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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO

8 No.

9 THE PEOPLE OF THE STATE
OF CALIFORNIA,

**Defendant's Brief In Opposition To
Including Investigation Costs As
Part Of The Restitution Order.**

10
11 Plaintiff,

12 v.

13 SAM SAMPLE

Date:
Time:
Dept:

14
15 Defendant

16 _____ /
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18 INTRODUCTION

19 This brief responds to the District Attorney's brief, and establishes the following
20 three legal propositions. First, the State Compensation Insurance Fund is not entitled to
21 mandatory restitution for investigation costs under Penal Code section 1202.4 because it
22 is not in the business of musical or movie recording, or live entertainment. Second, even
23 if Penal Code section 1202.4 mandated the recovery of investigation costs for victims
24 outside the recording and entertainment industries, a more specific statute gives the court
25 discretion as to whether to impose such costs in insurance fraud cases. Third, because the
26 State Compensation Insurance Fund is a public agency it is not entitled to mandatory
27 restitution for investigation costs without authorization by a special statute. The brief
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1 concludes with a statement that imposing investigation costs as part of a restitution order
2 conflicts with the rehabilitative goal of the requirement of restitution.

3
4 ARGUMENT AND AUTHORITIES

5 1.

6 **Because the State Compensation Insurance Fund is not in**
7 **the business of manufacturing or selling either live**
8 **entertainment, or sound or audiovisual products, it is not**
9 **entitled to the mandatory payment of investigation costs**
10 **under Penal Code section 1202.4.**

11 Because the District Attorney’s brief is clearly written, it is easy reconstruct his
12 argument:

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14 Premise 1: Penal Code section 1202.4 requires restitution to be ordered in a criminal
15 case.

16 Premise 2: Restitution includes economic loss by the payment of investigation fees.

17 Conclusion: Penal Code section 1202.4 requires the payment of investigation costs.
18

19 The District Attorney strongly concludes that Penal Code section 1202.4 *mandates*
20 the imposition of investigation costs as restitution. Consider the following two statements
21 made by the District Attorney. “Only a finding on the record of compelling and
22 extraordinary reasons which are not apparent in this case allows a court to deny restitution
23 of the investigation costs PC1202.4.” (DA 8:24-25; 9:1.)¹ “The court is required to
24 award the restitution for the investigative and other economic losses in the amounts
25 claimed by the victims.” (DA 9:13-14.) The District Attorney’s conclusion is legally

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27 ¹“DA” refers to the District Attorney’s brief entitled, “People’s Brief in Support of
28 Restitution Order to Include Investigative Costs.”

1 false.

2 The problem with the District Attorney’s argument begins with Premise 2. Neither
3 the statutory law nor the case law *requires* the payment of investigation costs under Penal
4 Code section 1202.4 unless the victim is in the business of manufacturing or selling either
5 live entertainment, or sound or audiovisual products. We begin with the statutory law.

6 The only provision of Penal Code section 1202.4 that makes it mandatory to
7 impose investigation costs is found in subdivision (r): “The order of restitution *shall* also
8 include reasonable costs incurred as a result of any investigation of the violation
9 undertaken by the owner, lawful producer, or trade association acting on behalf of the
10 owner or lawful producer.” (Emphasis added.) But subdivision (r) only applies to
11 violations of Penal Code sections 653h, 653s, 653u, and 653w. And these Penal Code
12 sections apply to the business of manufacturing or selling either live entertainment, or
13 sound or audiovisual products. The District Attorney relies on Penal Code section 1202.4
14 subdivision (f). The Legislature could easily have put such mandatory language in
15 subdivision (f). But it did not.

16 The fact that the District Attorney also relies upon Article I, section 28 subdivision
17 (b), of the state constitution does not change the result. That is because the state
18 constitutional mandate for restitution has been carried out by the Legislature’s enactment
19 of a comprehensive statutory scheme for restitution. (*People v. Martinez* (2005) 36
20 Cal.4th 384, 394 [30 Cal.Rptr. 3d 779, 115 P.3d 62].) Thus it is the specific statutory
21 provisions that control the issue of restitution. We now turn to the case law.

22 The District Attorney cites *People v. Farael* (1999) 70 Cal.App.4th 864 [83
23 Cal.Rptr.2d 16] for the proposition, “All investigation costs are proper restitution to be
24 ordered paid to an insurance agency dealing with a fraudulent claim.” (DA 6:19-21.)
25 The specific holding in the case is that a court may impose as a condition of probation
26 that the defendant sign a confession of judgment in favor of a victim in lieu of a
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1 restitution order. (70 Cal.App.4th at pp. 866-867.) The facts of the case were that the
2 defendant signed a confession of judgement to pay investigation costs. But no issue as to
3 whether those costs were ordered in the exercise of the judge’s discretion, or because they
4 were legally mandated, was before the court. “It is axiomatic that cases are not authority
5 for propositions not considered.” (*People v. Ault* (2004) 33 Cal.4th 1250,1268, fn. 10 [17
6 Cal.Rptr.3d 302, 95 P.3d 523].) Thus *Farael* is not authority for the District Attorney’s
7 claim.

8 The District Attorney cites *People v. Maseshwari* (2003) 107 Cal.App.4th 1406
9 [132 Cal.Rptr.2d 903]. In that case the defense argued: (1) the restitution ordered was
10 outside Penal Code section 1202.4 because it was a civil disposition of damages; (2) the
11 victim was required to use public prosecutorial and investigative agencies in lieu of
12 running up costs in civil litigation; and (3), the victim would receive a windfall. The case
13 did not litigate the issue of whether the award of investigation costs was mandated by
14 Penal Code section 1202.4. Thus all that *Maseshwari* shows is that a trial judge exercised
15 *discretion* to include investigation costs as part of restitution.

16 Similarly, the District Attorney cites *People v. Ortiz* (1997) 53 Cal.App.4th 791
17 [62 Cal.Rptr.2d 66] for the proposition that “Costs of services which further the criminal
18 investigation are properly ordered as restitution.” (DA 7:24-26.) The District Attorney’s
19 citation of *Ortiz* is correct. But *Ortiz* nevertheless fails to support the District Attorney’s
20 conclusion that payment of investigation fees is mandated. All *Ortiz* does is show that a
21 trial court has discretion to order investigation costs as restitution under Penal Code
22 section 1202.4.

23 The District Attorney relies heavily on *People v. Maseshwari*, telling us that “the
24 only difference” between that case and the present one is that the victim in *Maseshwari*
25 did not sue for the collection of investigative costs first. (DA 7:7-9.) “The only factual
26 distinction is that” SCIF mitigated damages by a more prompt investigation. (DA 7:9-

1 11.) But the District Attorney fails to cite a case that is even closer to the present; *People*
2 *v. O’Casey* (2001) 88 Cal.App.4th 967 [106 Cal.Rptr. 263]. *People v. O’Casey* is closer
3 because it dealt with a restitution award in a workman’s compensation fraud case. There
4 the trial judge exercised discretion to disallow investigative costs as part of a restitution
5 order to a private insurance company. (See 88 Cal.App.4th at p. 970.)

6 Neither the statutory law nor the case law supports the District Attorney’s
7 conclusion that Penal Code section 1202.4 mandates this court to order that investigation
8 costs be included as restitution. As we will see next, the statutory law specifically
9 provides that, in cases of insurance fraud, the court has *discretion* whether or not to order
10 the payment of investigation costs as restitution.

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12 2.

13 **Even assuming that investigation costs are mandated under**
14 **the general restitution statute, Penal Code section 1202.4,**
15 **the court has discretion as to whether to impose such costs**
16 **under the more specific statute applicable to insurance**
17 **fraud; Insurance Code section 1871.4.**

18 The District Attorney argues that this court is required to impose the State
19 Compensation Insurance Fund’s investigation costs as part of a restitution order: “The
20 court *is required* to award the *restitution for the investigative* and other economic losses
21 in the amounts claimed by the victims.” (DA 9:13-14, emphasis added.) The District
22 Attorney bases his claim on an interpretation of Penal Code section 1202.4. However, a
23 more specific statute governing restitution in cases of insurance fraud, Insurance Code
24 section 1871.4, gives the court discretion as to whether to impose investigation costs as
25 part of a restitution order.

26 Under the “Doctrine of the Specific over the General” more specific provisions of
27 written instruments, whether they be constitutions, statutes or contracts, preempt more
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1 general provisions. “It is a basic tenet of statutory construction that in reading the
2 elements of an organic document such as a Constitution, statute, or charter, a special
3 provision controls a general provision.” (*Miller v. City of Sacramento* (1977) 66
4 Cal.App.3d 863, 870 [136 Cal.Rptr. 315].) This principle is explicitly stated in Civil
5 Procedure Code section 1859:

6 In the construction of a statute the intention of the Legislature, and in the
7 construction of the instrument the intention of the parties, is to be pursued,
8 if possible; and when a general and particular provision are inconsistent, the
9 latter is paramount to the former. So a particular intent will control a
general one that is inconsistent with it.

10 As the District Attorney explains, the present case is one in which Mr. Sample was
11 convicted of crimes arising out of insurance fraud. (See DA 1-3.) Indeed, the District
12 Attorney had charged Mr. Sample with insurance fraud in violation of Penal Code section
13 550 subdivision (b)(1), and Insurance Code section 1871.4 subdivision (a)(1).

14 The restitution provision for cases involving insurance fraud is set out in Insurance
15 Code section 1871.4 subdivision (b), which states in relevant part:

16 Restitution shall be ordered, including restitution for any medical evaluation
17 or treatment services obtained or provided. The court shall determine the
18 amount of restitution and the person or persons to whom the restitution shall
19 be paid. A person convicted under this section *may* be charged the costs of
investigation *at the discretion of the court*.

20 (Emphasis added.) In addition to Penal Code section 1202.4 subdivision (r), Labor Code
21 section 3700.5 subdivision (c), which applies to employers, shows that when the
22 Legislature wants to create a mandatory duty to impose investigation costs as part of
23 restitution it knows how to do so:

24 Upon a first conviction of a person under this section, the person *may be*
25 *charged the costs of investigation at the discretion of the court*. Upon a
26 subsequent conviction, the person *shall be charged the costs of*
27 *investigation* in addition to any other penalties pursuant to subdivision (b).
28 The costs of investigation shall be paid only after the payment of any

1 benefits that may be owed to injured workers, any reimbursement that may
2 be owed to the director for benefits provided to the injured worker pursuant
3 to Section 3717, and any other penalty assessments that may be owed.

4 (Emphasis added.) Because Insurance Code section 1871.4 more specifically applies to
5 insurance fraud than Penal Code section 1202.4, its restitution provisions prevail. (Cf.
6 *People v. Amin* (2000) 85 Cal.App. 4th 58, 63-65 [101 Cal.Rptr.2d 756] holding in a
7 workman’s compensation fraud case that the restitution provision of Insurance Code
8 section 1871.4 prevails over Labor Code section 5300.)

9 But Mr. Sample was not convicted of committing insurance fraud in violation of
10 Insurance Code section 1871.4. Rather, he was convicted of committing grand theft in
11 violation of Penal Code section 487. So how is it that the restitution provisions of
12 Insurance Code section 1871.4 applies to this case? The answer is provided by *People v.*
13 *Ozkan* (2004) 124 Cal.App.4th 1072 [21 Cal.Rptr.3d 854].

14 In *People v. Ozkan* the defendant was the president of a corporation that owned
15 some gas stations. He had regular gas put in tanks for supreme grade and mid-grade gas.
16 He thus defrauded members of the public who paid for premium gas when they bought
17 regular gas, and he failed to pay the state \$27,000 in sales taxes. Ozkan pleaded guilty to
18 grand theft in violation of Penal Code section 484, and to filing false sales tax returns in
19 violation of Revenue and Taxation Code section 7153.5. Two counts were dismissed.
20 One dismissed count charged conspiracy to obtain money by false pretenses. The other
21 charged conspiracy to defraud by false advertising. Ozkan acknowledged that payment of
22 restitution would be a consequence of his plea, and there was a *Harvey* waiver with
23 regard to the dismissed counts. The trial court refused to impose restitution for
24 investigation costs, and the prosecution appealed. The trial court’s ruling was reversed by
25 the Court of Appeal. (124 Cal.App.4th at p. 1081.)

26 The Court of Appeal held that investigation costs could be recovered under
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1 Business and Professions Code section 12015.5. That section provides that the recovery
2 of investigation costs “shall” be imposed upon any person convicted of violating any
3 provision in division five of the Business and Professions Code. Ozkan was not
4 convicted of violating any provision of the Business and Professions Code. However, he
5 had made a *Harvey* waiver when he entered his plea. A *Harvey* waiver allows the court
6 to consider the facts of the dismissed counts. (*People v. Ozkan, supra*, 124 Cal.App.4th
7 at p. 1078.) One of the dismissed conspiracy counts alleged as overt acts that Ozkan
8 committed illegal acts violating accurate weights and measures as set forth in Business
9 and Professions Code sections 13413 and 13501. “As these violations fall within section
10 12105.5, Ozkan’s plea agreement brought him within to the provisions of this statute.”
11 (*Ibid.*) “Section 12015.5 states that an order for recovery of investigation costs ‘shall’ be
12 imposed where a defendant is ‘convicted of violating any of the provisions of this
13 division.’ The mandatory language of the statute would indicate the trial court was
14 required to order restitution of investigation costs when it applies.” (*Id.* at p. 1079.)

15 Thus while Mr. Sample was not convicted of violating Insurance Code section
16 1871.4, the terms of his plea allows this court to consider the facts of the case that
17 otherwise invoke Insurance Code section 1871.4. And this would be the result even
18 without a *Harvey* waiver. That is because the dismissed counts are transactionally related
19 to the counts to which Mr. Sample pleaded guilty. The court can therefore take the facts
20 of the dismissed counts under consideration. (See *People v. Harvey* (1979) 25 Cal. 3d
21 754, 758 [159 Cal.Rptr. 696, 602 P.2d 396].)

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The State Compensation Insurance Fund’s status as a public agency prevents it from obtaining investigation costs under Penal Code section 1202.4.

Before holding that investigation costs could be recovered under the specific provisions of the Business and Professions Code, the Court of Appeal in *People v. Ozkan*, *supra*, first held that a public agency is not generally a direct victim when it spends money to investigate crime: “Under the relevant case law and the statutory scheme, public agencies are not directly ‘victimized’ for purposes of restitution under Penal Code section 1202.4 merely because they spend money to investigate crimes or apprehend criminals.” (124 Cal.App.4th 1072.) In his brief the District Attorney fails to address the status of the State Compensation Insurance Fund.

To be sure, the State Compensation Insurance Fund (SCIF) takes on the properties of both a state agency and a private insurance company. On the one hand, the State Treasurer is the custodian of all SCIF’s securities. (Ins. Code § 11788.) On the other hand, the money that SCIF deposits with the State Treasurer is not state money. (Ins. Code § 11800.1.) For some purposes SCIF is treated as a private enterprise. (*Notrica v. State Compensation Ins., Fund* (1999) 70 Cal.App.4th 911, 941 [83 Cal.Rptr.2d 89].) On balance, however, SCIF should be treated as a statute agency for purposes of the present hearing. “The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of question of fact, or as to the true interpretation of words or the construction of language used in a statute.” (*Ex parte Tartar* (1959) 52 Cal.2d 250, 257 [339 P.2d 553].)

SCIF was created by the state. (See Cal. Const., art. 14, § 4.) It was the state that dictated that SCIF place its principal office in San Francisco. (Ins. Code § 11781.) It was the state that gave SCIF permission to build a branch office in Los Angeles. (Ins. Code § 11781.5.) Treatment of SCIF as a governmental entity is supported by the language with

1 which it is sometimes referred to by the courts. “The State Compensation Insurance Fund
2 is an agency of the state.” (*Gilmore v. State Compensation Ins. Fund* (1937) 23
3 Cal.App.2d 325, 329 [73 P.2d 640].) “The Fund certainly is a ‘public entity.’” (*Maxon*
4 *Industries, Inc. v. State Compensation Ins. Fund* (1993) 16 Cal.App.4th 1387, 1392 [20
5 Cal.Rptr.2d 730].) SCIF was treated as a “public agency” in *State Compensation*
6 *Insurance Fund. v. Riley* (1937) 9 Cal.2d 126 [69 P.2d 985].) And finally, the following
7 excerpt from the history section of SCIF’s website underscores SCIF’s status as a public
8 agency: “2008 – Legislature passes State Fund governance laws that expand the Board of
9 Directors, creates additional exempt executive positions and makes State Fund subject to
10 California Public Records and Bagley-Keene Opening Meeting Acts.”
11 (<http://www.scif.com/about/History.html>)

12 SCIF is a public agency. Therefore, under *People v. Ozkan*, Penal Code section
13 1202.4 does not require this court order investigation fees as restitution.

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15 4.

16 **Given that the purpose of restitution is to contribute to the**
17 **rehabilitation of a person convicted of a crime, this court**
18 **should exercise its discretion so that investigation costs are**
19 **not made part of a restitution order.**

20 A major purpose of requiring restitution in a criminal case is to rehabilitate the
21 offender. “Moreover, the concept of restitution embodies not only the notion that people
22 who suffer loss as a result of criminal activity should be compensated for those losses
23 [Citation.], but also a perception of the value of restitution as a ‘deterrent to future
24 criminality’ [Citation.], and ‘to rehabilitate the criminal.’ [Citation.]” (*People v. Crow*
25 (1993) 6 Cal.4th 952, 957 [26 Cal.Rptr.2d 1, 864 P.2d 80].) “Restitution has long been
26 considered a valid condition of probation because of its rehabilitative value.” (*People v.*
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1 *Pinedo* (1998) 60 Cal.App.4th 1403, 1405 [71 Cal.Rptr.2d 151].) Even if this court
2 exercises discretion to not order investigation costs as part of restitution, Mr. Sample will
3 still owe a large sum of money to SCIF. It would be contrary to Mr. Sample's
4 rehabilitation to create a debt so huge that he would become a virtual slave by having to
5 spend the rest of his life paying thousands of dollars to a public agency.

6 This court is not required to order the recovery of investigation costs as restitution.
7 The court should exercise its discretion under Insurance Code section 1871.4 to not
8 require the payment of SCIF's investigation costs.

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10 Dated: November 17, 2009

Respectfully submitted,

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14 ANTHONY FINKAS
15 Attorney for Defendant
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