

October 20, 2004

Michael J. Yerly, Clerk  
Court of Appeal, Sixth Appellate District  
333 West Santa Clara Street  
San Jose, CA 95113

Re: *People v. Sorenson*, H026774  
Supplemental Letter Brief

Dear Mr. Yerly:

The court has requested supplemental letter briefs from the parties in the above case discussing the application of the court's recent decision in *People v. Dickerson*, H026484, 2004 Cal. App. LEXIS 1675, decided October 6, 2004.

Our response is twofold. First, as explained in Part 1 below, *Dickerson* was wrongly decided and should not be followed. Alternatively, as explained in Part 2, *Dickerson* is distinguishable on its facts from the present case because the advisements concerning the restitution fine in the present case were made in *permissive* language, while the advisements in *Dickerson* were made in *mandatory* language.

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1. ***Dickerson* Is Wrongly Decided in that it is Contrary to the Supreme Court’s Opinion in *Walker*, and Thus Violates Settled Principles of *Stare Decisis*.**<sup>1</sup>

Appellant respectfully contends that the opinion in *Dickerson* is directly contrary to the California Supreme Court’s decision in *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), and thus violative of the rule of *stare decisis*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As explained below, there is but a single factual distinction between the facts of *Dickerson* and the present case, on the one hand, and *Walker* on the other, namely that an advisement about a potential penal consequence of a restitution fine was given in *Dickerson* and the present case, but not in *Walker*. However, this is a distinction without a meaningful difference in the instant case, and is not a proper basis for the opinion in *Dickerson* to have reached a result contrary to the Supreme Court’s holding in *Walker*. As explained below, the analysis of this Court in *Dickerson* finding no violation of the plea bargain is, point by point, contrary to the holding of the Supreme Court in *Walker*, rendering *Dickerson* an opinion which should not be followed because it is based on legal analysis which violates settled principles of *stare decisis*.

The present case and *Dickerson* are identical to *Walker* in nearly every pertinent detail: in each case, the defendant agreed to plead guilty in exchange for a specified sentence and dismissal of other charges (*Walker, supra*, at p. 1018; *Dickerson*, slip opin., p. 1; CT 55; RT 24-31); in each case there was no mention of a restitution fine as part of the plea bargain (*ibid.*); and in each case the judge did not give the admonition required pursuant to Penal Code section 1192.5.<sup>2</sup> (*Walker, supra*, at pp. 1029-1030.) Lastly, in each case the court imposed a substantial restitution fine when it sentenced the defendant.

The Supreme Court held in *Walker* that a restitution fine constitutes punishment, and that the amount of such fines “should generally be considered in plea negotiations.” (*Walker*, at p. 1024.) The court ultimately concluded that “the \$5,000

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1. The following discussion borrows substantially from the rehearing petition filed in *Dickerson*, where this writer is also the counsel of record.

2. Statutory references are to the Penal Code if not otherwise specified.

restitution fine was a significant deviation from the negotiated terms of the plea bargain . . .” (*id.*, at p. 1029), which required reduction of the fine to the statutory minimum. (*Ibid.*) As the Supreme Court later explained, the basis for the holding in *Walker* was the Court’s implicit finding “that the defendant in that case could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.” (*In re Moser* (1993) 6 Cal.4th 342, 356.)

The only notable difference between the situation presented in *Walker* versus that of *Dickerson* and the present case has to do with the advisement given to the defendant about possible fines. When the trial court in *Walker* accepted the plea bargain, it told the defendant “the maximum penalties provided by law for this offense are 3 years, 5 years, or 7 years in state prison and a fine up to \$10,000.” (*Walker*, at p. 1018.) In *Dickerson*, the court advised appellant that it “could impose fines up to \$50,000 . . .” and that it “must impose a restitution fine of between \$200 and \$10,000.” (*Dickerson*, slip opin. p. 2.) In the present case, the court told appellant, “You can be ordered to pay fines and fees totaling as much as 5,000 dollars. . . . [¶] You can be ordered to contribute \$10,000 to the State Restitution Fund with a required minimum contribution of \$200.” (RT 25-26)

In *Dickerson*, this Court concluded, contrary to *Walker*, that there was no implied condition of the plea bargain that the defendant not receive a substantial penal fine. (*Dickerson*, slip opin., pp. 10-13.) With all due respect to this Court, the reasoning in *Dickerson* as to this point is neither logical nor persuasive, and is directly contrary to the bases of the holding in *Walker*.

The opinion suggests that the defendant’s interpretation of *Walker* as requiring that a substantial restitution fine be made part of a plea bargain, “rests upon an erroneous, overbroad reading of *Walker*.” (*Dickerson*, slip opinion, p. 10, quoting *Moser*, *supra*, 6 Cal.4th at p. 356.) To the contrary, the *Dickerson* court’s interpretation of *Walker* is impermissibly narrow.

To begin with, the opinion fails to acknowledge that *Moser* is inapposite. That case concerned the question whether erroneous advisements as to the length of a defendant’s parole period rendered this factor a part of the plea bargain. As the majority in *Moser* noted, the period of parole for an offense is not a matter subject to the trial court’s discretion, and thus not a factor which could ever be a part of plea negotiations

or a term of a plea bargain. (*Id.*, at p. 357.) By contrast, the Supreme Court in *Walker* expressly recognized the discretionary nature of restitution fines beyond the required minimum, and admonished both trial courts and the parties to plea agreements to “take care to consider restitution fines during the plea negotiations.” (*Walker, supra*, at p. 1030.)<sup>3</sup> In *Dickerson* and in the present case, as in *Walker*, there was *nothing* said in the description of the plea agreement which indicated that a substantial restitution fine was contemplated as a part of the defendant’s punishment. In *Dickerson* and the present case, as in *Walker*, the defendant had a reasonable expectation, based on the negotiated plea bargain, that no such substantial fine would be imposed. (*Moser, supra*, at p. 356.)

The basic flaw in *Dickerson* can be found in its statement that “*Walker* should not be understood as finding that the restitution fine has been and will be the subject of plea negotiations in every criminal case.” (Slip opin., p. 10.) This conclusion misreads the meaning of the holding in *Walker*. The holding in *Walker* does not depend on whether or not a restitution fine was the actual subject of plea negotiations. In fact, there is no suggestion in *Walker* itself that the issue of restitution fines was ever a part of plea negotiations. What is more, the Supreme Court’s conclusion in *Walker* that the absence of a substantial penal fine was an *implicit* term of the plea bargain is based on the fact that the stated terms of the plea bargain made no mention of a restitution fine. (*Moser, supra*, at p. 356; *Walker, supra*, at pp. 1024, 1029.)

Both the present case and *Dickerson* are indistinguishable from *Walker* in this regard. It follows that this Court’s conclusion in *Dickerson*, based on the absence of any mention of restitution fines in the statement of the terms of the plea bargain, that “[this topic] was not a part of the plea agreement” (*Dickerson* slip opin., p. 11, quoting *Moser, supra*, at p. 379) is both besides the point and contrary to the holding in *Walker*.

*Dickerson* notes that “*Walker* does not prohibit criminal defendants from striking whatever bargain appears to be in their best interests, including leaving the

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3. “[W]e recognized in *Walker* that, in general, the specific amount of the restitution fine to be imposed on a defendant . . . is a proper subject of plea negotiations. . . .” (*Moser, supra*, at p. 733, fn. 11.)

imposition of the fines to the sentencing court.” As stated, the proposition is true enough. If, when announcing the terms of the plea bargain, the court or parties state that the plea agreement left to the trial court any decision as to the amount of fines to be imposed, a defendant could hardly claim that imposition of a discretionary fine violated the plea bargain. But where, as in the present case, *Dickerson*, and *Walker*, *nothing at all was said* about such a fine, the defendant had a reasonable expectation that there would be no substantial penal fine imposed. (*Moser, supra*, at p. 356; *Walker, supra*, at pp. 1024, 1029.)

The opinion in *Dickerson* suggests that *People v. DeFilippis* (1992) 9 Cal.4th 1876, 1878-1879 stands for the proposition that it was enough that appellant was advised of the potential consequence of a restitution fine. (*Dickerson* slip opin., p. 11.) This conclusion could only be reached by standing *DeFilippis* on its head. The holding in *DeFilippis* is that there was no plea bargain *at all*, and because there was no plea bargain, *Walker* did not apply. (*Id.*, at p. 1879.) In the present case and *Dickerson* it is undisputed that there was a plea bargain, i.e., “a guilty plea [was] entered in exchange for specified benefits such as . . . an agreed maximum punishment.” (*Walker, supra*, at p. 1024.) In fact, *DeFilippis* involved the complete *converse* of the present case and *Dickerson* – no plea bargain, and a failure to give the required advisement as to a restitution fine. (*DeFilippis, supra*, at pp. 1879-1880.) The court in that case found no violation of *Walker* because there was no plea bargain, and then concluded that the defendant could not complain about the absence of an advisement because he waived such an argument of error by failing to object at the time of sentencing. (*Ibid.*) *DeFilippis* is entirely inapposite, and does not support the *Dickerson* court’s attempt to avoid the clear holding in *Walker*.

*Dickerson* also stresses the fact that the probation report notified appellant of restitution fines of \$6,800, and that appellant did not object at the sentencing hearing to either this recommendation or to the court’s imposition of fines in this amount, concluding that appellant’s counsel “could have been expected to object . . . [i]f these substantial restitution fines violated defendant’s plea bargain. . . .” (Slip opin., p. 12.)<sup>4</sup>

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4. There was no probation report in the present case, as the plea and sentence occurred at the same proceeding. (See CT 55)

However, *Walker* is indistinguishable as to these two points, since in that case the probation report had recommended a \$7,000 restitution fine and there was no objection to the \$5,000 fine imposed by the trial court. (*Walker, supra*, at p. 1019) Thus it was as true in *Walker* as it was in *Dickerson* and the present case that “nobody in the trial court seemed to think that the imposition of [substantial] restitution fines . . . violated the terms of the plea bargain.” (*Dickerson* slip opin., p. 12.)

Nonetheless, our Supreme Court concluded in *Walker* that the fine imposed without objection at the time of sentencing violated the plea bargain because it was a “significant deviation from the negotiated terms of the plea bargain . . .” (*Walker, supra*, at p. 1029), a conclusion that this Court is bound by, even if it disagrees with the reasoning behind it. (*Auto Equity, supra*, 57 Cal.2d at p. 455; *In re Marriage of Curtis*, (1992) 7 Cal.App.4th 1, 10.) This court’s determination in *Dickerson* that “the parties at least implicitly agreed that additional punishment in the form of statutory fines and fees would be left to the discretion of the sentencing court . . .” (*Dickerson* slip opin., p. 12) is thus completely contrary to the holding of the Supreme Court in *Walker*, on an all-but identical factual record, that the *absence* of any reference to a restitution fine in the plea agreement meant that the defendant “reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.” (*Moser, supra*, at p. 732.)

We return finally to the sole distinction between *Walker*, on the one hand, and *Dickerson* and the present case, on the other – that the defendants in *Dickerson* and the instant case were advised about a potential restitution fine, and the defendant in *Walker* was not. The *Dickerson* opinion gives but slight mention to this distinguishing fact, noting only that it provides “further confirmation” to its hypothesis that restitution fines were simply not part of the plea bargain. (Slip opin., p. 12.) In point of fact, the variation in the advisements between the present case and *Walker* is a “distinction without a difference.” In *Walker*, the court advised the defendant that he was subject to a “fine of up to \$10,000 . . .” without specifying the nature of such a fine. (*Walker, supra*, at p. 1019.) Such an advisement arguably encompassed the \$5,000 restitution fine imposed by the trial court in *Walker*. However, because the fine was not part of the negotiated plea, the Supreme Court found a violation of the plea bargain, and reduced the fine to the statutory minimum. It did so not because of any defect in the

advisement, but because of the failure to include the fine as part of the negotiated plea.

The trial court only advised the defendant that a \$10,000 fine was a possible consequence of the guilty plea. This was inadequate. The court should have advised defendant there was a possible \$10,000 penalty fine and a mandatory restitution fine of between \$100 and \$10,000. This error, standing alone, would not entitle defendant to a remedy for two reasons. [¶] First, defendant waived the error by not objecting to the fine when it was imposed. Second, he has not shown prejudice. Although the court advised him of a possible \$10,000 fine (with the nature of the fine unspecified), it imposed no penalty fine at all and only a \$5,000 restitution fine. Since the actual fine imposed was less than that advised, defendant was not prejudiced by the incomplete admonition.

However, the \$5,000 restitution fine was a significant deviation from the negotiated terms of the plea bargain. Since the court did not give the section 1192.5 admonition, and this was not merely a failure to advise of the consequences of the plea, defendant cannot be deemed to have waived his rights by silent acquiescence. Nor did he waive them expressly. As harmless error analysis is not applicable, defendant is entitled to a remedy. The error was raised for the first time on appeal. Therefore, the fine must be reduced to the minimum of \$100.

(*Walker, supra*, at pp. 1029-1030.)

The fact that in the present case and *Dickerson* there is not an unremediable defect in the nature of the advisement as to penal consequences is of no moment. In this case and *Dickerson*, as in *Walker*, the substantial restitution fines were “a significant deviation from the negotiated terms of the plea bargain . . .”, there was no 1192.5 advisement, and thus no waiver of the present challenge, and the proper remedy is the one mandated by *Walker*, reduction of the fines to the statutory minimum of \$200.

For the foregoing reasons, appellant submits that *Walker* remains the controlling authority in the present case, and that *Dickerson* is an incorrectly decided opinion which should not be followed in the present case.

**2. *Dickerson* is Distinguishable on Its Facts from the Present Case, Requiring a Result in this Case Which Comports with *Walker*.**

Assuming, arguendo, that this court concludes that *Dickerson* was correctly

decided, appellant contends alternatively that his case is distinguishable because of the different nature of the advisement given to him about a potential restitution fine. In *Dickerson*, the trial court utilized mandatory language in explaining about the restitution fine, telling the defendant that it “must impose a restitution fine of between \$200 and \$10,000.” (*Dickerson*, slip opin. p. 2.) By contrast, in the present case, the court told appellant the following:

You *can* be ordered to contribute \$10,000 to the State Restitution Fund with a *required* minimum contribution of \$200.

(RT 25-26, emphasis added.) The court’s explanation to appellant in the present case made it clear that the only mandatory part of a restitution fine was the *minimum* amount of \$200, and that any other fine was a mere possibility. On this explanation, it is fair to infer, under the logic of *Dickerson*, that the defendant would have understood that his plea included an obligation to pay the “required minimum” fine of \$200. However, it is anything but clear that the plea bargain obligated appellant to accept as punishment discretionary fines totaling more than \$2,000.

Under the clear holding of *Walker*, as explained by the Supreme Court in *Moser*, appellant “could have understood the negotiated plea agreement to signify that no substantial fine would be imposed . . .” (*Moser, supra*, 6 Cal.4th at p. 356) in excess of the mandatory \$200 amount described by the court. In this respect, appellant is entitled to the same remedy afforded to the defendant in *Walker*: reduction of the fines to the required statutory minimums, as discussed in the briefs in this case.

Respectfully submitted,

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