

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 354

INTRODUCER: Senator Harrell

SUBJECT: Restitution

DATE: February 3, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bond	Cibula	JU	Pre-meeting
2.			CJ	
3.			RC	

I. Summary:

SB 354 modifies the procedures for establishment of an award of criminal restitution owed to a crime victim to allow hearsay testimony to aid in the determination of the value of the victim’s loss.

II. Present Situation:

Restitution - In General

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.”¹ “Unlike civil damages, restitution is a criminal sanction. 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.”²

A crime victim has a state constitutional right to restitution. The State Constitution provides that a victim has the “right to full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct.”³ This language was adopted by the voters in 2018.⁴

A sentencing court must order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant’s offense; and damage or loss related to the

¹ BLACK’S L. DICTIONARY (11th ed. 2019).

² *Spivey v. State*, 531 So. 2d 965, 967 (Fla. 1988).

³ Art. I, s. 16(b)(9), FLA. CONST.

⁴ The language was presented to the voters as Revision 6 on the 2018 General Election ballot, and it is commonly referred to as “Marcy’s Law.”

defendant's criminal episode, unless the court finds clear and compelling reasons not to order restitution. If ordered, restitution is a mandatory condition of probation.⁵

How Restitution is Proved and Calculated

In general, the fair market value at the time of the offense is the appropriate value for purposes of restitution. However, the Florida Supreme Court in *Hawthorne*⁶ ruled that "a court is not tied to fair market value as the sole standard for determining restitution amounts, but rather may exercise such discretion as required to further the purposes of restitution."⁷ The court found that fair market value can be established either through direct testimony of the victim or through evidence of the following four factors:

- Original market cost;
- Manner in which the item was used;
- The general condition and quality of the item; and
- The percentage of depreciation.⁸

A criminal trial and conviction must (unless waived) be heard before a jury and guilt must be proved beyond a reasonable doubt. Restitution, however, is a part of the sentencing process. A sentencing hearing is tried before the judge alone, and the essential facts need only be proved by a preponderance of the evidence.⁹

The Florida Evidence Code applies equally to all civil and criminal actions.¹⁰ The code prohibits admission of hearsay evidence, unless one of the exceptions apply.¹¹ "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.¹²

Courts have Suggested Change

In 2012, Katrina R. Phillips stole jewelry and sold it. She was convicted for various crimes involving the victim's stolen jewelry. In a 2013, restitution hearing the victim testified as to her opinion of the value of the stolen family heirloom jewelry. In her testimony, the victim described how she had reviewed six websites looking for values of similar jewelry. The trial court found victim's testimony credible and reliable, and awarded the victim restitution of \$20,511. The District Court of Appeal found in 2014 that the victim's testimony violated the hearsay rule because it was based on internet research.¹³ The DCA reluctantly reversed the restitution award, saying:

⁵ Section 775.089(1)(a), F.S.

⁶ *State v. Hawthorne*, 573 So. 2d 330 (Fla. 1991).

⁷ *Id.* at 333.

⁸ *Id.* at 332-33.

⁹ Section 775.089(7), F.S.

¹⁰ Section 90.103, F.S.

¹¹ Section 90.802, F.S.

¹² Section 90.801(1)(c), F.S.

¹³ *Phillips v. State*, 141 So. 3d 702 (Fla. 4th DCA 2014).

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.¹⁴

The appellate court suggested adding the following language to s. 775.089(7), F.S.:

The court is not bound by fair market value as the sole standard for determining restitution amounts, but rather may exercise such discretion as required to further the purposes of restitution, including consideration of hearsay.¹⁵

On remand, the restitution award was reduced to \$12,046.¹⁶

In 2015, Cricket Kathleen Toole stole various goods. She was convicted of dealing in stolen property and false verification of ownership to a pawnbroker. At the restitution hearing, the victim testified to the items’ value by providing their original price, and guesstimating their replacement value. The trial court ordered restitution of \$ 9,984.12.¹⁷

¹⁴ *Id.* at 705-06.

¹⁵ *Id.* at 706.

¹⁶ Indian River County, OR Book 2653, Page 1090; and OR Book 2815, Page 2401.

¹⁷ *Toole v. State*, 270 So. 3d 371, 373 (Fla. Dist. Ct. App. 2019), *review dismissed*, No. SC19-456, 2019 WL 2275025 (Fla. May 29, 2019).

The DCA reversed in 2019, finding that the state had failed to prove all four elements of valuation of restitution. The court then went further, lamenting the continued problems with restitution awards:

Despite the statute, the rules, the case law, and the constitutional amendment, proving restitution continues to be difficult for victims, and receiving compensation for their loss continues to be elusive. . . . We have previously suggested a legislative fix . . . yet, the statute remains the same as does the problem--proving restitution.¹⁸

The DCA took the further step of certifying the issue for review as a matter of great public importance by the Florida Supreme Court:

Is *Hawthorne*'s formula for determining restitution based on the fair market value of the victim's property still viable after the passage of Amendment 6 (Marsy's Law), or should a trial court no longer be bound by fair market value as the sole standard for determining restitution amounts, and instead exercise such discretion as required to further the purposes of restitution, including consideration of hearsay?¹⁹

The case was appealed to the Florida Supreme Court, but was dismissed without opinion after the defendant died.

III. Effect of Proposed Changes:

SB 354 adopts the change to restitution law suggested by the Fourth District Court of Appeal. The language adopts the *Hawthorne* standard that allows the trial court latitude in using a valuation standard other than fair market value, if consistent with the purposes of restitution. The bill also allows the court to consider hearsay evidence when determining restitution.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹⁸ *Id.* at 374.

¹⁹ *Id.* at 375.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.089.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.