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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONALD LEE THURMAN, Defendant and Appellant.	B284941 (Los Angeles County Super. Ct. Nos. GA088935, GA087849, PA067832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darrell Mavis, Judge. Affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Donald Lee Thurman (Thurman) guilty of the first degree murder of Nicholas Carter (Carter) with special circumstances. Thurman contends on appeal that the trial court misinstructed the jury on the law of murder and accomplice testimony. Further, he contends that the trial court violated his due process rights by imposing fines without first determining his ability to pay them. We affirm the judgment.

BACKGROUND

I. The murder of Nicholas Carter

Thurman is a self-admitted conman with a history of lying to and stealing from those in his life, including coworkers and friends. Numerous witnesses testified at trial about the fraud and identity theft Thurman committed against them. He, for example, embezzled from his former employer, Albertsons. He also stole $28,000 from the Boy Scouts. Using friends' identities, he opened bank accounts and credit cards. He borrowed money, promising to pay it back, but often failing to do so. Thurman also spun elaborate lies to further his schemes. He told friends like Erik Pearson, with whom Thurman was particularly close, that he was an undercover police officer, going so far as to persuade the more naïve of them to go on "undercover" "operations" with him.

Around July 2012, Carter and Thurman's paths crossed. At that time, Carter started working in Glendale and was looking for a place to live. In response to a listing on Craigslist, he met Thurman and agreed to share an apartment with him.

Not long after moving in with Thurman, Carter discovered that Thurman had stolen his identity. In September 2012, police officers conducted a probation search of the apartment, as

Thurman—unbeknownst to Carter—was on probation. An officer told Carter that Thurman had photographs of Carter's driver's license and other private information on Thurman's phone. Carter discovered unauthorized charges on his credit cards. Thurman also used Carter's identity to guarantee a friend's lease. Carter filed a police report against Thurman on November 26, 2012.

By this time, Carter had moved out of the apartment he shared with Thurman and moved in with friend and coworker Allison Purtle. Carter told Purtle that Thurman had "every excuse in the book for everything." Carter also told Purtle and another close friend and coworker, Jason Berk, that Thurman owed Carter $4,000.

Berk last saw Carter on January 7, 2013 at 8:00 p.m. As they left work that night, Carter told Berk he was going to meet Thurman at BJ's Restaurant to discuss the things they had in storage together. BJ's video surveillance confirmed that Carter, Thurman, and Pearson were at BJ's until about 9:30 p.m. Carter did not return to the apartment he shared with Purtle. His friends and family never saw Carter again.

However, Carter's friends and family continued to receive text messages from his phone. On January 8, 2013, Berk and Purtle received text messages from Carter's phone saying Carter would not be at work because his grandmother had passed away. Neither Purtle nor Berk knew at the time that Carter's grandparents had long been dead. From January 7 to January 18, 2013, Carter's father, who was very close to his son and communicated with him daily, received over 50 text messages from Carter's phone.

Financial transactions continued to occur in Carter's name. Purchases were made on his credit cards, and withdrawals were made from his bank accounts. Video surveillance from places where the transactions occurred—e.g., grocery stores, Target, and banks—showed Thurman and Pearson using Carter's credit cards.

When more than a week passed without seeing Carter, Berk and others became concerned because Carter had an excellent work ethic and it was uncharacteristic of him to be gone for so long without checking in. Berk texted Carter on January 17, 2013, asking him to check in, but Berk received responses that Carter's family still needed him. Friends began to suspect the text messages they had been receiving were not really from Carter. These suspicions heightened when they discovered Carter's bike still locked up outside the office. On January 18, 2013, Carter's father filed a missing person's report.

However, unbeknownst to Carter's family, on January 8, 2013 hikers had discovered a puddle of blood off a trail in the Angeles National Forest. On January 19, 2013, officers discovered Carter's body, wrapped in a blanket, buried in a shallow grave. None of Carter's property was found with his body—not his cell phone, wallet or credit cards. Carter died from blunt force trauma to the head.

II. Pearson's testimony

Thurman and Pearson were charged with Carter's murder. However, Pearson entered into a plea agreement with the prosecution and agreed to testify at Thurman's trial.

At trial, Pearson, then 26 years old, testified that he had known Thurman since they were kids. They lost contact but reconnected in January 2012 and became close. Pearson believed

that Thurman was an undercover cop, albeit a dirty one. Pearson also believed Thurman's tales that Pearson's girlfriend was in danger and needed protection, for which Pearson agreed to pay Thurman.

On January 7, 2013, Thurman and Pearson bought two shovels. They drove into the Angeles National Forest and dug holes along an old fire trail before returning home.[1] Later that night, Thurman picked up Pearson in a red Ford Focus which Pearson had rented a month before. En route to BJ's, Thurman told Pearson to kill Carter with a bat Thurman had in the car. Thurman explained that his police captain was Carter's adoptive father and wanted Carter to disappear.

Carter joined them at BJ's. They ate and drank, and Carter and Thurman argued about finances. When they were done, Carter did not want to ride his bicycle home because he felt woozy from the beer he'd consumed. After locking his bicycle up at work, Carter, Thurman, and Pearson drove in the Focus to a liquor store, and then to their former apartment building to check the mail. When Carter got out of the car, Pearson came up behind him and struck Carter with the bat six or seven times on

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[1] Pearson was a bit unclear about when they bought the shovels and went into the forest to dig the grave. However, Thurman and Pearson's cell phones were off network on January 7, 2013, from about 4:00 p.m. to 6:00 p.m.—inferentially, when they were digging Carter's grave—and from about 10:00 p.m. to 1:00 a.m. on January 7 to January 8—when they were killing Carter and burying him.

the head.[2] According to Pearson, he killed Carter because Thurman had threatened to harm him or his family if he didn't.

Thurman and Pearson drove Carter's body to the Angeles National Forest where they wrapped Carter's body in a blanket Carter had owned since college and buried him in the predug grave. After cleaning the grave site by pouring bleach around it, they returned to the murder scene and poured bleach on the curb where they'd murdered Carter. Thurman also cleaned the car, shovels, and bat. Even so, blood was later discovered in the car.

After the murder, Pearson and Thurman used Carter's credit cards and identity to make purchases. Thurman also used Carter's money to settle debts to others like Rosemary Hayden (Pearson's sister) to whom Thurman gave $500 in gift cards. Thurman also sent text messages to Carter's friends and family from Carter's phone, pretending to be Carter.

III. Thurman's testimony

Thurman testified in his own defense at trial. He admitted being a conman but denied any involvement with the murder. Instead, Thurman testified that after leaving BJ's, Pearson and Carter dropped Thurman off at home, and Thurman went to the gym and then to bed. As to why Thurman had Carter's cell phone and credit cards, Thurman explained that Carter gave them to him at BJ's, because Carter was a willing participant in Thurman's fraudulent schemes.

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[2] Before trial, Pearson had maintained that Thurman beat Carter with the bat. At trial, Pearson confessed for the first time that he was the actual killer.

IV. Procedural background

As indicated, Pearson pleaded guilty to first degree murder (Pen. Code, § 187, subd. (a)).[3] In exchange for testifying truthfully at trial, he was to be sentenced to 25 years to life.

Thurman proceeded to be tried by a jury, which found him guilty of first degree murder (§ 187, subd. (a)) and found true special circumstance allegations that he murdered Carter while engaged in a robbery (§ 190.2, subd. (a)(17)), while lying in wait (*id.*, subd. (a)(15)), because Carter was a witness to a crime (*id.*, subd. (a)(10)), and for financial gain (*id.*, subd. (a)(1)).

On July 17, 2017, the trial court sentenced Thurman to life without the possibility of parole. The trial court also imposed sentence on two other cases—cases Nos. PA067832 and GA087849—which had been trailing the murder case and to which Thurman had pleaded no contest. On each of the cases, the trial court imposed a $300 restitution fine (§ 1202.4, subd. (b)), a $40 court operations assessment (§ 1465.8), and a $30 court facilities assessment (Gov. Code, § 70373).[4]

DISCUSSION

I. The special circumstance instruction

Thurman contends the trial court misinstructed the jury that it could find him guilty of murder if it found he possessed property stolen from the victim and found slight corroborating evidence, under CALCRIM No. 376. We need not reach the

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[3] All further statutory references are to the Penal Code.

[4] The trial court also imposed victim restitution (§ 1202.4, subd. (f)), and a parole revocation restitution fine, which it stayed. Thurman does not challenge these orders.

merits of this contention because, even assuming error, no conceivable prejudice to Thurman could have resulted. The jury found true four special circumstance allegations (§ 190.2, subd. (a)(1), (10), (15) & (17)). Even if we reversed one allegation, three would remain, and Thurman would still be subject to a sentence of life without the possibility of parole.

II. Instruction on accomplice testimony

The trial court correctly instructed the jury that Pearson was an accomplice and how to treat his testimony, under CALCRIM Nos. 335 (accomplice testimony) and 708 (special circumstances, corroboration of accomplice testimony). (See generally § 1111; *People v. Mohamed* (2016) 247 Cal.App.4th 152, 161.) Thurman, however, faults the trial court for not similarly instructing the jury that it could not convict him on evidence provided by Pearson that was corroborated only by Thurman's testimony. No such instruction was necessary.

The purpose underlying section 1111 is to ensure that a defendant will not be convicted solely on the testimony of an accomplice who might have a self-serving motive to implicate the defendant. (*People v. Davis* (2005) 36 Cal.4th 510, 547.) That purpose is inapplicable to protect a defendant from his own testimony. It is further unclear how it is applicable where, as here, the defendant testifies and denies being an accomplice; that is, Thurman denied helping Pearson murder Carter. In any event, a defendant's own testimony may supply the necessary corroboration for an accomplice's testimony. (*People v. Williams* (1997) 16 Cal.4th 635, 680; *People v. Mohamed*, *supra*, 247 Cal.App.4th at p. 163; *People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012.) As the People point out, Thurman cites no authority

for the notion an accomplice's testimony cannot be corroborated by a defendant's own testimony in a single-defendant case.[5]

III. Ability to pay hearing

Without objection from Thurman, the trial court imposed a $300 restitution fine under section 1202.4, subdivision (b), a $30 court facility assessment under Government Code section 70373, and a $40 court operations assessment under section 1465.8. Under recent authority holding that such assessments may not constitutionally be imposed absent evidence of the defendant's ability to pay them, Thurman contends that the matter must be remanded so that the trial court can conduct an ability to pay hearing. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).) We disagree.

The defendant in *Dueñas*, *supra*, 30 Cal.App.5th at page 1160 was an indigent mother of two young children. Because of her cerebral palsy, Dueñas dropped out of high school, did not have a job, and, as an adult and mother, received public assistance. (*Ibid.*) As a teenager, she was unable to pay three juvenile citations, which led to a suspension of her driver's license. She then suffered misdemeanor convictions for driving with a suspended license. In each case, she "was offered the ostensible choice of paying a fine or serving jail time in lieu of payment." (*Id.* at p. 1161.) Unable to pay, she served time in jail.

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[5] Contrast the single-defendant case with one in which the accomplice is one of multiple defendants in a single criminal trial. In such a case, it is proper to instruct that to the extent a codefendant's testimony tends to incriminate a defendant, it should be viewed with care and caution and is subject to the corroboration requirement. (*People v. Avila* (2006) 38 Cal.4th 491, 561–562.)

(*Ibid.*) When she was charged with another misdemeanor for driving with a suspended license, she asserted at sentencing that she did not have the ability to pay the fine. She asked the trial court to set a hearing to determine her ability to pay. However, the trial court concluded that the assessments were mandatory regardless of her inability to pay them and rejected that due process and equal protection required the court to consider her ability to pay.

On appeal, *Dueñas*, *supra*, 30 Cal.App.5th at page 1157 held that due process requires a trial court to conduct a hearing to determine a defendant's ability to pay before imposing assessments. Further, constitutional concerns required execution of the section 1202.4 restitution fine to be stayed pending an ability to pay hearing. (*Id.* at pp. 1164, 1172.)

Unlike the defendant in *Dueñas*, Thurman did not object below on the ground of his inability to pay. Generally, where a defendant has failed to object to a restitution fine based on an inability to pay, the issue is forfeited on appeal. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) Respectfully, we agree with our colleagues in Division Eight that this general rule applies here to the assessments imposed under section 1465.8 and Government Code section 70373. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153; but see *People v. Castellano* (2019) 33 Cal.App.5th 485.)

As to whether forfeiture applies to the $300 restitution fine under section 1202.4, subdivision (b), that is an issue we need not decide. Whether or not forfeiture applies to the restitution fine, as well as to assessments, *Dueñas* is still inapplicable. *Dueñas* is based on the due process implications of imposing assessments and fines on the impoverished defendant. The situation in which

Thurman has put himself—life in prison without the possibility of parole—does not implicate the same due process concerns at issue in factually unique *Dueñas*. Thurman, unlike Dueñas, does not face incarceration because of an inability to pay assessments and fines. Thurman is in prison because he murdered Carter. Even if Thurman does not pay the assessments and fines, he will suffer none of the cascading and potentially devastating consequences Dueñas suffered. (See *Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) Thurman has and will never face additional punishment because he cannot pay assessments or fines.

Moreover, there is no evidence Thurman is indigent. To the contrary, the record before us shows that before going to prison for murdering Carter, Thurman was employed and made money, ill-gotten and otherwise. (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 139 [defendant not "similarly situated" to Dueñas].) And, that Thurman might have to pay restitution for money he stole from friends and from the Boy Scouts is not indicia of indigence of the type contemplated in *Dueñas*.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

DHANIDINA, J.

I concur:

EDMON, P. J.

LAVIN, J., Concurring and Dissenting:

I agree with the majority's conclusion that even if instructing the jury with a modified version of CALCRIM No. 376 was error, the error was harmless. I also agree with the majority's conclusion that the court correctly instructed the jury on accomplice testimony. I respectfully disagree, however, with the majority's conclusion that defendant forfeited any challenge to the imposition of the court facilities fee (Gov. Code, § 70373), the court security fee (Pen. Code,[1] § 1465.8), and the restitution fine (§ 1202.4, subd. (b)) by failing to object in the trial court. I therefore concur in part and dissent in part.

1. CALCRIM No. 376

When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one of which was legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129.) Here, besides finding defendant guilty of first degree murder with the special circumstances of murder committed while engaged in the commission of robbery and for financial gain, the jury found defendant guilty of first degree murder with the special circumstances of murder of a witness to a crime to prevent the witness from testifying in a criminal proceeding and for murder committed while lying in wait. Accordingly, even if the court's instruction improperly informed the jury that defendant's possession of recently stolen property may create an inference that the murder was committed by defendant during the

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[1] All undesignated statutory references are to the Penal Code.

commission of the crime of robbery—i.e., felony murder—the jury *also* based its verdict on the legally valid theory that defendant murdered Nicholas Carter with malice aforethought. (See *People v. Chiu* (2014) 59 Cal.4th 155, 167.) Thus, any instructional error was harmless.

2. Defendant's Ability to Pay Fines and Fees

People v. Dueñas, which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1169–1172 (*Dueñas*).) No one saw it coming—and defendant was not required to anticipate it.

2.1. The issue was not forfeited.

"There is a well-established exception to the forfeiture doctrine where a change in the law—warranting the assertion of a particular objection, where it would have been futile to object before—was not reasonably foreseeable. (*People v. Black* (2007) 41 Cal.4th 799, 810 ['We long have applied the rule that although challenges to procedures … normally are forfeited unless timely raised in the trial court, "this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." '].)" (*People v. Johnson* (2019) 35 Cal.App.5th 134, 137–138; see *People v. Brooks* (2017) 3 Cal.5th 1, 92 [" '[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence' "].)

The majority cites *Avila* in support of the general rule that "where a defendant has failed to object to a restitution fine based

on an inability to pay, the issue is forfeited on appeal." (Maj. opn. *ante*, p. 10, citing *People v. Avila* (2009) 46 Cal.4th 680, 729.) But *Avila* concerned the imposition of the maximum restitution fine, $10,000, well *above* the statutory minimum. (§ 1202.4, subd. (b)(1) [minimum restitution fine for felonies is $300].) Here, of course, the court imposed the minimum $300 restitution fine—and, until *Dueñas* held otherwise, the court could not consider a defendant's ability to pay that amount. (§ 1202.4, subd. (c) ["The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. 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[.]"]; see *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1169–1172.)

Nor does *Avila* apply to the court fees at issue here, which, by statute, must be imposed regardless of a defendant's ability to pay them. (§ 1465.8, subd. (a)(1) [fee "shall be imposed on every conviction for a criminal offense" except for parking offenses]; Gov. Code, § 70373, subd. (a)(1) [same].)

I also disagree with my colleagues in Division Eight that either Ms. Dueñas's foresight in objecting in her case or *Dueñas*'s reference to the Magna Carta is relevant to this analysis. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154–1155.) To the contrary, while *Dueñas* "is grounded in long-standing due process principles and precedent [citation], … the statutes at issue here stood and were routinely applied for so many years without successful challenge [citation], that [I am] hard pressed to say its holding was predictable and should have been

anticipated. [Citations.]" (*People v. Johnson*, *supra*, 35 Cal.App.5th at p. 138, fn. omitted.)

In short, before *Dueñas*, no court had ever held that a criminal defendant had the right to a court determination of his ability to pay the minimum restitution fine, the facilities fee, or the security fee.

2.2. The error was prejudicial.

Nor have the People established beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

First, I disagree with the majority that "there is no evidence Thurman is indigent." (Maj. opn. *ante*, p. 11.) Defendant was represented by the public defender below and is represented by court-appointed counsel on appeal. As this court recently explained in *Rodriguez*, "[b]efore the public defender's office is appointed as counsel, it must verify the defendant's indigence by assessing his income, expenses, debt, and other relevant financial data. [Citation.] The final determination of indigence is made by the court. [Citations.] As such, public defender clients, all of whom have already been financially evaluated and found indigent by the court, are legally entitled to a presumption of indigence for most purposes. [Citation]." (*People v. Rodriguez* (2019) 34 Cal.App.5th 641, 645 (*Rodriguez*).)

Second, a defendant's ability to pay fines and fees is evaluated in light of his total financial obligations. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) Total financial obligations include court-ordered victim restitution, which must be paid first. (§ 1203.1d, subd. (b)(1), (3) [payments allocated first to victim restitution, then to fines, including restitution fine]; Cal. Code Regs., tit. 15, § 3097, subd. (g).) Here, defendant owes

thousands of dollars in restitution to his victims: At sentencing, he was ordered to pay $3,155 in restitution to the Victim's Compensation Board; he had an outstanding restitution order of approximately $22,000 in case No. PA067832; and a hearing was scheduled in case No. GA087849 to determine how much restitution he owed to Parker Brooks and the Boy Scouts of America.

To be sure, defendant may be able to pay some of these obligations with wages he earns in prison—but paid prison work is not guaranteed.[2] (See *Rodriguez*, *supra*, 34 Cal.App.5th at pp. 648–649 [under § 2700 and Cal. Code Regs., tit. 15, § 3040, subds. (a) & (k), prison inmates are not entitled to paid work].) And, even assuming defendant could secure such work, it is unclear that his wages would be sufficient to pay the fine and fees at issue here. "The inmate minimum wage in California prisons is $0.08 per hour and $12 per month. [Citation.] Inmate technicians, like bakers, barbers, firefighters, and heavy-equipment operators, may earn between $0.15 and $0.24 per hour ($23–$36 per month). [Citation.] Those with special skills, such as mechanics, dental technicians, X-ray technicians, and welders can earn between $0.19 and $0.32 per hour ($29–$48 per month). [Citation.]" (*Rodriguez*, at p. 649.)

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[2] I also note that while prison wages may be relevant to a defendant's ability to pay the restitution fine, it is not clear that such wages are relevant to his ability to pay court costs, which is typically evaluated based on the defendant's financial circumstances in the six months or year following sentencing. (See, e.g., Gov. Code, § 68635, subds. (c), (d) [inmate's ability to pay court fees in civil cases determined based on average balance in inmate trust account for six-month period preceding application for fee waiver].)

Accordingly, it is not clear beyond a reasonable doubt that defendant has the ability to pay the $300 restitution fine or $70 in fees imposed below.

2.3. Remand is appropriate.

While it may not always be necessary to remand for a hearing on a defendant's ability to pay fines and fees, remand is appropriate under the circumstances of this case. Here, the record reveals neither the precise amount of victim restitution imposed nor the amounts of any fines and fees ordered in defendant's other cases. It is also possible defendant still has access to illicitly-acquired funds or other assets not revealed in the record. This court is ill-equipped to make that finding in the first instance. (See *People v. McCullough* (2013) 56 Cal.4th 589, 594; compare, e.g., *Rodriguez*, *supra*, 34 Cal.App.5th at pp. 648–650 [declining to remand for inquiry into defendant's ability to pay attorney's fees in light of his "financial circumstances, the statutory presumption that he lacks the ability to pay, and the lack of evidence to conceivably rebut that presumption"].)

Accordingly, I would remand this matter for the limited purpose of allowing defendant to assert his inability to pay the assessed fines and fees. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490–491; accord, *People v. Viera* (2005) 35 Cal.4th 264, 305–306 [where defendant was ordered to pay a restitution fine at a time when court could not consider his ability to pay, defendant was entitled to remand so the court could consider his ability to pay under current statutory criteria].)

I would also hold that if, on remand, the prosecution chooses not to contest defendant's inability to pay, the court must stay the restitution fine and strike the fees—the best result defendant could obtain after a contested hearing. (See *People v.*

Viera, *supra*, 35 Cal.4th at p. 306 [ordering trial court to reduce restitution fine to statutory minimum if ability to pay is uncontested on remand]; *People v. Wall* (2017) 3 Cal.5th 1048, 1076 ["if the Attorney General chooses not to contest the question of restitution on remand, he should so inform the trial court in writing with notice to [defendant]. In that event, the court shall reduce [defendant's] restitution fine to … the statutory minimum at the time of his crime, and no hearing will be necessary"].)

LAVIN, J.