

CA Sample Restitution Motion

directing defendant to pay restitution in the amount of [REDACTED]. The motion is based on this notice, the attached Memorandum of Points and Authorities, all pleadings and any other evidence filed with the court, and such evidence as may be presented at the hearing on the motion.

Dated: _____

Respectfully submitted,

[Attorney Information]

human trafficking victims may proceed by a pseudonym and mandating that such victim must be informed that his or her name “will become a matter of public record unless he or she requests that it not become a matter of public record”]; Pen. Code § 293.5 [recognizing that sexual assault victims may proceed by a pseudonym by providing that “the court, at the request of the . . . victim [of a sexual offense], may order the identity of the . . . victim in all records and during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense”].)]

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

[Insert relevant facts, including the nature of the trafficking offense(s), the victim’s age at relevant periods if the victim was a child-victim, the plea agreement, if any,² the nature of the victim’s loss, any other economic losses caused by defendant’s criminal conduct, and information about the value of the victim’s services and/or the actual income derived by defendant from the victim’s services. If you choose to attach documentation of these losses to support this motion or submit such information in connection with a restitution hearing (e.g., receipts, estimates or affidavits), redact any information that compromises the victim’s privacy.]

ARGUMENT

I. [NAME/PSEUDONYM] HAS STANDING IN THIS COURT TO ASSERT AND SEEK ENFORCEMENT OF [HER/HIS] CONSTITUTIONAL AND STATUTORY RIGHTS TO RESTITUTION.

The California Constitution, as amended by the Victims’ Bill of Rights Act of 2008 (Marsy’s Law), guarantees that crime victims shall be afforded numerous enforceable rights, including the right to restitution and the right to be heard at any proceeding involving restitution. (Cal. Const., art. I, § 28, subds. (b)(13) [affording victims “the right to seek and secure restitution” and requiring that “[r]estitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss”] and (b)(8) [affording victims the right “[t]o be heard, upon request, at any proceeding . . .

² [Practitioner’s Note: The plea agreement may include restitution to persons other than the victim of the charged or pled-to offense. (See, e.g., *People v. Beck* (1993) 17 Cal.App.4th 209, 216 [21 Cal.Rptr.2d 250] [recognizing that “restitution ordered on dismissed counts are valid provided the plea under which payment of restitution is made a condition was ‘freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court’].)]

involving a post-arrest release decision, plea, sentencing, . . . or any proceeding in which a right of the victim is at issue”].) Penal Code section 1202.4³ also mandates that “[t]he court shall order full restitution” in every case. (Penal Code § 1202.4, subd. (f) [as amended in 2016].⁴)

Marsy’s Law expressly provides that the victims, their lawful representatives, and prosecutors acting at the request of the victim have standing to assert and seek enforcement of their rights in any “any trial or appellate court with jurisdiction over the case.” (Cal. Const., art. I, § 28, subd. (c), par. (1).) The Penal Code also recognizes that victims have standing to assert and seek enforcement of their right to restitution in this Court. (See Pen. Code, § 1202.4, subd. (f)(1), italics added [“The court may modify the amount, on its own motion *or on the motion of* the district attorney, *the victim or victims*, or the defendant”]; Pen. Code § 1202.46, italics added [“This section does not prohibit *a victim*, the district attorney, or a court on its own motion *from requesting* correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine pursuant to Section 1202.4”].)⁵

³ All further statutory references are to the Penal Code unless otherwise indicated.

⁴ The 2016 amendment deleted the following italicized language from Penal Code section 1202.4, subd. (f), which provided, in relevant part, that “[t]he court shall order full restitution *unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.*” (Former Penal Code § 1202.4(f), italics added; see Stats.2016, c. 37 (A.B.2295), § 3 [“Existing law requires the court to order a person who is convicted of a crime to pay restitution to the victim or victims for the full amount of economic loss, unless the court finds compelling and extraordinary reasons for not doing so and states them on the record. . . . This bill would require the court to order full restitution”].) Former section 1202.4, subdivision (f), was contrary to and in violation of, Marsy’s Law’s mandate that restitution be ordered in every case without exception. (Cf. *People v. Pierce* (2015) 234 Cal.App.4th 1334, 1338 [184 Cal.Rptr.3d 607] [“Though section 1202.4, subdivision (f) permits a trial court to provide less than full restitution where it provides ‘compelling and extraordinary reasons’ for doing so, we question, whether this discretion statutorily afforded the court is constitutionally sound in light of the amendment of article I, section 28, subdivision (b) of the California Constitution effectuated by the voters’ approval of . . . Marsy’s Law”].)

⁵ [Practitioner’s Note: In certain cases, it may be appropriate to include a reference to the following in this section, perhaps in a footnote: Because the victim’s right to restitution is a constitutional right, it cannot be bargained away or limited by the prosecution, and the prosecution cannot waive the victim’s right to receive full restitution. (See, e.g., *People v. Valdez* (1994) 24 Cal.App.4th 1194, 1202–1203 [30

[Name/Pseudonym] is a crime victim as defined by the California Constitution. A “victim” under California law is a “person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act” and includes that “person’s spouse, parents, children, siblings, or guardian,” as well as “a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated.” (Cal. Const., art. I, § 28, subd. (e).) [Insert explanation of how the victim in this case meets the constitutional definition of “victim.”]

Hopefully the following statement can be made: “It is undisputed that [Name/Pseudonym] meets this definition.”] Accordingly, [Name/Pseudonym] properly appears before this Court, seeking enforcement of [her/his] constitutional and statutory rights.

II. SECTION 1202.4(f) REQUIRES THE COURT TO ORDER DEFENDANT TO PAY RESTITUTION IN AN AMOUNT THAT REIMBURSES [NAME/PSEUDONYM] FOR ALL ECONOMIC LOSS INCURRED AS A RESULT OF DEFENDANT’S CRIMINAL CONDUCT.

While criminal restitution serves compensatory and punitive goals, its primary purpose is to fully compensate the victim for “all economic loss and disruption caused . . . by the defendant’s criminal conduct.” (*People v. Runyan* (2012) 54 Cal.4th 849, 865 [143 Cal.Rptr.3d 674].) In furtherance of these aims, section 1202.4(f) directs the Court to order “full restitution” (Penal Code § 1202.4, subd. (f)) and identifies a non-exhaustive list of loss categories for which restitution is proper, including, inter alia, the cost of medical and mental health services, lost wages, relocation expenses, and attorney’s fees. (Penal Code § 1202.4, subds. (f)(3)(A)-(L); see *People v. Giordano* (2007) 42 Cal.4th 644, 656 [68 Cal.Rptr.3d 51] [“Since its amendment in 1996, the list of categories of compensable loss in Penal Code section 1202.4 has been

Cal.Rptr.2d 4]; accord *People v. Brown* (2007) 147 Cal.App.4th 1213, 1226 [54 Cal.Rptr.3d 887] [“Victim restitution cannot be bargained away by the People”].)]

nonexclusive . . .”].) In making an award pursuant to section 1202.4(f), the Court must construe the term “loss” broadly and order restitution for all expenses incurred as a result of the crime, regardless of whether they arise before or after the restitution hearing. (*Giordano, supra*, at p. 658.)⁶

In this case, [Name/Pseudonym] incurred [*Identify all economic loss incurred by the victim. Explain the causal connection between the loss and address any anticipated argument regarding potential intervening causes. Explain why the services/expenses were necessary here or in the itemized section below.*] Accordingly, [Name/Pseudonym] seeks the following in restitution:

1. [*Itemize each item and the \$ amount sought. Include all relevant information, e.g., the date(s) of service/purchase, the cost, any bill or other supporting evidence, etc.*]
2. [*Repeat as needed.*]

III. SECTION 1202.4(q) REQUIRES THE COURT TO ORDER DEFENDANT TO PAY ADDITIONAL RESTITUTION IN AN AMOUNT EQUAL TO DEFENDANT’S ILL-GOTTEN GAINS OR THE VALUE OF [NAME/PSEUDONYM]’S LABOR OR SERVICES, WHICHEVER IS GREATER.

In 2005, with the passage of section 236.1, California became the first state to “specifically make human trafficking not only a federal crime, but also a state crime.” Benjamin Thomas Greer, *What is the Monetary Value of Slave Labor?: Restitution Based on a Traditional*

⁶ “Section 1202.4 does not, by its terms, require any particular kind of proof.” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543 [74 Cal.Rptr.3d 901].) “Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim.” (*Ibid.*) So long as the amount of restitution determined by the court is arrived at rationally and factually, the restitution determination is sound. (See, e.g., *People v. Phu* (2009) 179 Cal.App.4th 280, 283-284 [101 Cal. Rptr. 3d 601] [““[S]entencing judges are given virtually unlimited discretion as to the kind of information they can consider”” in determining victim restitution. [Citations.] When there is a factual and rational basis for the amount of restitution ordered, no abuse of discretion will be found.”].)

Fair Market Value Valuation Basis May Not Fully Compensate Human Labor Trafficking

Victims, 31 N. Ill. U. L. Rev. 553, 560 (2011). The California Trafficking Victims Protection Act enacted not only section 236.1 but also amended section 1202.4 by adding subdivision (q) to enlarge the scope of restitution calculation for trafficking victims. (See Cal. Penal Code § 1202.4, subd. (q); Stats.2005, c. 240 (A.B.22), § 10.5.)

Under section 1202.4, subdivision (q), “[u]pon conviction for a violation of Section 236.1, the court shall, *in addition to any other penalty or restitution*, order the defendant to pay restitution . . . pursuant to this section.” (Penal Code § 1202.4, subd. (q), italics added.)⁷ This provision requires that:

[T]he court shall base its order *upon the greater of the following*: the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, *or* the value of the victim’s labor as guaranteed under California law, *or* the actual income derived by the defendant from the victim’s labor or services *or* any other appropriate means to provide reparations to the victim.

(*Ibid.*, italics added.)⁸

In mandating that the greater of a number of different valuation calculations is to be used when determining a trafficking victim’s loss, this statutory provision “commands the court to

⁷ That California’s restitution scheme requires courts to award restitution to a trafficking victim under both subdivision (f) *and* (q) of section 1202.4 is clear from the inclusion of the “in addition to any other penalty or restitution” clause in subdivision (q). (See *In re C.H.* (2011) 53 Cal.4th 94, 103 [133 Cal.Rptr.3d 573] [“It is a settled principle of statutory construction, that courts should “strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.”] [quoting *Klein v. United States of America* (2010) 50 Cal.4th 68, 80, 112 Cal.Rptr.3d 722].)

⁸ In this respect, section 1204.4(q) imposes a similar restitution calculation to that required by the federal Trafficking Victims Protection Act of 2000. (See 18 U.S.C. § 1593 [expressly defining the “full amount of the victim’s losses” to also include the offender’s ill-gotten gains or the value of the victim’s labor or services, whichever is greater].)

choose the recovery that *best* mitigates the injury,” (Greer, *supra*, at p. 574, original italics)—a command that exemplifies the principle that restitution orders should be individually tailored to make the victim financially whole (see, e.g., *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123 [43 Cal.Rptr.2d 681] [observing that “an order for restitution . . . attempts to make a victim whole”]; *Giordano, supra*, 42 Cal.4th at p. 658 [observing that one function of restitution orders is to “restore the economic status quo, to the extent that it is possible”]). This provision also recognizes that the entirety of the actual economic loss incurred by a human trafficking victim may be difficult or impossible to calculate, and full restitution in such cases requires the court to “forc[e] the criminal to yield up to his victim the fruits of the crime,” rendering the crime “worthless to the criminal.” (*United States v. Fountain* (7th Cir. 1985) 786 F.2d 790, 800, *opinion supplemented on denial of reh’g*, (7th Cir. 1985) 777 F.2d 345 (Posner, J.).)⁹

In this case, . . . [Identify all relevant income or value information known or reasonably estimated, along with the value calculations. For examples of restitution calculation based on the value of services or income earned in a sex trafficking case, see *United States v. Lewis* (D.D.C. 2011) 791 F.Supp.2d 81, 92-94 (addressing restitution for multiple victims).]

Accordingly, pursuant to section 1202.4, subdivision (q), [Name/Pseudonym] seeks additional restitution in the amount of [fill in \$].

⁹ Insofar as defendant may argue that a restitution order should not award a sex trafficking victim the value of performing illegal commercial sex activities, the Court must reject such argument as “preposterous given that [defendant’s] victim[] w[as] enslaved and forced to prostitute.” (*U.S. v. Cortes-Castro* (11th Cir. 2013) 511 Fed. Appx. 942, 947.) By its express terms, section 1202.4, subdivision (q), applies to all victims of the trafficking offenses under section 236.1. No principle of statutory construction supports an interpretation of subdivision (q) that excludes all commercial sex trafficking victims from receiving his or her statutorily mandated additional restitution based on the greater of the valuation calculations provided.

CONCLUSION

Under California law, all crime victims have constitutional and statutory rights to restitution. Where a defendant has been convicted of human trafficking, the Court must award restitution in an amount that not only reimburses the victim for all economic loss incurred by the victim but also includes the additional statutory loss based on the greater of a number of alternative calculations. Here, [Name/Pseudonym] has shown that [she/he] is entitled to restitution for all of the aforementioned losses. Therefore, [Name/Pseudonym] requests that the Court grant this motion and order mandatory restitution in the amount of \$ [amount] to [Name/Pseudonym].

Dated: _____

Respectfully submitted,

[Attorney Information]