

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 Rules

BILL: CS/CS/SB 354

INTRODUCER: Rules Committee; Judiciary Committee, and Senator Harrell

SUBJECT: Restitution

DATE: March 26, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Stokes</u>	<u>Jones</u>	<u>CJ</u>	Favorable
3.	<u>Bond</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 354 amends ss. 775.089 and 985.437, F.S., providing that while the primary purpose of restitution is to compensate the victim, it also serves the rehabilitative and deterrent goals of the criminal and juvenile justice systems.

Additionally, the bill provides that restitution must be determined on a fair market value basis unless the state, victim, or defendant or child, shows that using another basis, including, but not limited to, replacement cost, purchase price less depreciation, or actual cost of repair, is equitable and better furthers the purposes of restitution. The court may consider hearsay evidence for the purpose of determining restitution, provided that the hearsay evidence has a minimal indicia of reliability.

The bill is effective July 1, 2021.

II. Present Situation:

Restitution

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

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

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 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 conducted before the judge alone, and the essential facts need only be proved by a preponderance of the evidence.⁹ Contested restitution hearings are uncommon, in most cases where restitution is ordered the amount of restitution is agreed between the parties.

Evidence Code and Hearsay

The Florida Evidence Code applies equally to all civil and criminal actions, at hearings and at trial.¹⁰ The code prohibits admission of hearsay evidence, unless one of the exceptions apply.¹¹

² *Spivey v. State*, 531 So. 2d 965, 967 (Fla. 1988). See also, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (Feb. 1984).

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 “Marsy’s Law.”

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.

“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 The common reasons cited for the hearsay rule include:

- Because the underlying hearsay statement is not made under oath, it is less reliable than in-court testimony given under oath.
- A jury cannot determine the reliability of the hearsay testimony.
- An opposing party cannot cross-examine the person who made the out-of-court statement.¹³

Not all hearsay is inadmissible. The Evidence Code contains 30 exceptions to the hearsay rule.¹⁴ Hearsay evidence that is admitted into evidence may be attacked by an opposing party.¹⁵ Hearsay testimony is admissible in a sentencing hearing, provided the defendant has a fair opportunity to rebut it.¹⁶

All evidence introduced at a hearing or trial, including hearsay, must be weighed for its reliability. The standard jury instructions in a criminal case explains, in relevant part:

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.¹⁷

The direction to weigh the reliability of the evidence applies equally to a hearing decided by a judge without a jury.

Where hearsay evidence is allowed, such evidence is still subject to other rules of evidence. For instance, the evidence must be relevant,¹⁸ must not be unduly prejudicial or confusing,¹⁹ and the witness must have personal knowledge of the matter.²⁰

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

¹² Section 90.801(1)(c), F.S.

¹³ EHRHARDT’S FLORIDA EVIDENCE, 2018 Ed., s. 801.1.

¹⁴ Sections 90.803 and 90.804, F.S.

¹⁵ Section 90.806, F.S.

¹⁶ *Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998)(capital cases); *McInerney v. State*, 213 So. 3d 933 (Fla. 4th DCA 2017)(non-capital cases, except hearsay not admissible related to a request for sentence enhancement).

¹⁷ Fla. Std. Jury Instruction 3.9.

¹⁸ Section 90.402, F.S.

¹⁹ Section 90.403, F.S.

²⁰ Sections 90.604, F.S.

the 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.²¹ The DCA reluctantly reversed the restitution award, saying:

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.²²

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.²³

On remand, the restitution award was reduced to \$12,046.²⁴

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

²¹ *Phillips v. State*, 141 So. 3d 702 (Fla. 4th DCA 2014).

²² *Id.* at 705-06.

²³ *Id.* at 706.

²⁴ Indian River County, OR Book 2653, Page 1090; and OR Book 2815, Page 2401.

victim testified to the items' value by providing their original price, and guesstimating their replacement value. The trial court ordered restitution of \$9,984.12.²⁵

In 2019, the Fourth DCA reversed the 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.²⁶

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?²⁷

The case was appealed to the Florida Supreme Court, but was dismissed without opinion after the defendant died.²⁸

III. Effect of Proposed Changes:

The bill amends ss. 775.089 and 985.437, F.S., providing that while the primary purpose of restitution is to compensate the victim, it also serves the rehabilitative and deterrent goals of the criminal and juvenile justice systems.

Additionally, the bill provides that restitution must be determined on a fair market value basis unless the state, victim, or defendant or child, shows that using another basis, including, but not limited to, replacement cost, purchase price less depreciation, or actual cost of repair, is equitable and better furthers the purposes of restitution. The court may consider hearsay evidence for the purpose of determining restitution, provided that the hearsay evidence has a minimal indicia of reliability.

The bill is effective July 1, 2021.

²⁵ *Toole v. State*, 270 So. 3d 371, 373 (Fla. 4th DCA 2019), *review dismissed*, No. SC19-456, 2019 WL 2275025 (Fla. May 29, 2019).

²⁶ *Id.* at 374.

²⁷ *Id.* at 375.

²⁸ *Florida v. Toole*, No. SC19-456, 2019 WL 2275025 (Fla. May 29, 2019)(*See* docket entry on May 28, 2019).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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 and 985.437.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules on March 25, 2021:

The committee substitute adds the requirement that hearsay evidence used to determine restitution is only admissible if the hearsay evidence has a minimal indicia of reliability.

CS by Judiciary on February 15, 2020:

The committee substitute adds the purposes of restitution and adds that fair market value is the default valuation standard. The committee substitute applies to juvenile delinquency cases in addition to criminal cases.

- B. **Amendments:**

None.