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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** SB 756                      **Hearing Date:** April 18, 2017  
**Author:** Stern  
**Version:** February 17, 2017  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** SC

**Subject: *Restitution: Noneconomic Losses: Child Sexual Abuse***

### HISTORY

**Source:** Los Angeles District Attorney's Office

**Prior Legislation:** SB 1768 (Kopp) Chapter 587, Stats. 1998  
SB 736 (Davis) Chapter 657, Stats. 1991

**Support:** California District Attorneys Association; California State Sheriffs' Association;  
Crime Victims United; San Diego County District Attorney

**Opposition:** California Public Defenders Association

### PURPOSE

***The purpose of this bill is to authorize noneconomic restitution where a person is convicted of continuous sexual child abuse or sexual acts with a child 10 years of age or younger.***

*Existing law* states it is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. (Cal. Const., art. I, § 28, subd. (b).)

*Existing law* requires criminal defendants to make full restitution to the victims of their crimes as determined by the court. (Pen. Code § 1202.4, subd. (f).)

*Existing law* generally limits restitution to economic losses incurred as the result of defendant's criminal conduct. (Pen. Code § 1202.4, subd. (f).)

*Existing law* creates an exception to this general limitation and permits courts to order restitution for noneconomic losses, including, but not limited to, psychological harm, for felony violations of lewd and lascivious acts against a child under 14 years of age. (Pen. Code § 1202.4, subd. (f)(3)(F).)

*Existing law* states that any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes against persons or property, against a child

under the age of 14 with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony punishable by imprisonment in the state prison for 3, 6 or 8 years. (Pen. Code § 288.)

*Existing law* provides that any person who either resides in the same home as a minor child or has recurring access to the child, who over the period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct, as defined, with a child under the age of 14, or three or more acts of lewd and lascivious conduct, as defined in Penal Code section 288, is guilty of the offense of continuous sexual abuse of a child and is punishable by imprisonment in the state prison for a term of 6, 12, or 16 years. (Pen. Code § 288.5.)

*Existing law* provides that it is a felony punishable by imprisonment in the state prison for a term of 25 years to life for any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger; and it is a felony punishable by imprisonment in the state prison for a term of 15 years to life for any person 18 years of age or older who engages in oral copulation or penetration with a foreign object with a child who is 10 years of age or younger. (Pen. Code § 288.7.)

*This bill* adds the crimes of continuous sexual abuse of a child and sexual acts with a child 10 years of age or younger to the statute authorizing noneconomic restitution for lewd and lascivious acts against a child under the age of 14.

## COMMENTS

### 1. Need for This Bill

According to the author:

SB 756 will help address the mental health needs of children who are victims of serious sex crimes. While California law currently requires criminal offenders to pay non-economic restitution for specified sex crimes, it has not been updated to cover serious sex crimes committed against young children, such as sodomy and oral copulation, and continuous sexual abuse of a person under 14 years of age. SB 756 closes the loop hole in the law and requires restitution for the pain and suffering incurred by these victims. The trauma that young children experience from egregious sex crimes takes an enormous psychological toll, leaving them anxious, depressed, withdrawn and even suicidal. To cope, many need the help of a mental health counselor to help understand that they can recover from the abuse, trust adults and lead a normal life. According to a 2003 National Institute of Justice report, 3 out of 4 adolescents who have been sexually assaulted were victimized by someone they knew well. Offenders who have caused this psychological damage need to be held accountable and help pay for the victim's psychological recovery.

### 2. Victim Restitution Generally

Under the California Constitution (Article 1, § 28), as implemented by Penal Code section 1202.4, a sentencing judge in a criminal case must order a defendant to pay full restitution to the

victim for all his or her economic losses. As interpreted by the courts, the term "economic losses" in the restitution statute consistently has referred to actual economic losses.

"In a criminal case an award of restitution is committed to the sound discretion of the trial court." (*People v. Giordano* (2007) 42 Cal.4th 644, 665.) The trial court is given almost unlimited discretion as to the kind of information it can consider and the sources where it comes from. (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1275.) Likewise, the trial court is entitled to use any rational method of fixing the amount of restitution. (*People v. Goulart* (1990) 224 Cal.App.3d 71, 83.)

While statutory provisions for victim restitution have been broadly and liberally construed, the amount of restitution must be limited to losses actually incurred as a result of the defendant's criminal conduct. (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1526.) Although full restitution in the amount of the losses resulting from appellant's criminal conduct is required [Penal Code Section 1202.4(f)(3)], the victim is not entitled to overcompensation. "A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall." (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1017-1018; *People v. Fortune* (2005) 129 Cal.App.4th 790, 795; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995.) "A direct restitution award in excess of the victim's loss is unauthorized." (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 45; *People v. Williams* (1989) 207 Cal. App. 3d 1520, 1524.)

Under existing law, there is an exception to this general limitation that permits courts to order restitution for noneconomic losses, including, but not limited to, psychological harm for felony violations of lewd and lascivious acts against a child under 14 years of age. (Pen. Code § 1202.4, subd. (f)(3)(F).) This bill would additionally authorize a victim to receive noneconomic restitution for the crimes of continuous sexual abuse of a child (Pen. Code § 288.5) and sexual acts with a child 10 years of age or younger. (Pen. Code § 288.7.)

### 3. Relevant Case Law and Legislative History

Existing law specifies that a defendant may be ordered to pay noneconomic restitution for psychological harm for felony violations of Penal Code section 288. (Pen. Code § 1202.4, subd. (f)(3)(F).) The meaning of the term "felony violations of Penal Code section 288" is a question of statutory interpretation.

When determining statutory construction, it is the court's duty "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*People v. Trevino* (2001) 26 Cal.4th 237, 240.) The court starts its analysis by "examining the statutory language because it generally is the most reliable indicator of legislative intent." (*Id.* at 241.) The court must give the language its usual and ordinary meaning, and "[i]f there is no ambiguity, then [the court must] presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272.) If, however, the statutory language is ambiguous, the court "may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Ibid.*) The court must ultimately choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. (*Ibid.*) Any interpretation that would lead to absurd consequences is to be avoided. (*Ibid.*)

In *People v. Valenti* (2016) 243 Cal.App.4th 1140, the Second District Court of Appeal looked at the plain language of section 1202.4(f)(3)(F) and found that the provision clearly limits noneconomic restitution awards to felony convictions of section 288. It does not include section 288.5, and sections 288 and 288.5 are not interchangeable. The court went on to further state that it is not the court's "job to insert language in a statute which is not there. Had the Legislature wanted to include section 288.5 in the restitution statute, it was capable of doing so. It did not." (*Id.* at 1181-1182.) Because the court found the language of the statute to be unambiguous, the court did not make any further determinations on legislative history or other intrinsic sources.

Subsequently, the First District Court of Appeal in *People v. McCarthy* (2016) 244 Cal.App.4th 1096 disagreed with *Valenti* and found that the plain language of section 1202.4(f)(3)(F) is ambiguous because the statute specifies "violations of section 288" rather than "convictions of section 288," which could be interpreted to mean that the statute authorizes an award for noneconomic restitution for convictions for conduct violating section 288, even if the conviction is not for section 288 itself. (*Id.* at 1105-1106.) The court supported its determination by pointing to the Legislature's use of the terms "conviction" in some provisions of section 1202.4, and its use of the term "violations" in this particular paragraph authorizing noneconomic restitution. Because the language was not clear, the court looked at legislative history and found that when the provision for noneconomic restitution was first added to section 1202.4, it expressly applied to a "conviction" for a felony violation of section 288. The provision was later amended to drop the word conviction which, according to the court, presumably shows the Legislature's intent to remove the requirement that defendants actually be convicted of a charge under section 288 in order for noneconomic restitution to be awarded. (*Id.* at 1107.)

The *McCarthy* court next considered whether a construction permitting noneconomic restitution for convictions under section 288 but not for convictions under section 288.5 would lead to an absurd result. The court found that it would lead to an absurd result and refused to adopt a construction of the statutory language that would grant noneconomic restitution to victims of lewd and lascivious acts but not to victims of what are much more serious violations of the Penal Code. (*Id.* at 1108-1109.)

After *Valenti* and *McCarthy*, the same issue was considered by the Fourth District Court of Appeal. (*People v. Martinez* (2017) 8 Cal.App.5th 298.) The defendant was convicted of continuous sexual abuse of a child under the age of 14 pursuant to Penal Code section 288.5. The trial court ordered defendant to pay the victim \$150,000 in noneconomic restitution and the defendant appealed. The court, after considering the holding in *Valenti* and *McCarthy*, agreed with *McCarthy* and held that Penal Code section 1202.4 (f)(3)(F) does not limit the authority to award noneconomic restitution to cases where a person is convicted of section 288. Specifically, the court concluded that the provision authorizes noneconomic restitution in child molestation cases if the conduct underlying the conviction also constitutes a violation of Penal Code section 288. (*Martinez, supra*, 8 Cal.App.5th at 306.)

Because there is a split of authority in the appellate courts, there is some support for the conclusion that the existing provision authorizing noneconomic restitution is ambiguous and should be clarified in order to avoid further litigation.

This bill amends Penal Code section 1202.4(f)(3)(F) to specifically include felony violations of Penal code section 288.5 and 288.7.

#### 4. Argument in Support

The Los Angeles District Attorney's Office is the sponsor of this bill and writes in support:

Penal Code section 1202.4(f)(3)(F) permits a court to award noneconomic losses, including, but not limited to, psychological harm, for felony violations of Penal Code section 288. Penal Code section 288 makes it a crime to willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1 (sexual intercourse, sodomy, oral copulation or sexual penetration), upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.

However, Penal Code section 1202.4(f)(3)(F) fails to include Penal Code sections 288.5 and 288.7 which are just as serious (if not more serious) charges than Penal Code section 288. Penal Code section 288.5 makes it a crime to continuously engage in substantial sexual conduct with a child under the age of 14. Penal Code section 288.7 makes it a crime for a person 18 years of age or older to engage in sexual intercourse, sodomy, oral copulation or sexual penetration of a child who is 10 years of age or younger.

It makes little sense for a child under the age of 14 but older than 10 years of age to be awarded non-economic damages when they are the victim of child sexual assault, but not to award non-economic damages to a child aged 10 or younger who is the victim of the same conduct. Nor does it make sense to award non-economic damages to a child who is the victim of two sexual assaults but not if they are victimized three or more times.

#### 5. Argument in Opposition

According to the California Public Defenders Association:

SB 756 is redundant and, therefore, not needed. SB 756 extends restitution for psychological harm for continuous sexual abuse. Existing Penal Code section 1202.4(f)(3)(F) states that restitution can be ordered for [N]oneconomic losses, including but not limited to, psychological harm, for felony violations of section 288." Case law has already extended psychological harm restitution to continuous child abuse, Penal Code section 288.5. In *People v. Smith* (2011), the trial court ordered \$750,000 in restitution for years of child sexual abuse. *People v. Martinez* (2017) reached the same result. The only published case that appears to have reached a different conclusion is *People v. Valenti* (2016). In *Valenti*, the Attorney General conceded that 288.5 was not included in the ambit of 1202.4(f)(3)(F), even though courts all over the state had reached a different.