INCREASE IN MINIMUM RESTITUTION FINES
– WATCH FOR EX POST FACTO VIOLATIONS –

by Elaine A. Alexander, Executive Director
April 2012

Effective January 1, 2012, Penal Code section 1202.4, subdivision (b)(1) was amended to increase the minimum amount of the restitution fine (though not the maximum) as follows:

> The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars ($240) starting on January 1, 2012, two hundred eighty dollars ($280) starting on January 1, 2013, and three hundred dollars ($300) starting on January 1, 2014, and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, and shall not be less than one hundred twenty dollars ($120) starting on January 1, 2012, one hundred forty dollars ($140) starting on January 1, 2013, and one hundred fifty dollars ($150) starting on January 1, 2014, and not more than one thousand dollars ($1,000), if the person is convicted of a misdemeanor.[1]

The statute, enacted in Assembly Bill No. 686 last year, does not expressly provide for either retroactive or prospective application of the change.

This memo directs counsel's attention to a possible constitutional issue that could arise from the change: application of the amendment to defendants who committed the underlying offense before January 1.

Relevant ex post facto law

Any time penalties increase, counsel should be alert to the possibility of an ex post facto violation of both the state and federal Constitutions. (U.S. Const., art. I, § 9, cl. 3; art. I, § 10, cl. 1; Cal. Const., art. I, § 9; see also Pen. Code, § 3 ["No part of it [the Penal Code] is retroactive, unless expressly so declared"].)

According to the classic formulation in *Calder v. Bull* (1798) 3 U.S. (3 Dallas) 386, 390, the ex post facto prohibition applies to, among other things: "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."

---

[1]The minimum levels before 2012 were $200 for a felony and $100 for a misdemeanor.

The ex post facto prohibition ensures that, *at the time the crime was committed*, the defendant had fair notice of the punishment attached to the act.[2] A later enacted law raising the punishment cannot be applied retroactively, because the person in committing the crime would not have known the punishment could be that great.

The status of restitution as "punishment" has been addressed a number of times. Restitution *fines* (as opposed to compensatory victim restitution) have been held to constitute punishment:

Restitution fines

People v. Hanson (2000) 23 Cal.4th 355: Restitution fines are punishment within the meaning of the state constitutional double jeopardy doctrine; that was the intent of the Legislature; citing *Zito* with apparent approval.

People v. Walker (1991) 54 Cal.3d 1013, 1024: Restitution fine "qualifies as punishment" for purpose of enforcing plea bargain.

People v. Zito (1992) 8 Cal.App.4th 736, 741[3]: Restitution fine is punishment for ex post facto purposes. (See also *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248, *People v. Callejas* (2000) 85 Cal.App.4th 667, 670, *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31, and *People v. Downing* (1985) 174 Cal.App.3d 667 [under ex post facto principles, amount of fine is calculated as of the date of the offense].)

Other fees

People v. Alford (2007) 42 Cal.4th 749, 757: Court security fee is not punitive; however, "[f]ines arising from convictions are generally considered punishment."

People v. Sharret (2011) 191 Cal.App.4th 859, 869-870: A criminal laboratory analysis fee is punitive and subject to Penal Code section 654; fines are punishment.

---

[2]Although grounded in the notion of fairness, in that it requires due notice of the criminality of the act before it is committed, ex post facto doctrine is not an inquiry into actual reliance. Based on the (largely fictional) hypothesis that a defendant will consult the law (or at least could have consulted it) before performing a criminal act, it in effect requires notice to "the world." (*McBoyle v. United States* (1931) 283 U.S. 25, 27.)

[3]*Zito* involved both a restitution fine and victim restitution.

People v. Batman (2008) 159 Cal.App.4th 587, 589-591: Deoxyribonucleic acid penalty is punitive within the meaning of the state and federal constitutional prohibitions against ex post facto laws.

Compensatory victim restitution

People v. Harvest (2000) 84 Cal.App.4th 641: Compensatory victim restitution "is not punishment and is therefore not constitutionally barred" under double jeopardy principles when imposed for the first time on remand after an appeal.

People v. Young (1995) 38 Cal.App.4th 560, 568: Victim restitution does not constitute an increase in punishment where it was a condition of probation and is continued as part of a sentence following revocation.

Cf. *People v. Zito*, *supra*, 8 Cal.App.4th 736, 741: Compensatory victim restitution is punishment for ex post facto purposes, when change in law removed a $10,000 limit on combined compensatory restitution and fine and allowed actual losses (in this case, set at $300,000); opinion does not distinguish compensatory restitution from restitution fines.

Minimum punishments are subject to ex post facto restrictions. (*Lindsey v. Washington* (1927) 301 U.S. 397 [law making mandatory what was previously the maximum only]; *John L. v. Superior Court* (2004) 33 Cal.4th 158, 182; *People v. Delgado* (2006) 140 Cal.App.4th 1157 [removal of discretion to strike priors]; *People v. Williams* (1987) 196 Cal.App.3d 1157 [same].)

Applying ex post facto law to cases

Determining whether a restitution fine imposed after January 1, 2012, on a defendant who committed the crime before then violated ex post facto prohibitions may be tricky. The cases at the fringes will be relatively easy. If the trial court expressly says it is following the new law and would have imposed a lower fine than the new minimum except for the change in the law, an ex post facto violation is shown on the face of the record. At the other extreme, if the trial court affirmatively says it is applying the old law or intends to impose a fine substantially higher than either minimum, anyway, the ex post facto argument may not be available. In the middle – the cases with a silent or ambiguous record – the issue of whether the new law affected the fine will require further exploration.

It is possible to argue every restitution fine imposed on defendants in the silent-record class has to be stricken or remanded for consideration under the old law, unless the record actually rebuts the possibility the trial court might have imposed a lower fine but for the change in the law. Such an argument, however, must take account of the

normal appellate presumption that the trial court knew and followed the law. (*People v. Braxton* (2004) 34 Cal.4th 798, 814; *People v. Stowell* (2003) 31 Cal.4th 1107, 1114; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) Usually it is the appellant's burden to establish error; it will not be presumed. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In *People v. Fuhrman* (1997) 16 Cal.4th 930, 944-946, the court declined to presume the trial court did not know it had the power to strike priors before the decision in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497; rather, it held habeas corpus, rather than appeal, is the remedy when record is silent as to the judge's understanding of this authority.

Nevertheless, the presumption of correctness in the face of a silent record is not absolute, and the court may decline to apply it when doing so would be unreasonable. The presumption does not apply when the law requires reasons or findings to be stated explicitly. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1210-1211 [remanding where law required court to declare whether offense was felony or misdemeanor].) Nor does it apply when at the time of sentencing the law was unclear or uncertain or conflicted. (*People v. Fuhrman, supra*, 16 Cal.4th 930, 945 [when, at time of sentencing, weight of Court of Appeal authority was against court's power to strike priors, "we do not believe it would be appropriate to rely upon the rule that a trial court ordinarily is presumed to have correctly applied the law"]; *People v. Jeffers* (1987) 43 Cal.3d 984, 1000-1001 [ambiguous statutory language, no authoritative court interpretation].).

The presumption also does not apply when there is a "substantial likelihood the trial court relied on an incorrect interpretation of the provision in question." (*People v. Jeffers, supra*, 43 Cal.3d at p. 1001 [court made comment that could be interpreted to mean "the evidence would not *permit* a finding of [probation] eligibility," emphasis original].) Counsel certainly should argue for remand when the record creates a reasonable inference, even if not shown positively, that the judge may have misunderstood the law and may have imposed a lower fine under the old law had he or she known application of the new minimum would be an ex post facto violation.

The defendant does not have to establish he or she actually *would* have received a lower fine. As the court in *People v. Williams, supra*, 196 Cal.App.3d 1157, 1160, held:

> It is irrelevant to an ex post facto determination that a defendant could have received the same sentence under the old law as he definitely will under the new law. (*Lindsey v. Washington, supra*, 301 U.S. at pp. 400-401; accord *Miller v. Florida* [(1987) 482 U.S. 423] at pp. 432-433.) It is therefore irrelevant here that defendant could have received a five-year enhancement under the old law. By making mandatory what was previously discretionary, the Legislature has changed the standard by which punishment will be imposed to defendant's disadvantage. Applying these laws to defendant thus runs afoul of the ex post facto clause.

Likewise, *Lindsey v. Washington*, *supra*, 301 U.S. at p. 400, noted:

> Under the earlier [statute] . . . , the prisoners could have been sentenced for a maximum term less than the fifteen year penalty authorized by the statute. Under the later statute, the sentence by the court . . . was for fifteen years. ¶The effect of the new statute is to make mandatory what was before only the maximum sentence. . . . Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change.

(See also *Miller v. Florida* (1987) 482 U.S. 423, 433 ["this is not a case where we can conclude, as we did in *Dobbert* [*Dobbert v. Florida* (1977) 432 U.S. 282], that 'the crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute'"].)

Nor is it necessary to show the defendant had a *right* to a lower fine than was imposed. (*Weaver v. Graham* (1981) 450 U.S. 24, 29-30 ["a law need not impair a 'vested right' to violate the ex post facto prohibition . . . . The presence or absence of an affirmative, enforceable right is not relevant . . . . Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated"]; *In re Stanworth* (1982) 33 Cal.3d 176, 180; *In re Seabock* (1983) 140 Cal.App.3d 29, 32.)

In appropriate cases, where the adjustment to the restitution fine may be de minimis, it may be possible to seek a stipulation or concession from the Attorney General, rather than litigating the issue. Such an approach would save time for attorneys on both sides, for the Court of Appeal, and, when remand would be necessary, for the trial court. In these fiscally difficult times, such savings of public money are worth exploring. The client benefits, as well, because the likelihood of relief is enhanced.

This short memo does not purport to resolve these matters or prescribe a fill-in-the-blanks formula for determining whether or how to construct an ex post facto argument. Counsel will have to research the issue further and adapt the argument to the facts of each case. The point here is to lay out some of the relevant factors and law and to ensure the issue is considered where available.