannot be incarcerated for failure to pay a restitution fine. (See *Torres, supra*, 39 Cal.App.5th at p. 860, fn. 4 [no showing that \$10,000 restitution fine impacts fundamental liberty interest or would result in incarceration if not paid].)

*Dueñas's* reliance on *Mayer v. City of Chicago* (1971) 404 U.S. 189 as establishing that the reasoning of *Antazo* and *Bearden* applies even where imprisonment does not result from a defendant's inability to pay a fine or fee, was misplaced. (See *Dueñas, supra*, 30 Cal.App.5th at pp. 1167-1168.) *Mayer*, and its precursor, *Griffin v. Illinois* (1956) 351 U.S. 12, did not recognize a fundamental right of a criminal defendant to be free



from a punitive fine that he lacked the present ability to pay. Rather, those cases both involved forcing defendants to pay to access the justice system. (See *Mayer*, at p. 196; *Griffin*, at pp. 13, 19; accord, *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 112; *Ake v. Oklahoma* (1985) 470 U.S. 68, 76-77.) Here (and in *Dueñas*) the restitution fine was a form of punishment, not charging for access to the justice system. For this reason, *Mayer* and *Griffin* have no application here.

Because the restitution fine does not implicate a fundamental liberty interest, it must be reviewed only for rationality. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 728; see also *Perkey v. Department of Motor Vehicles* (1986) 42 Cal.3d 185, 189.) Under a rational basis test, “it suffices if the law could be thought to further a legitimate governmental goal[.]” (*Board of Trustees v. Fox* (1989) 492 U.S. 469, 480; see also *Glucksberg*, at p. 728.) The restitution fine in this case advances the state’s legitimate interest in punishment.

“The object of the criminal law is to deter the individual from committing acts that injure society by harming others, their property, or the public welfare, and to express society’s condemnation of such acts by punishing them.” (*People v. Roberts* (1992) 2 Cal.4th 271, 316, italics added.) “Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses.” (*Southern Union Co. v. United States* (2012) 567 U.S. 343, 349; accord, *People v. Alford* (2007) 42 Cal.4th 749, 757.)

“[T]he Legislature intended restitution fines as punishment.” (*Hanson, supra*, 23 Cal.4th at p. 361.) As such, it serves the state’s legitimate interest in punishing criminal defendants and deterring unlawful conduct. Thus, imposition of the maximum restitution fine survives scrutiny under rational basis review.

## CONCLUSION

Accordingly, the \$10,000 restitution fine imposed in Ramirez's case should be upheld.

Dated: November 20, 2019      Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 3,358 words.

Dated: November 20, 2019

XAVIER BECERRA  
Attorney General of California

*/s/ Elizabeth W. Hereford*

ELIZABETH W. HEREFORD  
Deputy Attorney General  
Attorneys for Respondent

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: **People v. Irving Ramirez**  
No.: **S155160**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On November 20, 2019, I electronically served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 20, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Alameda County District Attorney's Office  
Attn: The Honorable Nancy O'Malley  
District Attorney  
[Via TrueFiling Only]

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 20, 2019, at San Francisco, California.

\_\_\_\_\_  
T Pham  
Declarant

\_\_\_\_\_  
*/s/ T Pham*  
Signature

**STATE OF CALIFORNIA**  
 Supreme Court of California

***PROOF OF SERVICE***

**STATE OF CALIFORNIA**  
 Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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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.

11/20/2019

Date

/s/Tuyen Pham

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Signature

Hereford, Elizabeth (282956)

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Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

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Law Firm