

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 495 Determining Restitution Amounts for Crimes

**SPONSOR(S):** Judiciary Committee and Criminal Justice & Public Safety Subcommittee, Mooney and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 354

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**FINAL HOUSE FLOOR ACTION:** 114 Y's

1 N's

**GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 495 passed the House on April 27, 2021, as CS/CS/SB 354.

Restitution is a form of redress for a crime victim that may be ordered as part of the sentence issued by a criminal or juvenile court. Restitution's primary purpose is to compensate a victim for lost or destroyed property, and may be monetary or non-monetary in form. In determining monetary restitution, a court must consider: the amount of the loss sustained by the victim; the defendant's financial resources; the defendant's present and potential future financial needs and earning ability and those of his or her dependents; and any other factors the court deems appropriate.

Generally, a court must rely on the fair market value (FMV) of the property at the time of the offense to determine restitution. When FMV will adequately compensate a victim or otherwise serve the purpose of restitution, it must be established either through direct testimony or evidence establishing the property's:

- Original market cost;
- Manner of use;
- General condition and quality; and
- Percentage of depreciation.

Hearsay is an out of court statement which is offered to prove the truth of the matter it asserts and is generally not permitted in a criminal case unless an exception applies. In determining restitution, a court may generally consider a property owner's testimony regarding the FMV of his or her property, but if a defendant objects, hearsay evidence may not be an owner's sole basis for his or her opinion of the FMV. While case law currently provides exceptions to using FMV as the sole standard for determining restitution, hearsay rules restrict a court's ability to consider hearsay evidence in determining restitution. Recent case law involving scenarios in which courts were forced to order restitution without hearsay evidence, to the detriment of the victim, has resulted in multiple opinions urging the Legislature to consider amending Florida's restitution laws to allow a court to consider hearsay evidence in determining a restitution award.

The bill provides that in both criminal and juvenile delinquency cases:

- The primary purpose of restitution is to compensate a victim, but restitution is also intended to serve the rehabilitative and deterrent goals of the criminal justice system;
- A court must use FMV to determine restitution, unless the state, victim, or defendant shows that using another basis is equitable and furthers the stated purpose of restitution; and
- A court may consider hearsay evidence to resolve any dispute regarding the proper amount or type of restitution, provided the court finds that the hearsay evidence has a minimal indicia of reliability.

Under the bill, a court may, but is not required to, consider hearsay evidence when necessary to determine a fair and equitable restitution amount. When there is a dispute regarding the proper amount or type of restitution, the bill allows a court to consider evidence such as reports from Kelly Blue Book or Realtor.com, or comparable property listings from sources like Ebay, Etsy, Amazon, or other Internet sites. By authorizing a court to consider hearsay evidence, the bill may allow a court to order restitution in an amount that is just and fair to all parties.

The bill may have an indeterminate positive impact on restitution awards to crime victims.

The bill was approved by the Governor on June 29, 2021, ch. 2021-172, L.O.F., and became effective on July 1, 2021.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Background

##### Restitution

Restitution is a form of redress for a crime victim<sup>1</sup> that may be ordered as part of the criminal sentence issued by a court. Restitution is “full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.”<sup>2</sup> The primary purpose of restitution is to compensate a victim for lost or destroyed property, but it also serves the rehabilitative and deterrent goals of the criminal justice system.<sup>3</sup>

Unless the court finds clear and compelling reasons not to order restitution, the sentencing court must, in addition to any punishment, order a defendant to make restitution to a victim for any damage or loss:

- Caused directly or indirectly by the defendant’s actions; and
- Related to the defendant’s criminal episode.<sup>4</sup>

If the court does not order restitution, or orders restitution for only a portion of the damages caused by the defendant’s actions and related to the criminal episode, the court must provide detailed reasons for its decision on the record.<sup>5</sup>

Restitution may be monetary or non-monetary in form.<sup>6</sup> For the purpose of determining the amount of monetary restitution, s. 775.089(6), F.S., requires a court to consider:

- The amount of the loss sustained by the victim;
- The defendant’s financial resources;
- The defendant’s present and potential future financial needs and earning ability and those of his or her dependents; and
- Any other factors the court deems appropriate.<sup>7</sup>

If a defendant’s actions result in bodily injury to the victim, a court must order restitution to include medical expenses, therapy and rehabilitation expenses, and lost wages and income. If the offense caused a victim’s death, a court must order restitution to include an amount equal to the cost of necessary funeral services.<sup>8</sup> Where an offense did not cause a victim bodily injury, a court may still award restitution to include a victim’s lost income and wages which resulted from the offense.<sup>9</sup>

If a court sentences a defendant to probation or the defendant is paroled, any order of restitution must be satisfied as a required condition of his or her probation or parole.<sup>10</sup>

#### *Restitution in Juvenile Delinquency Court*

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<sup>1</sup> “Victim” means each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct result or indirect result of the defendant’s offense or criminal episode, and also includes the victim’s estate if the victim is deceased, and the victim’s next of kin if the victim is deceased as a result of the offense. The term also includes governmental entities and political subdivisions, as those terms are defined in s. 11.45, when such entities are a direct victim of the defendant’s offense or criminal episode and not merely providing public services in response to the offense or criminal episode. S. 775.089(1)(c), F.S.

<sup>2</sup> Black’s L. Dictionary (11<sup>th</sup> ed. 2019).

<sup>3</sup> *Toole v. State*, 270 So.3d 371, 373-374 (Fla.4th DCA 2019), review dismissed, No. SC19-456, 2019 WL 2275025 (Fla. May 29, 2019).

<sup>4</sup> S. 775.089(1)(a), F.S.

<sup>5</sup> S. 775.089(1)(b)1., F.S.

<sup>6</sup> *Id.*

<sup>7</sup> S. 775.089(6), F.S.

<sup>8</sup> S. 775.089(2)(a), F.S.

<sup>9</sup> S. 775.089(2)(b), F.S.

<sup>10</sup> S. 775.089(4), F.S.

Section 985.437, F.S., allows a court with jurisdiction over a child adjudicated delinquent to order the child, as part of a probation program, to make restitution in money, by promissory note cosigned by the child's parent or guardian, or in kind in an amount or manner the court finds reasonable.<sup>11</sup> The restitution ordered must not be an amount greater than the child or the child's parent or guardian could reasonably pay.<sup>12</sup>

The court may retain jurisdiction over a child and the child's parent or legal guardian whom the court orders to pay restitution until the restitution order is satisfied. However, to retain jurisdiction, the court must hold a restitution hearing to determine the amount owed to a victim and the child's ability to pay. Following a restitution hearing, the court may only retain jurisdiction by entering a separate restitution order unconnected with the child's disposition order or commitment order, on or before the date the court's jurisdiction would otherwise end.<sup>13</sup>

### Fair Market Value

In determining restitution, a court must generally rely on the fair market value (FMV) of the property at the time of the offense. When FMV will adequately compensate a victim or otherwise serve the purpose of restitution,<sup>14</sup> it must be established either through direct testimony or evidence establishing the property's:

- Original market cost;
- Manner of use;
- General condition and quality; and
- Percentage of depreciation.<sup>15</sup>

However, in limited circumstances, a court is not restricted to the FMV as the sole standard for determining restitution and may exercise its discretion as required to further the purpose of restitution when the value of the stolen property itself consists of more than just its FMV. For example, deviations from FMV have been recognized in cases involving the theft of a family heirloom, a new automobile, or an older car that had been repaired shortly before the theft.<sup>16</sup> Whether proving restitution based on FMV or not, a court is ultimately constrained by the legal requirement that a victim not receive a windfall and that a defendant not be ordered to pay in excess of the damage he or she caused.<sup>17</sup> Therefore, restitution may not exceed the damage caused by the defendant's criminal conduct.<sup>18</sup>

### Hearsay

Hearsay is a statement made by a person not testifying at a trial or hearing, offered in evidence to prove the truth of what the statement asserts.<sup>19</sup> Hearsay is generally not permitted in criminal courts unless the statement falls under a hearsay exception.<sup>20</sup> In determining restitution, a court may generally consider a property owner's testimony regarding the FMV of his or her property.<sup>21</sup> However, if the defendant objects, hearsay evidence may not be the owner's sole basis for his or her opinion of the FMV.<sup>22</sup> When ordering restitution, hearsay rules may prohibit a court from considering popular sources

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<sup>11</sup> S. 985.437(1)-(2), F.S.

<sup>12</sup> S. 985.437(2), F.S.

<sup>13</sup> S. 985.0301(5)(d), F.S.

<sup>14</sup> The purpose of restitution is not only to compensate the victim, but also to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. *Spivey v. State*, 531 So.2d 965 (Fla. 1988).

<sup>15</sup> *Abbott v. State*, 543 So.2d 411, 412 (Fla. 1st DCA 1989); *State v. Hawthorne*, 573 So.2d 333 (Fla. 1991).

<sup>16</sup> *Tolbert v. State*, 268 So.3d 947, 949 (Fla. 1st DCA 2019) quoting *Davis v. State*, 244 So.3d 374, 377 (Fla. 4th DCA 2018); *Wolff v. State*, 981 So.2d 651 (Fla. 4th DCA 2008); *Domaceti v. State*, 616 So.2d 1148 (Fla. 4th DCA 1993);

<sup>17</sup> *L.A.D. v. State*, 616 So.2d 106, 108 (Fla. 1st DCA 1993); *Rodriguez v. State*, 956 So.2d 1226, 1232 (Fla. 4th DCA 2007) (citing *Glaubius v. State*, 688 So.2d 913, 916 (Fla. 1997)).

<sup>18</sup> See, e.g., *Tolbert*, 268 So.3d 947, 949 (Determining that a victim's loan balance did not make a vehicle worth more than just its FMV, and thus, it was improper for the trial court to order restitution to cover the victim's loan balance which was in excess of the FMV).

<sup>19</sup> S. 90.801, F.S.

<sup>20</sup> The Florida Evidence Code contains 30 exceptions to the hearsay rule. See ss. 90.803 and 90.804, F.S.

<sup>21</sup> *Schenk v. State*, 150 So.3d 275, 276 (Fla. 5th DCA 2014), quoting *State v. Hawthorne*, 573 So.2d 330, 333 (Fla. 1991).

<sup>22</sup> *Schenk*, 150 So.3d 275 at 276.

for determining property value like Kelly Blue Book and Ebay, and therefore may create an inequitable result for a victim.

### Recent Case Law

In many cases, determining restitution without the ability to consider solely hearsay evidence may leave the court with no option but to order restitution in an amount which does not fairly compensate a victim for his or her loss. For example, in *Phillips v. State*, the Fourth District Court of Appeal expressed concern regarding the inability to consider hearsay in determining a restitution award. In *Phillips*, the defendant stole several items of family heirloom jewelry from the victim and sold it. Following the defendant's conviction, the victim testified at a restitution hearing regarding the value of the stolen family heirlooms, recounting six websites on which she reviewed similar items in an attempt to determine the jewelry's value. Despite the defendant's objection to the victim's hearsay testimony, the trial court found the victim's testimony credible and reliable, and awarded \$20,511 in restitution. Upon appeal in 2014, the Fourth District held that because the victim's testimony was based on Internet research and the defendant objected, the testimony was inadmissible hearsay. The court reluctantly reversed the trial court's restitution award, but stated the following:

In reaching our conclusion, we recognize that it was practically impossible for the victim to establish the restitution amount without relying on hearsay evidence. [...] The fact that it was practically impossible for the victim to establish the restitution amount without relying on hearsay evidence appears to have caused an unjust result for the victim, because she and the state appear to have no other means by which to prove the restitution amount. [A]lthough we are obligated to remand for a new restitution hearing, we are doubtful that the new hearing will provide the victim with any relief.

We surmise that the victim here is not alone. This court and our sister courts recently have issued multiple opinions reversing restitution awards where the victim and the state have not presented competent, substantial evidence supporting the amount awarded. See, e.g., *T.D.C.*, 117 So.3d at 811 (“[A]bsent circumstances tending to show that [fair market value] does not adequately compensate the victim or otherwise serve the purpose of restitution ... the amount of restitution should be established through evidence of [fair market value] at the time of the theft.”) (citation and quotation marks omitted). In each case, a wholly innocent person has been left with a more difficult, if not impossible, path to recover their stolen items' value. The circuit court in this case recognized this unjust result in honorably attempting to justify its determination of the restitution amount here.<sup>23</sup>

The court recommended amending s. 775.089(7), F.S., to allow courts to not be limited to FMV in determining restitution and to authorize courts to exercise discretion as required to further the purposes of restitution, including consideration of hearsay. Upon remand, the trial court was forced to reduce the restitution award to \$12,046.

In 2019, the Fourth District issued a similar opinion in *Toole v. State*, following the defendant's conviction for dealing in stolen property and false verification of ownership to a pawnbroker. At the trial court's restitution hearing in *Toole*, the victim testified to the items' value by providing their original price, and guesstimating their replacement value. Based on the victim's testimony the trial court ordered restitution of \$9,984.12. Upon appeal, the Fourth District reversed the trial court's restitution order, finding that the state had failed to prove all four elements of valuation for restitution. The court also addressed the continuing problems with restitution awards, stating that “[d]espite the statute, the rules, the case law, and the constitutional amendment,<sup>24</sup> proving restitution continues to be difficult for

<sup>23</sup> *Phillips v. State*, 141 So.3d 702, 705 (Fla. 4th DCA 2014).

<sup>24</sup> In 2018, Florida voters approved Amendment 6, which included the Marsy's Law Crime Victims' Bill of Rights. The Amendment made changes to Florida law regarding the rights of crime victims, including provisions ensuring that every victim, in every case, in every jurisdiction throughout the state of Florida will enjoy the constitutionally protected rights to restitution, including the right to: full

victims, and receiving compensation for their loss continues to be elusive. [...] We have previously suggested a legislative fix [...] and yet, the statute remains the same as does the problem—proving restitution.”<sup>25, 26</sup>

## Effect of the Bill

The bill amends ss. 775.089 and 985.437, F.S., to provide that in both criminal and juvenile delinquency cases:

- The primary purpose of restitution is to compensate a victim, but restitution is also intended to serve the rehabilitative and deterrent goals of the criminal justice system;
- A court must use FMV to determine restitution, unless the state, victim, or defendant shows that using another basis is equitable and furthers the stated purpose of restitution; and
- A court may consider hearsay evidence to resolve any dispute regarding the proper amount or type of restitution, provided the court finds that the hearsay evidence has a minimal indicia of reliability.<sup>27</sup>

While case law currently provides exceptions to using FMV as the sole standard for determining restitution, the Florida Evidence Code restricts a court’s ability to consider hearsay evidence in determining restitution. The bill authorizes a court to exercise its discretion to further the purposes of restitution, including considering hearsay evidence. Under the bill, a court may, but is not required to, consider hearsay evidence when necessary to determine a fair and equitable restitution amount.

When there is a dispute regarding the proper amount or type of restitution, the bill allows a court to consider evidence such as reports from Kelly Blue Book or Realtor.com, or comparable property listings from sources like Ebay, Etsy, Amazon, or other Internet sites. By authorizing a court to consider hearsay evidence in determining restitution, the bill may allow a court to order restitution in an amount that is just and fair to all parties.

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restitution and to be provided with assistance collecting restitution; have any monies or property collected from a person or dered to make restitution be first applied to the restitution owed to the victim before any amount is paid to the government; and compensation as provided by the law. See Art. I, s. 15, Fla. Const.

<sup>25</sup> *Toole*, 270 So.3d at 373-374.

<sup>26</sup> The Fourth District went further by certifying the issue for review by the Florida Supreme Court as a matter of great public importance. *Id.* at 375. However, the petition for review was dismissed as moot following the Respondent’s death. *State v. Toole*, No. SC19-456, 2019 WL 2275025, at \*1 (Fla. May 29, 2019).

<sup>27</sup> *Toole*, 270 So.3d at 380 (holding that requiring minimal indicia of reliability is an additional requirement to the admission of hearsay in determining the amount of restitution to safeguard a defendant’s right to due process).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive impact on restitution awards to crime victims.

### D. FISCAL COMMENTS:

None.