

No. S165195

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY NAVARRO

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Orange County
Case No. 02NF3143
Honorable Francisco Briseño, Judge

APPELLANT'S THIRD SUPPLEMENTAL BRIEF

RICHARD I. TARGOW
Attorney at Law (SBN 87045)
Post Office Box 1143
Sebastopol, California 95473
Telephone: (707) 829-5190

Attorney for Appellant

TABLE OF CONTENTS

ARGUMENT	6
THE IMPOSITION OF OVER \$20,000 IN RESTITUTION CONSTITUTED AN ILLEGAL AND EXCESSIVE FINE WHICH SHOULD BE STRICKEN IN ITS ENTIRETY	6
A. The Court Imposed Two Fines Totalling Over \$20,000 Despite the Only Available Evidence Showing that Appellant Had No Ability to Pay Even the Cost of the Probation Report	7
B. The Two Fines Violated the Eighth Amendment Prohibition Against Excessive Fines, And the Remedy is Reversal	9
C. Imposition of the Maximum Restitution Fine Without Regard to Appellant's Inability to Pay Was Also an Abuse of Discretion Under Section 1202.4	14
D. The Lack of an Objection Did Not Forfeit the Claims	20
CONCLUSION	23
CERTIFICATE OF LENGTH	24

TABLE OF AUTHORITIES

CASES

Austin v. United States (1993) 509 U.S. 602	9, 11
Chapman v. California (1967) 386 U.S. 18	13
City of Sacramento v. Drew (1989) 207 Cal.App.3d 1287	14
In re Andrews (2002) 28 Cal.4th 1234	22
In re Barnes (1985) 176 Cal.App.3d 235	20
In re Gruntz (9th Cir. 2000) 202 F.3d 1074	11
Los Angeles County Dept. of Children and Family Servs. v. Superior Court (2005) 126 Cal.App.4th 144	20
People ex rel. State Air Resources Bd. v. Wilmshurst (1999) 68 Cal.App.4th 1332	10
People v. Allen (2019) 41 Cal.App.5th 312, 321	11
People v. Cowan (2020) 47 Cal.App.5th 32	10-14, 21
People v. Duenas (2019) 30 Cal.App.5th 1157, 1172	12-13, 21

People v. Gamache (2010) 48 Cal.4th 347	6, 20, 21
People v. Giordano (2007) 42 Cal.4th 644	16
People v. Gray (2005) 37 Cal.4th 168	23
People v. Jennings (2005) 128 Cal.App.4th 42	11
People v. McGhee (1988) 197 Cal.App.3d 710	16
People v. Mendoza Tello (1997) 15 Cal.4th 264	23
People v. Miracle (2018) 6 Cal.5th 318, 356	17
People v. Rowland (1997) 51 Cal.App.4th 1745	10
People v. Ruiz (2018) 4 Cal. 5th 1100	9
People v. Santos (2019) 38 Cal.App.5th 923, 934	12
Rodman v. Superior Court (1939) 13 Cal.2d 262	20
Sargon Enterprises, Inc. v. University of Southern Cal. (2012) 55 Cal.4th 747	16
Strickland v. Washington (1984) 466 U.S. 668	22

Timbs v. Indiana
(2019) ___ U.S. ___, 139 S.Ct. 682 6, 9, 12, 13, 21

STATUTES

Penal Code § 1202.4 6, passim
Penal Code § 1203.1 8
Penal Code, section 2700.1 18
Stats. 2000, Ch. 1016, § 9.5. 15

ARGUMENT

THE IMPOSITION OF OVER \$20,000 IN RESTITUTION CONSTITUTED AN ILLEGAL AND EXCESSIVE FINE WHICH SHOULD BE STRICKEN IN ITS ENTIRETY

At the time of filing appellant's opening brief, the claims appearing herein appeared to be precluded by *People v. Gamache* (2010) 48 Cal.4th 347, 409, which held that a failure to object to a restitution fine constituted a waiver. Since then, a U.S. Supreme Court decision, *Timbs v. Indiana* (2019) ___ U.S. ___ [139 S.Ct. 682; 203 L.Ed.2d 11], renders the *Gamache* waiver inapplicable. In this brief, appellant will argue (1) that the imposition of both the restitution fine and the victim's restitution fine without reference to appellant's obvious inability to pay constituted an excessive fine under the Eighth Amendment to the U.S. Constitution; (2) that, in addition, the imposition of the restitution fine was an abuse of discretion under Penal Code section 1202.4; and (3) that the failure of trial counsel to object does not bar these claims.

A. The Court Imposed Two Fines Totalling Over \$20,000 Despite the Only Available Evidence Showing that Appellant Had No Ability to Pay Even the Cost of the Probation Report

As part of appellant's sentence, the trial court imposed two restitution fines: a \$10,000 restitution fine pursuant to Penal Code, section 1202.4, subdivision (b)(1), and an additional \$10,433.80 in restitution for the Victim's Compensation and Claims Board pursuant to section 1203.1, subdivision (b). (8 CT 2264, lines 59-60 [Minute Order]; 8 CT 2275 [Abstract of Judgment]; 39 RT 6932.)

The Probation Department's Presentence Report (PSR, 8 CT 2219 et seq.) contained the following limited information regarding appellant's ability to pay:

a. That defendant had related a "somewhat minimal" employment history, as well as having earned income by selling methamphetamine between 1995 and 1998, as well having restored and customized muscle cars and Harley Davidson motorcycles (8 CT 2239);

b. That defendant "was given a 'Notice of Right to a Financial Hearing' pursuant to 1203.1b PC and did not submit an

‘Adult Financial Statement.’ He verbally stated, however, that he has neither assets nor liabilities at this time.” (8 CT 2240); and

c. Finally, in the report’s recommendation, it was stated both that (1) “Further, the defendant be ordered to pay a restitution fine pursuant to Penal Code 1202.4(b)(1), in the amount of \$10,000;” and that “The Probation Department has conducted a financial evaluation and has determined that he does not have the ability to pay and, therefore, recommends the Court waive the cost of the Probation report.” (8 CT 2245-2246.)

After reviewing this report, the court imposed both a maximum restitution fine of \$10,000 (§ 1202.4, subd. (b)(1)) and a victim’s restitution fine of \$10,433.80 (§ 1203.1, subd. (b)) for a total of \$20,433.80 in spite of the fact that the only evidence before the court regarding appellant’s ability to pay was that he had no assets and, according to the probation officer’s finding, was not even able to pay for the cost of the probation report itself.

B. The Two Fines Violated the Eighth Amendment Prohibition Against Excessive Fines, And the Remedy is Reversal

Both fines are now subject to reversal following a 2019 decision of the United States Supreme Court clarifying for the first time that the excessive fines prohibition applies to the states through the 14th Amendment. (*Timbs v. Indiana*, *supra*, 139 S.Ct. at pp. 686-687.)

For purposes of excessive fines analysis, the central question is whether a monetary sanction is at least partially punitive in nature.

The Eighth Amendment's "protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority," and applies to civil and criminal penalties alike. (*Timbs*, *supra*, 139 S.Ct. at p. 686; see *Austin v. United States* (1993) 509 U.S. 602, 610 (*Austin*)). Because monetary "sanctions frequently serve more than one purpose" (*ibid.*) and have "multiple effects" (*People v. Ruiz* [(2018) 4 Cal. 5th 1100,] 1108), *Austin* announced a test for identifying an Eighth Amendment "fine" that is both simpler and broader than the more complex *Ward/Mendoza-Martinez* approach. Under *Austin*, because "[t]he notion of punishment ... cuts across the division between the civil and the criminal law," a monetary sanction that cannot "fairly be said solely to serve a remedial purpose" will be subject to scrutiny as an Eighth Amendment fine if it "can only be explained as serving in part to punish." (*Austin*, *supra*, at p. 610, *italics added*; see *People ex rel. State*

Air Resources Bd. v. Wilmshurst (1999) 68 Cal.App.4th 1332, 1350 . . . [“[e]ven assuming a fine serves some remedial purpose, it will be considered punishment [for purposes of applying the Eighth Amendment] if it also serves either retributive or deterrent purposes”].)

(People v. Cowan (2020) 47 Cal.App.5th 32, 44-45 [parallel citations omitted].)

The Cowan court held that although the court facility and court operations assessments imposed on the defendant in that case were partly or even primarily intended to achieve the Legislature’s court-funding objectives, the mere fact that they were assessed in a criminal, rather than a civil, context was a “powerful indicator” that they were intended in part to punish. (Id, at p. 45.) Accordingly, the sentencing court was required to consider the defendant’s ability to pay these assessments. (Id., at pp. 49-50.)

Like the assessments in Cowan, the victim restitution orders in this case were imposed in a criminal case against appellant and although partly intended to remedy harm to the victims were also at least partly punitive in nature. Such orders are a direct consequence of a criminal conviction (People v. Rowland (1997) 51 Cal.App.4th 1745, 1752-1753; Pen. Code §

1202.4(a)(1)), and the collection of restitution is a continuation of a criminal action. (See, *In re Gruntz* (9th Cir. 2000) 202 F.3d 1074, 1084-1087. Unlike civil judgments, direct victim restitution cannot be bargained away in a plea bargain or waived by the prosecutor or court, nor can they be discharged in bankruptcy. (*People v. Allen* (2019) 41 Cal.App.5th 312, 321.)

Indeed, in *People v. Allen*, supra, the Court of Appeal held that while the primary purpose of direct victim restitution is “to reimburse the victim for economic losses caused by the defendant’s criminal conduct, i.e., to make the victim reasonably whole,” the “secondary goals of direct restitution include rehabilitation of the defendant and deterrence of future criminality.” (*Id.*, at p. 321, citing *People v. Guillen* (2013) 218 Cal.App.4th 975, 985; see, also, *People v. Jennings* (2005) 128 Cal.App.4th 42, 57.) Thus, *Allen*, *Guillen*, and *Jennings* all acknowledge that the victim restitution statutes are at least partly punitive in nature, i.e., they are at least partly based upon rehabilitation of the defendant and deterrence of further criminal conduct. Accordingly, under the analysis in *Austin v. United States*, supra, 509 U.S. at p. 610 and *Cowan*, supra, 47

Cal.App.5th at pp. 44-45, the defendant's ability to pay must be considered in ordering direct victim restitution.

The courts of appeal have taken different approaches to the fashioning the correct remedy in a case in which a maximum restitution fine has been improperly imposed on an indigent defendant. In *People v. Duenas* (2019) 30 Cal.App.5th 1157, 1172, the Court of Appeal noted that the remedy in a case in which a large restitution fine was imposed on an indigent defendant is to stay the execution of the fine "until and unless the People demonstrate that the defendant has the ability to pay the fine." Accordingly, in a case such as this one, where all available evidence before the court demonstrated an inability to pay a restitution fine, the burden shifts to the People to demonstrate ability to pay, and an objection from the defense would therefore be futile for this separate reason.

Appellant recognizes that other courts have held that the defendant bears the burden of proof on this issue. (See, e.g., *People v. Santos* (2019) 38 Cal.App.5th 923, 934.) However, appellant submits that *Duenas* was right, but for the wrong reason. *Timbs* established that imposing a restitution fine on a

defendant unable to pay it violates the defendant's federal Eighth Amendment rights, and as previously noted, violations of federal constitutional rights trigger application of the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24, in which the burden rests with the state to show the error was harmless beyond a reasonable doubt. Thus, either under *Duenas* or *Timbs and Chapman*, the burden shifts to the People to show defendant has the ability to pay and that any error was therefore harmless beyond a reasonable doubt.

However, *Duenas* relied merely upon a statutory and not a constitutional analysis. By contrast, in *Cowan*, *supra*, the court applied an Eighth Amendment excessive fine analysis and concluded that because the state and federal constitutions prohibit the imposition of an excessive fine, "it would not be an appropriate remedy in this case should an excessive fines determination be made to allow imposition of a restitution fine subject to a stay" and the fine therefore could not be imposed at all. (*Id.*, 47 Cal.App.5th at p. 50.) The court held that even a mandatory minimum restitution fine of \$200 could not be imposed on an indigent.

Appellant submits that the Cowan reasoning is more compelling, and that because an excessive fine cannot constitutionally be imposed, appellant's restitution fine and direct victim restitution must be struck in their entirety. Alternatively, appellant submits that this matter should be remanded for a hearing on appellant's ability or inability to pay the restitution and victim restitution fines imposed here.

C. Imposition of the Maximum Restitution Fine Without Regard to Appellant's Inability to Pay Was Also an Abuse of Discretion Under Section 1202.4

Notwithstanding the foregoing constitutional analysis, the trial court also abused its discretion under section 1202.4 when it imposed the maximum restitution fine without considering appellant's ability to pay and despite evidence that he was unable to pay.

Penal Code section 1202.4, subdivision (b)(1) authorized the trial court to impose a mandatory minimum restitution fine of \$200 against appellant.¹ This section also granted the trial court

¹ The statute in effect at the time of the offense, in pertinent part, provided:

In setting the amount of the fine pursuant to

(continued...)

the discretion to increase the fine up to \$10,000 after considering certain factors, including appellant's inability to pay the fine, the seriousness and gravity of the offense, and the circumstances of its commission. (§ 1202.4, subd. (d).) Under the statute, the trial court did not have to make express findings as to the factors bearing on the amount of the fine, nor was it required to conduct a separate hearing on the issue. (Pen. Code § 1202.4, subd. (d).) Here, the trial court imposed the maximum restitution fine of \$10,000 pursuant to section 1202.4 without holding a hearing,

¹ (...continued)

subdivision (b) in excess of the two-hundred-dollar (\$200) or one-hundred-dollar (\$100) minimum, the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime.

Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required. (Stats. 2000, Ch. 1016, § 9.5.)

making findings, or reviewing evidence of appellant's ability to pay.

A challenge to a restitution fine is ordinarily evaluated under an "abuse of discretion" standard. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664; *People v. McGhee* (1988) 197 Cal.App.3d 710, 715-717.) The Court of Appeal in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, best explained the abuse of discretion standard:

Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law. [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred. . . . The pertinent question is whether the grounds given by the court . . . are consistent with the substantive law . . . and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under [the statute], read in light of the purposes and policy of the statute.

(*Id.*, at pp. 1297-1298; see also *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773.)

In challenging the imposition of a fine, a defendant must identify something in the record indicating that the trial court has breached its duty to consider his ability to pay. (People v. Miracle (2018) 6 Cal.5th 318, 356.) The record in this case demonstrates that the trial court abused its discretion when it failed to consider information in the probation report that clearly showed appellant had no assets, had not had any steady employment for many years, and did not even have assets sufficient to pay for the probation report.² Moreover, appellant had qualified as indigent and his counsel was appointed by the court. (1 CT 88.) Thus, at the time of sentencing, all available evidence before the court showed appellant lacked the ability to pay restitution.

Moreover, simple common sense and even a rudimentary understanding of correctional policy and practice made it obvious that appellant would have no ability to pay such a fine in the future. As of 1985, the Department of Corrections ranked providing work for condemned inmates its lowest priority for

² The record does not disclose how much a probation report might have cost in 2007; whatever the amount was, it was undoubtedly a pittance compared to the fines the court imposed.

providing work to the overall inmate population (In re Barnes (1985) 176 Cal.App.3d 235, 238-239.) There is nothing the record, or in the cases, to indicate that jobs were any more available to condemned inmates in 2007, when appellant was sentenced.³ (In re Barnes (1985) 176 Cal.App.3d 235, 237-238.)

Nevertheless, in spite of the fact that appellant had no assets or income and would have no income in the future, the court imposed a maximum restitution fine of \$10,000 and an additional \$10,433.80 in victim restitution fines. The statute directed that the court shall consider appellant's inability to pay among other factors in increasing the amount of the restitution fine in excess of the two hundred-dollar (\$200) minimum. (Pen. Code § 1202.4, subd. (c) ["[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

³ Pursuant to Proposition 66, passed by the California voters in 2016, a new addition to the Penal Code, section 2700.1, requires all condemned inmates to work. However, there is no indication whatsoever that the new section is anything other than aspirational. Because condemned inmates like appellant are given the lowest priority, they are effectively barred from having jobs and earning any income. In any case, Proposition 66 was not even a gleam in prosecutors' eyes at the time of sentencing herein.

in increasing the amount of the restitution fine in excess of the two hundred-dollar (\$200) or one hundred-dollar (\$100) minimum.”].) The trial court did not adhere to the statute’s clear mandate in imposing the maximum restitution fine.

In deciding the amount of restitution to impose, the trial court was required to consider other factors in addition to the defendant’s inability to pay and future earning capacity: (1) the seriousness, gravity and circumstances of the offense, (2) any economic gain derived by the defendant, (3) the extent to which any other person suffered losses, and (4) the number of victims involved in the crime. (§ 1202.4, subd. (d).) These factors, however, do not preclude consideration of the inability to pay. Although the trial court did not have to make express findings as to the factors bearing on the amount of the fine, the statute mandated that this factor be considered in determining the amount above the minimum fine that would be imposed. As such, having failed to consider inability to pay when imposing the maximum restitution fine pursuant to the statute, the trial court abused its discretion. “[W]hen a statute authorizes prescribed procedure, and the court acts contrary to the authority thus

conferred, it has exceeded its jurisdiction. . . .’ [Citations.]”
(Rodman v. Superior Court (1939) 13 Cal.2d 262, 269; Los Angeles County Dept. of Children and Family Servs. v. Superior Court (2005) 126 Cal.App.4th 144, 152.) A condemned prisoner in San Quentin cannot work to earn the money needed to pay the maximum restitution fine. The Department of Corrections and Rehabilitation has recognized that it does not have the resources and staff to offer employment to all the state’s prison.

D. The Lack of an Objection Did Not Forfeit the Claims

Appellant recognizes that appellant’s counsel did not formally object to the imposition of the maximum restitution fine and that this court has in the past held that such a failure to object constitutes a waiver of the claim. (People v. Gamache (2010) 48 Cal.4th 347, 409.) However, for several reasons, this court should find the issue preserved for this appeal.

First, the Gamache decision does not indicate that the claim in that case was constitutionally based, as it is here; indeed, the claim appears to have been entirely statutory in nature, relying solely on Penal Code section 1202.4. Certainly, the decision does not reference either the Due Process or Equal

Protection Clauses of the 14th Amendment or the excessive fines prohibition of the Eighth Amendment, or the corresponding rights in the California Constitution, and the fine in this case violates all of these constitutional provisions simultaneously. Recent Court of Appeal decisions have held that assessing and attempting to collect a restitution fine to an indigent prisoner who cannot pay it violates principles of due process and equal protection. (People v. Duenas, supra, 30 Cal.App.5th at pp. 1166-1167; see, also, People v. Cowan, supra, 47 Cal.App.5th at pp. 51-56 [Street, J., concurring and arguing analysis should be conducted as an equal protection issue].)

Second, as noted in the previous section, the law has changed since Gamache was decided, and the excessive fines provision of the Eighth Amendment clearly applies to the states. (Timbs v. Indiana, supra, 139 S.Ct. 682.) Accordingly, notwithstanding the lack of an objection, this court should consider this claim and apply the constitutional principles discussed in Timbs to determine whether the fine imposed in this case was “excessive” within the meaning of the Eighth Amendment.

Furthermore, a formal objection is both unnecessary and futile since California law already requires that the court consider inability to pay as one of the factors in assessing the amount of the fine to be imposed in excess of the statutory minimum. An objection from counsel would constitute a futile request that the sentencing court exercise a discretion the statutory scheme already requires the court to exercise.

Finally, to the extent that any objection was required, counsel was ineffective in failing to make such an objection. (Strickland v. Washington (1984) 466 U.S. 668, 694.) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (Strickland v. Washington, *supra*, at p. 687; In re Andrews (2002) 28 Cal.4th 1234, 1253.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to

provide one, or there simply could be no satisfactory explanation.”
(People v. Gray (2005) 37 Cal.4th 168, 207, emphasis added;
citing People v. Mendoza Tello (1997) 15 Cal.4th 264, 266.)

Here there was no conceivable reason other than sheer incompetence for counsel’s failure to object. As discussed above, the record clearly demonstrated that appellant was indigent and had no ability to pay fines totaling \$20344.80. There can be no satisfactory tactical or strategic reason for this omission, and counsel was therefore ineffective in failing to make such an objection.

CONCLUSION

For the foregoing reasons, the restitution and victim’s restitution fines imposed herein should be reversed.

DATED: December 21, 2020

Respectfully submitted,

RICHARD I. TARGOW
Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify that this brief uses a 13-point Century Schoolbook font and contains 3427 words.

RICHARD I. TARGOW

DECLARATION OF SERVICE

Re: People v. Anthony Navarro

No. S165195

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

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Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266

Wesley Van Winkle (TrueFiling)
Alternate Assisting Attorney
P.O. Box 5216
Berkeley, CA 94705-0216

Anthony Navarro, Appellant (Mail)

Orange County Superior Court (Mail)
Clerk, Criminal Appeals
700 Civic Center Drive West
Santa Ana, CA 92701

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RICHARD I. TARGOW
Attorney at Law

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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(ANTHONY)

Case Number: **S165195**

Lower Court Case Number:

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Targow, Richard (87045)

Last Name, First Name (PNum)

Richard I. Targow, Attorney at Law

Law Firm