

# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Respondent,**

**v.**

**LESTER HARLAND WILSON,**

**Appellant.**

**CAPITAL CASE**

Case No. S189373

Riverside County Superior Court  
Case No. RIF079858  
The Honorable Elisabeth Sichel, Judge

## **SUPPLEMENTAL RESPONDENT'S BRIEF**

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## INTRODUCTION

Wilson argues that this Court should remand the matter to the trial court so it can consider his ability to pay the \$4,000 restitution fine previously ordered. (Supp. AOB 4-7.) The matter should not be remanded because Wilson forfeited his claim by failing to object in the trial court. Moreover, remand would not be appropriate in light of the presumption that the court considered Wilson's ability to pay, a presumption that is supported in light of the trial court's order of \$4,000, when probation recommended the maximum amount of \$10,000.

### **THE MATTER SHOULD NOT BE REMANDED FOR THE TRIAL COURT TO CONSIDER WILSON'S ABILITY TO PAY THE RESTITUTION FINE**

#### **A. Facts Relating to the Imposition of the Restitution Fine**

Wilson committed the offenses underlying the instant matter on June 8, 1997. (*People v. Wilson* (2008) 44 Cal.4th 758, 769.) The jury convicted Wilson and set the punishment at death. (*Ibid.*) Following the conviction, a probation report was generated on April 27, 2000, which recommended that the court impose a \$10,000 restitution fine pursuant to Penal Code section 1202.4. (12 CT 3222.) At the sentencing hearing held on June 29, 2000, the trial court imposed a \$4,000 restitution fine pursuant to Penal Code section 1202.4. (28 Original RT 3616-3617; 12 Original CT 3299.)<sup>1</sup> Counsel did not object or offer any evidence regarding Wilson's ability to pay.

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<sup>1</sup> Wilson states that the fine was imposed pursuant to Government Code section 13967. (Supp. AOB 4.) The minute order, probation recommendation, and abstract of judgment indicate the fine was imposed under Penal Code section 1202.4. (12 CT 3222, 3299, 3310.) Moreover, at the time of sentencing, Government Code section 13967 did not specially address restitution fines. (Stats. 1994, ch. 1106, § 2.)

The penalty phase was reversed by this Court in 2008. (*People v. Wilson, supra*, 44 Cal.4th at p. 769.) No issue relating to a restitution fine was raised by appellant during the pendency of that appeal.

The penalty phase was retried and the penalty was again fixed at death. (12 CT 3023, 3156.) At the sentencing hearing held on December 17, 2010, the trial court expressed an intention to adopt the court's previous order with respect to fines, fees, and restitution. (9 RT 1754-1755.) The defense stated it preferred to generate "a more definitive amount" and that the issue should be addressed with some specificity. He requested a "restitution hearing where we could have an opportunity to look into the matter." (9 RT 1755.) Counsel stated that Wilson would not be there for the hearing, to which the court asked, "So he's going to waive his appearance for the fines and fees and restitution?" Counsel answered in the affirmative. (9 RT 1756.) The court then set a hearing date for certification of the trial record and a hearing on restitution, fines, and fees. (9 RT 1756.)

On the date scheduled for the hearing, a number of matters were discussed and prior to adjourning the clerk inquired about the "restitution." (9 RT 1761.) The prosecutor stated that he looked into the matter. Wilson was ordered to pay restitution but it was difficult for him to discern how much had been paid to date. The prosecutor stated he preferred to leave the matter "as it is" and have no further order. The court wanted to ensure that the victims incurred no further expenses since the last order. The prosecutor did not believe there were additional expenses. (9 RT 1761.) The court then said it did not feel it necessary to revisit restitution and was going to take the matter off calendar. Counsel responded by stating, "yes." (9 RT 1761.)<sup>2</sup>

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<sup>2</sup> The trial court did not orally re-impose the restitution fine at that time. Should this Court find that the \$4,000 restitution fine needs to be

## **B. Relevant Statutory History of the Restitution Fine**

Prior to September 1992, a restitution fine was mandatory regardless of a defendant's ability to pay under former Penal Code section 1202.4, subdivision (a) and Government Code section 13967, subdivision (a). (Stats. 1990, ch. 45, § 4, p. 261; Stats. 1991, ch. 657, § 1, p. 3020.)

In September 1992, the Legislature amended Government Code section 13967, subdivision (a), requiring that the imposition of a fine within the range identified by that statute should be "subject to the defendant's ability to pay." (Stats. 1992, ch. 682, § 4, p. 2922.) In 1994, former Government Code section 13967 removed the language pertaining to the restitution fine. (Stats 1994, ch. 1106, § 2.) At the same time, Penal Code section 1202.4 was amended to delete the requirement that the restitution fine be imposed subject to the defendant's ability to pay, but required the court to consider all relevant factors, including the defendant's ability to pay, in setting the amount of the restitution fine beyond the minimum amount required. (Stats. 1994, ch. 1106, § 3.) Former Government Code section 13967 was repealed in its entirety in 2003. (Stats. 2003, c. 230, § 2.)

During the relevant time periods here, 1997 (when Wilson committed the crime), 2000 (when he was initially sentenced), and 2010 (when Wilson was sentenced following the reversal of his penalty phase), Penal Code section 1202.4 required that the trial court considering any relevant factors in setting the fine beyond the minimum required, including a defendant's ability to pay. (Pen. Code, section 1202.4 as amended in Stats. 1994, c. 1106, section 3.)

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orally pronounced even though the trial court expressed its intention to leave the fine as originally ordered in 2000, Respondent would not oppose a remand for the limited purpose to allow the trial court to do so.

### **C. Wilson Forfeited His Right to Contest the Restitution Fine**

Wilson has forfeited the instant claim because he did not raise the issue of his ability to pay twice in trial court or even during his first appeal.

A failure to object may be excused so that a defendant may benefit from any ameliorative benefits from statutory amendments that occurred while his case was pending on appeal. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 935; *People v. Vieira* (2005) 35 Cal.4th 264, 305.) Wilson cites no statutory authority to show that the code was amended in a favorable manner. Rather, he merely asserts that at the time of the original sentencing there was no requirement that the trial court make a determination of a defendant's ability to pay. (Supp. AOB 4-5.) However, as seen from the statutory history outlined above, there was indeed a requirement that the court consider a defendant's ability to pay in setting the fee above the mandatory minimum amount. Because that requirement has been present since 1994, years prior to the commission of the offenses, it cannot be said Wilson did not have the benefit of that consideration.

The decision in *People v. Gamache* (2010) 48 Cal.4th 347, 409, is instructive. There, this Court found the identical claim forfeited because the law at the time of his 1996 sentencing called for the trial court to consider his ability to pay in setting the restitution fine. (*Ibid.*) The court found that the defendant could have objected at the time if he believed this factor was being given inadequate consideration. (*Ibid.*) This Court came to an identical conclusion in *People v. Williams* (2015) 61 Cal.4th 1244, 1291, finding the issue had been forfeited for failure to object when the statutes which were operative at the time of sentencing authorized the trial court to consider a defendant's ability to pay the fine. Such is the case here and consequently the Court should deem the issue forfeited.

**D. Remand is Inappropriate Because the Fine Was Properly Imposed**

Notwithstanding the forfeiture, the court should deny Wilson's request to remand the matter for further consideration of his ability to pay or reduce the fine to its statutory minimum amount.

To begin with, this Court should presume that the trial court fulfilled its duty and considered appellant's ability to pay when it imposed the restitution fine at the initial court appearance. (Evid. Code, § 664; *People v. Williams, supra*, 61 Cal.4th at p. 1291; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1485-1486.) The presumption is well-founded in this case. At the time the court initially imposed the restitution fine, the probation officer recommended the fine be set at \$10,000. (12 CT 3222.) However, the trial court imposed less than half of that amount, \$4,000. (12 Original CT 3299.) It is fair to infer under these circumstances that the court did in fact consider Wilson's ability to pay and adjusted the fine accordingly.

Moreover, the burden has always been on the defendant to show his inability to pay. (See Pen. Code, § 1202.4(d); *People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) When a defendant can point to no evidence on the record to support an inability to pay, aside from the bare fact of his incarceration, the court may deny the claim on the merits, even when no express findings are placed on the record. (*People v. Gamache, supra*, 48 Cal.4th at p. 409.) In light of the presumption and the lack of evidence presented below, remand would be inappropriate under the circumstances.

## CONCLUSION

The People respectfully request that the Court deny Wilson's request that the matter be remanded to reconsider the restitution fine be denied.

Dated: May 29, 2018

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 1,422 words.

Dated: May 29, 2018

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STATE OF CALIFORNIA  
Supreme Court of California

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Date

/s/Alana Butler

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Signature

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