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# **Pennsylvania**

# **Restitution Benchbook**

## **2020**



**The Honorable Alice Beck Dubow**  
**The Honorable Judith Ference Olson**  
**The Honorable Jack A. Panella**  
**The Honorable Victor P. Stabile**  
Superior Court of Pennsylvania

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## *Preface*

This, the first edition of the *Pennsylvania Restitution Benchbook* has been prepared with the encouragement and sponsorship of Chief Justice Thomas G. Saylor and under the supervision of Stephen M. Feiler, Ph.D., the head of the Education Department of the Administrative Office of Pennsylvania Courts. The Benchbook is designed to assist judges in providing an overview of the law and procedure relating to restitution in adult and juvenile cases. When possible, procedural checklists have been included.

- Chapter I covers basic principles and concepts when restitution must be addressed in an adult or juvenile criminal prosecution.
- Chapter II examines the imposition of restitution at the sentencing phase of an adult criminal matter as part of a direct sentence.
- Chapter III addresses the imposition of restitution as a condition of probation in an adult criminal prosecution.
- Chapter IV examines the imposition of restitution in the dispositional phase of a juvenile prosecution.
- Chapter V includes the pertinent statutory provisions and Rules of Court pertaining to restitution.

## *Acknowledgements*

The dedicated talents of many individuals contributed to the production of this book. We particularly thank Thomas B. Darr and Geoff Moulton, respectively the former and current Court Administrators of Pennsylvania.

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**Foreword**  
by  
**CHIEF JUSTICE THOMAS G. SAYLOR**  
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Restitution as a manner of compensating victims can be found in the earliest examples of written law, including the Code of Hammurabi and the Torah. Compensation was often scaled according to the perceived harm caused, and was intended to supplant interpersonal violence borne of vengeance. In many early societies, no distinction was made between private and public harm, or between criminal and civil acts. Courts were focused on restoration, and often had great latitude in assigning the compensation deemed appropriate to satisfy the victim and restore community equilibrium.

Over time, the role of courts evolved as the compensatory purpose of restitution came to be recognized as secondary to the purpose of rehabilitating the offender. Restitution became encouraged as a way to impress upon the offender the egregious nature of the conduct and the offender's responsibility for it, to deter repeat malfeasance, and to encourage individuals to live in a responsible way.

The considerations in determining appropriate restitution continue to evolve today, as this *Benchbook* illustrates. In 2016, upon recommendation of the Criminal Procedural Rules Committee, the Pennsylvania Supreme Court modified several rules of criminal procedure toward the end of standardizing how restitution is awarded in those cases. The Committee's work was informed by recommendations from the Restitution in Pennsylvania Task Force. The Task Force, convened in 2011 by the Pennsylvania Office of the Victim Advocate, was charged with identifying, "solutions to increase the quality of restitution services at the state and county levels." Criminal justice partners from the judicial, legislative and executive branches collaborated in the effort. In their 2013 Final Report, the Task Force identified important considerations and best practices in managing restitution.

Now, in 2020, the Supreme Court and the Administrative Office of Pennsylvania Courts provide this concise, practical guide for trial judges issuing orders of restitution. And although the *Benchbook* is written primarily for trial court judges, appellate court judges also may find the information useful. Similarly, both new and experienced judges should find value.

The *Benchbook* details the applicable statutes, rules, and case law, and offers perspectives from experienced judges on issues that can arise in restitution cases. It provides guidance on common questions surrounding the mandatory nature of restitution. Importantly, it also addresses matters that are not routine, such as how bankruptcy affects an order of restitution, and the applicability of restitution in cases where the recipient is an entity other than a person, or a person other than the actual victim.

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The materials presented in the *Benchbook* were prepared and reviewed by Pennsylvania judges from all levels of the judiciary. I would like to thank President Judge Jack A. Panella of the Superior Court, who managed the project and worked for over three years to see it to fruition. Judge Panella, along with Superior Court Judges Judith Olson, Victor Stabile and Alice Dubow, gave their time to research and write the chapters. I also thank the members of the Benchbook Advisory Committee for their important roles, as well as Stephen Feiler, Ph.D. and Darren Breslin, Esq., of AOPC's Judicial Education Department for their assistance in bringing this book to the judiciary.

I am certain the *Benchbook* will prove a valuable tool for Pennsylvania judges, and I am grateful to those responsible for its development.

Chief Justice Thomas G. Saylor  
July 2020

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### ***Chapter One***

#### ***Introduction***

##### **I. SCOPE OF BENCHBOOK**

This benchbook is designed to assist judges in providing an overview of the law and procedure relating to restitution in adult and juvenile cases. When possible, procedural checklists have been included. Chapter I covers basic principles and concepts when restitution must be addressed in an adult or juvenile criminal prosecution.

Chapter Two examines the imposition of restitution at the sentencing phase of an adult criminal matter.

Chapter Three addresses the imposition of restitution as a condition of probation in an adult criminal prosecution.

Chapter Four examines the imposition of restitution in the dispositional phase of a juvenile prosecution.

Chapter Five is a collection of enabling statutes and rules which address restitution. Also included are crimes which have specific restitution provisions.

##### **II. LEGAL PRINCIPLES OF RESTITUTION**

###### **A. Basic Concepts of Restitution**

In the context of criminal proceedings, the primary purpose of restitution is rehabilitation of the offender by impressing on him the fact that his actions damaged the victim. ***Commonwealth v. Petrick***, 217 A.3d 1217, 1224 (Pa. 2019); ***Commonwealth v. Ramos***, 197 A.3d 766, 769 (Pa. Super. 2018).

It is well established that the primary purpose of restitution is rehabilitation of the offender by impressing upon him or her that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible. Thus, recompense to the victim is only a secondary benefit, as restitution is not an award of damages. Although restitution is penal in nature, it is highly favored in the law and encouraged so that the criminal will understand the egregiousness of his or her conduct, be deterred from repeating the conduct, and be encouraged to live in a responsible way. ***Commonwealth v. Harner***, 533 Pa. 14, 22, 617 A.2d 702, 706–07

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(1992). Thus, restitution, at its core, involves concepts of rehabilitation and deterrence.

***Commonwealth v. Brown***, 981 A.2d 893, 895-896 (Pa. 2009)(citations omitted).

Restitution is a creature of statute and, without express legislative direction, a court is powerless to direct a defendant to make restitution as part of his sentence. ***Commonwealth v. Kinnan***, 71 A.3d 983, 986 (Pa. Super. 2013). Where that statutory authority exists, however, the imposition of restitution is vested within the sound discretion of the sentencing judge. *Id.*

The trial court is authorized to order restitution pursuant to 42 Pa.C.S.A. § 9721 as follows:

§ 9721. Sentencing generally

(a) General rule.--In determining the sentence to be imposed, the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

- (1) An order of probation.
- (2) A determination of guilt without further penalty.
- (3) Partial confinement.
- (4) Total confinement.
- (5) A fine.

...

(c) Mandatory restitution.--In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained. For purposes of this subsection, the term "victim" shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

42 Pa.C.S.A. § 9721.

Two scenarios implicate the statutory authority for restitution: (1) as part of a direct sentence, or (2) as a condition of probation. See 18 Pa.C.S.A. § 1106 and 42 Pa.C.S.A. § 9763(b)(10), respectively.

Previously, Pennsylvania legislation also provided for a restitution order in intermediate punishment sentences. However, effective December 18, 2019, Title 42 was amended and repealed the provisions for state and county intermediate punishment,

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replacing each with similar programs, but neither mentions a separate grant of authority to order restitution distinct from the two provisions stated above.

Additionally, the provisions regarding restitution in probationary sentences were renumbered and moved from 42 Pa.C.S.A. § 9754 to 42 Pa.C.S.A. § 9763. All of the cases cited in this benchbook refer to the prior version of Section 9754; however, in light of the similarities in the two sections, the cases construing the prior version should be considered applicable to 42 Pa.C.S.A. § 9763.<sup>1</sup>

The regulations governing the Sentencing Guidelines also address restitution:

§ 303.14. Guideline sentence recommendations--economic sanctions.

(c) *Restitution*

(1) Restitution shall be added to any guideline sentence, as authorized by law. Relevant statutes include but are not limited to:

- (i) 18 Pa.C.S. § 1106 (relating to injuries to person or property)
- (ii) 18 Pa.C.S. § 1107 (relating to theft of timber)
- (iii) 18 Pa.C.S. § 1107.1 (relating to restitution for identity theft)
- (iv) 18 Pa.C.S. § 1110 (relating to restitution for cleanup of clandestine laboratories)
- (v) 18 P.S. § 11.1302 (relating to restitution to the Office of Victim Services)
- (vi) 42 Pa.C.S. § 9721(c) (relating to mandatory restitution)

(2) Restitution may be imposed as a direct sentence or as a condition of probation or intermediate punishment, and is considered a non-confinement sentencing alternative (see restorative sanction § 303.9(f)).

204 Pa.Code § 303.14.<sup>2</sup>

### Direct Sentence

Restitution is authorized by Section 1106 of the Crimes Code, 18 Pa.C.S.A. § 1106. That section mandates restitution in a direct sentence and provides, in pertinent part, that various entities are entitled to receive restitution:

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<sup>1</sup> “It is axiomatic that in determining legislative intent, all sections of a statute must be read together and in conjunction with each other, and construed with reference to the entire statute. . . . When the meaning of a word or phrase is clear when used in one section, it will be construed to mean the same thing in another section of the same statute. *Commonwealth v. Maloney*, 365 Pa. 1, 11, 73 A.2d 707, 712 (1950).” *Hous. Auth. of Cty. of Chester v. Pennsylvania State Civil Serv. Comm'n*, 730 A.2d 935, 945–46 (Pa. 1999)(citations omitted).

<sup>2</sup> References to intermediate punishment were deleted in 2019. See, e.g., 2019, Dec. 18, P.L. 776, No. 115, § 4,

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### § 1106. Restitution for injuries to person or property

(a) General rule. — Upon conviction for any crime wherein:

(1) property of a victim has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime; or

(2) the victim, if an individual, suffered personal injury directly resulting from the crime,

the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

...

(c) Mandatory restitution.—

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other government agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

(ii) If restitution to more than one victim is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:

(A) Any individual.

(A.1) Any affected government agency.

(B) The Crime Victim's Compensation Board.

(C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(E) Any estate or testamentary trust.

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- (F) Any business entity organized as a nonprofit or not for-profit entity.
- (G) Any other business entity.

18 Pa.C.S.A. § 1106.

Such restitution is mandatory to direct victims of the crime and requires a direct nexus between the loss and the amount of restitution. *Commonwealth v. Whatley*, 221 A.3d 651 (Pa. Super. 2019); *Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992).

A “Victim” is defined in Section 1106 as follows:

“Victim.” As defined in section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act. The term includes an affected government agency, the Crime Victim’s Compensation Fund, if compensation has been paid by the Crime Victim’s Compensation Fund to the victim, any insurance company that has compensated the victim for loss under an insurance contract and any business entity.

18 Pa.C.S.A. § 1106(h). The Crime Victim’s Act defines “Victim” as:

“Victim.” The term means the following:

- (1) A direct victim.
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
- (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child’s family:
  - Chapter 25 (relating to criminal homicide).
  - Section 2702 (relating to aggravated assault).
  - Section 3121 (relating to rape).
- (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiance, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

18 Pa.C.S.A. § 11.103.

The amount of restitution must be determined under the adversarial system with considerations of due process. *Commonwealth v. Crosley*, 180 A.3d 761, 771 (Pa. Super. 2018); *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super. 2004).

The Pennsylvania Crimes Code explains that in determining the amount of restitution the court must consider evidence of the extent of the injury suffered by the victim as presented by the district attorney. Section 1106(c)(2) provides:

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(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

- (i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

18 Pa.C.S.A. § 1106(c)(2).

When restitution is issued under Section 1106(a), a sentencing court is obligated to order full restitution regardless of the current financial resources of a defendant. 18 Pa.C.S.A. § 1106(c)(1)(i); *Commonwealth v. Holmes*, 155 A.3d 69, 86 (Pa. Super. 2017).

## Probationary Sentence

In imposing an order of probation, the trial court is empowered to require the defendant to make restitution pursuant to 42 PA.C.S.A. § 9763, which states:

**(a) General rule.**— In imposing probation, the court shall consider guidelines adopted by the Pennsylvania Commission on Sentencing under section 2154 (relating to adoption of guidelines for sentencing) or 2154.1 (relating to adoption of guidelines for restrictive conditions) and specify at the time of sentencing the conditions of probation, including the length of the term of restrictive conditions under subsection (c) or (d). The term of restrictive conditions under subsection (c) shall be equal to or greater than the mandatory minimum term of imprisonment required by statute.

**(b) Conditions generally.**--The court may attach any of the following conditions upon the defendant as it deems necessary:

...

(10) To make restitution of the fruits of the crime or to make reparations, **in an affordable amount and on a schedule that the defendant can afford to pay**, for the loss or damage caused by the crime.

42 Pa.C.S.A. § 9763(a)&(b)(10) (emphasis added).<sup>3</sup>

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<sup>3</sup> In 2019, the Legislature, in reference to probation, moved the condition of restitution from 42 Pa.C.S.A. § 9754(c)(8) to Section 9763(b)(10). The language used in Section 9763(b)(10) is similar to the prior section.

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When restitution is imposed as a condition of probation pursuant to 42 Pa.C.S.A. § 9763(b)(10), its purpose is to rehabilitate the defendant and provide some redress to the victim. This gives the sentencing court the flexibility to fashion the condition to rehabilitate the defendant. *Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992). Therefore, the requirement of a nexus between the loss and amount of restitution is relaxed. See *Commonwealth v. Hall*, 80 A.3d 1204, 1215 (Pa. 2013).

Notably, restitution imposed under section 9763 differs from restitution imposed under section 1106<sup>4</sup> (as part of a direct sentence) in that it requires a court to explicitly consider a defendant's ability to pay when it initially imposes the total amount of restitution, which cannot exceed the loss suffered by the victim. *Commonwealth v. Whatley*, 221 A.3d 651 (Pa. Super. 2019)(decided under 42 Pa.C.S.A. § 9754).

Furthermore, 18 Pa.C.S.A. § 1106 provides that a defendant's compliance with an order of restitution may be a condition of probation or parole:

(b) Condition of probation or parole.--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, the offender's compliance with such order may be made a condition of such probation or parole.

18 Pa.C.S.A. § 1106(b).

## Modification

Modification<sup>5</sup> of a restitution order is possible as long as the sentencing court sets some amount and method of restitution at the initial sentencing, and the requirements of Section 1106(c)(3) are met. *Commonwealth v. Ramos*, 197 A.3d 766, 779 (Pa. Super. 2018). However, a generalized, open-ended restitution order at sentencing with the intent to "work out the details and amount later" constitutes an illegal sentence, as would a sentencing court's delegation to the probation department or another agency to determine the amount of restitution.

If the initial sentencing order satisfies two, inextricable components which are derived from Section 1106(c), it can be modified at a later date:

the time at which a restitution sentence must be imposed, that is, at the sentencing hearing; and the specific nature of such a sentence, that is, definite as to amount and method of payment.

*Commonwealth v. Mariani*, 869 A.2d 484, 486 (Pa. Super. 2005).

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<sup>4</sup> 18 Pa.C.S.A. § 1106.

<sup>5</sup> Modification of a restitution order is also discussed in Chapter 2, Section II(D).

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The authority to modify restitution at a later date thereby gives the trial court a practical option when the full amount of restitution cannot be determined before sentencing under Pa.R.Crim.P. 704. **Commonwealth v. Ramos**, 197 A.3d 766, 770 n. 2 (Pa. Super. 2018). As stated by the Pennsylvania Supreme Court:

We recognize the tension between having finality in the restitution order at sentencing and the desire to have a sentence imposed speedily. Rule 704 of the Rules of Criminal Procedure requires imposition of a sentence within 90 days of conviction or the entry of a plea. See Pa.R.Crim.P. 704(A)(1). However, full restitution amounts are often undeterminable within the 90-day period. The Comment to Rule 704 recognizes this and provides that if the full amount of restitution cannot be determined at the time of sentencing, the judge should state on the record the basis for determining the amount set at sentencing. See *id.*, cmt. ¶ 20 (“In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution, if determined at the time of sentencing, or the basis for determining an amount of restitution.”). Further, the legislature provides sentencing courts broad authority to amend restitution orders at any time, if the court provides its reasons for doing so as a matter of record. See 18 Pa.C.S. § 1106(c)(3).

**Commonwealth v. Dietrich**, 970 A.2d 1131, 1134 (Pa. 2009)(footnote omitted).<sup>6</sup>

18 Pa.C.S.A. § 1106(c)(3) provides:

(3) The court may, at any time or upon the recommendation of the district attorney that is based on information received from the victim and the probation section of the county or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution, alter or amend any order of restitution made pursuant to paragraph (2), provided, however, that the court states its reasons and conclusions as a matter of record for any change or amendment to any previous order.

18 Pa.C.S.A. § 1106(c).

Therefore, modification is especially apt following a plea and immediate sentencing. However, the Commonwealth must still be prepared to present the sentencing court with the necessary evidence to support the imposition of restitution at the time of initial sentencing. Stated another way, allowing for modification of an existing specific restitution order cannot be used to circumvent or sidestep the principal requirements

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<sup>6</sup> The sentencing court cannot, of course, modify the amount of restitution without providing due process requirements of notice and an opportunity to be heard. **Commonwealth v. Blair**, --- A.3d ---, 2020 WL 1527225 (Pa. Super. 2020); **Commonwealth v. Hobson**, 45 A.2d 22 (Pa. Super. 1982).

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of 18 Pa.C.S.A. § 1106(c).

### B. The Restitution Hearing

The Commonwealth has the burden to prove the amount of “full restitution.” 18 Pa.C.S.A. § 1106(c)(1). Pennsylvania Rule of Criminal Procedure 705.1, which addresses restitution, became effective on July 1, 2016. The rule provides:

#### Rule 705.1. Restitution

- (A) At the time of sentencing, the judge shall determine what restitution, if any, shall be imposed.
- (B) In any case in which restitution is imposed, the judge shall state in the sentencing order:
  - 1) the amount of restitution ordered;
  - 2) the details of a payment plan, if any, including when payment is to begin;
  - 3) the identity of the payee(s);
  - 4) to which officer or agency the restitution payment shall be made;
  - 5) whether any restitution has been paid and in what amount; and
  - 6) whether the restitution has been imposed as a part of the sentence and/or as a condition of probation.

#### Pa.R.Crim.P. 705.1

In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution at the time of sentencing, whether it is a result of direct sentence or a probationary sentence.

The plain text of the statute requires the trial court to specify the amount of restitution at the time of the original sentencing as well as a method of payment. [18 Pa.C.S.A. § 1106(c)(2).] In addition, our cases unequivocally hold that “[t]he [trial] court [is] not free to delegate these duties to an agency.” *Commonwealth v. Deshong*, 850 A.2d 712, 716 (Pa.Super.2004). This includes the county probation department. *Id.*; see also *Commonwealth v. Mariani*, 869 A.2d 484, 486 (Pa. Super.2005) (stating, “an order of restitution to be determined later is *ipso facto* illegal”).

*Commonwealth v. Gentry*, 101 A.3d 813, 818 (Pa. Super. 2014). “This provides the defendant with certainty as to his sentence, and at the same time allows for subsequent

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modification, if necessary.” *Commonwealth v. Dinoia*, 801 A.2d 1254, 1257 (Pa. Super. 2002).

When determining the amount of restitution, Section 1106(c)(2) requires a hearing at the trial court level by directing the trial court to “consider the extent of injury suffered by the victim, the victim’s request for restitution as presented to the district attorney... and such other matters as it deems appropriate.” 18 Pa.C.S.A. § 1106(c)(2)(i).

The Superior Court explained how a trial court should compute a restitution award as follows:

Although restitution does not seek, by its essential nature, the compensation of the victim, the dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. A restitution award must not exceed the victim’s losses. A sentencing court must consider the victim’s injuries, the victim’s request as presented by the district attorney and such other matters as the court deems appropriate. The court must also ensure that the record contains the factual basis for the appropriate amount of restitution. In that way, the record will support the sentence.

*Commonwealth v. Burwell*, 58 A.3d 790, 794 (Pa. Super. 2012), quoting *Commonwealth v. Pledger*, 934 A.2d 715, 720 (Pa. Super. 2007)(citations omitted).

### C. Restitution as a Direct Sentence vs. Restitution as a Condition of Probation

Restitution pursuant to 18 Pa.C.S.A. § 1106(a) is limited to:

- (1) Property of a victim if it has been stolen, converted or otherwise unlawfully obtained; or
- (2) The value of the aforesaid property if it has been substantially decreased as a direct result of the crime; or
- (3) For the personal injury of the victim if directly resulting from the crime.

Restitution as a condition of probation under 42 Pa.C.S.A. § 9763 is for “loss or damage caused by the crime.” Although this statute includes the word “caused,” it does not contain the language directly resulting from the crime as does 18 Pa.C.S.A. § 1106(a). Case law has made clear that there is a significance to this difference in language.

Specifically, when restitution is imposed as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10), rather than a direct sentence under the Crimes Code, cases decided under the prior law stated that there need not be a direct nexus between offense and loss. While restitution cannot be indiscriminate, an “indirect connection between

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the criminal activity and the loss is sufficient.” **Commonwealth v. Harriott**, 919 A.2d 234 (Pa. Super. 2007) (Defendant who spit on a police officer after her arrest for DUI could be ordered to pay restitution as a condition of county intermediate punishment for the cost of precautionary blood testing for the officer); **Commonwealth v. Kelly**, 836 A.931, 934 (Pa. Super. 2003) (Defendant who was convicted only of receiving some of the property stolen from a truck could be ordered to pay restitution as a condition of probation for the damage caused to the truck by the original thief.).

**Direct Sentence:** When incorporated as part of a defendant’s direct sentence, restitution is penal in nature and *may be imposed without regard to the defendant’s ability to pay*. See 18 Pa.C.S.A. § 1106(c)(1)(i) (court shall order restitution “[r]egardless of the current financial resources of the defendant”).

**Probation:** The addition of conditions to an order of probation, including restitution, is primarily directed at rehabilitative goals and is intended to assist the defendant in leading a law-abiding life. In this context, restitution is imposed for losses or damages caused by the crime, and is to be set “in an affordable amount and on a schedule that the defendant can afford to pay.” 42 Pa.C.S.A. § 9763(b)(10).

An order for restitution as a direct sentence continues past any period of supervision, while restitution ordered as a condition of probation terminates at the end of the probationary period. In **Commonwealth v. Griffiths**, 15 A.3d 73 (Pa. Super. 2010), the Superior Court stated, in dicta, that “an order of restitution [as a direct sentence under 18 Pa.C.S.A. § 1106] is enforceable until paid.” **Griffiths**, 15 A.3d at 78; see also 42 Pa.C.S.A. § 9728(c) (“[n]otwithstanding [42 Pa.C.S.A. §] 6353 (relating to limitation on and change in place of commitment) or 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property), the period of time during which such judgments shall have full effect may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crimes of which he was convicted or the maximum term of confinement to which the offender was committed”).

Conversely, when restitution is ordered as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10), the restitution must be viewed as “a ‘condition’ that is required to be met in order to successfully complete . . . probation.” **Commonwealth v. Karth**, 994 A.2d 606, 610 (Pa. Super. 2010). Therefore, “[o]nce the term of probation expires, so, too, must any conditions attached thereto,” including any condition requiring that the probationer pay restitution – regardless of whether the amount of restitution ordered has been paid in full. *Id.*; see also **Commonwealth v. Holmes**, 155 A.3d 69, 87 (Pa. Super. 2017) (*en banc*) (plurality) (explaining that, when restitution is ordered as a condition of probation, the obligation to pay restitution “is discharged upon the expiration of the term of probation regardless of whether the obligation has been paid in full”).

### D. Collection of Restitution

In most cases, the court will need to create a payment plan for the collection of

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restitution.

If restitution is imposed as a condition of probation, the court must order the defendant to pay the total amount of restitution “on a schedule that the defendant can afford to pay.” 42 Pa.C.S.A. § 9763(b)(10). The same is also true for restitution imposed as a direct sentence:

In determining the amount **and method** of restitution, the court ... May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.

18 Pa.C.S.A. § 1106(c)(2). Whenever a defendant is unable to pay restitution “in a single remittance,” the payment plan must be based on:

the defendant’s financial resources, the defendant’s ability to make restitution and reparations and the nature of the burden the payment will impose on the defendant.

42 Pa.C.S.A. § 9730(b)(3). This statute also requires that payment plans be imposed after a hearing, so courts cannot, for example, simply apply a one-size fits-all approach to all defendants who owe restitution. *Id.* See **Commonwealth v. Smetana**, 191 A.3d 867, 873 (Pa. Super. 2018) (vacating both sentence of imprisonment and payment plan where the court failed to make findings on the record regarding the defendant’s ability to pay).

- Setting realistic payment plans can help avoid the need for further court proceedings in the future by limiting the risk that the defendant will default.

A defendant cannot be incarcerated for the failure to pay restitution if the failure results from the offender’s inability to pay:

(iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender’s inability to pay.

18 Pa.C.S.A. § 1106(c)(2)(iii). As with fines and costs, an affordable payment plan is a prerequisite to any punishment for nonpayment of restitution. See **Commonwealth ex. rel. Parrish v. Cliff**, 304 A.2d 158, 162 (Pa. 1973) (prohibiting incarceration of defendants who have not been given an opportunity to comply with “reasonable” payment plans in light of their financial resources). Under 42 Pa.C.S.A. § 9730(b), the sentencing court must make a determination of whether the defendant is “financially able to pay” before it can take action upon a default in payments.<sup>7</sup>

If the defendant is in default of a payment or advises the court that default is imminent, i.e., that the defendant cannot meet the original payment plan on a consistent basis, the court may schedule a rehearing to determine a new payment plan. 42 Pa.C.S.A. § 9730.

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<sup>7</sup> Issues involving contempt hearings are covered in Chapter 2, and probation violation proceedings are covered in Chapter 3.

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Generally, the collection of restitution is by the County's Probation Department. 42 Pa.C.S.A. § 9728(a); 18 Pa.C.S.A. § 1106(e). Although a sentence for restitution is to be considered a judgment in favor of the probation department, it is not a debt. However, the collection of restitution may be referred to a private collection agency. The sentencing court must make a determination that the offender is financially able to pay restitution before it may turn a delinquent account over to a private collection agency. 42 Pa.C.S.A. § 9730(b)(2).

42 Pa.C.S.A. § 9728 provides that a "sentence . . . for restitution" shall be a "judgment in favor of the probation department upon the person or the property of the person sentenced or subject to the order." Subsection (c) further provides that "the period of time during which such judgments shall have full effect may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crimes of which he was convicted or the maximum term of confinement to which the offender was committed."

Restitution orders are automatically entered as civil judgments if the total amount—combined with fines and costs—exceeds \$1,000, and the clerk of courts has the option of doing so if the amount is less than \$1,000.

(1) The county clerk of courts shall, upon sentencing, pretrial disposition or other order, transmit to the prothonotary certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, exceed \$1,000, and it shall be the duty of each prothonotary to enter and docket the same of record in his office and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

(2) The clerk of courts, in consultation with other appropriate governmental agencies, may transmit to the prothonotary of the respective county certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, do not exceed \$1,000, and, if so transmitted, it shall be the duty of each prothonotary to enter and docket the same of record in his office and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

42 Pa.C.S.A. § 9728(b). This process is automatic, as the law mandates that the clerk of courts transmit the financial information to the civil Prothonotary for entry as a judgment

A court also, upon application by the Commonwealth, may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property which may be necessary to satisfy

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an anticipated restitution order. 42 Pa.C.S.A. § 9728(e).

The payment of restitution is addressed at 42 Pa.C.S.A. § 9730 as follows, and now includes the use of credit and bank cards, as well as explicit authorization for a wage attachment:

### **§ 9730. Payment of court costs, restitution and fines**

**(a) Method of payment.**--The treasurer of each county may allow the use of credit cards and bank cards in the payment of court costs, restitution and fines and may provide for automatic periodic deductions from a bank account, subject to the agreement of the owner of the account.

**(a.1) Wage attachment.**--A court may, at sentencing, assign an amount not greater than 25% of the defendant's gross salary, wages or other earnings to be used for the payment of court costs, restitution or fines.

42 Pa.C.S.A. § 9730. Courts may impose the wage attachment at the time of sentencing pursuant to § 9730 (a.1). However, post-sentencing, courts may impose a wage attachment only following a hearing at which the court determines that the defendant is "financially able to pay." *Id.* at § 9730(b)(2). If the defendant is unable to pay, the court cannot impose a wage attachment.

The legislature has also made community service available as an alternative to paying restitution, but only if the court finds that the defendant is unable to pay. 42 Pa.C.S.A. § 9730(b)(3). The statute specifies that such community service must be "just and practicable under the circumstances."

No less than 50% of the money that a defendant pays goes towards restitution, with the remaining moneys to be used to pay fees, costs, and other court-ordered obligations:

**(g.1) Payment.**--No less than 50% of all moneys collected by the county probation department or other agent designated by the county commissioners of the county with the approval of the president judge of the county pursuant to subsection (b)(1) and deducted pursuant to subsection (b)(5) shall, until the satisfaction of the defendant's restitution obligation, be used to pay restitution to victims. Any remaining moneys shall be used to pay fees, costs, fines, penalties and other court-ordered obligations.

42 Pa.C.S.A. § 9728(g.1).

However, if the sentencing court does not specify the percentage, then only 50% of the money that a defendant pays goes towards restitution, with the other 50% going towards fines and costs. See also 204 Pa. Code 29.353(I)(A)(3). The trial court,

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however, can specify in its sentencing order that as much as 100% of payments first go to restitution until it is paid in full.

Whenever a defendant defaults on a payment plan, the court has the authority to enforce its restitution order, either through its contempt powers, or—if payment has been made a condition of probation—probation violation proceedings. The court must hold a hearing to determine whether the defendant is “financially able to pay.”<sup>42</sup> Pa.C.S.A. § 9730(b). This hearing must occur before a defendant is punished, even if the court has previously held such a hearing:

Judges must hold separate hearings for each alleged contemnor to ascertain whether any noncompliance flowed from (a) deliberate disregard of the court’s order or (b) circumstances beyond the defendant’s control. This must be done every time someone appears or reappears for a costs-and-fines proceeding, because the person’s financial situations may have changed since the last time she or he was before the court.

*Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018).

Depending on the outcome of that hearing, the court may punish the defendant, modify the payment plan, or permit the defendant to perform community service. The critical question, which Pennsylvania courts have imported from the U.S. Supreme Court question in *Bearden v. Georgia*, 461 U.S. 660, 672-673 (1983), is whether a defendant has “willfully” refused to pay. These issues are discussed at length later in this benchbook.<sup>8</sup>

In summary, if a defendant defaults in the payment of restitution after imposition of sentence, a hearing should be scheduled to determine whether the defendant is financially capable of making payments. Section 9730(b), **Procedures regarding default**, allows for modification of a payment plan when the defendant’s circumstances have changed, and grants options to the sentencing court to alter the schedule of payments as is just and practicable under the circumstances. The sentencing court may even consider replacing an order of restitution with community service if it is established that the defendant is unable to pay.<sup>9</sup>

### E. Appellate Review

Regarding challenges to the trial court’s imposition of restitution, the appellate courts have drawn a distinction between those cases where the challenge is directed to the trial court’s authority to impose restitution and those cases where the challenge is against the amount of the restitution order, under the circumstances.<sup>10</sup> A challenge may

<sup>8</sup> Procedures and options when a default occurs are discussed in Chapter 2, Section VI(D), Enforceability of Restitution Payments, and Chapter 3, Section VII Revocation Proceedings – Failure to Pay.

<sup>9</sup> Procedures and options when a default occurs are discussed in Chapter 2, Section VI(D), Enforceability of Restitution Payments.

<sup>10</sup> See also, 20A West’s Pa. Prac., Appellate Practice § 2119:22.

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be raised by either the defendant or the Commonwealth.<sup>11</sup>

In a recent decision, the Pennsylvania Supreme Court fully explained the differences in an appeal involving restitution and the challenge to a sentence which sounds in legality or the discretionary aspects of the sentence and the issue preservation implications of those determinations. In *Commonwealth v. Weir*, --- A.3d ---, 2020 WL 5822534 (Pa. Oct. 1, 2020), the Supreme Court stated, in reference to a legality challenge:

In the context of issue preservation principles, Section 1106 requires an integrated analysis of its relevant provisions. Section 1106(a) is mandatory in its directive and removes any discretion from the sentencing court to impose restitution as punishment upon conviction of a crime under two circumstances: where the property of a victim has been stolen, converted or otherwise unlawfully obtained or its value has been substantially decreased as a direct consequence of the crime, 18 Pa.C.S.A. § 1106(a)(1), or where the victim, if an individual, suffered personal injury resulting from the crime, 18 Pa.C.S.A. § 1106(a)(2). Thus, the failure of a trial court to impose restitution where the circumstances described in Section 1106(a)(1) or (2) are established results in an illegal sentence. Conversely, and as relevant to a defendant's challenge, if the statutory circumstances are not established and the sentencing court orders restitution, the challenge to the sentence implicates its legality. In either of these sentencing scenarios, a challenge to the sentence of restitution need not be preserved.

*Commonwealth v. Weir*, --- A.3d at ---, 2020 WL 5822534, \*10.

As to a challenge to the discretionary aspects of a sentence which includes a restitution order, the Supreme Court stated:

Moreover, the discretionary nature of the amount of restitution is established in Section 1106(c)(2), which sets forth the factors to be considered by the sentencing court in fashioning an award of restitution: "... the court shall consider the extent of injury suffered

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<sup>11</sup> For example, in *Commonwealth v. Pledger*, 934 A.2d 715 (Pa. Super. 2007), the Commonwealth appealed the sentencing court's decision to limit the order of restitution because the victim had signed a general release in favor of the defendant as a result of civil settlement which was paid by the defendant's insurer. The Superior Court found:

In the present case, the sentencing judge refused to consider restitution (beyond the aforesaid \$900.00) because the victim had signed a general civil release, having obtained a settlement from Appellee which was paid by his insurer. The court reasoned that the release precluded its consideration of restitution. We find this determination to be legal error. The victim could no more release Appellee from a potential sentence of restitution than from a potential sentence of incarceration or probation. All such matters are within the sentencing court's authority and duty. It was not for the victim to circumscribe the criminal court's powers or obligations.

*Id.* at 720.

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by the victim, the victim's request for restitution as presented to the district attorney ... and such other matters as it deems appropriate." 18 Pa.C.S. § 1106(c)(2)(i). This language, placing the determination of the amount of restitution under the sentencing court's consideration based on the stated factors and "other matters it deems appropriate," is the clearest possible indication of the General Assembly's recognition that fashioning the restitution order remained in the exercise of the sentencing court's discretion. [An appellant's] discontent with the amount of restitution and the evidence supporting it is a challenge to the sentencing court's exercise of discretion, not to the legality of the sentence. To access review of his challenge by the Superior Court, [an appellant is] required to file a Pa.R.A.P 2119(f) statement in his appellate brief.

*Id.* at \*11.

**Authority Appeal from Restitution Order** – challenge directed to the trial court's statutory authority to impose restitution, - considered a challenge to the legality of the sentence.

**Discretionary Appeal from Restitution Order** – challenge directed at the amount of the restitution order under the circumstances presented to the trial court - considered a challenge to the discretionary aspects of the sentence.

Where the court's authority to impose restitution is challenged, such as on the basis that the trial court's order of restitution is to a person who is not considered a "victim" of the crime as defined in the Crimes Code under Section 1106(h), it is a challenge which implicates the legality of the restitution sentence and is consequently non-waivable. *Commonwealth v. Langston*, 904 A.2d 917, 921 (Pa. Super. 2006). "Restitution" and "Victim" are defined in 18 Pa.C.S.A. § 1106 as:

(h) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Restitution." The return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court.

"Victim." As defined in section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act.<sup>1</sup> The term includes an affected government agency, the Crime Victim's Compensation Fund, if compensation has been paid by the Crime Victim's Compensation Fund to the victim, any insurance company that has compensated the victim for loss under an insurance contract and any business entity.

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18 Pa.C.S.A. § 1106(h).

Issues related to the legality of sentence are questions of law; as a result, the appellate standard of review is de novo and the scope of review is plenary. *Commonwealth v. Weir*, --- A.3d at ---, 2020 WL 5822534, \*4.

A challenge to the amount of restitution under the circumstances presented to the trial court is a challenge to the discretionary aspects of sentence. See *Commonwealth v. Walker*, 666 A.2d 301, 307 (Pa. Super. 1995) (stating that challenges alleging that a sentence of restitution is excessive under the circumstances of the case are challenges to the discretionary aspects of sentencing).

In an earlier decision, *In the Interest of M.W.*, 725 A.2d 729 (Pa. 1999), the Pennsylvania Supreme Court addressed the confusion surrounding whether an appeal challenges the discretionary aspects of sentencing rather than the legality, and clarified that a claim that the trial court lacked statutory authority to impose restitution implicates the legality of sentence, whereas a claim that the amount of restitution is excessive under the circumstances presented to the trial court implicates the discretionary aspects of sentencing. *Id.* at 731 n. 4.

An appellant challenging the discretionary aspects of his sentence, in regard to a restitution order, must comply with the requirements for raising a challenge to the discretionary aspects of a sentence. *Commonwealth v. Colon*, 708 A.2d 1279, 1281 (Pa. Super. 1998). There is a four-part test:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

*Commonwealth v. Moury*, 992 A.2d 162, 170 (Pa. Super. 2010).

### F. The “Causal Connection”

As a general rule, when restitution is imposed under 18 Pa.C.S.A. § 1106(a) as a direct sentence, there must be a specific nexus between the amount of restitution ordered by a trial court and the crime committed.

Case law speaks of restitution imposed under § 1106(a) as being a direct sentence, rather than just a condition of probation or intermediate punishment. *Interest of M.W.*, 725 A.2d 729, 731, 732

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(Pa. 1999); **Commonwealth v. Deshong**, 850 A.2d 712, 715, 716 (Pa. Super. 2004). Additionally, because of the statutory language “directly resulting from the crime,” **restitution is proper only if there is a direct causal connection between the crime and the loss.** *In re M.W.*, 725 A.2d at 732 (holding that restitution imposed as a direct sentence under 18 Pa.C.S.A. § 1106(a) must result directly from the crime); **Commonwealth v. Popow**, 844 A.2d 13, 19 (Pa. Super. 2004) (holding restitution for medical bills was improper under § 1106(a) due to lack of direct causation where appellant was acquitted of cutting victim and only convicted of threatening him); **Commonwealth v. Walker**, 666 A.2d 301, 310 (Pa. Super. 1995) (holding restitution for medical bills was proper under § 1106(a) because appellant’s drunk driving caused a two-car accident which directly injured the occupants of the other vehicle); **Commonwealth v. Fuqua**, 407 A.2d 24, 25, 28 (Pa. Super. 1979) (holding restitution for injury to property was proper under § 1106(a) because appellant’s drunk driving caused him to collide with victim’s house, thereby damaging it).

**Commonwealth v. Harriott**, 919 A.2d 234, 237-238 (Pa. Super. 2007)(emphasis added). Similarly, in **Commonwealth v. Harner**, 617 A.2d 702 (Pa. 1992), the Supreme Court noted that Section 1106 “applies only for those crimes to property or person where there has been a loss that flows from the conduct which forms the basis of the crime for which a defendant is held criminally responsible.” 617 A.2d at 706.

However, when restitution is imposed as a condition of probation under 42 Pa.C.S.A. § 9763, the required nexus between the defendant’s criminal conduct and the victim’s loss is relaxed. **Commonwealth v. Kinnan**, 71 A.3d 983, 986 (Pa. Super. 2013) (decided under Section 9754).

However, when restitution is ordered as a condition of probation, the sentencing court is accorded the latitude to fashion probationary conditions designed to rehabilitate the defendant and provide some measure of redress to the victim.... Thus, the requirement of a nexus between the damage and the offense is relaxed where restitution is ordered as a condition of probation.

**Commonwealth v. Hall**, 80 A.3d 1204, 1215 (Pa. 2013). Even with this relaxed nexus, “there must be at least an indirect connection between the criminal activity and the loss.” **Commonwealth v. Kinnan**, 71 A.3d 983, 986 (Pa. Super. 2013).

### III. RESTITUTION RESOURCES

The Pennsylvania Office of Victim Advocate supports a website dedicated to the recovery of restitution:

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<https://www.ova.pa.gov/Programs/RestitutionTaskForce/Pages/default.aspx>

The website includes a downloadable document Understanding Restitution When You Are a Victim of a Crime.

The Pennsylvania Office of Victim Services also maintains a website including a claim form to be used with the Pennsylvania Victims Compensation Assistance Program.

<https://pcv.pccd.pa.gov/available-services/Pages/Victims-Compensation.aspx>

State and city programs for victims of crime are listed in an inter-active map of Pennsylvania:

<https://pcv.pccd.pa.gov/available-services/Pages/Interactive-Map.aspx>

The possibility of restitution in a juvenile case is discussed on the website of the Juvenile Law Center:

<https://jlc.org/resources/restitution-pennsylvania>

## IV. TASK FORCE RECOMMENDATIONS

In October 2011, the Pennsylvania Office of the Victim Advocate convened the Restitution in Pennsylvania Task Force. The final report of the Task Force contained 47 recommendations for the judicial, legislative and executive branches of government. A summary of the recommendations are grouped into four overarching categories. Those recommendations which relate to trial courts are printed in bold lettering:

### ***Uniformity of Policy and Practice Recommendations:***

1. Convene a group of stakeholders to further review existing restitution law and compile recommendations for judicial, legislative or department/agency clarifications or revisions.
2. Develop restitution bench books for the juvenile justice and criminal justice systems.
3. Upon completion of the restitution bench books, develop quick reference sheets for restitution in the criminal and juvenile justice systems.
4. In conjunction with the development of restitution bench books, develop educational strategies, training and technical assistance for bench, bar, victim services, police and probation.
5. Develop a toolkit which would clarify policy and practice around restitution issues, identify evidence based and/or promising practices, clarify available enforcement tools and provide helpful articles, brochures, etc.
6. Encourage Administrative Office of Pennsylvania Courts and/or

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the Court Rules Committee to standardize a restitution order for use at sentencing/disposition.

**7. Encourage counties to establish collections enforcement units and hire dedicated staff to solely focus on collections enforcement efforts within the jurisdiction.**

**8. Encourage President Judges to establish restitution, fines and costs contempt courts allocating the judicial resources to preside over such hearings.**

9. The General Assembly should consider amending Title 42 Section 9728 (b)(5) to establish a mandated minimum percentage threshold for deductions from inmate personal accounts for both county correctional facilities and the Pennsylvania Department of Corrections.

**10. Encourage counties to provide Pennsylvania Department of Transportation with non-payment information so that the newly enacted mandate (Act 146 of 2012) for drivers' license suspension can be utilized, as appropriate.**

**11. Make wider use of dunning letters or overdue notices to notify or remind defendants that their payments are past due and of the sanctions that may be imposed by the court if they do not come into payment plan compliance.**

**12. Develop restitution funds and restitution programs throughout both the criminal and juvenile justice systems.**

**13. Expand the availability of programs and processes such as Victim Offender Conferencing/Dialogue throughout both the criminal and juvenile justice systems.**

***Strengthening Accountability Recommendations:***

**14. Reinforce the mandate that all Clerks of Court comply with Act 84 of 1998 and transmit "copies of all orders for restitution and amendments or alterations thereto, reparation, fees, costs, fines and penalties" to the Pennsylvania Department of Corrections for state sentenced inmates and to the county correctional facility for county sentenced inmates.**

**15. Reinforce the mandate that all Clerks of Court comply with the Act 84 of 1998 requirement to file civil judgments when a case balance reaches or exceeds \$1,000 and to exercise the option to file below \$1,000 if effective in a particular case to enforce payment compliance.**

**16. Provide support for on-going research regarding restitution in Pennsylvania.**

**17. Establish performance measures for agencies supervising probationers and parolees relative to the payment/collection of restitution.**

**18. Counties should conduct annual reviews to ensure that restitution collections are not superseded by the collection of county-assessed prison room and board rates and other county-established**

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**fees and payment allocation priorities.**

19. Strengthen existing tools to enhance restitution collection with particular attention to the issue of collecting restitution from adjudicated delinquents between the ages of 18 and 21.

20. Encourage the Juvenile Court Judges Commission to work with the Pennsylvania Council of Chief Juvenile Probation Officers to create or modify existing juvenile justice data collection and reporting processes to accurately and in detail track and publish county-specific information regarding the ordering and collection of restitution.

***Coordination of Information Recommendations:***

21. Identify an overarching agency or organization to continue the efforts of the Restitution in Pennsylvania Task Force, such as Pennsylvania Commission on Crime and Delinquency, Administrative Office of Pennsylvania Courts or the Office of the Victim Advocate.

22. Establish or agree to a unique individual identifier to be used across executive agencies and the judicial branch to better match records pertaining to individuals owing restitution, court costs and fines in the commonwealth of Pennsylvania within databases i.e., Pennsylvania Department of Transportation, Pennsylvania Department of Public Welfare and Administrative Office of Pennsylvania Courts' records.

23. Develop the capacity for Administrative Office of Pennsylvania Courts, the courts, Pennsylvania Department of Corrections, Office of the Victim Advocate, Pennsylvania Board of Probation and Parole and similar county-level agencies to share information to ascertain a defendant's total fines, costs, and restitution payments owed across all cases.

24. Establish a web-based system for victims/survivors to update personal contact information related to their restitution order.

25. Encourage all counties to establish communication protocols to determine whether individuals are in payment plan compliance with respect to public assistance eligibility.

**26. Place defendants on a single electronic payment plan (including restitution owed on juvenile delinquency cases) in the Common Pleas Case Management System and/or the Magisterial District Judge System applications maintained by the Administrative Office of Pennsylvania Courts for Courts of Common Pleas and Magisterial District Courts end users.**

**27. Enable the identification and collection of restitution owed in delinquency cases from offenders under the jurisdiction of criminal courts, adult probation departments, Pennsylvania Department of Corrections and Pennsylvania Board of Probation and Parole.**

**28. Encourage counties to enter warrants surrounding the issue of failing to pay restitution, fines, and costs, and/or failure to appear for said proceedings into Commonwealth Law Enforcement Assistance Network/National Crime Information Center, as appropriate. Such**

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**action will assist in the location of offenders outside of the originating jurisdiction and once located could result in the immediate collection of monies without the necessity to extradite/transport offenders.**

29. Clarify accepted documentation and practice for Pennsylvania Department of Corrections in order to maximize the collection of restitution from inmates; and modify required forms to include all outstanding restitution, fines and costs owed by an individual upon commitment to the Pennsylvania Department of Corrections.

**30. Attach priority to the collection of restitution, fines and costs in the development of the Common Pleas Case Management System delinquency module.**

31. The Supreme Court of Pennsylvania should consider providing a capacity to address collections performance measures and promote evidence-based and/or promising practices to improve the collection of restitution.

32. Pennsylvania Commission on Crime and Delinquency, through Criminal Justice Advisory Boards, should conduct training and share information with counties and prison boards on the evidence-based and promising practices of other counties that improve the restitution processes, including collection methods, prison policies, costs, etc.

**33. Create or modify existing criminal justice data collection and reporting processes to accurately and in detail track and publish county-specific information regarding the ordering and collection of restitution.**

**34. Provide practical information about restitution to victims.**

**35. Provide practical information about restitution to defendants.**

***Expansion of Authority Recommendations:***

36. Maintain the current mandatory threshold of filing civil judgments as per Title 42 Section 9728 (b)(1) when “judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, exceed \$1,000.”

37. The General Assembly should consider amending Title 42 Section 9728 (b)(5) to mandate both county correctional facilities and the Pennsylvania Department of Corrections to make deductions from inmate personal accounts.

38. Expand Pennsylvania Department of Transportation’s authority to suspend and/or prohibit renewal of driver licenses for payment non-compliance. [It is noted that this recommendation was accomplished through the passage of Act 146 of 2012.]

39. The General Assembly should consider amending relevant statutes to authorize counties or courts to suspend or prohibit the issuance of state-issued licenses when the applicant is delinquent in the payment of restitution, fines or costs. Types of licenses, registrations or other authorizations include, but are not limited to: driver’s license; hunting; fishing; professional licenses; vehicle registrations; etc. License

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limitations or suspensions shall be based on an individual case by case determination.

40. The General Assembly should consider amending Title 42 Section 9728 (g) Costs, etc., to clearly state that costs incurred by counties in support of collections enforcement efforts (staff, overhead) shall be borne by defendants.

41. The General Assembly should consider amending Title 42 Section 9730 adding section (a. 1) to clarify the authority of the court to assign the wages of a defendant who agrees to an assignment of income of not more than 25% of the defendant's gross salary, wages or other earnings to the court for payment of any restitution, fines or court cost. This amendment should also impose obligations on employers in this regard.

42. The Criminal Procedural Rules Committee should consider revisiting Pa.R.Crim.P. 535 and recommend the Pennsylvania Supreme Court adopt a revision authorizing the sentencing court to order any cash bail money posted by the defendant to be applied to any restitution, court costs or fines imposed. Alternatively the General Assembly should consider amending Title 42 adding a Section 5703 to provide for bail money posted by a defendant to be applied to restitution, fines and costs.

43. The General Assembly should consider authorizing courts to order wage attachment for defendants who have been found in contempt for nonpayment of restitution, costs or fines.

44. The General Assembly should consider authorizing courts to order wage attachment for defendants who have the ability to pay restitution, costs or fines.

45. The United States Congress should consider amending the Internal Revenue Code of 1986 Section 6402 to require the IRS to pay any state judicial debt to include overdue costs, fines and/or restitution from any federal income tax refund due to a delinquent defendant.

46. The General Assembly should consider enacting or amending statute to require the Pennsylvania Department of Revenue and Pennsylvania Lottery to pay any state judicial debt to include overdue restitution, costs and/or fines from any state income tax refunds and/or lottery winnings.

47. The Criminal Procedures Rules Committee should consider examining current court rules and the rules of other jurisdictions to consider whether any rules should be amended or new rules adopted to improve the collection of restitution.

*Restitution in Pennsylvania*, Task Force Final Report, (Office of the Victim Advocate, 2013), available at:

[http://victimsofcrime.org/docs/default-source/restitution-toolkit/restitution-taskforce\\_final-report-2013.pdf?sfvrsn=2](http://victimsofcrime.org/docs/default-source/restitution-toolkit/restitution-taskforce_final-report-2013.pdf?sfvrsn=2).

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## *Chapter Two*

# *Mandatory Restitution at Sentencing*

## I. TRIAL COURT CONSIDERATIONS

### A. Mandatory Restitution and Designation of a “Victim”

Provision of restitution is mandatory to a “victim” of a defendant’s crime under both Section 9721 of the Sentencing Code and section 1106 of the Crimes Code. Both of these statutes predicate restitution on who qualifies as a “victim”.

#### 1. The Relevant Statutes

Section 9721 of the Sentencing Code, regarding sentencing generally, provides

##### **§ 9721. Sentencing generally**

(a) General rule.--In determining the sentence to be imposed the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

- (1) An order of probation.
- (2) A determination of guilt without further penalty.
- (3) Partial confinement.
- (4) Total confinement.
- (5) A fine.

...

**(c) Mandatory restitution.**--In addition to the alternatives set forth in subsection (a) of this section **the court shall order the defendant to compensate the victim** of his criminal conduct for the damage or injury that he sustained. For purposes of this subsection, the term “victim” shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

42 Pa.C.S.A. § 9721. (Emphasis added).

Section 1106(a) of the Crimes Code more specifically provides for mandatory restitution to victims suffering harm as a direct result of a defendant’s crimes. This Section provides:

### § 1106. Restitution for injuries to person or property

(a) General rule.--Upon conviction for any crime wherein:

(1) property of a **victim** has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a **direct** result of the crime; or

(2) the **victim**, if an individual, suffered personal injury **directly** resulting from the crime,

the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

18 Pa.C.S.A. §1106(a). (Emphasis added).

The Pennsylvania Supreme Court has held that Section 1106(a) "applies only for those crimes to property or person where there has been a loss that flows from the conduct which forms the basis of the crime for which a defendant is held criminally accountable." *Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992); *see also Commonwealth v. Pappas*, 845 A.2d 829, 842 (Pa. Super. 2004) (holding that restitution under Section 1106(a) may be imposed only where the victim suffered a loss that flows from the criminal conduct that forms the basis of the crime).

To determine the correct amount of restitution, a "but-for" test is used—damages which occur as a result of the crime are those which should not have occurred but for the defendant's criminal conduct. *Commonwealth v. Oree*, 911 A.2d 169, 174 (Pa. Super. 2006). Therefore, there must be a direct link between the crime and the requested damages for restitution to be ordered under Section 1106(a). *See Commonwealth v. Barger*, 956 A.2d 458, 465 (Pa. Super. 2008) (*en banc*); *Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. 2007) (explaining that restitution ordered under Section 1106 is "proper only if there is a direct causal connection between the crime and the loss").

## 2. The Definition of a "Victim"

Both Section 9721(c) and Section 1106(a) refer to a "victim", but defining who qualifies as a "victim" for purposes of ordering mandatory restitution can be confusing due to incorporation by reference and legislative amendments.

### Prior Version of 18 Pa.C.S.A. §1106

Section 9721(c) requires a court to order restitution to a victim for damage resulting from a defendant's criminal conduct. The statute provides that "the term 'victim' shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The

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Administrative Code of 1929.” Section 479.1 however, was repealed by the act of May 15, 1998 (P.L. 882, No. 111, § 5103), also known as the Crime Victims Act.

Prior to October 24, 2018, section 1106(h) also defined the term “victim” as “defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.”

- The use of section 479.1 in the prior version of section 1106(h) was discussed by the Superior Court in ***Commonwealth v. Holmes***, 155 A.3d 69 (Pa. Super. 2017) (*en banc*). The Superior Court examined whether the parents of a child who was killed in a DUI fatality may be considered victims under 1106(a) for purposes of ordering restitution to recover the costs of the child’s funeral expenses. Initially, to answer that question, the Court had to determine what definition of the term “victim” was applicable in light of the legislative repeal of section 479.1. After examining the subsequent history to section 479.1 and its repealer provisions, the opinion in support of affirmance (OISA) determined that the CVA was a codification of the repealed statute and that unless clearly different from current law, the CVA was a continuation of the prior law. *Id.* at 80-81. Under these legislative directives, the OISA concluded that the definition of “victim” under the repealed section 479.1 and the current CVA revealed that they were consistent with each other and therefore, the current definition of “victim” under the CVA is, as intended, a part of the definition of “victim” under section 1106(h).

The opinion in support of reversal (OISR) disagreed, reasoning, that in light of the legislature’s various amendments to the Crimes Code subsequent to 1998 when section 479.1 was repealed, and the continued inaction by the legislature to replace section 479.1 with the CVA, that a court could only order restitution to a “direct victim” under section 1106(a). According to the OISR, this did not include the parents of a child victim. It was the position of the OISA that prior cases failed to consider section 5103 of the CVA that deemed the CVA to be a continuation of the repealed provisions of the Crimes Code, and that in fact, the Supreme Court reserved resolution of the interplay between section 1106 and the CVA for purposes of defining “victims” under those statutes. *Id.* at 85-86, citing ***Commonwealth v. Hall***, 80 A.3d 1204 (Pa. 2013). The OISA was the Superior Court’s attempt to resolve that interplay. The 2018 amendment to incorporate the definition of “victim” as contained under the CVA into section 1106(h) may be considered a legislative ratification of the OISA position in ***Holmes***.

### Current Version of 18 Pa.C.S.A. §1106

“Victim” is now defined in section 1106(h) as:

As defined in section 103 of the act of November 24, 1998 (P.L. 882,

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No.111), known as the **Crime Victims Act**. The term includes an affected government agency, the Crime Victim's Compensation Fund, if compensation has been paid by the Crime Victim's Compensation Fund to the victim, any insurance company that has compensated the victim for loss under an insurance contract and any business entity.

18 Pa.C.S.A. §1106(h). (Emphasis added).

The Crime Victim's Act ("CVA"), 18 P.S. § 11.101, *et seq.*, provides definitions for both a "direct victim" and a "victim". Section 11.103 of the CVA defines a "Direct" victim as

"Direct victim." An individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act. The term shall not include the alleged offender. The term includes a resident of this Commonwealth against whom an act has been committed or attempted which otherwise would constitute a crime as defined in this act but for its occurrence in a location other than this Commonwealth and for which the individual would otherwise be compensated by the crime victim compensation program of the location where the act occurred but for the ineligibility of such program under the provisions of the Victims of Crime Act of 1984 (Public Law 98-473, 42 U.S.C. § 10601 *et seq.*).

The designation of a "Victim" includes the following terms:

**"Victim."** The term means the following:

(1) A direct victim.

(2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.

(3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:

Chapter 25 (relating to criminal homicide).

Section 2702 (relating to aggravated assault).

Section 3121 (relating to rape).

(4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiance, one of whom is to be identified to receive communication as provided for in this act, except

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where the family member is the alleged offender.

18 P.S. § 11.103. While Section 9721<sup>1</sup> and Section 1106 complement each other addressing restitution to victims of crime, two distinctions between these statutes are notable.

First, while Section 9721 speaks in terms of a defendant compensating a “victim” for loss or injury resulting from a defendant’s criminal conduct, Section 1106 speaks in terms of compensating a “victim” who suffers loss to property or personal injury “directly” resulting from an offender’s crime. To date, no appellate case has addressed whether the reference to victim under 9721 and the reference to a victim who directly suffers harm under Section 1106 are in conflict where both statutes provide that restitution is mandatory. Under rules of statutory construction, these two provisions should be construed together in *pari materia* as one statute, as they relate to the same thing, and in a manner where the more specific provision controls the general if the two provisions are irreconcilable. *See* 1 Pa.C.S.A. §§ 1932, 1933. When viewed in this light, section 9721 is the general rule and Section 1106 the more specific. Therefore, it may be considered that under both statutes courts are obligated to order restitution to a victim who suffers property loss or personal harm as a direct result from an offender’s criminal action.

Second, as currently written, Sections 9721 and 1106 do not share the same definition of a “victim”.

- Section 9721 incorporates the definition of a “victim” by reference to Section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929. In contrast, section 1106(h) incorporates by reference the definition of a “victim” as contained in the Crime Victims Act. As explained above, this was not always the case. It would seem however, that since Section 9721 presents the same repealer and amendment problem as that considered in *Holmes*, that the same result should be reached, that being, that the definition of “victim” under Section 9721 is as defined under the CVA. This should be especially so where the legislature acted to amend the definition of “victim” to be as defined under the CVA.
- At sentencing, when a trial court must consider ordering restitution under Section 1106(a), it first must be careful to identify who qualifies as a “victim”, since restitution under Section 1106(a) only may be paid to those victims identified as such under that statute. The incorporation of the CVA into the definition of “victim” under Section 1106(h) expands who qualifies as a Section 1106(a) victim who suffers a loss as a direct result of a defendant’s criminal conduct.

The interplay between the definitions of “victim” and “direct victim” is illustrated

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<sup>1</sup> 42 Pa.C.S.A. § 9721.

## Mandatory Restitution at Sentencing

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in *Commonwealth v. Holmes*, 155 A.3d 69 (Pa. Super. 2017), (*en banc*) (opinion in support of affirmance), wherein the question presented was whether the parents of a child killed in a car accident as a result of the car owner being convicted of REAP for allowing the child to drive the owner's car while drunk, could be awarded restitution for funeral expenses as a victim under Section 1106(a). Following the definition of "victim" as defined under the CVA, the OISA found that the parents were entitled to be awarded restitution. Incorporating the CVA's definition of "victim" into Section 1106(a) qualified the parents as Section 1106(a) victims, since the CVA's definition of "victim" includes the parents of a child who was a direct victim of a crime. Without this connection, the parents in *Holmes* could not qualify for restitution under Section 1106(a). The opinion in support of reversal (OISR) reached a contrary result reasoning that only the CVA's reference to a "direct victim" was applicable to Section 1106(h)<sup>2</sup>

### B. No Retroactive Effect to Amendments

The Supreme Court and Superior Court have held that amendments to 18 Pa.C.S.A. § 1106 which broaden the definition of "victim" should **not** be effective in criminal cases that began before the effective date of the legislation, holding that, for example, "[b]ecause the events that led to [a]ppellant's conviction occurred before October 24, 2018, [the since-repealed] version of the statute applies." *Commonwealth v. Tanner*, 205 A.3d 388, 396 n.7 (Pa. Super. 2019).

- In *Tanner*, the appellant challenged the portion of his direct sentence requiring him to pay substantial restitution to Shenango Township, Lawrence County, Pennsylvania, under § 1106. Id. at 395-396. "Ultimately, [the Superior Court] concluded this restitution was illegal because Shenango Township was not considered a 'victim' under the relevant statutory provisions, relying directly upon our Supreme Court's guidance in *Commonwealth v. Veon*, 637 Pa. 442, 150 A.3d 435 (2016)." *Commonwealth v. Hunt*, 220 A.3d 582, 586-87 (Pa. Super. 2019).

## II. MANDATORY RESTITUTION ORDER AT SENTENCING

### A. Statutory Creation

Restitution is a statutory creation and must be imposed by a court as a direct sentence, pursuant to 18 Pa.C.S.A. § 1106, or as a condition of probation, pursuant to 42 Pa.C.S.A. § 9763.<sup>3</sup> In juvenile court proceedings, restitution may be ordered as deemed appropriate by the court, 42 Pa.C.S.A. § 6352(a)(5).<sup>4</sup> Section 1106 "mandates that courts

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<sup>2</sup> A review of Section 1106(a) indicates that the statute speaks in terms of ordering restitution to a "victim" who suffers a loss as a "direct" result of an offender's criminal conduct. This is different from an interpretation that reads Section 1106(a) as ordering restitution to a "direct victim".

<sup>3</sup> Restitution as a Condition of Probation is discussed in Chapter 3, *infra*.

<sup>4</sup> See Chapter 4 *infra*.

## Mandatory Restitution at Sentencing

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shall sentence offenders to make restitution in certain cases of injury to persons or property. See 18 Pa.C.S.A. § 1106(a)." *Commonwealth v. Whatley*, 221 A.3d 651, 653 (Pa. Super. 2019). Such restitution is limited to victims who suffer a direct loss from a crime and requires a direct nexus between the loss and the amount of restitution. See *Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992).

Restitution is a statutory creation and may be imposed by a court as a direct sentence, pursuant to 18 Pa.C.S.A. § 1106, or as a condition of probation, pursuant to 42 Pa.C.S.A. § 9754. When incorporated as part of a defendant's direct sentence, restitution is penal in nature and may be imposed without regard to the defendant's ability to pay. See 18 Pa.C.S.A. § 1106(c)(1)(i)(court shall consider restitution regardless of the current financial situation of the defendant). However, when imposed as a condition of probation . . . its function is primarily rehabilitative and is intended to assist the defendant in leading a law-abiding life. 42 Pa.C.S.A. § 9754(b). In this context, restitution is to be imposed only "in an amount [the defendant] can afford to pay." 42 Pa.C.S.A. § 9754(c)(8).

*Commonwealth v. Karth*, 994 A.2d 606, 607 (Pa. Super. 2010).<sup>5</sup>

When imposed as a direct sentence, the injury to property or person for which restitution is ordered must directly result from the crime.

As a direct sentence, restitution is authorized by 18 Pa.C.S.A. § 1106, which mandates that courts shall sentence offenders to make restitution in certain cases of injury to persons or property. See 18 Pa.C.S.A. § 1106(a). Such restitution is limited to direct victims of the crime and requires a direct nexus between the loss and the amount of restitution. See *Commonwealth v. Harner*, 533 Pa. 14, 617 A.2d 702, 706 (1992).

*Commonwealth v. Whatley*, 221 A.3d 651, 653 (Pa. Super. 2019). The sentencing court must apply a "but for" test imposing restitution. "[D]amages which occur as a direct result of the crime[s] are those which [would] not have occurred but for the defendant's criminal conduct." *Commonwealth v. Gerulis*, 616 A.2d 686, 697 (Pa. Super. 1992).

Restitution is made mandatory under 42 Pa.C.S.A. § 9721:

**(c) Mandatory restitution.--**In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained. For purposes of this subsection, the term "victim" shall be as defined in section 479.1 of the act of April 9, 1929

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<sup>5</sup> In 2019, restitution in probationary sentences was moved from 42 Pa.C.S.A. § 9754 to § 9763.

## Mandatory Restitution at Sentencing

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(P.L. 177, No. 175), known as The Administrative Code of 1929.

42 Pa.C.S.A. § 9721.<sup>6</sup>

The Crime Victims Act, 18 Pa.C.S.A. §§ 11.101 *et seq.*, defines “victim” as follows:

- (1) A direct victim.
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
- (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child’s family:

Chapter 25 (relating to criminal homicide).  
Section 2702 (relating to aggravated assault).  
Section 3121 (relating to rape).

- (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiance, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

18 Pa.C.S.A. § 11.103.

In the context of criminal proceedings, an order of “restitution is not simply an award of damages, but, rather, a sentence.” *Commonwealth v. Atanasio*, 997 A.2d 1181, 1182–83 (Pa. Super. 2010)(quoting *Commonwealth v. C.L.*, 962 A.2d 489, 494 (Pa. Super.

✓ JUDICIAL POLICY; Restitution  
is part of a Sentence

2008)). However, restitution is a creature of statute and, without express legislative direction, a court is powerless to direct a defendant to make restitution as part of a sentence. *Commonwealth v. Harner*, 617 A.2d 702, 704 (Pa. 1992).<sup>7</sup>

18 Pa.C.S.A. § 1106 mandates the imposition of restitution as part of a criminal sentence.<sup>8</sup> Restitution, when it is imposed as a direct sentence, can be entered only as to losses for which the defendant has been held criminally accountable. The very words of the statute provide that it is applicable only: “Upon conviction for any crime wherein:

- (1) property of a victim has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime; or

<sup>6</sup> For purposes of Section 9721, the term “victim” is referenced to the Administrative Code of 1929, which was subsequently repealed and recodified in the Crimes Victims Act, 18 Pa.C.S.A. §§ 11.101 *et seq.* See *Commonwealth v. Veon*, 150 A.3d 435, 449 (Pa. 2016). The definition of “victim” is now found at 18 Pa.C.S.A. § 11.103.

<sup>7</sup> The General Assembly also has granted authority to the Department of Corrections to develop guidelines and a procedure to collect monies for restitution as well as fines and costs from inmates who are in the state system of corrections. See 42 Pa.C.S.A. § 9728(b)(5); *Boyd v. Department of Corrections*, 831 A.2d 779 (Pa. Cmwlth. 2003).

<sup>8</sup> In addition to other mandatory requirements for restitution, 18 Pa.C.S.A. § 1107.1 specifies additional terms for restitution for identity theft.

## Mandatory Restitution at Sentencing

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(2) the victim, if an individual, suffered personal injury directly resulting from the crime . . .”

18 Pa.C.S.A. § 1106. Interference with custody of children is not such a crime. *Commonwealth v. Harner*, 617 A.2d 702, 705 (Pa. 1992).

“[R]estitution is the requirement that the criminal offender repay, as a condition of his sentence, the victim or society, in money or services.” *Commonwealth v. Brown*,

✓ JUDICIAL POLICY; Restitution as rehabilitative and deterrence

981 A.2d 893, 895 (Pa. 2009) (footnote omitted). It acts to rehabilitate the offender “by impressing upon him or her that his criminal conduct caused

the victim’s loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible.” *Id.* (citation omitted). “[I]t is highly favored in the law and encouraged so that the criminal will understand the egregiousness of his or her conduct, be deterred from repeating the conduct, and be encouraged to live in a responsible way.” *Id.* (citation omitted).

### B. Sentencing Court’s Responsibility

Since restitution is part of a criminal sentence, it must be supported by the record and the trial court must determine:

- (1) the loss or damages resulting from the defendant’s conduct;
- (2) the amount of compensation; and
- (3) how such amount should be paid.

*Commonwealth v. Walker*, 666 A.2d 301, 311 (Pa. Super. 1995) citing to *Commonwealth v. Balisteri*, 478 A.2d 5, 9 (Pa. Super. 1984).<sup>9</sup>

Restitution applies only for those crimes to property or person where there has been a loss that flows from the conduct which forms the basis of the crime for which a defendant is held criminally accountable. *Commonwealth v. Wright*, 772 A.2d 157, 159 (Pa. Super. 1998). The statute requires that a victim’s loss be caused directly by a defendant’s criminal conduct rather than a loss consequential to such conduct. *Commonwealth v. Langston*, 904 A.2d 917, 923 (Pa. Super. 2006).

Act 121 of 1998 imposes upon the court the requirement that if restitution is ordered, the amount must be determined at the time of sentencing, 18 Pa.C.S.A. § 1106(c)(2). It also places upon the Commonwealth the requirement that it provide the court with its recommendation of

✓ JUDICIAL POLICY: Trial Court Must Initially Determine Restitution Amount

<sup>9</sup> At the time *Walker* and *Balisteri* were decided, a factor that the trial court had to consider was an amount of compensation that the defendant could afford to pay. That is no longer a factor when restitution is mandatory at the time of sentencing because of the amendments to Section 1106(c) which establish that a defendant’s ability to pay is irrelevant except when the court imposes a payment plan or if the defendant defaults on the restitution order. 18 Pa.C.S.A. § 1106(c)(1)(i).

## Mandatory Restitution at Sentencing

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a restitution amount at or prior to the time of sentencing. 18 Pa.C.S.A. § 1106(c)(4). Although the statute provides for amendment or modification of restitution “at any time,” 18 Pa.C.S.A. § 1106(c)(3), the modification refers to an order “made pursuant to paragraph (2) ....” *Id.* Therefore, the statute mandates an initial determination of the amount of restitution at sentencing. This provides the defendant with certainty as to his sentence, and at the same time allows for subsequent modification, if necessary. *See* 18 Pa.C.S.A. § 1106(c)(3); *cf.* 42 Pa.C.S.A. § 5505.

As a result, Section 1106 requires the sentencing court to determine the specifics of restitution at the initial sentencing hearing. If the sentencing court does not address the specific amount of restitution and a payment method, or if the sentencing court refers these items to another agency of the court (such as the probation department), the sentencing order will be vacated:

Consistent with the plain language of § 1106(c)(2), our Courts have held that the trial court may not impose a general order of restitution at sentencing and then “work out the details” and amounts at a later date. [**Commonwealth v. Mariani**, 869 A.2d 484, 486 (Pa. Super. 2005).] “[A]n order of restitution to be determined later is ipso facto illegal.” *Id.* Similarly, “the sentencing court bears the duty of determining the specifics of restitution. The court is not free to delegate these duties to an agency.” **Commonwealth v. Deshong**, 850 A.2d 712, 716 (Pa. Super. 2004) (brackets and citations omitted).

The record reflects that at the sentencing hearing, the court ordered Appellant “to pay costs, [and] make restitution, which is capped at \$1,481,562.54.” N.T., 1/4/2006, at 32. While the court did set a maximum cap, the court did not specify any particular amount of restitution, particularly as to future medical expenses. Moreover, the court did not specify any method of payment.

We recognize that the court held a post-sentence motion hearing at which the court attempted to clarify both the amount and the method of payment. N.T., 5/19/2006, at 4–5. Specifically, the court indicated its belief that Appellant would pay the amounts that the DPW incurs on an ongoing, “pay-as-you-go” basis. *Id.* at 5–6; see also Trial Court Opinion, 8/14/2006, at 4 n. 2 (“It is important to note that the Commonwealth is not seeking these costs from Defendant unless they are actually incurred by [the victim]. The purpose of including them in restitution is only so that if such costs are accrued, Defendant will be responsible for their payment.”) Unfortunately, the court never modified the sentencing order to make these facts clear. Rather, the certified record continues to reflect only a generalized order of restitution with no amount or method of payment. We are constrained to hold that such an order is illegal and must be corrected.

## Mandatory Restitution at Sentencing

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**Commonwealth v. Smith**, 956 A.2d 1029, 1033-1034 (Pa. Super. 2008)(*en banc*) (footnotes omitted).

Pursuant to 18 Pa.C.S.A. § 1106, it is mandatory to award full restitution. However, it still is necessary for the trial court to ensure that the record contains the factual basis for

✓ JUDICIAL POLICY: “Full Restitution”  
Must be Determined at an  
Adversarial Hearing

the appropriate amount of restitution, utilizing the adversarial system with considerations of due process. **Commonwealth v. Atanasio**, 997 A.2d 1181, 1183 (Pa. Super. 2010). At the

hearing, the parties are the defendant and the Commonwealth. The trial court must make sure that any award made is not speculative or excessive. **Commonwealth v. Walker**, 666 A.2d 301, 311 (Pa. Super. 1995).

The victim may seek civil damages if unsatisfied with the restitution award. **Commonwealth v. Ortiz**, 854 A.2d 1280 (Pa. Super. 2004)(*en banc*).

The trial court must determine the loss or damage the defendant has caused and how

✓ JUDICIAL POLICY: No Delegation to  
Probation Department

he should pay it. The trial court may not delegate these obligations to any agency, such as the Office of Probation and Parole.

**Commonwealth v. Gentry**, 101 A.3d 813, 818 (Pa. Super. 2014).

- **Commonwealth v. Deshong**, 850 A.2d 712 (Pa. Super. 2004): The trial court was required to set the manner and amount of restitution at the time of sentencing without delegating that decision to a probation office. Because the trial court improperly permitted the probation department to determine the amount and recipients of restitution, the restitution order “amounted to an illegal sentence . . . .” *Id.* at 716.

Whenever restitution has been ordered as a direct sentence pursuant to Section 1106, the court is required under the statute to order full restitution regardless of the current financial resources of the offender. **Commonwealth v. Shotwell**, 717 A.2d 1039, 1045 (Pa. Super. 1998). 18 Pa.C.S.A. § 1106(c) establishes that restitution in a criminal case

✓ JUDICIAL POLICY: Restitution  
Determined and Ordered Without  
Regard to Defendant’s Ability to Pay

is mandatory and the *defendant’s ability to pay is irrelevant* except when the court imposes a payment plan or if the defendant defaults on the restitution order. **Commonwealth v. Colon**, 708 A.2d 1279, 1284 (Pa. Super. 1998).

As a result, the question of a defendant’s ability to pay a restitution order within a certain time period or at all is irrelevant at the time of sentencing because the trial court is not obligated to inquire into ability to pay when it enters the order. **Commonwealth v. Leber**, 802 A.2d 648, 652 (Pa. Super. 2002).<sup>10</sup> Section 1106(c)(1)(i) provides that the court must order full restitution regardless of

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<sup>10</sup> However, if the court makes the payment of restitution a condition of probation, it must be “in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.” 42 Pa.C.S.A. § 9763(b)(10).

## Mandatory Restitution at Sentencing

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the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss.

- **Commonwealth v. Oree**, 911 A.2d 169 (Pa. Super. 2006): Because the defendant was found guilty of simple assault and recklessly endangering another person, the restitution order was appropriate although it exceeded one million dollars. The defendant suffered organic brain syndrome and must reside at a nursing home because of the beating by the defendant.
- **Commonwealth v. Shotwell**, 717 A.2d 1039, 1045 (Pa. Super. 1998): “Whenever restitution has been ordered pursuant to Section 1106, the court is required under statute to order full restitution regardless of the current financial resources of the offender.”

Restitution may be awarded to entities other than the victim:

- Pursuant to the mandatory nature of restitution at the time of sentencing, the trial court must also order restitution to be paid to an insurance company, under 18 Pa.C.S.A. § 1106(c)(1)(i), for loss suffered by the victim, even if the victim has already been compensated by the insurance company. The insurance company is a “victim” as defined by the statute. 18 Pa.C.S.A. § 1106(h). **Commonwealth v. Stradley**, 50 A.3d 769, 773 (Pa. Super. 2012). The mandatory nature of this provision does not violate public policy. *Id.*
- Furthermore, the trial court may order restitution to be paid by the defendant for loss previously compensated by the Crime Victim’s Compensation Board to the Crime Victim’s Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. 18 Pa.C.S.A. § 1106(c)(1)(i).

Orders of restitution have been upheld even where the victim has received compensation from an insurance company or from a civil court settlement. **Commonwealth v. B.D.G.**, 959 A.2d 362 (Pa. Super. 2008)(en banc); **Commonwealth v. Guerra**, 955 A.2d 416 (Pa. Super. 2008).

- A victim is entitled to the full amount of restitution notwithstanding any civil court release. **Commonwealth v. B.D.G.**, 959 A.2d 362 (Pa. Super. 2008) (en banc); **Commonwealth v. Guerra**, 955 A.2d 416 (Pa. Super. 2008); **Commonwealth v. Pleger**, 934 A.2d 715 (Pa. Super. 2007).

Section 1106(c) provides:

The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim’s Compensation Board or other government agency but shall order the defendant to pay any

## Mandatory Restitution at Sentencing

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restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

18 Pa.C.S.A. § 1106(c)(1)(i).

The sentencing court must also address how the restitution must be paid. Restitution must be imposed at the time of sentencing, and the amount and method of payment must be specified by the sentencing court. A sentence which includes the provision that "restitution is to be determined" at some later time or hearing renders the sentence illegal. 18 Pa.C.S.A. § 1106(c)(2).<sup>11</sup>

The Crimes Code specifies the priorities of Payees for restitution purposes. Section 1106 (c)(1)(ii) specifies the priorities of payment of restitution in the event the trial court orders payment to more than one different person or entity:

✓ **JUDICIAL POLICY: Priorities of Restitution**

(c) Mandatory restitution.--

(1) The court shall order full restitution:

...

(ii) If restitution to more than one victim is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:

- (A) Any individual.
- (A.1) Any affected government agency.
- (B) The Crime Victim's Compensation Board.
- (C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.
- (D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.
- (E) Any estate or testamentary trust.

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<sup>11</sup> For further discussion on how restitution must be paid, see Section VI(A).

## Mandatory Restitution at Sentencing

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- (F) Any business entity organized as a nonprofit or not-for-profit entity.
- (G) Any other business entity.

18 Pa.C.S.A. § 1106(c)(1)(ii).

It is important to note that although the listing of priorities in Section 1106(c)(1)(i) includes a government agency which has provided reimbursement to the victim and an estate or testamentary trust, none of these are included in the definition of "victim" in Section 1106(h). For further discussion, see Section II (C), **Priorities of Restitution Payments, *infra*.**

The Superior Court first recognized the impact of subrogation in **Commonwealth v. Kerr**, 444 A.2d 758, 760-61 (Pa. Super. 1982). In **Kerr**, the Superior Court held that

✓ **JUDICIAL POLICY: Subrogated Restitution May Be Ordered**

even though a victim was insured and received compensation from his insurer, full restitution was proper. The Court held that the rehabilitative goal of restitution was served "by impressing upon the offender the loss he has caused and his responsibility to repair that loss as far as it is possible to do so." *Id.* at 760. Additionally, the court noted that the victim was entitled to restitution in the full amount of his loss, regardless of the existence of insurance. Finally, the court ruled that the insurance company's right of subrogation did not affect the validity of the trial court's restitution order.

The trial court should ordinarily not order restitution payments directly to medical providers, unless the medical provider is a direct loss "victim" under the restitution statute. See **Commonwealth v. Solomon**, 25 A.3d 380, 391 (Pa. Super. 2011).

The court was required to assess the loss to the victim and order full restitution as of the date of the sentencing hearing. The record establishes that as of that date, [the victim] owed the full amount of the medical bills to the hospital, and that none of the bills had been paid by any party. Accordingly, the restitution order properly provided for full payment to the victim who at the time of sentencing had an outstanding obligation to pay the full amount of the bills. An order requiring [Appellant] to pay "restitution" to the hospital, which was very unlikely to ever be paid, would not extinguish [Appellant's] legal obligation to pay [the victim's] hospital bills. Moreover, there is no provision in the restitution statute that empowers a court to order that restitution be paid to a creditor of a victim: only parties who directly sustained a loss, or who paid compensation for such losses are entitled to be the beneficiaries of a restitution order.

*Id.* at 391 (quoting trial court).

## Mandatory Restitution at Sentencing

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### C. Priorities of Restitution Payments

Although Section 1106 of the Crimes Code provides for mandatory restitution, the sentencing court must set priorities of payment, in the event more than one victim is to receive restitution. In accordance with Section 1106(c)(1)(ii), when establishing priorities, the sentencing court must order payment in the following order:

- Any individual victim.
- Any affected government agency, defined as the Commonwealth, a political subdivision or local authority that has sustained injury to property.
- The Crime Victim's Compensation Board.
- Any other governmental agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.
- For example, the extent that restitution is ordered either prior to or subsequent to the making of an award by the Office of Victims' Services, the restitution shall be paid to the Commonwealth to the extent of the award by the Office of Victims' Services. 18 P.S. § 11.1302
- Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct – insurance company defined as an entity that compensates a victim for loss under an insurance contract;
- Any estate or testamentary trust;
- Any business entity organized as a nonprofit or not-for-profit entity;
- Any other business entity.

18 Pa.C.S.A. § 1106(c)(1)(ii). A “business entity” is defined as a domestic or foreign:

- (1) business corporation;
- (2) nonprofit corporation;
- (3) general partnership;
- (4) limited partnership;
- (5) limited liability company;
- (6) unincorporated nonprofit association;
- (7) professional association; or
- (8) business trust, common law business trust or statutory trust.

18 Pa.C.S.A. § 1106(h).

#### Restitution to Parties Other Than “Direct” Victims

“For over a decade the courts of this Commonwealth have struggled with the issue of whether parties other than the ‘direct’ victim of the crime are entitled to restitution under 18 Pa.C.S.A. § 1106.” **Commonwealth v. Runion**, 662 A.2d 617, 619 (Pa. 1995).

## Mandatory Restitution at Sentencing

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Underlying this issue is the apparent policy that restitution is not meant to be a reimbursement system to third parties but rather a compensation system to “victims” as that term is defined by the statute. *Commonwealth v. Keenan*, 853 A.2d 381, 384 (Pa. Super. 2004).

It is important to note that although the listing of priorities in Section 1106(c)(1) (ii) includes a government agency which has provided reimbursement to the victim and an estate or testamentary trust, none of these is included in the definition of “victim” in Section 1106(h).

In *Commonwealth v. Brown*, 981 A.2d 893 (Pa. 2009), the Pennsylvania Supreme Court was faced with a similar problem when they reviewed the decision of the trial court which had granted restitution to Medicare. At the time, Section 1106 did not mention Medicare or any specific governmental entities, so that it was unclear whether Medicare, as a governmental agency, could receive restitution. The Supreme Court noted that the Legislature, by adopting Section 1106, made clear that it intended a variety of possible persons to be eligible to receive restitution by including a priority scheme when restitution to more than one person was ordered at the same sentencing. *Id.* at 898. “Thus, while the General Assembly seemingly envisions certain government agencies to be entitled to restitution, which government agencies are to receive restitution is not plain.” *Id.*

The Supreme Court recognized that the Legislature had rewritten Section 1106 in 1995 and 1996<sup>12</sup> in order to expand the class of entities eligible for restitution.

While not the model of clarity, the legislature certainly evinced an extension of those entities who could receive restitution through the priorities scheme. As noted above, this included not only the “victim,” but also the Crime Victim’s Compensation Board, other government agencies, and insurance companies. Furthermore, the General Assembly explicitly enlarged the definition of “victim” to include the Crime Victim’s Compensation Fund and insurance companies. Thus, while the General Assembly expanded the definition of “victim,” . . . and in doing so widened the definition of that term, the revamping of Section 1106 was even more sweeping and implicitly broadened the class of entities eligible for restitution to include government agencies, in addition to manifesting a heightened focus on the need for and importance of restitution.

*Brown*, 981 A.2d at 899–900. The Supreme Court then looked to the legislative history of Section 1106, the object to be obtained, and the consequences of particular interpretations. After a review of these standards, the Supreme Court concluded:

[T]he legislature intended that a criminal offender not only be required

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<sup>12</sup> Of course, this would occur again in 2004 and 2018.

## Mandatory Restitution at Sentencing

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to provide restitution to the victim directly, but to government agencies which indirectly provide reimbursement to the victim, including payment to a medical provider on the victim's behalf. As Medicare, a government agency, made payments to a medical provider on behalf of the victim as a direct result of Brown's crime, we find that it is entitled to reimbursement under Section 1106.

*Id.* at 902.

### D. Modification

Although the trial court is required to specify the amount of restitution at sentencing, it may modify the restitution order ***at any time*** if the court explains its reasons for modification on the record. ***Commonwealth v. Dietrich***, 970 A.2d 1131, 1135 (Pa. 2009); ***Commonwealth v. Biauce***, 162 A.3d 1133, 1139 (Pa. Super. 2017).

18 Pa.C.S.A. § 1106(c)(3) provides:

The court may, at any time or upon the recommendation of the district attorney . . . alter or amend any order of restitution made pursuant to paragraph (2), provided, however, that the court states its reasons and conclusions as a matter of record for any change or amendment to any previous order.

18 Pa.C.S.A. § 1106(c)(3).

If the sentencing court sets an amount of restitution at sentencing, the court can later modify the restitution as long as the court meets the requirements of Section 1106(c)(3). ***Dietrich***, 970 A.2d at 1135. "The broad language of Section 1106(c)(3)

✓ JUDICIAL POLICY: Altering or Amending an Order of Restitution

indicates the court has jurisdiction to modify a restitution order at any time without regard to when information should have been available for consideration." ***Biauce***, 162 A.2d at 1139.<sup>13</sup>

- The "broad language" of Section 1106(c)(3) creates an exception to the typical inability of a trial court, beyond 30 days, to make changes or modifications to a "Final Order" pursuant to Pa.R.A.P. 341 and 42 Pa.C.S.A. § 5505 (Modification of orders).

The sentencing court cannot, of course, modify the amount of restitution without providing due process requirements of notice and an opportunity to be heard. ***Commonwealth v. Blair***, 230 A.3d 1274 (Pa. Super. 2020); ***Commonwealth v. Hobson***, 45 A.2d 22 (Pa. Super. 1982). Since a hearing on restitution is a sentencing hearing, counsel must be appointed for a qualified defendant. ***Commonwealth v. Zrncic***, 131

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<sup>13</sup> See Section VII, MODIFICATION, infra.

## Mandatory Restitution at Sentencing

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A.3d 1008 (Pa. Super. 2016).

In terms of modification, Pennsylvania case law has held that 18 Pa.C.S.A. § 1106(c) (3) creates an *independent cause of action* for a defendant to seek a modification of an existing restitution order at any time directly from the trial court. ***Commonwealth v. Gentry***, 101 A.3d 813, 816 (Pa. Super. 2014). *See also* 18 Pa.C.S.A. § 1106(g) for preservation of private remedies.

This power to alter or amend does not exist after a notice of appeal has been filed; however, the trial court's power is restored when it regains jurisdiction. ***Commonwealth v. Weathers***, 95 A.3d 908 (Pa. Super. 2014). *See* Pa.R.A.P. 1701(a) ("Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasi-judicial order is

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sought, the trial court or other government unit may no longer proceed further in the matter."); ***Commonwealth v. Ledoux***, 768 A.2d 1124, 1125 (Pa. Super. 2001) ("Jurisdiction is vested in the

Superior Court upon the filing of a timely notice of appeal.").

Since a hearing on restitution is a sentencing hearing, counsel must be appointed for a qualified defendant. ***Commonwealth v. Zrncic***, 131 A.3d 1008 (Pa. Super. 2016).

In ***Commonwealth v. McKee***, 38 A.3d 879 (Pa. Super. 2012), the trial court imposed a sentence of imprisonment followed by a period of probation, ordered immediate parole, and imposed a \$500.00 order of restitution. The defendant filed an appeal from the judgment of sentence based on insufficient evidence, and the defendant's judgment of sentence was reversed. When the defendant sought return of the restitution previously paid, by filing a Petition for Return of Restitution and Court Costs, the trial court declined

✓ JUDICIAL POLICY: If Restitution Order reversed on appeal, the trial court must order the return of any restitution erroneously paid.

on the basis it lacked jurisdiction. On appeal, based upon the broad language of Section 1106, the Superior Court first ruled that "courts have jurisdiction to modify restitution orders at any time without regard to when information

should have been present for consideration." *Id.* at 882. Therefore, the Petition was not untimely, was not waived, and the trial court had jurisdiction to address it. Second, the Superior Court held that upon a reversal of a defendant's judgement of sentence based on insufficient evidence, the trial court is authorized, in appropriate cases, to return any restitution erroneously paid.

### E. Limitations on When Restitution Can Be Imposed

There are several parameters which guide a restitution order at the time of sentencing:

- (1) Restitution can only be imposed for crimes of which the defendant was convicted.

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- **Commonwealth v. Muhammed**, 219 A.3d 1207, 1214 (Pa. Super. 2019) (“However, because neither Appellant nor his co-defendant were held criminally accountable for the theft of items from the victim’s home, the trial court imposed an illegal sentence when it ordered restitution for those losses.”).
- (2) The evidence must show a “direct nexus between the crime” and the loss of value to the victim’s property.
- **Commonwealth v. Barger**, 956 A.2d 458, 465 (Pa. Super. 2008) (“Even assuming that there was a loss of property within the meaning of Section 1106, there was no direct nexus between the crime for which Appellant was convicted and the loss of the couch, as Section 1106 requires.”).
- (3) Restitution for *property* is limited to the classes specified in 18 Pa.C.S.A. § 1106(a).
- Property which has been either: (1) stolen, (2) converted, (3) unlawfully obtained, or (4) had its value substantially decreased.
- (4) Restitution for *personal injury* is limited to the definition as specified in the Crimes Code, 18 Pa.C.S.A. § 1106(h): “Actual bodily harm, including pregnancy, directly resulting from the crime.”
- Due to the “directly resulting from the crime” language, the Superior Court has held that restitution is proper for personal injury “only if there is a direct causal connection between the crime and the loss.” **Commonwealth v. Harriott**, 919 A.2d 234, 238 (Pa. Super. 2007) A “but for” test must be used in calculating these damages which occurred as a direct result of the crime. **Commonwealth v. Oree**, 911 A.2d 169, 174 (Pa. Super. 2006).
- (5) Restitution is limited to the version of the restitution statute applicable at the time of the events which establish the crime.
- **Commonwealth v. Hunt**, 220 A.3d 582, 587-589 (Pa. Super. 2019): Amendments to the Crimes Code definitions governing restitution for injuries to person or property, which expanded the definition of “victim,” do not apply retroactively.

## F. Restitution Ordered as Direct Sentence vs as a Condition of Probation

As a direct sentence, restitution is authorized by 18 Pa.C.S.A. § 1106, which mandates that courts shall sentence offenders to make restitution in certain cases of injury to persons or property. *See* 18 Pa.C.S.A. § 1106(a). Such restitution is limited to direct victims of the crime and requires a direct nexus between the loss and the amount

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of restitution. *See Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992).

However, when restitution is imposed as a condition of probation pursuant to 42 Pa.C.S.A. § 9754, its purpose is to rehabilitate the defendant and provide some redress to the victim. Under section 9754, the sentencing court is given the flexibility to fashion the condition to rehabilitate the defendant. *See Harner*, 617 A.2d at 706. Therefore, the requirement of a nexus between the loss and amount of restitution is relaxed. *See Commonwealth v. Hall*, 80 A.3d 1204, 1215 (Pa. 2013). Notably, restitution imposed under section 9754 also is unique in that it requires a court to explicitly consider a defendant's ability to pay.

In **Commonwealth v. Whatley**, 221 A.3d 651 (Pa. Super. 2019), the Superior Court stated:

Pennsylvania courts have consistently held that a determination of a defendant's ability to pay is an integral requirement of imposing restitution as a condition of probation. In **Harner**, our Supreme Court held that a trial court must determine what damage a victim suffered, what amount of restitution appellant can afford to pay, and how the appellant should pay restitution. *See id.* at 707. Similarly in **Commonwealth v. Kinnan**, 71 A.3d 983 (Pa. Super. 2013), this Court stated: “[w]here a sentencing court imposes restitution as a probationary condition, sub-section 9754(c)(8) obligates the court to determine what loss or damage has been caused and what amount of restitution the defendant can afford to pay.” *Id.* at 987 (citations omitted).

Accordingly, where a sentencing court fails to consider a defendant's ability to pay prior to imposing restitution as a probationary condition, the order of restitution constitutes an illegal sentence. *See Kinnan*, 71 A.3d at 988.

**Whatley**, 221 A.3d at 653-54.

### III. CLASSIFICATION OF “VICTIM”

#### A. Historical Review of a “Victim”

Prior to 1995, restitution was discretionary: “the offender may be sentenced to make restitution.” Act No. 1998-121 changed the wording from “may” to “shall” and rendered restitution mandatory. *See 18 Pa.C.S.A. § 1106(a)*.<sup>14</sup> However, only the “victim” was permitted restitution and the victim was defined as a “person.”

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<sup>14</sup> 1998 Pa. Legis. Serv. Act 1998-121 (H.B. 413) (PURDON'S).

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Writing for the Pennsylvania Supreme Court, then Justice Ronald Castille spoke to the breadth of the pre-amendment restitution statute in *Commonwealth v. Runion*, 662 A.2d 617 (Pa. 1995). In *Runion*, a victim, who was a welfare recipient, was assaulted and hospitalized for her injuries. The Department of Public Welfare paid the victim's medical costs and filed for restitution. The Supreme Court opined that the prior version of Section 1106 failed to indicate whether government agencies were considered to be within the definition of "victim," which was defined, at the time, as any "person" who suffered injuries as a direct result of the crime. 18 Pa.C.S.A. § 1106(h). Therefore, the Court turned to the Statutory Construction Act's definition of "person." 1 Pa.C.S.A. § 1991. The Court reasoned that, based upon the statutory definition of that term, which excluded from the definition of "person" governmental agencies of the Commonwealth, government agencies did not fall within the definition of "victim," and, therefore, were not eligible for restitution. *Runion*, 662 A.2d at 621.

The legislature has rewritten Section 1106 to significantly strengthen and amplify the notion of restitution, and to expand the class of entities eligible for restitution. Specifically, after the amendments, restitution became mandatory. 18 Pa.C.S.A. § 1106(a) ("the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor"). Moreover, restitution to the greatest extent is required. *Id.* § 1106(c)(1) ("[t]he court shall order full restitution"); *Commonwealth v. Brown*, 981 A.2d 893, 899 (Pa. 2009).

In *Brown*, Justice Debra Todd explained the now expansive definition of "victim" for purposes of restitution:

Furthermore, the General Assembly broadened the class of those entities eligible to receive restitution. While not the model of clarity, the legislature evinced an extension of those entities who could receive restitution through the priorities scheme. As noted above, this included not only the "victim," but also the Crime Victim's Compensation Board, other government agencies, and insurance companies. Furthermore, the General Assembly explicitly enlarged the definition of "victim" to include the Crime Victim's Compensation Fund and insurance companies. Therefore, while the General Assembly expanded the definition of "victim," which was the focus of our opinion in *Runion*, and in doing so widened the definition of that term, the revamping of Section 1106 was even more sweeping and implicitly broadened the class of entities eligible for restitution to include government agencies, in addition to manifesting a heightened focus on the need for and importance of restitution.

981 A.2d at 899-900.

Based upon the legislative history of Section 1106 and the General Assembly's extensive revision to that section, the Supreme Court in *Brown* found that the legislature

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intended that a criminal offender not only be required to provide restitution to the victim directly, but to government agencies which indirectly provide reimbursement to the victim, including payment to a medical provider on the victim's behalf. As Medicare, a government agency, made payments to a medical provider on behalf of the victim as a direct result of Brown's crime, the Supreme Court found that it was entitled to reimbursement under Section 1106. *Brown*, 981 A.2d at 902.<sup>15</sup>

### B. Current Definitions of "Victim"

A number of statutory provisions define the term "victim":

#### 1. The Crimes Code

The propriety of ordering restitution to a victim is delineated in the Crimes Code, in Chapter 11, Authorized Disposition of Offenders, which provides that upon conviction for any crime wherein the *victim* suffered personal injury, "the offender shall be sentenced to make restitution in addition to the punishment proscribed therefore." 18 Pa.C.S.A. § 1106(a). The term "victim" is defined under this section as follows:

**"Victim."** As defined in section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act. The term includes an affected government agency, the Crime Victim's Compensation Fund, if compensation has been paid by the Crime Victim's Compensation Fund to the victim, any insurance company that has compensated the victim for loss under an insurance contract and any business entity.

18 Pa.C.S.A. § 1106(h). The Crime Victims Act is codified at 18 P.S. § 11.103.

#### 2. The Crime Victims Act

The Crime Victims Act, 18 P.S. §§ 11.101 – 11.5102, defines a victim as:

**"Victim."** The term means the following:

- (1) A direct victim.
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
- (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:

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<sup>15</sup> In *Commonwealth v. Smith*, 956 A.2d 1029 (Pa. Super. 2008)(*en banc*), the Department of Public Welfare (DPW) was determined to be entitled to restitution for expenses incurred in caring for a victim who was the child of the defendant.

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Chapter 25 (relating to criminal homicide).  
Section 2702 (relating to aggravated assault).  
Section 3121 (relating to rape).

- (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

18 P.S. § 11.103.

### 3. The Sentencing Code

Another reference to a “victim” is made in the Sentencing Code, 42 Pa.C.S.A. § 9701 *et seq.*, which provides as follows:

- (c) Mandatory restitution.--In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained. For purposes of this subsection, the term “victim” shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

42 Pa.C.S.A. § 9721(c).

For purposes of Section 9721, the term “victim” is referenced to the Administrative Code of 1929, which was subsequently repealed and recodified in the Crimes Victims Act, 18 Pa.C.S.A. § 11.101 *et seq.* See **Commonwealth v. Veon**, 150 A.3d 435, 449 (Pa. 2016). The definition of “victim” is now found at 18 P.S. § 11.103.

### C. Examples

#### 1. Compensation for Injury to a Victim

##### Emotional or Mental Health Injury

Injury to the emotional health of a child can be as damaging, if not more so, than any physical injury. In **Commonwealth v. Balisteri**, 478 A.2d 5 (Pa. Super. 1984), the Court found that the defendant’s conduct in perpetrating sexual assaults caused severe emotional harm to his young victims. Therefore, he was ordered to “bear the financial expense, as far as is feasible, for the alleviation of the mental anguish” and was therefore ordered to pay restitution for psychological treatment and counseling. *Id.* at 9. The Court concluded that “actual bodily harm” includes “actual emotional or mental disturbances for the purpose of imposing restitution.” *Id.*

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### Lost Wages

Because the language of Section 1106 clearly evidences the intent to provide the victim with fullest compensation for his losses suffered as a direct result of the defendant's criminal conduct, the Superior Court found justification for a restitution order for lost wages in ***Commonwealth v. Burwell***, 58 A.3d 790 (Pa. Super. 2012). The Court looked to the statute's explicit permission for an insurance company or employer (who provides an employee's insurance benefits) to be reimbursed by the defendant when the victim's lost wages were covered by an insurance or employment contract. The Court held that it would be inconsistent to deny the victim's direct claim for those same lost wages, especially where the victim is first in the statutory order of payment.<sup>16</sup>

### Estate of Victim

Because an estate stands in the shoes of the victim, it is a "victim" under the restitution statute. ***Commonwealth v. Biauce***, 162 A.3d 1133 (Pa. Super. 2017).

"A personal representative in the person of the executor or administrator of [the victim's] estate stands in the shoes of the deceased victim as far as entitlement to benefits is concerned." ***Commonwealth v. Lebarre***, 961 A.2d 176, 180 (Pa.Super. 2008) (quoting ***Freeze v. Donegal Mut. Ins. Co.***, 504 Pa. 218, 224, 470 A.2d 958, 961 (1983)). If the legislature wanted to extinguish a victim's right to benefits upon death, the legislature would have specifically provided this language in the statute. *Id.* "[B]ecause an estate stands in the shoes of the victim under the restitution statute, it is the 'victim' within the meaning of that statute." *Id.* at 181.

***Commonwealth v. Biauce***, 162 A.3d at 1139.

In ***Commonwealth v. Lebarre***, 961 A.2d 176 (Pa. Super. 2008), the defendant entered a guilty plea to charges of homicide by vehicle while driving under the influence of alcohol, homicide by vehicle, and related charges. The trial court found that the estate of victim stood in the shoes of victim under 18 Pa.C.S.A. § 1106(c), and therefore it was proper to award restitution for the amounts owed by the estate as reimbursement to the Department of Public Welfare. The Department was a "victim" within meaning of statute for restitution amounts directly to government agency that has compensated the victim. This case was decided before Section 1106(c) was amended to include any "estate or testamentary trust."

## 2. The Crime Victim's Compensation Fund

The Crime Victim's Compensation Board is specifically mentioned as a "Victim" in 18 Pa.C.S.A. § 1106(c)(1)(ii)(B). That section

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<sup>16</sup> 18 Pa.C.S.A. § 1106(c)(1)(ii)(A).

provides, in subsection (h):

**“Victim.”** As defined in section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act.<sup>1</sup> The term includes an affected government agency, the Crime Victim’s Compensation Fund, if compensation has been paid by the Crime Victim’s Compensation Fund to the victim, any insurance company that has compensated the victim for loss under an insurance contract and any business entity.

18 Pa.C.S.A. § 1106(h).

It is clear that the Crime Victim’s Compensation Board is an appropriate recipient of mandatory restitution for amounts it has advanced to crime victims in Pennsylvania. *Commonwealth v. Langston*, 904 A.2d 917 (Pa. Super. 2006). However, the statute requires that “a victim’s loss be caused directly by a defendant’s criminal conduct rather

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than a loss consequential to such conduct.” *Id.* at 923. The mandatory payment of restitution pursuant to Section 1106 of the Crimes Code is limited to victims who suffer a direct loss and not to third parties, including family members, who shoulder the burden of the victim’s losses.

### Payments to Family Members

In *Commonwealth v. Langston*, 904 A.2d 917 (Pa. Super. 2006), restitution was ordered to be paid to the Crime Victims Compensation Fund for monies it paid on behalf of Michael Clark, who was in utero at the time of the underlying car accident which formed the basis for the criminal charges. There was no evidence presented that he suffered any physical injuries as a result of defendant’s conduct. Michael Clark’s loss of support resulting from the death of his father, Glenn Clark, and the injuries to his mother, Annette Clark, caused during the car accident, while tragic, was an indirect consequence of defendant’s criminal conduct.

The Court in *Langston* held that it was not disputed that Michael was a victim/claimant for purposes of the Crime Victims Act (CVA). However, a “claimant” for purposes of the CVA is not necessarily a “victim” entitled to mandatory restitution under 18 Pa.C.S.A. § 1106. The defendant could only have been required to reimburse the Fund under Section 1106(c)(1)(i) for compensation paid to the direct victims, Glenn Clark and Annette Clark, Michael’s parents. Here, the Fund did not make any payments to the direct victims of defendant’s crimes. Restitution is not a replacement for child support unless the recipient is a direct victim of the crime.

### **3. Payments by Other Governmental Agency**

A governmental agency is entitled to restitution if

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- 1) it is a victim as defined by Section 11.103 (a “direct victim”)<sup>17</sup>, or
- 2) it has compensated a victim for loss under Section 1106 (a government agency, other than the Crime Victim’s Compensation Board, “which has provided reimbursement to the victim as a result of the defendant’s criminal conduct”)<sup>18</sup>, or
- 3) it is an “affected governmental agency” under Section 1106.<sup>19</sup>

### Governmental Agency Not a “Direct Victim” under Section 11.103

The Pennsylvania Supreme Court’s decision in ***Commonwealth v. Veon***, 150 A.3d 435 (Pa. 2016) held that a *Commonwealth agency* could not be considered a victim entitled to restitution as defined by Section 11.103. In ***Veon***, our Supreme Court’s review of the relevant statutes, legislative histories, and prior case law led to its holding that a government agency, the Pennsylvania Department of Community and Economic Development, was “neither a ‘direct victim’ nor a reimbursable compensating government agency under Section 1106.” ***Veon***, 150 A.3d at 455 (footnote omitted). Importantly, the Supreme Court scrutinized the language in Section 11.103 and determined that it applied to human beings only:

Notwithstanding any legislative expansion of the definition of “victim,” it is clear that the plain text of Section 11.103 still envisages “victims” as “persons” commonly understood. A “victim” under Section 11.103 must be “a direct victim,” *i.e.*, an “individual” who has suffered injury, death, or loss of earnings; or a “child,” “parent,” “guardian,” or “family member.” Every relevant noun unequivocally describes a human being, not a government agency, and nowhere else is there a relevant definition that persuades us to broaden the common understanding of these words.

*Id.* at 454.

In ***Commonwealth v. LeClair***, 236 A.3d. 71 (Pa. Super. 2020), the Appellant was convicted of first-degree murder and related offenses. Briefly, the facts of the case were that the Appellant murdered his wife while out on his boat in Lake Erie. He disposed of her body by weighing it down with an anchor. He then contacted the United States Coast Guard to falsely report that his wife had fallen overboard. At sentencing, he was ordered to pay restitution to the USCG for their time and expenses in responding to the call.

In reversing the trial court’s restitution order, the Superior Court first referenced ***Commonwealth v. Hunt***, 220 A.3d 582 (Pa. Super. 2019), and then explained:

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<sup>17</sup> 18 P.S. § 11.103.

<sup>18</sup> 18 Pa.C.S.A. § 1106(c)(1)(ii)(D).

<sup>19</sup> 18 Pa.C.S.A. § 1106(h): the term “Victim” is defined as, *inter alia*, “an affected government agency” which is defined as “The Commonwealth, a political subdivision or local authority that has sustained injury to property.”

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Based on our review, we disagree with the trial court's conclusion that the USCG was entitled to restitution as a direct victim under [18 Pa.C.S.A. § 1106]. As noted previously, our Supreme Court has explicitly stated that the term "direct victim" refers exclusively to individuals, not government agencies. [*Commonwealth v. Veon*, 150 A.3d 435, 454 (Pa. 2016)]; see also [*Commonwealth v. Tanner*, 205 A.3d 388, 398 (Pa. Super. 2019)] (stating that Section 11.103 "defines a 'victim' as an individual who has been harmed by the offender" and noting that "a government agency is not entitled to restitution because it is [not] an individual victim ...."). Further, we are bound by the *Hunt* Court's holding that the CVA precludes using the now-repealed definition of "victim" set forth in the Administrative Code of 1929 or the definition of "person" in 1 Pa.C.S. § 1991 to interpret the meaning of "victim" under the restitution statute. See *Hunt*, 220 A.3d at 589-90 (stating that the CVA's definition of 'victim' "is the sole definition" for purposes of Section 1106); *see also* 18 Pa.C.S. § 1106(h); 18 P.S. § 11.103. Therefore, based on our governing case law, because the USCG cannot be classified as a 'direct victim' under the CVA, the restitution portion of Appellant's sentence is illegal and must be vacated. See *Veon* 150 A.3d at 454.

*Commonwealth v. LeClair*, 236 A.3d. 71, 86 (Pa. Super. 2020).

### Restitution for Compensation Paid to Victim under Section 1106

The 1998 amendments to the definition of a "victim" under the Crimes Code broadened the class of those entities eligible to receive restitution. "Mandatory restitution" under Section 1106(c) requires the trial court to order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other government agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board.

18 Pa.C.S.A. § 1106(c)(1)(i). The order of priorities of payments include:

(C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

18 Pa.C.S.A. § 1106(c)(1)(ii)(C).

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### ➤ Medicare

In light of the statutory amendments enacted in 1998, the Supreme Court in ***Commonwealth v. Brown***, 981 A.2d 893 (Pa. 2009), upheld a sentencing court's order of restitution to Medicare for expenses it paid to medical providers on behalf of an assault victim who suffered injuries at the hands of the defendant. 981 A.2d at 902. The defendant had argued that Medicare did not pay the victim directly, but paid the victim's medical providers, and therefore Medicare had not provided "reimbursement" to the victim.

In ***Commonwealth v. Brown***, the Pennsylvania Supreme Court decided that Medicare was entitled to restitution for payments made in reference to the victim of the defendant's criminal conduct and for the treatment of injuries from defendant's assault. The Court stated:

[I]nterpreting Section 1106 to embrace those government entities that indirectly provide reimbursement to a victim would serve the salutary purposes of making manifest to criminal offenders the egregious nature of their actions, impressing upon defendants that they are responsible for their conduct, deterring repeat malfeasance, and encouraging these individuals to live in a responsible way. Furthermore, we do not believe that such an interpretation would result in the adverse consequences suggested by [the defendant] and posited by the Superior Court in [***Commonwealth v. Figueroa***, 691 A.2d 487 (Pa. Super. 1997)], where restitution is transformed into a reimbursement to society. Rather, *such an interpretation is limited to those government agencies which make payments on behalf of a victim of a crime.*

***Brown***, 981 A.2d at 901–02 (emphasis added).

### ➤ Public Assistance Fraud

In Pennsylvania, it is a crime for any person to willfully obtain public assistance or federal food stamps using false statements, misrepresentation, impersonation, or other fraudulent means.

Restitution to the government is mandatory:

Any person committing a crime enumerated in subsection (a) shall be ordered to pay restitution of any moneys received by reason of any false statement, misrepresentation, impersonation, failure to disclose required information or fraudulent means. Restitution ordered under this subsection may be paid in a lump sum, by monthly installments or according to such other schedule

as is deemed just by the sentencing court. Notwithstanding the provisions of 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property) to the contrary, the period of time during which the offender is ordered to make restitution may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crime of which that person was convicted, if the sentencing court determines such period to be reasonable and in the interests of justice.

62 P.S. § 481(c).

### ➤ Benefits for Injured Police Officer

In ***Commonwealth v. Smith***, 699 A.2d 1303 (Pa. Super. 1997), the Superior Court was faced with deciding whether the City of Allentown was entitled to restitution for having paid the police officer victim's medical bills, indemnified his wages, and absorbed the cost of his portable police radio. The ***Smith*** court discussed the 1995 amendments to the restitution statute which were intended to reimburse governmental agencies and insurance companies that had paid victims for losses that were a direct result of a defendant's criminal actions. Specifically, the ***Smith*** Court relied upon the dual purpose of mandatory restitution:

- (1) to provide the victim with the fullest compensation for the loss, and
- (2) to rehabilitate the offender by impressing upon him that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible.

In keeping with the purposes behind restitution, the Court held that the City was, for all intents and purposes, the victim's insurer, although it was self-insured, and that it was entitled to be reimbursed for the amounts it paid to the victim to compensate him for his wage loss.

### ➤ Drug Offense and Buy Money

In ***Commonwealth v. Boyd***, 835 A.2d 812 (Pa. Super. 2003), the defendant had pled guilty to four counts of Delivery of a Controlled Substance. The Commonwealth spent \$3,240 for the purchase of controlled substances from defendant. Defendant argued that his trial counsel should have objected to the restitution because the Commonwealth failed to prove that it was a "victim" within the meaning of the restitution statute. Because the Commonwealth had

not reimbursed the victim, directly or indirectly, for property damage or personal injury, the Commonwealth did not fall under section 1106(c)(1)(ii)(C).

However, a defendant may be ordered to pay a pro rata share of “buy money” used by the Pennsylvania State Police to make undercover purchases of controlled substances as recoverable as part of the **costs** of prosecution. *See Commonwealth v. Smith*, 901 A.2d 1030 (Pa. Super. 2006). In concluding the trial court had the authority to impose the costs, the Superior Court held the

buy money expended by officers in furtherance of their investigation and apprehension of persons suspected of crime are reasonable costs of prosecution within the purview of [16 P.S.] § 1403, if such funds are not recovered by drug enforcement officers prior to the time of sentencing.

901 A.2d at 1033.

#### 4. Payments by Insurance Companies

##### Reimbursement Of Insurance Proceeds Paid To Victim For Defendant's Conduct

An insurance company is only entitled to restitution if it is a victim as defined by Section 11.103, or it has compensated a victim for loss under Section 1106. *See* 18 P.S. § 11.103; 18 Pa.C.S.A. § 1106(c)(1)(ii)(D). The Crime Victims Act, 18 P.S. § 11.103, defines “victim” as:

- (1) A direct victim
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
- (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child’s family...
- (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiance, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

18 P.S. § 11.103 (1)-(4). “Direct victim” is defined in Section 11.103, in pertinent part, as:

An **individual** against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act. The term

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shall not include the alleged offender.

*Id.* (emphasis added). Therefore, it would not appear that an insurance company could be considered a victim under the Crime Victims Act.

However, under 18 Pa.C.S.A. § 1106, the definition of “victim” includes an insurance company which has provided reimbursement to a victim due the defendant’s criminal conduct. 18 Pa.C.S.A. §§ 1106(c)(1)(i) &(c)(1)(ii)(D). Insurance companies are listed in the priorities of payments in § 1106(h).

[R]estitution for amounts paid by an insurer must be awarded to that insurer. The argument that an insurer cannot be considered a victim is clearly refuted by the definition of “victim” contained within the statute. The term “Victim” “includes ... any insurance company that has compensated the victim for loss under an insurance contract.” 18 Pa.C.S. § 1106(h).

***Commonwealth v. Stradley***, 50 A.3d 769, 773 (Pa. Super. 2012).

Therefore, an insurance company that provides payment to a victim of a crime is considered a victim itself and entitled to mandatory restitution.

The term “victim” includes any insurance company that has compensated the victim for loss under an insurance contract. ***Commonwealth v. Opperman***, 780 A.2d 714, 720 (Pa. Super. 2001).

Furthermore, the defendant does not avoid a restitution order because the victim has already received insurance proceeds which cover the damage caused by the defendant’s criminal conduct. Rather, under 18 Pa.C.S.A. § 1106(c)(1)(i), the sentencing court should not subtract from its restitution order any sums already received by the victim from insurance proceeds, but instead order the defendant to pay restitution to an insurance company for loss previously compensated.

Thus, in no uncertain terms, the statutory language requires the sentencing court to order restitution so as to provide the victim with full compensation for his or her actual loss and that such an award is not to be reduced by any amount the victim received from an insurer.

***Stradley***, 50 A.3d at 773.

### Victim’s Settlement with Insurance Company Irrelevant

Any release signed due to settlements in civil cases against the defendant, with reference to the defendant’s criminal conduct, do not serve to offset mandatory restitution. The release is irrelevant to the sentencing court’s obligation to order

full mandatory restitution. *Commonwealth v. Pleger*, 934 A.2d 715 (Pa. Super. 2007).

In *Commonwealth v. Guerra*, 955 A.2d 416 (Pa. Super. 2008), Guerra, the driver of an automobile, pled guilty to third degree murder and related charges following an accident which resulted in the death of the driver of the other car. Prior to the accident, Guerra had ingested large amounts of cocaine and alcohol. The victim's parents instituted a civil suit against Guerra, which was settled by Guerra for amounts paid by AAA-Mid-Atlantic Insurance Group, Guerra's insurer. Guerra argued that he was entitled to a credit for the amounts paid by his insurer. The Court held that there is no entitlement to credit against a restitution obligation based upon civil settlement payment made by (or paid on behalf of) a defendant to victim's family. "The fact that a civil settlement agreement was reached by the parties has no bearing on the court-ordered restitution." *Guerra*, 955 A.2d at 419.

### IV. PROCEDURE

Following a guilty plea, *nolo contendere* plea, or a trial, the trial court must order payment of restitution when the crime for which the defendant was convicted involved:

- Property which was stolen, converted or otherwise obtained, or
- Property which sustained a substantial decrease in value as a direct result of the crime, or
- A victim suffered personal injury directly resulting from the crime.

18 Pa.C.S.A. § 1106(a). The trial court is required to set the manner and amount of restitution at sentencing. *Commonwealth v. Deshong*, 850 A.2d 712 (Pa. Super. 2004). Section 1106 mandates this initial determination of the amount of restitution at sentencing thereby providing the defendant with certainty as to his sentence; subsequent modification, if necessary, is permissible. *Commonwealth v. Ortiz*, 854 A.2d 1280 (Pa. Super. 2004).

In *Commonwealth v. Dietrich*, 970 A.2d 1131 (Pa. 2009), the Pennsylvania Supreme Court noted that Section 1106(c)(3) of the Crimes Code authorizes a sentencing court to modify restitution orders at *any time* provided the court states its reasons as a matter of record. *Id.* at 1135 (emphasis in original) (citing 18 Pa.C.S.A. § 1106(c)(3)). The Court further determined that "Section 1106(c)(3)'s broad language indicates a legislative intent that courts have jurisdiction to modify restitution orders at any time without regard to when information should have been present for consideration." *Id.* Section 1106(c)(3) of the Crimes Code provides that:

The court may, at any time or upon the recommendation of the district attorney that is based on information received from the victim and the probation section of the county or other agent designated by the

## Mandatory Restitution at Sentencing

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county commissioners of the county with the approval of the president judge to collect restitution, alter or amend any order of restitution made pursuant to paragraph (2), provided, however, that the court states its reasons and conclusions as a matter of record for any change or amendment to any previous order.

18 Pa.C.S.A. § 1106(c)(3). Section 1106(c)(3) does not require a court alter or amend a restitution order, but merely empowers the trial court to do so.

Although Section 1106(c)(3) allows the judge to alter restitution, this does not mean that in every case the judge can alter the restitution award at any time for any reason. There must be justifiable reasons for the modification, and other principles of law must be followed. At some point, finality is needed.

*Ortiz*, 854 A.2d at 1282.

### A. Best Practices: Advise Defendant at Time of Guilty Plea or *Nolo Contendere* Plea

Although not required by statute or under the Rules of Criminal Procedure, in appropriate cases it is best to advise the defendant at the time of a plea of the trial court's mandatory obligation to order restitution at sentencing and of the defendant's right to

✓ JUDICIAL POLICY: Limited Rights to Appeal After Guilty Plea

a hearing on the appropriateness and amount of restitution. By advising the defendant of the mandatory nature of restitution at sentencing,

the trial court can ensure that the defendant is knowingly and voluntarily agreeing to the plea.

If the plea is premised upon the trial court imposing a specific amount of restitution upon acceptance of the plea, it is best for the trial court to provide the defendant with notice, both oral and written, of the restitution provision prior to accepting the plea.

✓ JUDICIAL POLICY: Notice to Defendant of Plea Premised Upon Specific Amount of Restitution

See *Commonwealth v. Rush*, 909 A.2d 805 (Pa. Super. 2006)(In negotiated plea arrangement, the defendant was made aware, prior to entering the plea, of the specific amount the trial court intended to impose as restitution upon acceptance of the plea).

In *Rush*, *supra*., the trial court, in the codefendant's case, credited the victim's testimony to support the restitution determination. Prior to entry of the guilty plea in Rush's case, the trial court judge clearly explained that the restitution order was based

✓ JUDICIAL POLICY: Appeal Rights Limited by terms of Negotiated Plea

on the victim's testimony, which the trial court found credible, as to the value of the stolen property. *Id.* at 810. Therefore, there

was no violation of Rush's due process rights by the trial court's failure to conduct an evidentiary hearing prior to imposing restitution upon Rush's guilty plea. Rush entered

## Mandatory Restitution at Sentencing

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the negotiated plea whereby he was made aware, prior to entering the plea, that the trial court would impose a specific amount of restitution upon acceptance of the plea, and whereby Rush agreed to accept restitution set in the codefendant's case for the same crimes.

### B. Necessity of a Hearing

The defendant has a right, grounded in statute and due process, to a hearing during which the Commonwealth, absent an agreement, must substantiate the need for restitution, *i.e.*, the extent of injury suffered by the victim. The trial court must then determine the amount and method of restitution. *See* 18 Pa.C.S.A. § 1106(c)(2)(i) & (c)(4)(i)-(ii). Because a restitution order is within the sound discretion of the trial court and must be supported by the record, *Commonwealth v. Opperman*, 780 A.2d 714, 718 (Pa. Super. 2001), it is recommended that the trial court make a record of its factual and credibility findings and legal conclusions. “[T]he [trial] court must ensure that the record contains the factual basis for the appropriate amount of restitution.” *Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. 2010)(citation omitted).

The trial court must determine the amount that constitutes the “full restitution” at a sentencing hearing or hearings. *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super. 2004).

✓ JUDICIAL POLICY: Restitution Must Be Imposed at the Initial Sentencing Hearing with Full Constitutional Safeguards.

Best practices include keeping the sentencing hearing open, with a rescheduled date, if the trial court cannot make a final determination of restitution at the initial sentencing hearing.

It is the Commonwealth's burden of proving its entitlement to restitution. *Commonwealth v. Boone*, 862 A.2d 639, 643 (Pa. Super. 2004) (stating that the amount of restitution must be supported by the record). When fashioning an order of restitution, the lower court must ensure that the record contains the factual basis for the appropriate amount of restitution. *Commonwealth v. Pledger*, 934 A.2d 715, 720 (Pa. Super. 2007). The dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. *Id.* The amount of the restitution award may not be excessive or speculative. *Commonwealth v. Rush*, 909 A.2d 805, 810 (Pa. Super. 2006). It is well-settled that “[a]lthough it is mandatory under section 1106(c) to award full restitution, it is still necessary that the amount of the ‘full restitution’ be determined under the adversarial system with considerations of due process.” *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super. 2004).

## Mandatory Restitution at Sentencing

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**Commonwealth v. Atanasio**, 997 A.2d 1181, 1183 (Pa. Super. 2010). The restitution award may not be excessive or speculative. *Id.*; **Commonwealth v. Pappas**, 845 A.2d 829, 843 (Pa. Super. 2004).

### C. The Sentencing Hearing

The procedure and requirements for a restitution hearing are spelled out in Pa.R.Crim.P. 705.1:

#### Rule 705.1 Restitution

- (A) At the time of sentencing, the judge shall determine what restitution, if any, shall be imposed.
- (B) In any case in which restitution is imposed, the judge shall state in the sentencing order:
  - (1) the amount of restitution ordered;
  - (2) the details of a payment plan, if any, including when payment is to begin;
  - (3) the identity of the payee(s);
  - (4) to which officer or agency the restitution payment shall be made;
  - (5) whether any restitution has been paid and in what amount; and
  - (6) whether the restitution has been imposed as a part of the sentence and/or as a condition of probation.

"Except as provided by Rule 702(B), sentence in a court case must typically be imposed within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*." Pa.R.Crim.P. 704(A)(1).

#### Use of a Pre-Sentence Investigation Report

Pa.R.Crim.P. 702 provides that a pre-sentence investigation report "shall include a victim impact statement as provided by law."

✓ JUDICIAL POLICY: Pre-sentence Reports May Be Utilized To Address Restitution

Pa.R.Crim.P. 702(A)(4). Although a defendant has a right to a hearing on restitution, that right can be waived when the defendant stipulates to

the amount of restitution and raises no objection to the restitution order at the time of sentencing.

- The Carbon County Court of Common Pleas, in **Commonwealth v. Darling**, 58 Pa. D. & C.4th 378, 388 (Pa. Com. Pl. 2002), accepted the presentence investigation

## Mandatory Restitution at Sentencing

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report prepared pursuant to Rule 702 and made it part of the record at sentencing. The presentence report contained copies of the billing invoices for the medical, hospital and emergency services provided to the victim for the injuries directly attributable to the defendant's conduct. The trial court ruled that because the victim impact statement was made part of the record, was provided to the defendant, and the information contained therein was subject to reasonableness and necessity arguments by the defendant at the hearing on restitution, the trial court justifiably relied upon the report in calculating the need and amount of restitution.

- In *Commonwealth v. Pappas*, 845 A.2d 829 (Pa. Super. 2004), a presentence report was used by the trial court to justify the award of restitution. The appellant challenged the trial court's determination of the amount of restitution, arguing that the presentence report had not been made part of the record. The Superior Court rejected this argument:

Appellant argues that the sentence of restitution is not supported by the record because the specific values for the vehicles were not brought out during trial, and that the pre-sentence investigation report is not part of the record on which the sentence may rely. We disagree. **A pre-sentence report is part of the record and may be considered by the sentencing court.** See [*Commonwealth v. Yanoff*, 690 A.2d 260, 266 (Pa. Super. 1997)] (use of pre-sentence report information by sentencing court is permissible); *Commonwealth v. Masip*, 567 A.2d 331, 336 (Pa. Super. 1989) ("A presentence report constitutes part of the record and speaks for itself.... It is presumed to be valid and need not be supported by evidence unless and until it is challenged by the defendant.").

*Pappas*, 845 A.2d at 842 (emphasis added).

### Amount and Method of Payment Must Be Ordered at Sentencing

The trial court must impose "some amount and method of restitution at the **initial** sentencing." *Commonwealth v. Ramos*, 197 A.3d 766, 769 (Pa. Super. 2018). In *Ramos*,

✓ **JUDICIAL POLICY: An Amount and Method of Payment for Restitution Must Be Imposed at the Initial Sentencing Hearing.**

at the defendant's initial sentencing, instead of ordering a specific amount of restitution, the trial court scheduled a restitution hearing at a later date. *Id.* at 768. The Superior Court held that there is no discretion in the trial court to postpone a restitution hearing until a later date: "it is the court's order at the initial sentencing, postponing the imposition of restitution until a later date that fails . . . to meet the criteria of the restitution statute and taints the entire sentence." *Id.* at 770. Therefore, the trial court in *Ramos* had no authority to impose restitution while simultaneously deferring the amount and method of such until a later date; the initial sentencing order constituted

hearing until a later date: "it is the court's order at the initial sentencing, postponing the imposition of restitution until a later date that fails . . . to meet the criteria of the restitution statute and taints the entire sentence." *Id.* at 770. Therefore, the trial court in *Ramos* had no authority to impose restitution while simultaneously deferring the amount and method of such until a later date; the initial sentencing order constituted

## Mandatory Restitution at Sentencing

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an illegal sentence. *Id.* 771. Consequently, the Superior Court vacated the sentence in its entirety and remanded the case to the trial court for resentencing. *Id.*

In ***Commonwealth v. Muhammed***, 219 A.3d 1207 (Pa. Super. 2019), the trial court ordered Appellant to pay court costs plus a restitution amount that would be determined

✓ **JUDICIAL POLICY: Impermissible to Defer Restitution to a Later Hearing.**

at a future hearing. *Id.* at 1212. However, the trial court did not specify a restitution amount or payment method. Instead, several days later, the trial court held a restitution hearing where the defendant was subsequently ordered to pay a specified amount in specified installments. The Superior Court held that “the trial court had no authority to impose restitution while deferring the amount... for decision at a later date.” *Id.* at 1213. The Superior Court vacated the entire sentence and remanded for resentencing.

If restitution is ordered as part of a sentence under 18 Pa.C.S.A. § 1106(a), it cannot at the same time also be ordered as a condition under Section 9754(c)(8). ***Commonwealth v. Holmes***, 155 A.3d 69, 87-88 (Pa. Super. 2017) (the *en banc* court was evenly divided on every issue except this one).

In summary, when a trial court is handling a claim for restitution, Section 1106(c) has two components:

- The time at which restitution must be imposed, *i.e.*, the sentencing hearing; and
- The specific nature of such sentence, *i.e.*, definite as to amount and method of payment.

See ***Commonwealth v. McCabe***, 230 A.3d 1199, (Pa. Super. 2020) citing ***Commonwealth v. Mariani***, 869 A.2d 484 (Pa. Super. 2005).

For further discussion on the amount of restitution, see Section V(C), Amount of Restitution, *infra*.

### D. Restitution Not Affected by Bankruptcy

A restitution order imposed in a criminal proceeding is not dischargeable in a liquidation or “straight bankruptcy” proceeding under Chapter 7 of the Bankruptcy Code:

[W]e hold that [11 U.S.C.A.] § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

***Kelly v. Robinson***, 479 U.S. 36, 50, 107 S.Ct. 353, 361, 93 L.Ed.2d 216 (1986).

In ***Commonwealth v. Petrick***, 217 A.3d 1217 (Pa. 2019), in an opinion written

## Mandatory Restitution at Sentencing

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by Justice Sallie Updyke Mundy, the Pennsylvania Supreme Court held that mandatory

✓ JUDICIAL POLICY: Restitution Not  
Dischargeable in Bankruptcy Chapter 7

restitution in the amount of \$6,700 as part of a sentence for theft by deception, arising out of the victims' advance payments to the defendant for remodeling work that he never performed, together with the defendant's failure to refund money, was exempt from discharge in Chapter 7. The Court ruled that the restitution order was not dischargeable regardless of whether the criminal prosecution occurred after the defendant had been granted discharge or if the victims had failed to object to the discharge order in the bankruptcy proceedings.

In *Commonwealth v. Shotwell*, 717 A.2d 1039 (Pa. Super. 1998), the defendant was ordered to pay restitution after his discharge in bankruptcy was received. The defendant claimed to have listed the victim in his bankruptcy petition, thereby discharging the debt prior to the order of restitution. The court made no determination as to whether the victim had in fact been listed, notified or discharged in the defendant's bankruptcy proceedings. The Trial Court went on to reason that the discharge in bankruptcy did not apply even if the debt to the victim had been discharged in bankruptcy **before** the criminal charges were filed or the restitution ordered, as an "obligation of criminal restitution does not arise out of the same duty as the allegedly discharged civil debt". *Id.* at 1045.

Upon examination of the facts of this case, in light of the relevant law, we hold that an order of restitution, payable pursuant to the Pennsylvania Crimes Code, is not subject to discharge under the Bankruptcy Code. See 11 U.S.C.A. § 523(a)(7); *Kelly v. Robinson*, *supra*. We further hold that an order of restitution entered subsequent to a bankruptcy discharge is separate and distinct from any discharge involving a civil debt. Here, the trial court's order of restitution arose out of the traditional responsibility of the Commonwealth to protect its citizens by enforcing its criminal statutes and to rehabilitate offenders by imposing a criminal sanction intended for that purpose. See *id.* Neither the Bankruptcy Code nor Pennsylvania law will allow appellant to avoid the consequences of his criminal scheme, as the decision to impose restitution turns on the penal goals of the State and the situation of the offender. A condition of restitution in a criminal sentence simply does not recreate the civil debtor-creditor relationship that existed in the bankruptcy proceedings. *Id.* Accordingly, we will not disturb the trial court's restitution order.

*Shotwell*, 717 A.2d at 1046.

In *In re Fidler*, 442 B.R. 763 (Bankr. D. Nev. 2010), the defendant was charged with issuing bad checks after he had obtained a discharge in bankruptcy. The Bankruptcy Court refused to stay the criminal proceedings:

## Mandatory Restitution at Sentencing

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The penalty in Nevada for issuing checks without sufficient funds is one to four years in prison, and a fine of up to \$5,000. Nev. Rev. Stat. § 193.130 (2009). Additionally, “the court shall order restitution.” Nev. Rev. Stat. § 205.130 (2009). Like *Gruntz*, we hold that there is “no rationale or justification for severing economic and noneconomic ramifications of the debtor’s criminal conduct.” [*Gruntz v. County of Los Angeles*, 202 F.3d 1074, 1085-1086 (9th Cir. 2000)]. While the restitution obligation is subject to limitations, the state courts are not precluded by bankruptcy law from imposing it. See 3 Collier on Bankruptcy ¶ 362.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (“A criminal court may jail or fine the debtor for actions before or after commencement of a case,” including failure to pay criminal restitution.).

*Fidler*, 442 B.R. at 767-768.

Furthermore, the automatic stay provision of the Bankruptcy Code does not apply

✓ **JUDICIAL POLICY: Automatic Stay Provision Not Applicable to Restitution.**

to restitution. Because the collection of restitution is a continuation of a criminal action, a state court may proceed with a criminal prosecution without violating the automatic stay provisions of bankruptcy law:

The plain language of § 362(b)(1) exempts the “commencement or continuation of a criminal action or proceeding against the debtor” from the automatic stay afforded by § 362(a).

*United States v. Colasuonno*, 697 F.3d 164, 173 (2d Cir. 2012).

Nor is a restitution obligation dischargeable under Chapter 13<sup>20</sup> of the Bankruptcy Code. 11 USC §1328(a)(3) provides in pertinent part:

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--

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<sup>20</sup> 11 USC §§1301 et seq.

...

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime ....

11 U.S.C.A. § 1328.

## V. BURDEN OF PROOF

### A. Burden of Proving Entitlement on the Commonwealth

Although an order of restitution is mandatory, “[i]t is the Commonwealth’s burden

✓ JUDICIAL POLICY: The Commonwealth has the burden of proving entitlement to restitution.

of proving its entitlement to restitution.” The burden may not be placed upon the defendant to rebut the assertions of the Commonwealth. *Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. 2010).

The responsibilities of the District Attorney are detailed in 18 Pa.C.S.A. § 1106, which provides, in subsection (c):

(4) (i) It shall be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered. This recommendation shall be based upon information solicited by the district attorney and received from the victim.

(ii) Where the district attorney has solicited information from the victims as provided in subparagraph (i) and has received no response, the district attorney shall, based on other available information, make a recommendation to the court for restitution.

(iii) The district attorney may, as appropriate, recommend to the court that the restitution order be altered or amended as provided in paragraph (3).

18 Pa.C.S.A. § 1106(c)(4).

When fashioning an order of restitution:

- the lower court must ensure that the record contains the factual basis for the appropriate amount of restitution.” *Atanasio*, 997 A.2d at 1183.
- It is well settled that an award of restitution cannot be excessive or speculative. *Id.*

## Mandatory Restitution at Sentencing

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- Although it is mandatory under Section 1106(c) to award full restitution, “it is still necessary that the amount of the ‘full restitution’ be determined under the adversarial system with considerations of due process.” *Id.*, quoting **Commonwealth v. Ortiz**, 854 A.2d 1280, 1282 (Pa.Super.2004).

In **Commonwealth v. Atanasio**, 997 A.2d 1181 (Pa. Super. 2010), the defendant pleaded *nolo contendere* to simple assault for punching the victim in the face. At sentencing,

✓ JUDICIAL POLICY: The Burden Cannot be Shifted to the Defendant.

the trial court awarded restitution for the victim’s broken ankle, which was diagnosed three days after the assault. The defendant filed

a motion to modify sentence in which he challenged the award of restitution. At the hearing, the defendant argued that the Commonwealth offered no evidence connecting the broken ankle to the assault in question. The trial court, however, replied that it was the defendant who had failed to prove the ankle injury was not related to the assault, and it denied the defendant’s motion to modify sentence. On appeal, the Superior Court reversed and remanded for a new restitution hearing. It was the Commonwealth’s burden, the Court explained, to prove the causal relationship between the victim’s broken ankle and the punch the defendant delivered to the victim’s face that resulted in his *nolo contendere* plea to simple assault. In denying the defendant’s motion, the trial court had impermissibly shifted the burden of proof. See **Commonwealth v. Crosley**, 180 A.3d 761, 772 (Pa. Super. 2018).

- Section 1106 requires that a victim’s loss be caused directly by a defendant’s criminal conduct rather than a loss consequential to such conduct. **Commonwealth v. Langston**, 904 A.2d 917, 923 (Pa. Super. 2006).

Both the Commonwealth and the trial court must take action regarding restitution at the initial sentencing hearing; in default thereof, the right to enter a restitution order

✓ JUDICIAL POLICY: Forfeiture of Opportunity to Order or Seek Restitution.

is lost. The Commonwealth must present evidence and a recommendation for restitution, and the trial court must enter an order specifying an amount

of restitution and a method of payment, at the sentencing hearing. **Commonwealth v. Lekka**, 210 A.3d 343, 358 (Pa. Super. 2019).

Because, as all parties agree, the Commonwealth did not recommend restitution, there was no discussion of the propriety of a restitution award at the sentencing hearing, and there is no support in the record for the amount of restitution ordered, the portion of Appellant’s sentence requiring that he pay restitution in the amount of \$ 1,000 to the victim’s heirs was in error.

**Lekka**, 210 A.3d at 358.

The Commonwealth forfeits its right to seek restitution if it does not make a recommendation to the sentencing court as to the amount of restitution to be ordered, and presents evidence thereof, based on information provided by the victim or other available source.

## Mandatory Restitution at Sentencing

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- Furthermore, the trial court must enter a definite amount of restitution, and a method of payment, at the initial sentencing hearing, or else the right to seek restitution is forfeited.

Pa.R.Crim.P. 704, Procedure at Time of Sentencing, provides:

- (A) Time for Sentencing.
  - (1) Except as provided by Rule 702(B), sentence in a court case shall ordinarily be imposed within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*.
  - (2) When the date for sentencing in a court case must be delayed, for good cause shown, beyond the time limits set forth in this rule, the judge shall include in the record the specific time period for the extension.

The Superior Court has stated that as long as the sentencing court sets “some” type of restitution at the initial sentencing, meaning an amount and method of payment, in accordance with Rule 704, then the court retains the authority to modify restitution at a later date if necessary under the circumstances.

As long as the sentencing court sets **some** amount and method of restitution at the initial sentencing, the court can later modify that order, but only if the requirements of Section 1106(c)(3) are met. **Commonwealth v. Dietrich**, 601 Pa. 58, 970 A.2d 1131 (2009). This authority to modify restitution takes into account that the full amount of restitution might be indeterminable before sentencing under Pa.R.Crim.P. 704.

**Commonwealth v. Ramos**, 197 A.3d 766, 770 (Pa. Super. 2018).

## B. Standards

### 1. Burden of Proving Entitlement to Restitution - Summary

Although an award of restitution lies within the discretion of the trial court, it should not be speculative or excessive and the appellate courts must vacate a restitution order which is not supported by the record. **Commonwealth v. Rotola**, 173 A.3d 831, 834 (Pa. Super. 2017).

It is the Commonwealth’s burden of proving its entitlement to restitution. **Commonwealth v. Atanasio**, 997 A.2d 1181, 1183 (Pa. Super. 2010). When

✓ JUDICIAL POLICY: The Commonwealth has the burden of proving entitlement to restitution.

fashioning an order of restitution, the trial court must ensure that the record contains the factual basis for the appropriate amount

of restitution. ***Commonwealth v. Pleger***, 934 A.2d 715, 720 (Pa. Super. 2007). The dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. *Id.*

The Commonwealth must present evidence that the victim suffered a loss that flows from the conduct of the defendant in relation to the crime for which the defendant was convicted. ***Commonwealth v. Poplawski***, 158 A.3d 671 (Pa. Super. 2017).

It is well-settled that “[a]lthough it is mandatory under section 1106(c) to award full restitution, it is still necessary that the amount of the ‘full restitution’ be determined under the adversarial system with considerations of due process.” ***Commonwealth v. Ortiz***, 854 A.2d 1280, 1282 (Pa. Super. 2004).

### 2. Burden of Proof

Although the Commonwealth has the burden of proving the entitlement to restitution, Pennsylvania law is silent on the specific standard of proof the Commonwealth bears to support a restitution order. This differs from the federal system and most other state courts which require proof by a preponderance of the evidence.

✓ **JUDICIAL POLICY: Pennsylvania has not adopted a specific Burden of Proof.**

Federal Law

There are three primary acts that govern restitution in criminal cases in the federal courts:

- (1) the Victim and Witness Protection Act of 1982 (“VWPA”), largely codified at 18 U.S.C. §§ 3663, 3664;
- (2) the Mandatory Victims Restitution Act of 1996 (“MVRA”), largely codified at 18 U.S.C. § 3663A; and
- (3) the Crime Victims’ Rights Act (“CVRA”), largely codified at 18 U.S.C. § 3771.

Under the MVRA, the burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the attorney for the Government by a preponderance of the evidence:

### **§ 3664. Procedure for issuance and enforcement of order of restitution**

- (e) Any dispute as to the proper amount or type of restitution shall

be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

18 U.S.C.A. § 3664 (e). "The government bears the burden of proving by a preponderance of the evidence the amount of the loss sustained by a victim as a result of the offense." *United States v. Kay*, 717 F.3d 659, 667 (8th Cir. 2013). "And once the Government has satisfied its burden to offer evidence supporting its restitution calculation, the burden shifts to the defendant to dispute the amount with her own evidence. Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. 18 U.S.C. § 3664(e)." *United States v. Steele*, 897 F.3d 606, 613 (4th Cir. 2018) (citations omitted).

### Typical State Law

Massachusetts law requires all of the procedural safeguards that are applicable in Pennsylvania but further utilizes the preponderance of the evidence standard to prove the amount of restitution:

At a restitution hearing, the Commonwealth bears the burden of proving the amount of the loss by a preponderance of the evidence. Moreover, the defendant must have an opportunity to be heard and to cross-examine witnesses. The defendant is entitled to rebut the victim's estimate of the injury with the defendant's own experts or witnesses.

*Commonwealth v. Chase*, 877 N.E.2d 945, 955 (Mass. App. Ct. 2007)(quotations and citations omitted).

Numerous other states have adopted the preponderance of the evidence standard:

- *H.L.C. v. State*, 950 So.2d 1268 (Fla. Dist. Ct. App. 2007)(“In a restitution proceeding, it is the State’s burden to prove the amount of loss for restitution purposes. The burden of proof is by a preponderance of the evidence.”);
- *State v. Simmons*, 88 N.E.3d 651 (Ohio 2017)(amount of restitution must be based on the criminal conduct of which the defendant was convicted, the economic loss must be direct and proximate result of that conduct, and the standard to prove restitution is by a preponderance of the evidence);
- *People v. Horne*, 767 N.E.2d 132 (N.Y. 2002)(the prosecution bears the burden of proving, by a fair preponderance of the evidence, the facts in support of restitution).

## Mandatory Restitution at Sentencing

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### Restitution is Decided by the Trial Judge

Furthermore, the federal courts, and most state courts, have uniformly rejected the argument that the decision to award restitution requires submission to a jury pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). These cases have acknowledged the lower standard of a preponderance of the evidence as contrasted with beyond a reasonable doubt, but held that the restitution order is determined by the trial judge rather than a jury. See *United States v. Milkiewicz*, 470 F.3d 390 (3d Cir. 2006); *People v. Mercer*, 2020 WL 205302 (Cal. 2020). In support of this holding, the Third Circuit Court of Appeals has stated:

Restitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct. In this sense, even though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged.

Rather, restitution constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner. In these circumstances, we do not believe that ordering a convicted defendant to return ill-gotten gains should be construed as increasing the sentence authorized by a conviction pursuant to [*United States v. Booker*, 543 U.S. 220 (2005)]

### ***United States v. Leahy*, 438 F.3d 328, 338 (3d Cir. 2006)**

Act 84<sup>21</sup>, codified in 42 Pa.C.S.A. § 9728, specifies procedures for the collection of restitution, reparation, etc., and allows the Pennsylvania Department of Corrections to make monetary deductions from an inmate's account for the purposes of collecting restitution and court costs. 42 Pa.C.S.A. § 9728(b)(5). Adding further support for the finding that the procedure to establish restitution does not violate *Apprendi* is the Commonwealth Court's decision in *Richardson v. Pennsylvania Department of Corrections*, 991 A.2d 394 (Pa. Cmwlth. 2010). In *Richardson*, the Commonwealth Court held that Act 84, i.e., deductions from an inmate's account to pay and order for restitution and costs, did not violate due process rights even though the deductions are made without an opportunity for a hearing. The Commonwealth Court found guidance in *Buck v. Beard*, 879 A.2d 157 (Pa. 2005), in which the Pennsylvania Supreme Court held that a sentencing hearing provides all the process required before deductions are made from an inmate account.

### **C. Amount of Restitution**

The amount of restitution and the method of payment must be specified by the

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<sup>21</sup> Act 84, Act of June 18, 1998, P.L. 640.

## Mandatory Restitution at Sentencing

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sentencing court. 18 Pa.C.S.A. § 1106(c)(2) provides:

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

(i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

(ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.

(iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.

(iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.

18 Pa.C.S.A. § 1106(c)(2).

In determining the amount of restitution to be ordered, a sentencing court must consider the amount of loss suffered by the victim, the fact that the defendant's actions caused the injury, and the type of payment that will best serve the needs of the victim and the capabilities of the defendant. *Commonwealth v. Wright*, 722 A.2d 157, 159 (Pa. Super. 1998).

Since an order of restitution is a sentence, whether it is imposed as a direct sentence

✓ JUDICIAL POLICY: The Amount of Restitution Must Be Supported in the Record.

or as a condition of probation, it must be supported by the record and may not be speculative or excessive. *Commonwealth v. Rotola*, 13 A.3d 831, 834 (Pa. Super. 2017).

Due to the language "directly resulting from the crime," restitution is "proper only if there is a direct causal connection between the crime and the loss." *Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. 2007).

✓ JUDICIAL POLICY: The Amount of Restitution Must Be Supported in the Record.

"The sentencing court applies a 'but for' test in imposing restitution; damages which occur as a direct result of the crimes are those which

would not have occurred but for the defendant's criminal conduct." *Commonwealth v. Poplawski*, 158 A.3d 671, 674 (Pa. Super. 2017). A restitution order must not exceed the victim's losses. *Commonwealth v. Burwell*, 58 A.3d 790, 794 (Pa. Super. 2012).

### VI. RESTITUTION PAYMENTS

#### A. Amount of Restitution

Restitution must be imposed at the time of sentencing, and the amount and method of payment must be specified by the sentencing court. A sentence which includes the

✓ JUDICIAL POLICY: The amount and method of payment must be imposed at the time of sentencing.

provision that restitution is to be *determined at some later date or hearing* renders the sentence illegal. 18 Pa.C.S.A. § 1106(c)(2) provides:

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

(i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

(ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.

(iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.

(iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.

18 Pa.C.S.A. § 1106(c)(2). *See also Commonwealth v. Mariani*, 869 A.2d 484, 486 (Pa. Super 2005)(restitution must be imposed at sentencing hearing, *i.e.*, the amount and method of payment).

✓ JUDICIAL POLICY: The Commonwealth must make a recommendation for restitution at sentencing

This must be read in conjunction with § 1106(c)(4) which requires the prosecution to make a recommendation to the Court "at or prior to the time of sentencing." *Commonwealth v. Ortiz*, 854 A.2d 1280, 1283 (Pa. Super. 2004)(*en banc*).

18 Pa.C.S.A. § 1106(c) specifies the role of the Commonwealth:

(4) (i) It shall be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered.

## Mandatory Restitution at Sentencing

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This recommendation shall be based upon information solicited by the district attorney and received from the victim.

(ii) Where the district attorney has solicited information from the victims as provided in subparagraph (i) and has received no response, the district attorney shall, based on other available information, make a recommendation to the court for restitution.

(iii) The district attorney may, as appropriate, recommend to the court that the restitution order be altered or amended as provided in paragraph (3).

18 Pa.C.S.A. § 1106(c)(4).

Unless the statute under which a defendant is convicted contains a specific restitution provision, 18 Pa.C.S.A. § 1106(c)(4) mandates that the Commonwealth is required to make a recommendation to the court prior to sentencing concerning the amount of restitution to be ordered. *Commonwealth v. Dietrich*, 970 A.2d 1131, 1134 (Pa. 2009).

When the statute under which a defendant is convicted does contain a specific restitution provision, for example, as in 18 Pa.C.S.A. § 4105(e)<sup>22</sup>, then there is no need for the Commonwealth to make a recommendation to the trial court as is required under Section 1106(c)(4). See *Commonwealth v. Redman*, 864 A.2d 566 (Pa. Super. 2004).

### B. Causal Connection

Restitution may be imposed only for those crimes to property or person where the victim suffered a loss that flows from the conduct that forms the basis of the crime for which the defendant is held criminally accountable. *Commonwealth v. Poplawski*, 158 A.3d 671 (Pa. Super. 2017).

Because restitution is a sentence, the amount ordered must be supported by the record; it may not be speculative or excessive. The amount of a restitution order is limited by the loss or damages sustained as a direct result of defendant's criminal conduct and by the amount supported by the record.

*Commonwealth v. Dohner*, 725 A.2d 822, 824 (Pa. Super. 1999) (internal citations and quotations omitted). The payment of restitution ordered by the court cannot be in excess of the damage caused by the defendant. *Commonwealth v. Pappas*, 845 A.2d 829, 842 (Pa. Super. 2004).

To be a valid order of restitution, there must be a causal link between the criminal

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<sup>22</sup> 18 Pa.C.S.A. § 4105(e), Bad Checks, requires that the sentence include an order for the issuer or passer to reimburse the payee the face amount of the check.

## Mandatory Restitution at Sentencing

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conviction and the victim's injuries. There are several statutes that need to be considered. In the Crimes Code, Section 1106(a) provides the following:

(a) General rule.--Upon conviction for any crime wherein:

- (1) property of a victim has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime; or
- (2) the victim, if an individual, suffered personal injury directly resulting from the crime,

the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

18 Pa.C.S.A. § 1106(a).

Section 1106 specifies that restitution should be in relation to the injury suffered by the victim:

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

- (i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

18 Pa.C.S.A. § 1106(c)(2)(i).

Due to the language "directly resulting from the crime" from Section 1106(a), restitution is proper only if there is a direct causal connection between the crime and the loss. *Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. 2007). The sentencing court must apply a "but for" test in imposing restitution; damages which occur as a direct

✓ JUDICIAL POLICY: Sentencing Court Must Use a "But For" Test in Setting Restitution Amount.

result of the crimes are those which would not have occurred but for the defendant's criminal conduct. *Commonwealth v. Muhammed*, 219 A.3d 1207, 1213 (Pa. Super. 2019) citing *Commonwealth v. Gerulis*, 616 A.2d 686, 697 (Pa. 1992).

- Although the sentence of restitution must be supported by the record, a pre-sentence investigation report, made part of the record at sentencing, may be considered by the sentencing court and used as a basis for the restitution order. *Commonwealth v. Pappas*, 845 A.2d 829, 842 (Pa. Super. 2004); see also *Commonwealth v. Yanoff*, 690 A.2d 260, 266 (Pa. Super. 1997)(use of pre-sentence report information by sentencing court was permissible).

## Mandatory Restitution at Sentencing

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In reference to personal injuries suffered by the victim, Pennsylvania law indicates that in determining the amount of restitution the court “[s]hall consider the extent of

✓ JUDICIAL POLICY: Personal Injury =  
actual bodily harm.

injury suffered by the victim” 18 Pa.C.S.A. § 1106(c)(2)(i), and defines “personal injury” as “[a]ctual bodily harm, including pregnancy, directly resulting from the crime,” 18 Pa.C.S.A. § 1106(h).

In *Commonwealth v. Oree*, 911 A.2d 169 (Pa. Super. 2006), the defendant was convicted of simple assault and recklessly endangering another person after he battered the victim, leaving the victim unconscious. Immediately after the assault, the victim

✓ JUDICIAL POLICY: Restitution for  
Personal Injuries Must Reflect Actual  
Bodily Harm Resulting From the Crime.

required surgery because he had fluid in his brain. As a result, the victim suffered an organic brain syndrome due to head trauma; he needs to reside at a nursing home

indefinitely because he is unable to bathe, dress, or care to his personal needs. The sentencing court ordered restitution in the amount of \$1,229,229.09, based upon the evidence of the victim’s continued medical and care needs presented at the sentencing hearing. Although it will take the defendant a lifetime to pay the restitution, the Superior Court affirmed:

While we do not doubt defendant’s assertion that he may be making restitution payments for the balance of his lifetime since he currently earns only \$2,500.00 per month as a machine operator, we will not make the sweeping pronouncement he seeks. We hold that the trial court’s imposition of restitution does not constitute *per se* cruel and unusual punishment simply because it may take defendant a lifetime to pay. We conclude the trial court properly exercised its authority and did not impose restitution which was disproportionate to the injuries caused by defendant.

*Oree*, 911 A.2d at 171.

### C. Method and Payment of Restitution

Both the Crimes Code and the Sentencing Code address the amount and method of payment of restitution. Section 1106 of the Crimes Code refers only to restitution. The Sentencing Code addresses not only restitution, but also reparation, fees, costs, fines and penalties. Review herein is limited to the topic of restitution. With respect to restitution, these statutes should be read in *pari materia*, as they relate to the same thing. See 1 Pa.C.S.A. § 1932.

Section 1106(c)(2) of the Crimes Code, provides

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of

## Mandatory Restitution at Sentencing

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restitution, the court:

- (i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.
- (ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.
- (iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.
- (iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.

18 Pa.C.S.A. § 1106(c)(2).

### Method and Payment Plans

In most cases, the court will need to create a payment plan for the collection of restitution.

When restitution is imposed as a direct sentence, the court must adopt a method of payment on a schedule that the defendant can afford to pay because a defendant cannot be incarcerated for the failure to pay restitution if the failure results from the offender's inability to pay:

- (iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.

18 Pa.C.S.A. § 1106(c)(2)(iii). In determining the amount **and method** of restitution, the court may order restitution "in a lump sum, by monthly installments or according to such other schedule as it deems just." 18 Pa.C.S.A. § 1106(c)(2)(ii).

- Setting realistic payment plans can help avoid the need for further court proceedings in the future by limiting the risk that the defendant will default.

Respecting types of payment, the December 2019 amendments to Section 9730 of the Sentencing Code,<sup>23</sup> now provide that, in addition to court costs and fines, the treasurer of each county may allow the use of credit cards and bank cards for the payment of *restitution* and may provide for automatic periodic deductions from a bank account, subject to the agreement of the owner of the account. 42 Pa.C.S.A. § 9730.

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<sup>23</sup> Act of December 18, 2019, P.L. 776, No. 115.

## Mandatory Restitution at Sentencing

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When restitution is ordered by a judge,<sup>24</sup> it is to be made by the offender to the probation section of the county in which he was convicted or to another agent designated by that county's commissioners with the approval of the president judge of the county to collect restitution according to the court order. 18 Pa.C.S.A. § 1106(e). Consistent

✓ JUDICIAL POLICY: Restitution to be paid to Probation Department or other designated agent.

with this, section 9728(a)(1)<sup>25</sup> of the Sentencing Code provides that all restitution shall be collected by the county probation department or other agent designated by the

county commissioners of the county with the approval of the president judge of that county for that purpose and in any manner provided by law. The payment handoff to the county probation department or other agent is an essential step to the docketing of a defendant's restitution order as a judgment and how restitution is to be made and collected.

Once a court orders that restitution be made, the county clerk of courts shall, upon sentencing, transmit to the prothonotary certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, exceed \$1000. 42

✓ JUDICIAL POLICY: Restitution order to be docketed as a judgment in Prothonotary office.

Pa.C.S.A. § 9728(b)(1). Each prothonotary then is to enter and docket the same of record in his office and to index the same as judgments are indexed. *Id.* When the aggregate of

these amounts does not exceed \$1000, the clerk of courts, in consultation with other appropriate government agencies, *may* transmit to the prothonotary certified copies of all judgments to have the same indexed in the prothonotary's office as judgments. 42 Pa.C.S.A. § 9728(b)(2).

### D. Enforceability of Restitution Payments

#### Restitution Entered as a Judgment

The total amount for which a person is liable under Section 9728 may be entered as a judgment upon the person or property of the person sentenced or ordered, regardless of whether the amount has been ordered to be paid in installments. 42 Pa.C.S.A. § 9728(b)

✓ JUDICIAL POLICY: Sentencing Court may take action to preserve property available to satisfy restitution amount.

(4). A court also, upon application by the Commonwealth, may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any

other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order. 42 Pa.C.S.A. § 9728(e).

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<sup>24</sup> Restitution ordered by a magistrate judge is subject to jurisdictional limitations. See 18 Pa.C.S.A. § 1106(d).

<sup>25</sup> Section 9728 of the Sentencing Code, 42 Pa.C.S.A. § 9728, most recently was amended by the act of December 18, 2019, P.L. 776, No. 115. In particular, Sections (a)(2) and (b)(5) were amended to require a private or county collection agency, to require statistical information be provided to the Pennsylvania Commission on Sentencing, and to more particularly detail how deductions may be made from an inmate's wages and personal accounts.

## Mandatory Restitution at Sentencing

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Importantly, the period of time during which judgments shall have full effect **may exceed** the maximum term of imprisonment to which the offender could have

✓ **JUDICIAL POLICY: An order for Restitution enforceable beyond maximum term of imprisonment.**

been sentenced for crimes of which he was convicted or the maximum term of confinement to which the offender was committed. 42 Pa.C.S.A. § 9728(c).

(a) **Period of time.**--Notwithstanding section 6353 (relating to limitation on and change in place of commitment) or 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property), the period of time during which such judgments shall have full effect may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crimes of which he was convicted or the maximum term of confinement to which the offender was committed.

42 Pa.C.S.A. § 9728(c).

### Term of Enforceability of Restitution Order

It also is the case since the 1998 amendments to Section 1106(c)(2)(ii)<sup>26</sup> that an order of restitution is enforceable until paid, regardless of whether the maximum term of imprisonment for which a defendant could have been sentenced has expired.

- ***Commonwealth v. Griffiths***, 15 A.3d 73 (Pa. Super. 2010)(construing 18 Pa.C.S.A. § 1106(c)(2)(ii) - an order of restitution is enforceable until paid). Cf. ***Commonwealth v. Luper***, 745 A.2d 1248 (Pa. Super. 2000)(construing precursor to section 1106(c)(2)(ii) - a court's ability to enforce payment of restitution cannot exceed the maximum term of imprisonment to which a defendant could have been sentenced).

It is important to recognize that enforcement of a restitution order beyond the maximum term for which a defendant could have been sentenced only applies where restitution is ordered as a part of a sentence under section 1106, and not as a condition of probation under Section 9754. ***Commonwealth v. Karth***, 994 A.2d 606 (Pa. Super. 2010). Section 9728 specifically addresses "a sentence... for restitution." *Id.* It does not address restitution imposed as a condition of probation. Thus, Section 9728 only applies to the collection of restitution imposed as part of a direct sentence, not as a condition of probation. *Id.*

### Failure or Default in Restitution Payments

Both Section 1106(f) of the Crimes Code and Section 9730(b) of the Sentencing Code address a defendant's failure or default to make restitution payments. Section

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<sup>26</sup> Act of December 3, 1998, P.L. 933, No. 121.

1106(f) provides

**(f) Noncompliance with restitution order.**--Whenever the offender shall fail to make restitution as provided in the order of a judge, the probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution shall notify the court within 20 days of such failure. Whenever the offender shall fail to make restitution within 20 days to a magisterial district judge, as ordered, the magisterial district judge shall declare the offender in contempt and forward the case to the court of common pleas. Upon such notice of failure to make restitution, or upon receipt of the contempt decision from a magisterial district judge, the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

18 Pa.C.S.A. § 1106(f). This provision addresses noncompliance with restitution orders before both a magisterial district court and a common pleas court.

### Default from MDJ Order of Restitution

While cases involving restitution before magisterial district judges (“MDJ”) are rare, MDJs have jurisdiction to enter orders in cases involving summary offenses or certain misdemeanors of the third-degree where the amount of restitution is less than \$500. 42 Pa.C.S.A. § 1515(a)(1) and 6(i). However, Section 1106 applies only to “crimes,” not summary offenses, which are treated differently in the Crimes Code.<sup>27</sup> Thus, courts of common pleas only pursue the nonpayment of restitution arising from cases where the MDJ sentenced a defendant in a third-degree misdemeanor.

Restitution in summary offenses is governed by a combination of Pa.R.Crim.P. 456 and 42 Pa.C.S.A. § 9730. In short, Rule 456 sets forth the basic procedural requirements that govern contempt proceedings for nonpayment of fines, costs, and restitution. Because the relevant statutory and constitutional provisions are the same as for contempt proceedings involving court of common pleas proceedings, they are discussed at length below.

### Default from Trial Court Order of Restitution

When a common pleas court receives notice from a probation office that an offender has failed to make restitution, Section 1106(f) requires that the court order a hearing to determine if the defendant “is in contempt of court or has violated his probation or parole.” Such a proceeding is governed by both statutory and constitutional requirements. Section 9730(b) of the Sentencing Code, as amended in December 2019, provides the basic procedural framework for this contempt hearing, as well as the court’s options:

<sup>27</sup> 18 Pa.C.S.A. § 1106(a) specifies that it applies only “upon conviction for any crime.” The definitions in 18 Pa.C.S.A. § 106(c), in turn, explain that “summary offenses” are not “crimes.”

### (b) Procedures regarding default.--

- (1) If a defendant defaults in the payment of court costs, **restitution** or fines after imposition of sentence, the issuing authority or a senior judge or senior magisterial district judge appointed by the president judge for the purposes of this section may conduct a hearing to determine whether the defendant is financially able to pay.
- (2) If the issuing authority, senior judge or senior magisterial district judge determines that the defendant is financially able to pay the costs, **restitution** or fine, the issuing authority, senior judge or senior magisterial district judge may enter an order for wage attachment, turn the delinquent account over to a private collection agency or impose imprisonment for nonpayment, as provided by law.
- (3) If the issuing authority, senior judge or senior magisterial district judge determines that the defendant is without the financial means to pay the costs, **restitution** or fine immediately or in a single remittance, the issuing authority, senior judge or senior magisterial district judge may provide for payment in installments. In determining the appropriate installments, the issuing authority, senior judge or senior magisterial district judge shall consider the defendant's financial resources, the defendant's ability to make **restitution** and reparations and the nature of the burden the payment will impose on the defendant. If the defendant is in default of a payment or advises the issuing authority, senior judge or senior magisterial district judge that default is imminent, the issuing authority, senior judge or senior magisterial district judge may schedule a rehearing on the payment schedule. At the rehearing the defendant has the burden of proving changes of financial condition such that the defendant is without the means to meet the payment schedule. The issuing authority, senior judge or senior magisterial district judge may extend or accelerate the schedule, leave it unaltered or sentence the defendant to a period of community service as the issuing authority, senior judge or senior magisterial district judge finds to be just and practicable under the circumstances.
- (4) A decision of the issuing authority, senior judge or senior magisterial district judge under paragraph (2) or (3) is subject to section 5105 (relating to right to appellate review).

42 Pa.C.S.A. § 9730(b) (emphasis added).

In short, the court must hold a hearing, and it must do so each time the defendant appears before it for nonpayment:

## Mandatory Restitution at Sentencing

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Judges must hold separate hearings for each alleged contemnor to ascertain whether any noncompliance flowed from (a) deliberate disregard of the court's order or (b) circumstances beyond the defendant's control. This must be done every time someone appears or reappears for a costs-and-fines proceeding, because the person's financial situations may have changed since the last time she or he was before the court.

***Commonwealth v. Mauk***, 185 A.3d 406, 411 (Pa. Super. 2018).

As stated above, if the court determines that the defendant is able to pay, then the court may enter an order for wage attachment, turn the delinquent account over to a private collection agency, or impose imprisonment for nonpayment "as provided by law." 42 Pa.C.S.A. § 9730(b)(2).

The hearing contemplated under Section 9730(b) may be conducted by the court, or by a senior judge or senior magisterial district judge appointed by the president judge of the court. In many respects the sanctions or remedies available to a court are similar to those that may be considered by an issuing authority under Rule 456.

- If the court determines that the defendant is financially able to pay the restitution, the court may enter an order for wage attachment, turn the delinquent account over to a private collection agency or impose imprisonment for nonpayment, as provided by law.
- If the court determines a defendant is without the financial means to pay restitution immediately or in a single remittance, the court may provide for payment in installments with due consideration for a defendant's ability to make payments and the burden payments may impose on the defendant.
- Where a defendant is in default of a payment or advises that default is imminent, the court may schedule a rehearing on the payment schedule, at which time the defendant has the burden of proving changes of financial condition such that he is without the means to meet the payment schedule. If the defendant satisfies the burden of proof, then the court may extend or accelerate the schedule, leave it unaltered, or sentence the defendant to a period of community service as is just and practical under the circumstances.

While a court is not mandated to order imprisonment for failure to pay restitution when it is determined that a defendant is financially able to pay, it also is the case that a court may not imprison a person for nonpayment without a public hearing as required under Section 9730(b)(1). See 42 Pa.C.S.A. 9730(b)(1) and § 9730.1(d); ***Commonwealth v. Smetana***, 191 A.3d 867 (Pa. Super. 2018).

### Contempt Proceedings

Contempt proceedings may be either civil or criminal in nature, and the court should determine at the start which method it is using.

- Civil Contempt: If the court will issue an order designed to compel payment, and the court sets certain conditions by which the defendant can “purge” the contempt and escape punishment, it is a civil contempt proceeding. **Bruzzi v. Bruzzi**, 481 A.2d 648, 652 (Pa. Super. 1984). “If the dominant purpose of the court is to prospectively coerce the contemnor into compliance with the court’s directive, the adjudication is one of civil contempt.” **Commonwealth v. Pruitt**, 764 A.2d 569, 574 (Pa. Super. 2000). The purge amount set by the court must be within the present ability of the defendant to comply, and the court must make that finding beyond a reasonable doubt. **Barrett v. Barrett**, 368 A.2d 616, 621 (Pa. 1977); **Hyle v. Hyle**, 868 A.2d 601, 606 (Pa. Super. 2005).
- Criminal Contempt: If the court issues an order punishing the defendant for failing to comply with the court’s past order, and the defendant is not given any way to escape punishment, it is a criminal contempt proceeding. **Commonwealth v. Pruitt**, 764 A.2d 569, 574 (Pa. Super. 2000). When the court’s purpose is to vindicate the dignity and authority of the trial court, to protect the interest of the general public, and the sanction imposed is designed to punish the contemnor, then the citation is one for criminal contempt. **Commonwealth v. Charlett**, 391 A.2d 1296, 1298–99 (Pa. 1978). Indirect criminal contempt is a violation of a court order that occurred outside the court’s presence. **Commonwealth v. McMullen**, 961 A.2d 842, 849 (Pa. 2008). To prove indirect criminal contempt, evidence must be sufficient to establish: the court’s order was definite, clear, specific, and leaving no doubt in the person to whom it was addressed of the conduct prohibited; the contemnor had notice of the order; the act constituting the violation was volitional; and the contemnor acted with wrongful intent. **Commonwealth v. Baker**, 766 A.2d 328, 331 (Pa. 2001).

The procedural requirements, and the burden of proof, differ based on the type of contempt. Compare **In re Cullen**, 849 A.2d 1207, 1211 (Pa. Super. 2004) (explaining the elements of civil contempt) with **Commonwealth v. Baker**, 722 A.2d 718, 721 (Pa. Super. 1998) (*en banc*) (criminal contempt).

There is a right to counsel in all cases of criminal contempt, and a right to counsel in all cases of civil contempt where there is “a likelihood of imprisonment.” **Commonwealth v. Diaz**, 191 A.3d 850, 862 (Pa. Super. 2018) (civil contempt); **Commonwealth v. Ashton**, 824 A.2d 1198, 1203 (Pa. Super. 2003) (criminal contempt). The defendant must have a “timely opportunity to consult with counsel” prior to the hearing. **Commonwealth v. Mauk**, 185 A.3d 406, 412 (Pa. Super. 2018).

## Mandatory Restitution at Sentencing

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The Order for Restitution must be clear and definite. The court order that the defendant is alleged to have violated must be “definite, clear, and specific-leaving no doubt or uncertainty in the mind of the contemnor of the prohibited conduct.” *In re Cullen*, 849 A.2d 1207, 1210 (Pa. Super. 2004).

### Incarceration for Failure to Pay Restitution

The United States Supreme Court has made it clear that, “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because [s]he lacked the resources to pay it.” *Bearden v. Georgia*, 461 U.S. 660, 667-68 (1983). “Process is due in all costs-and-fines proceedings . . . [A] court may not constitutionally imprison someone for nonpayment of court costs and fines alone. Instead, it must be proved that the person has willfully refused to pay the fine or restitution when he has the means to pay ....” *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018).

## E. Payments During Incarceration

Both the Department of Corrections and county prisons automatically deduct restitution from an inmate’s account. Section 9728(b)(5) of the Sentencing Code was amended as of December 2019 to expand the scope of these inmate deductions.

### **(b) Procedure--**

\* \* \*

#### **(5) Deductions shall be as follows:**

(i) The **Department of Corrections** shall make monetary deductions of **at least 25%** of deposits made to inmate wages and personal accounts for the purpose of collecting restitution, costs imposed under section 9721(c.1) [mandatory payment of costs], filing fees to be collected under section 6602(c) (relating to prisoner filing fees) and any other court-ordered obligation.

(ii) The **county correctional facility** to which the offender has been sentenced shall:

(A) Be authorized to make monetary deductions from inmate wages and personal accounts for the purpose of collecting restitution, costs imposed under section 9721(c.1), filing fees to be collected under section 6602(c) and any other court-ordered obligation or fees owed to the county jail or prison related to the inmate’s incarceration.

(B) Deduct an amount sufficient to satisfy any outstanding restitution, costs imposed under section 9721(c.1)[mandatory payment of costs], filing fees to be collected under section 6602(c) or other court-ordered obligations before releasing funds on deposit.

(iii) Any amount deducted under this paragraph shall be in addition to the full amount authorized to be collected pursuant to any order for support. Any amount deducted shall be transmitted to the probation department of the county or other agent designated by the county commissioners with the approval of the president judge of the county in which the offender was convicted.

(iv) The Department of Corrections and each county correctional facility shall develop guidelines relating to its responsibilities under this paragraph. The guidelines shall be incorporated into any contract entered into with a correctional facility.

42 Pa.C.S.A. § 9728 (emphasis added). Prior to the December 2019 amendments to Section 9728, the Department of Corrections and county correctional facilities were treated the same for purposes of making deductions and transmitting amounts under this subsection. As amended, the legislature now has seen fit to require that the Department

✓ JUDICIAL POLICY: Deductions from an inmate's wages and personal accounts must be at least 25% for restitution.

of Corrections deduct at least 25% of an inmate's wages and personal accounts for purposes of the amounts owed, and with respect to county correctional facilities, to

authorize monetary deductions to fully satisfy any amounts owed in addition to any to be collected for support. In addition, section 9728(g.1) provides that *no less* than 50% of all monies collected by a county probation department or other agency shall be used to pay restitution to victims until satisfaction of the defendant's restitution obligation, although a sentencing court can specify a higher amount if it wishes to prioritize payments of restitution. 42 Pa.C.S.A. § 9728(g.1).

Deductions by the Department of Corrections from a prison inmate's account to

✓ JUDICIAL POLICY: Deductions from an inmate's wages and personal accounts do not require a separate hearing.

pay fines, costs or restitution are lawful pursuant to statute and do not require prior proof of an inmate's ability to pay, and do not require any additional hearing beyond

that which occurred at the original sentencing proceeding. *Buck v. Beard*, 879 A.2d 157 (Pa. 2005), *George v. Beard*, 824 A.2d 393 (Pa. Cmwlth. 2003), *aff'd per curiam*, 831 A.2d 597 (Pa. 2003).

### F. Relevance of a Jury's Verdict

A jury's decisions in setting the amount of restitution sometimes plays a role in the

## Mandatory Restitution at Sentencing

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sentencing court's determination of full restitution. When a victim suffers a loss directly resulting from a defendant's crime, the Sentencing Code provides that a court shall order full restitution to a victim, regardless of the current financial resources of a defendant so as to provide a victim with the fullest compensation for a loss. 18 Pa.C.S.A. § 1106(c).

"A sentence imposing restitution is not an award of damages.... Restitution for injuries to a person or property is authorized by statute 'in addition to the punishment prescribed' for the crime at issue." *Commonwealth v. Wright*, 722 A.2d 157 (Pa. Super. 1998).

- Therefore, it was held in *Wright* that an order of restitution, supported by the record, for property damage resulting directly from a defendant's criminal conduct in the amount of \$20,745.82, was not an abuse of the court's discretion, even though the misdemeanor crimes for which the defendant was convicted only required that the jury determine the loss to be more than \$1,000.00, but less than \$5,000.00. Once a defendant has been convicted of a crime resulting in a direct loss to a victim, a restitution award is to be made without consideration of the underlying conviction, since the purpose of restitution is to make the victim whole.
- In *Wright*, the victim suffered damages to crops and two pieces of farm equipment as a direct result of the criminal conduct. However, at the time of trial, only one of the pieces of farm equipment had estimates and repair bills available for evidence. Accordingly, the jury only had before it the loss of the single piece of farm equipment. After the defendant's conviction, and at the time of sentencing, the prosecution presented evidence of the repair costs of the other piece of equipment. Therefore, because the victim had now provided, and the Commonwealth moved into evidence, the total damages for both pieces of equipment, the trial court ordered restitution in this total amount. The Superior Court affirmed, holding that although the jury had made a determination for grading purposes, the sentencing court could award restitution beyond that amount because the record, at the time of sentencing, supported the order.
- *Wright* was distinguished in *Commonwealth v. Poplawski*, 158 A.3d 671 (Pa. Super. 2017). In *Poplawski*, the jury had all of the necessary evidence before it at the time of trial. Therefore, the sentencing court was bound to honor the jury's determination. "Absent circumstances such as those in *Wright*, the court may not go beyond the jury's verdict in fashioning its restitution award." *Poplawski*, 158 A.3d at 675.

### G. Civil Remedies and Discharge

#### Discharge of Restitution Order

## Mandatory Restitution at Sentencing

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In *Commonwealth v. Holmes*, 155 A.3d 69 (Pa. Super. 2018), the Superior Court had occasion to discuss the difference in discharge between an order of restitution under Section 1106(a) and an order providing for restitution as a condition of probation under Section 9754. As explained, an order of restitution for losses resulting directly from a defendant's criminal conduct under Section 1106(a) is not discharged until paid in full, whereas any unpaid restitution ordered as a condition of probation is discharged upon completion of probation. The Court stated

When a victim suffers injury to person or property, a sentencing court is mandated under Section 1106(a) to enter an order of restitution. Restitution under Section 1106(a), as part of a sentence, is penal in character and is imposed for losses for which a defendant has been held criminally accountable. *Harner*, 617 A.2d at 706. When restitution is issued under Section 1106(a), a sentencing court is obligated to order full restitution regardless of the current financial resources of a defendant. 18 Pa.C.S.A. § 1106(c)(1)(i). Once an order of restitution has been made as part of a defendant's sentence under Section 1106(a), it is enforceable until paid. 18 Pa.C.S.A. § 1106(c)(2)(ii); *Commonwealth v. Griffiths*, 15 A.3d 73, 75 (Pa. Super. 2010).

In contrast, restitution may be ordered under Section 9754(c)(8) as a condition of probation. 42 Pa.C.S.A. § 9754(c)(8). When ordered as a condition of probation a court may order a defendant “[t]o make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.” *Id.* Unlike restitution under Section 1106(a) that serves a punitive purpose, restitution ordered as a condition of probation under Section 9754(c)(8) is primarily aimed at rehabilitating and integrating a defendant into society as a law-abiding citizen and is deemed a constructive alternative to imprisonment. *Harner*, 617 A.2d at 706; *Hall, supra*. Additionally, a sentencing court, when ordering restitution under Section 9754(c)(8), also must determine what amount of restitution a defendant can afford to pay, and how the restitution is to be paid. *Harner*, 617 A.2d at 707. Unlike restitution under Section 1106(a), the obligation to pay restitution under Section 9754(c)(8), as a condition of probation, expires upon the end of the term of probation, even if the amount of restitution ordered has not been paid in full. *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. 2010).

*Holmes*, 155 A.3d at 86.

### Civil Remedy Available to Victim

It must be remembered that orders of restitution are part of the criminal sentencing process. This is distinct from remedies which a victim may pursue civilly at law. A

## Mandatory Restitution at Sentencing

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judgment or order of restitution does not bar the victim, by way of appropriate civil action, to recover from the offender for property or personal injury damages, provided, however, that any civil award will be reduced by the amount paid under the criminal judgment.

**(g) Preservation of private remedies.**--No judgment or order of restitution shall debar the victim, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

18 Pa.C.S.A. § 1106(g).

### Victim's Insurance

A victim is entitled to restitution regardless of whether the victim has submitted an insurance claim or has been partially or fully reimbursed by the victim's insurer.

[A] defendant, as part of a sentencing scheme, can be directed to make restitution to a victim injured by the defendant's conduct, even though the victim has already been paid through a civil settlement or when the victim receives compensation from the victim's insurer for the loss sustained.

*Brethren Mut. Ins. Co. v. McKernan*, 961 A.2d 205, 209 n. 12 (Pa. Super. 2008).

### Defendant's Insurance

Pennsylvania courts have held that Pennsylvania public policy prohibits insurance coverage for an order of restitution imposed pursuant to a criminal conviction. *McKernan*, 961 A.2d at 206; *Darwin Nat'l Assurance Co. v. Luzerne Cty. Transp. Auth.*, CV 3:14-2417, 2016 WL 1242283, at \*8 (M.D. Pa. Mar. 30, 2016). This does not bar the victim from commencing a civil action against the defendant due to property or personal injury damage.

## H. Payments from Victims Compensation Assistance Program

The following information is from the Pennsylvania Office of Victim's Services:

A victim of a crime may be entitled to receive compensation from the Pennsylvania Victims Compensation Assistance Program. A victim is eligible if:

- The crime occurred in Pennsylvania,
- The crime was reported to the proper authorities within 3 days or a Protection From Abuse order was filed within 3 days of the crime,

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- The victim cooperated with law enforcement authorities investigating the crime, the courts, and the Victims Compensation Assistance Program in processing the claim,
  - The claim is filed within 2 years after the discovery of the crime (there are exceptions when the victim is a child,
  - The victim has paid or owes at least \$100 of any combination of the expenses listed below. If the victim is age 60 or over, there is no minimum loss requirement.
- |   |  |
|---|--|
| • Medical Expenses<br>• Counseling Expenses<br>• Loss of Earnings<br>• Loss of Support<br>• Funeral Expenses<br>• Stolen Cash (restricted to certain types of income) | • Transportation Expenses<br>• Childcare<br>• Home Healthcare Expenses<br>• Relocation Expenses<br>• Crime-Scene Cleanup |
|---|--|

The program does not cover (1) pain and suffering, and (2) stolen or damaged property (except replacement of stolen or damaged medical equipment).

The website to file a form is [www.dave.state.pa.us/daveprod](http://www.dave.state.pa.us/daveprod).

## VII. STANDARD OF REVIEW UPON APPEAL

A challenge to the trial court's imposition of restitution falls into one of two categories: a legality challenge or a discretionary challenge. The appellate courts have drawn a distinction between those cases where the challenge is directed to the trial court's **authority to impose restitution** (legal challenge) and those cases where the challenge is premised upon a claim that **the restitution order is excessive** (challenge to discretionary aspects of sentence).

**Legality Challenge of Restitution Order** – challenge directed to the trial court's statutory authority to impose restitution, - considered a challenge to the legality of the sentence.

A challenge to a court's authority to impose restitution is generally considered to be a challenge to the legality of the sentence. *Commonwealth v. Gentry*, 101 A.3d 813 (Pa. Super. 2014). These challengers include when there is an appeal on the basis that the restitution order is unsupported by the record, or inapplicable to a certain crime. It is well-settled that “[i]f no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction.” *Commonwealth v. Rivera*, 95 A.3d 913, 915 (Pa. Super. 2014) (citation omitted).

In a recent decision, the Pennsylvania Supreme Court fully explained the differences in an appeal involving restitution and the challenge to a sentence which sounds in legality

## Mandatory Restitution at Sentencing

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or the discretionary aspects of the sentence and the issue preservation implications of those determinations. In **Commonwealth v. Weir**, --- A.3d ---, 2020 WL 5822534 (Pa. Oct. 1, 2020), the Supreme Court stated, in reference to a legality challenge:

In the context of issue preservation principles, Section 1106 requires an integrated analysis of its relevant provisions. Section 1106(a) is mandatory in its directive and removes any discretion from the sentencing court to impose restitution as punishment upon conviction of a crime under two circumstances: where the property of a victim has been stolen, converted or otherwise unlawfully obtained or its value has been substantially decreased as a direct consequence of the crime, 18 Pa.C.S.A. § 1106(a)(1), or where the victim, if an individual, suffered personal injury resulting from the crime, 18 Pa.C.S.A. § 1106(a)(2). Thus, the failure of a trial court to impose restitution where the circumstances described in Section 1106(a)(1) or (2) are established results in an illegal sentence. Conversely, and as relevant to a defendant's challenge, if the statutory circumstances are not established and the sentencing court orders restitution, the challenge to the sentence implicates its legality. In either of these sentencing scenarios, a challenge to the sentence of restitution need not be preserved.

**Commonwealth v. Weir**, 2020 WL 5822534 at \*10.

"An illegal sentence must be vacated." **Commonwealth v. Gentry**, 101 A.3d 813, 817 (Pa. Super. 2014). Issues relating to the legality of a sentence are questions of law; as a result, the appellate standard of review over such questions is *de novo* and the appellate scope of review is plenary. See **Commonwealth v. Golson**, 189 A.3d 994, 1000 (Pa. Super. 2018).

Challenges to the legality of a sentence are non-waivable. **Commonwealth v. Wolfe**, 140 A.3d 651, 660 (Pa. 2016). Generally, an appellant cannot raise new legal theories for the first time on appeal. Pa.R.A.P. 302(a); **Commonwealth v. Truong**, 36 A.3d 592, 598 (Pa. Super. 2012) (*en banc*). If an appellant's claim presents a challenge to the legality of his sentence, it is not waived, even though raised it for the first time on appeal or in the appellate brief. **Commonwealth v. Barnes**, 151 A.3d 121, 122 (Pa. 2016); **Commonwealth v. Golson**, 189 A.3d 994, 1000 (Pa. Super. 2018).

As to a challenge to the discretionary aspects of a sentence which includes a restitution order, the Supreme Court stated:

Moreover, the discretionary nature of the amount of restitution is established in Section 1106(c)(2), which sets forth the factors to be considered by the sentencing court in fashioning an award of restitution: "... the court shall consider the extent of injury suffered

by the victim, the victim's request for restitution as presented to the district attorney ... and such other matters as it deems appropriate."

18 Pa.C.S. § 1106(c)(2)(i). This language, placing the determination of the amount of restitution under the sentencing court's consideration based on the stated factors and "other matters it deems appropriate," is the clearest possible indication of the General Assembly's recognition that fashioning the restitution order remained in the exercise of the sentencing court's discretion. [An appellant's] discontent with the amount of restitution and the evidence supporting it is a challenge to the sentencing court's exercise of discretion, not to the legality of the sentence. To access review of his challenge by the Superior Court, [an appellant is] required to file a Pa.R.A.P 2119(f) statement in his appellate brief.

*Commonwealth v. Weir*, 2020 WL 5822534 at \*11.

**Discretionary Appeal from Restitution Order** – challenge directed at the amount of the restitution order under the circumstances presented to the trial court - considered a challenge to the discretionary aspects of the sentence

If the challenge is based on excessiveness, it concerns the discretionary aspects of the sentence. *Commonwealth v. Oree*, 911 A.2d 169 (Pa. Super. 2006).

[T]he appellate courts have drawn a distinction between those cases where the challenge is directed to the trial court's authority to impose restitution and those cases where the challenge is premised upon a claim that the restitution order is excessive. When the court's authority to impose restitution is challenged, it concerns the legality of the sentence; however, when the challenge is based on excessiveness, it concerns the discretionary aspects of the sentence.

*Id.* at 173. "[C]hallenges alleging that a sentence of restitution is excessive under the circumstances have been held by this [C]ourt to be challenges to the discretionary aspects of sentencing." *Commonwealth v. Walker*, 666 A.2d 301, 307 (Pa. Super. 1995).

An appellant challenging the discretionary aspects of his sentence must invoke appellate jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine:

(1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903;

(2) whether the issue was properly preserved at sentencing or in a

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motion to reconsider and modify sentence, see Pa.R.Crim.P. [720];  
(3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and  
(4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

***Commonwealth v. Moury***, 992 A.2d 62, 170 (Pa. Super. 2010).

The standard of review in an appeal from the discretionary aspects of a sentence is well settled:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

***Commonwealth Antidormi***, 84 A.3d 736, 760 (Pa. Super. 2014)(citation omitted).

*Chapter Three*

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## ***Chapter Three***

### ***Restitution as a Condition of Probation***

#### **I. GENERALLY**

##### **A. Introductory Note**

Effective December 18, 2019, the Pennsylvania legislature amended Title 42. Among other things, the amendments eliminated state and county intermediate punishments as sentencing alternatives and renumbered the section titled “conditions of probation” from 42 Pa.C.S.A. § 9754 to 42 Pa.C.S.A. § 9763. For ease of understanding and for faster reference, within this chapter, we have changed all instances of the prior statutory numbering to the current numbering.

##### **B. Introductory Warning**

In cases where there exists a statutorily defined “victim” who, as a result of the crime, suffers damage or injury to their person or property, the sentencing court is mandated to order restitution under 18 Pa.C.S.A. § 1106 and/or 42 Pa.C.S.A. § 9721(c) – regardless of whether the court also sentences the defendant to a term of probation. *See* 18 Pa.C.S.A. § 1106(a) (providing for mandatory restitution “[u]pon conviction for **any crime** wherein” the stated conditions are met) (emphasis added); 42 Pa.C.S.A. § 9721(c) (providing for mandatory restitution “[i]n addition to the [sentencing] alternatives set forth in subsection (a),” which include a sentence of probation) (emphasis added). Full discussion regarding the mandatory restitution provisions of the Crimes Code and the Sentencing Code is beyond the scope of this chapter. We direct the sentencing court to review those sections, as well as Chapter Two of this book, case law interpreting those sections, and 18 P.S. § 11.103 (defining the term “victim” for purposes of 42 Pa.C.S.A. § 9721(c) and defining, in part, the term “victim” for purposes of 18 Pa.C.S.A. § 1106), for consideration as to whether those statutes are applicable to the facts of the case.

Relatedly, we note that, in *Commonwealth v. Holmes*, 155 A.3d 69 (Pa. Super. 2017) (*en banc*), an *en banc* panel of the Superior Court held that a trial court may not characterize a single restitution order as both a direct sentence under 18 Pa.C.S.A. § 1106 and a condition of probation under 42 Pa.C.S.A. § 9763(b)(10). *Holmes* held that, if restitution is mandatory under 18 Pa.C.S.A. § 1106, it must be imposed under that section – and not under 42 Pa.C.S.A. § 9763(b)(10). *Commonwealth v. Holmes*, 155 A.3d 69, 87 (Pa. Super. 2017) (*en banc*) (opinion in support of affirmance) (“It would be impermissible for this Court to interpret Sections 1106(a) and [9763(b)(10)] in a manner that would create conflicts between these two statutory provisions. . . . Simply

## **Restitution as a Condition of Probation**

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put, if restitution must be ordered as part of a sentence under Section 1106(a), it cannot at the same time also be ordered merely as a condition under Section [9763(b)(10)]"); **Commonwealth v. Holmes**, 155 A.3d 69, 87 (Pa. Super. 2017) (*en banc*) (opinion in support of reversal) (agreeing that "the trial court erred to the extent it ordered restitution as a condition of [the defendant's] probation under Section [9763(b)(10)] . . . [because] restitution cannot be imposed as both a condition of probation and as part of a defendant's sentence under Section 1106(a) of the Crimes Code").

### **C. Restitution-Creature of Statute**

"[A]n order of restitution must be based upon statutory authority. In the context of a criminal case, restitution may be imposed either as a direct sentence, 18 Pa.C.S.A. § 1106(a), or as a condition of probation, 42 Pa.C.S.A. § [9763]." **In re M.W.**, 725 A.2d 729, 731-732 (Pa. 1999) (some citations omitted). Also, in a juvenile proceeding, there is statutory authority for a court to order restitution as part of an order of disposition. See 42 Pa.C.S.A. § 6352.

#### **a. Restitution as Condition of Probation: 42 Pa.C.S.A. § 9763**

In relevant part, 42 Pa.C.S.A. § 9763 provides:

##### **§ 9763. Conditions of probation**

**(a) General rule.**--In imposing probation, the court shall consider guidelines adopted by the Pennsylvania Commission on Sentencing under section 2154 (relating to adoption of guidelines for sentencing) or 2154.1 (relating to adoption of guidelines for restrictive conditions) and specify at the time of sentencing the conditions of probation, including the length of the term of restrictive conditions under subsection (c) or (d). The term of restrictive conditions under subsection (c) shall be equal to or greater than the mandatory minimum term of imprisonment required by statute.

**(b) Conditions generally.**--The court may attach any of the following conditions upon the defendant as it deems necessary:

...

(10) To make restitution of the fruits of the crime or to make reparations, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.

...

## Restitution as a Condition of Probation

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(15) To do other things reasonably related to rehabilitation.

...

42 Pa.C.S.A. § 9763.<sup>1</sup>

### D. Definitions

In *Commonwealth v. Hall*, 80 A.3d 1204 (Pa. 2013), the Pennsylvania Supreme Court declared:

As described in [42 Pa.C.S.A. § 9763(b)(10)], monetary conditions of probation may be for the purpose of “restitution” or “to make reparations” for the loss or damage caused by the crime, but they must be limited to an amount the defendant “can afford to pay.” ... [T]he common dictionary definitions of the terms used in [42 Pa.C.S.A. § 9763(b)(10)] are somewhat general. “Restitution” has been defined as: “a giving back to the rightful owner of something that has been lost or taken away; restoration” and “a making good for loss or damage; reimbursement.” Webster’s New World Dictionary 1212 (2nd College ed. 1986). The legal definition of “restitution” is: “[c]ompensation of a loss; esp., full or partial compensation paid by a criminal to a victim, . . . ordered as part of a criminal sentence or as a condition of probation.” Black’s Law Dictionary 1339 (8th ed. 2004). [The Pennsylvania Supreme Court] has explained that restitution “refers to compensation required for the wrongful appropriation of money or property.” *Commonwealth v. Walton*, 397 A.2d 1179, 1183 n.10 (Pa. 1979)].

Likewise, the ordinary dictionary definition of “reparations” describes “a making of amends; making up for a wrong or injury” and “compensation . . . for crimes committed against individuals; payable in money, labor, goods, etc.” Webster’s at 1204. The legal definition

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42 Pa.C.S.A. § 9754, entitled “Order of probation,” declares:

(a) **General rule.**--In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision. The court shall consider probation guidelines adopted by the Pennsylvania Commission on Sentencing under sections 2154 (relating to adoption of guidelines for sentencing) and 2154.1 (relating to adoption of guidelines for restrictive conditions).

(b) **Conditions generally.**--The court shall attach reasonable conditions authorized by section 9763 (relating to conditions of probation) as it deems necessary to ensure or assist the defendant in leading a law-abiding life.

...

42 Pa.C.S.A. § 9754.

## Restitution as a Condition of Probation

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of “reparations” describes “[t]he act of making amends for a wrong” and “[c]ompensation for an injury or wrong.” Black’s at 1325. These definitions convey a certain retrospection: the payment involved in restitution and reparations is to remedy a harm already inflicted upon a victim. *See Walton*, 397 A.2d at 1183 n.10, 1185 (“reparation” refers to compensation paid to victim who suffered physical injury as result of crime; sentencing court properly ordered defendant convicted of aggravated assault in shooting incident to pay blinded victim twenty-five dollars per week as condition of probation).

*Commonwealth v. Hall*, 80 A.3d 1204, 1212-1213 (Pa. 2013).

### E. Purposes Served

Criminal sentencing essentially serves one or more of the following four purposes: “(1) deterrence, (2) incapacitation, (3) rehabilitation, [and] (4) retribution.” Arthur W. Campbell, *LAW OF SENTENCING* § 2.1. The primary purpose of any order of restitution (whether imposed as a direct sentence under 18 Pa.C.S.A. § 1106, as a condition of probation under 42 Pa.C.S.A. § 9763, or as an order of disposition of a delinquent child under 42 Pa.C.S.A. § 6352) is rehabilitation. *See Commonwealth v. Veon*, 150 A.3d 435, 451 (Pa. 2016) (in considering the mandatory restitution statute of 18 Pa.C.S.A. § 1106(c), the Supreme Court held: “the primary purpose of restitution is rehabilitation of the offender. Consequently, recompense to the victim is only a secondary benefit, as restitution is not an award of damages, a proposition reinforced by the General Assembly’s 1998 amendment of Section 1106 making restitution mandatory rather than discretionary”) (quotations and some citations omitted); *Commonwealth v. Petrick*, 217 A.3d 1217, 1225 1226 (Pa. 2019) (same)<sup>2</sup>; 42 Pa.C.S.A. § 6352(a)(5) (authorizing the juvenile court to order “payment by the child of reasonable amounts of money as fines, costs, fees or restitution as deemed appropriate as part of the plan of rehabilitation”). The Pennsylvania Supreme Court explained:

generally speaking, restitution is the requirement that the criminal offender repay, as a condition of his sentence, the victim or society, in money or services. It is well established that the primary purpose of restitution is rehabilitation of the offender by impressing upon him or her that his [or her] criminal conduct caused the victim’s loss or personal injury and that it is his [or her] responsibility to repair the loss or injury as far as possible. Thus, recompense to the victim is only a secondary benefit, as restitution is not an award of damages. Although restitution

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<sup>2</sup> In earlier cases, the Pennsylvania Supreme Court stated that, when imposed as a direct sentence under 18 Pa.C.S.A. § 1106, restitution serves a “primarily punitive” purpose. *See Commonwealth v. Harner*, 617 A.2d 702, 704 (Pa. 1992) (“where restitution is imposed in addition to a statutory punishment, such as imprisonment, the order must be strictly scrutinized since its purpose is primarily punitive”); *Commonwealth v. Walton*, 397 A.2d 1179, 1184 (Pa. 1979) (same). The Pennsylvania Supreme Court has, *sub silentio*, retreated from this statement in recent years and now holds that the “primary purpose of restitution is rehabilitation of the offender.” *Commonwealth v. Brown*, 981 A.2d 893, 895-896 (Pa. 2009); *Veon*, 150 A.3d at 451; *Petrick*, 217 A.3d at 1225 1226.

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is penal in nature, it is highly favored in the law and encouraged so that the criminal will understand the egregiousness of his or her conduct, be deterred from repeating the conduct, and be encouraged to live in a responsible way. Thus, restitution, at its core, involves concepts of rehabilitation and deterrence.

***Commonwealth v. Brown***, 981 A.2d 893, 895-896 (Pa. 2009) (citations and footnotes omitted).

As tailored specifically toward the subject of this chapter, in ***Commonwealth v. Harner***, 617 A.2d 702 (Pa. 1992), the Pennsylvania Supreme Court held that, when imposed as a condition of probation, restitution is “primarily aimed at rehabilitating and reintegrating a law breaker into society as a law-abiding citizen.” ***Commonwealth v. Harner***, 617 A.2d 702, 706 (Pa. 1992). As secondary purposes, restitution ordered as a condition of probation serves to “deter [the defendant] from repeating [his or her] conduct” and “provide some measure of redress to the victim.” *Id.* at 707; ***In re M.W.***, 725 A.2d 729, 732 (Pa. 1999).

### F. Criminal Sanction

The Pennsylvania Superior Court explained:

Whether imposed as a direct sentence or as a condition thereof (e.g., condition of probation), the primary purpose of restitution is the rehabilitation of the offender. It is true that restitution helps the victim, but this fact is secondary to the reality that restitution is an aspect of sentencing imposed by a court on an offender in order to facilitate the administration of criminal justice.

Various characteristics of restitution further illustrate that its true nature is that of a criminal sanction. For example, while a crime victim certainly may ask the district attorney to seek restitution, it is the district attorney who has the authority to present that request to the court. Moreover, an order of restitution does not create a creditor-debtor relationship between the victim and the offender. Unlike a civil judgment, the victim has no standing to enforce a restitution order. Instead, restitution can only be enforced by the criminal court, just as penalties of incarceration or probation are within the court’s exclusive purview. . . . In the end, restitution is simply not an award of damages but, rather, a sentence.

***Commonwealth v. Pledger***, 934 A.2d 715, 720 (Pa. Super. 2007) (citations omitted).

### G. Construction and Interpretation

“[P]rovisions for payment of monetary sums as the result of criminal convictions are penal in nature.” *Commonwealth v. Hall*, 80 A.3d 1204, 1212 (Pa. 2013); see also *Commonwealth v. Melvin*, 103 A.3d 1, 54 (Pa. Super. 2014) (holding that the catchall provision of the (now-repealed) county intermediate punishment statute was penal). Thus, the restitution provision of 42 Pa.C.S.A. § 9763 (restitution as a condition of probation) is penal.

“The Statutory Construction Act requires penal provisions of statutes to be strictly construed, 1 Pa.C.S.A. § 1928(b)(1), and thus such language should be interpreted in the light most favorable to the accused.” *Commonwealth v. Melvin*, 103 A.3d 1, 54 (Pa. Super. 2014) (quotations omitted); *see also Commonwealth v. Hall*, 80 A.3d 1204, 1212 (Pa. 2013) (“as a penal statute, Section 97[63] must be interpreted in the light most favorable to [the defendant]”); *Commonwealth v. Rivera*, 95 A.3d 913, 915 (Pa. Super. 2014) (“[s]ince section 97[63] is a penal statute, we must strictly construe this provision and interpret any ambiguity in the light most favorable to the criminal defendant”).

### H. Restitution Encouraged

The Pennsylvania Supreme Court has stated:

the practice of ordering restitution or reparation as [] a condition [of probation] is widely established and highly favored in the law, as an aid both to the criminal in achieving rehabilitation and to his victim in obtaining some measure of redress.

Such sentences are encouraged and give the trial court the flexibility to determine all the direct and indirect damages caused by a defendant and then permit the court to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way.

*Commonwealth v. Harner*, 617 A.2d 702, 706-707 (Pa. 1992) (citations omitted).

### I. Restitution Not Affected by Bankruptcy

A restitution order imposed in a criminal proceeding is not dischargeable in a liquidation or “straight bankruptcy” proceeding under Chapter 7 of the Bankruptcy Code. As the United States Supreme Court held in *Kelly v. Robinson*: “[11 U.S.C.] § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.” *Kelly v. Robinson*, 479 U.S. 36, 50 (1986).

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In *Commonwealth v. Petrick*, the Pennsylvania Supreme Court specifically held: “[h]aving determined that the basis for restitution orders in Pennsylvania remains focused on the rehabilitative needs of defendants, we conclude the holding of the United States Supreme Court in *Kelly* applies.” *Commonwealth v. Petrick*, 217 A.3d 1217, 1226 (Pa. 2019). Thus, even in the context of mandatory restitution ordered under 18 Pa.C.S.A. § 1106, the Pennsylvania Supreme Court held:

Because the mandatory restitution order serves criminal justice goals, restitution orders remain distinct from civil debt liability with respect to discharge in bankruptcy. This distinction is unaffected by the temporal relationship between the proceedings in the bankruptcy court and the criminal prosecution. Additionally, it is unaffected by a creditor’s participation in the bankruptcy proceedings.

*Id.*

Further, the automatic stay provision of the Bankruptcy Code does not apply to restitution. Because the collection of restitution is a continuation of a criminal action, a state court may proceed with a criminal prosecution without violating the automatic stay provisions of bankruptcy law:

The plain language of § 362(b)(1) exempts the “commencement or continuation of a criminal action or proceeding against the debtor” from the automatic stay afforded by § 362(a).

*United States v. Colasuonno*, 697 F.3d 164, 173 (2d Cir. 2012).

## J. Differences between Restitution Imposed as a Direct Sentence and Condition of Probation

“An order of restitution is a sentence, whether it is imposed as a direct sentence or as a condition of probation.” *Commonwealth v. Griffiths*, 15 A.3d 73, 77 (Pa. Super. 2010); *see also Commonwealth v. Hall*, 80 A.3d 1204, 1211 (Pa. 2013) (“questions implicating the trial court’s power to impose restitution concern the legality of the sentence”). Nevertheless, there are important differences between restitution imposed as a direct sentence (under 18 Pa.C.S.A. § 1106) and as a condition of probation (under 42 Pa.C.S.A. § 9763). These differences include:

### 1. Mandatory vs. Discretionary

In terms of restitution imposed as a direct sentence, 18 Pa.C.S.A. § 1106 provides that the sentencing court must order the defendant to make full restitution when the defendant has been convicted of any crime where, as a direct result of the crime, the

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victim suffers injury to their property or person. *See* 18 Pa.C.S.A. § 1106(a). On the other hand, “the courts are traditionally and properly vested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case,” including ordering restitution as a condition of probation under 42 Pa.C.S.A. § 9763. *Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992). Simply stated, 42 Pa.C.S.A. § 9763 provides the trial court with discretion as to whether to order the defendant to pay restitution as a condition of probation. *See, e.g.*, 42 Pa.C.S.A. § 9754(b) (“[t]he court shall attach reasonable conditions authorized by section 9763 (relating to conditions of probation) **as it deems necessary** to ensure or assist the defendant in leading a law-abiding life”) (emphasis added); 42 Pa.C.S.A. § 9763(b)(10) (“[t]he court **may** attach any of the following conditions upon the defendant as it deems necessary: . . . [t]o make restitution of the fruits of the crime or to make reparations, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime”) (emphasis added); *see also A. Scott Enters., Inc. v. City of Allentown*, 142 A.3d 779, 787 (Pa. 2016) (“[a]lthough ‘may’ can mean the same as ‘shall’ where a statute directs the doing of a thing for the sake of justice, it ordinarily is employed in the permissive sense”); *Commonwealth v. A.M. Byers Co.*, 31 A.2d 530, 532 (Pa. 1943) (“[t]he word ‘may’ clearly implies discretionary power. The language is permissive, rather than mandatory”). Nevertheless, “[t]he practice of ordering restitution or reparation as [] a condition [of probation] is widely established and highly favored in the law, as an aid both to the criminal in achieving rehabilitation and to his victim in obtaining some measure of redress.” *Commonwealth v. Walton*, 397 A.2d 1179, 1183 (Pa. 1979).

## **2. Persons Who May Be Subjects of Restitution**

Restitution under the Crimes Code, 18 Pa.C.S.A. § 1106, generally limits restitution to a statutorily defined “victim.” *See* 18 Pa.C.S.A. § 1106; *see also* 18 P.S. § 11.103. As our Supreme Court observed, “[n]othing in the plain language of Section 97[63] either specifies or limits the persons who may be proper subjects of restitution or reparation as a condition of probation.” *Commonwealth v. Hall*, 80 A.3d 1204, 1213 (Pa. 2013).

As an example, in *Commonwealth v. Wydo-Streit*, 2019 WL 3719529 (Pa. Super. 2019) (non-precedential decision),<sup>3</sup> the defendant stole approximately \$75,000.00 while she was the borough manager of Carmichaels Borough. She pleaded guilty to many counts of theft by unlawful taking or disposition. The trial court sentenced her to serve a term of imprisonment, followed by five years of probation and, as a condition of her probation, to pay Carmichaels Borough restitution in an amount of \$24,965.11, plus an additional \$15,430.00 for the costs the borough incurred in having an accounting firm conduct an audit. *Commonwealth v. Wydo Streit*, 2019 WL 3719529 (Pa. Super. 2019) (non precedential decision), at \*1.

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<sup>3</sup> *Wydo-Streit* was filed on August 7, 2019. As a non-precedential decision filed after May 1, 2019, *Wydo-Streit* may be cited for its persuasive value. Pa.R.A.P. 126(b).

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On appeal, the defendant claimed the trial court did not have authority to order her to pay restitution to Carmichaels Borough. Among other things, the defendant claimed that, in ***Commonwealth v. Veon***, 150 A.3d 435 (Pa. 2016), the Pennsylvania Supreme Court “concluded that, with some limited exceptions, only a human being may be considered a victim entitled to recover restitution under Section 1106.” ***Wydo Streit***, 2019 WL 3719529 at \*6. According to the defendant, since Carmichaels Borough was not a human being, the trial court could not order her to pay restitution to the borough. ***Id.*** The Superior Court concluded that the defendant’s claim was meritless.

As the Court initially noted, “pursuant to ***Veon*** and its progeny, a sentence directing [the defendant] to pay restitution to Carmichaels Borough under Section 1106 would [indeed] be illegal.” ***Id.*** However, in this case, the trial court imposed restitution as a condition of the defendant’s probation, under 42 Pa.C.S.A. § 9763(b)(10). The Superior Court held that, in contrast to 18 Pa.C.S.A. § 1106, 42 Pa.C.S.A. § 9763(b)(10) does not expressly limit the individuals or entities that may receive restitution as a condition of a defendant’s probation – and nothing prohibited the trial court from ordering that the defendant pay restitution to a municipality as a condition of her probation. Thus, the Superior Court held that the restitution order was proper. ***See id.*** at \*\*6-7.

### 3. Types of Crimes to Which the Statute is Applicable

The Pennsylvania Supreme Court held: “the very words of [18 Pa.C.S.A. § 1106 (mandatory restitution imposed as a direct sentence)] provide that [the statute] is applicable only upon conviction for a crime wherein property has been stolen, converted, unlawfully obtained or its value substantially decreased, or where the victim suffers personal injury directly resulting from a crime.” ***Commonwealth v. Harner***, 617 A.2d 702, 705 (Pa. 1992); ***see also*** 18 Pa.C.S.A. § 1106(a). For restitution imposed as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10), the statute has no explicit limitation on the types of crimes to which it is applicable. ***See*** 42 Pa.C.S.A. § 9763(b)(10) (“[t]he court may attach any of the following conditions upon the defendant as it deems necessary: . . . [t]o make restitution ***of the fruits of the crime or to make reparations***, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime”) (emphasis added).

### 4. Nexus Between the Damage and the Crime

In ***In re M.W.***, 725 A.2d 729 (Pa. 1999), the Pennsylvania Supreme Court explained:

In the context of a criminal case, restitution may be imposed either as a direct sentence, 18 Pa.C.S. § 1106(a), or as a condition of probation, 42 Pa.C.S. § 9763. When imposed as a sentence, the injury to property or person for which restitution is ordered must directly result from

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the crime.<sup>4</sup> *See* 18 Pa.C.S.A. § 1106(a). However, when restitution is ordered as a condition of probation, the sentencing court is accorded the latitude to fashion probationary conditions designed to rehabilitate the defendant and provide some measure of redress to the victim. As the Pennsylvania Supreme Court stated in [*Commonwealth v. Harner*]:

Such sentences [(of ordering restitution as a condition of probation)] are encouraged and give the trial court the flexibility to determine all the direct and indirect damages caused by a defendant and then permit the court to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way.

[*Commonwealth v. Harner*, 617 A.2d 702, 707 (Pa. 1992)].

Thus, the requirement of a nexus between the damage and the offense is relaxed where restitution is ordered as a condition of probation.

*In re M.W.*, 725 A.2d 729, 732 (Pa. 1999) (footnotes and some citations omitted); *see also Commonwealth v. Nuse*, 976 A.2d 1191, 1193 (Pa. Super. 2009) (“where restitution is imposed as a condition of probation, the required nexus is relaxed. While restitution cannot be indiscriminate, an indirect connection between the criminal activity and the loss is sufficient. Thus, even without direct causation, a court may properly impose restitution as a probationary condition if the court is satisfied that the restitution is designed to rehabilitate the defendant and to make some measure of reimbursement to the victim”) (quotations, citations, and corrections omitted).

Even under this relatively lax standard, the Pennsylvania Superior Court has stressed that, for restitution imposed as a condition of probation, “there must be at least an indirect connection between the criminal activity and the loss. Additionally, to the extent a sentence of probation is imposed to make restitution for losses caused

<sup>4</sup> The Pennsylvania Superior Court has explained direct causation under 18 Pa.C.S.A. § 1106:

when a victim suffers injury to person or property, a sentencing court is mandated under § 1106(a) to enter an order of restitution for the loss or damage directly resulting from the crime. 18 Pa.C.S. § 1106(a). . . .

Because of the statutory language “directly resulting from the crime,” restitution under § 1106(a) is proper only if there is a direct causal connection between the crime and the loss. [*Commonwealth v. Harner*, 617 A.2d 702, 706 (Pa. 1992)] (stating that § 1106(a) “is clear on its face and applies only for those crimes to property or person where there has been a loss that flows from the conduct which forms the basis of the crime for which a defendant is held criminally accountable”). Thus, the sentencing court is statutorily required to impose restitution under § 1106(a) when the Commonwealth has established that the defendant committed a crime, the victim suffered injury to person or property, and there exists a direct causal nexus between the crime of which defendant was convicted and the loss or damage suffered by the victim. *See* 18 Pa.C.S. § 1106(a); *see also Commonwealth v. Pappas*, 845 A.2d 829, 842 (Pa. Super. 2004) (holding that restitution under § 1106(a) may be imposed only for those crimes to property or person where the victim suffered a loss that flows from the conduct that forms the basis of the crime for which the defendant is held criminally accountable).

*Commonwealth v. Weir*, 201 A.3d 163, 170-171 (Pa. Super. 2018), appeal granted, 215 A.3d 966 (Pa. 2019).

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by the defendant's criminal conduct, there should be proof of the damages suffered." *Commonwealth v. Kinnan*, 71 A.3d 983, 987 (Pa. Super. 2013) (quotations and citations omitted). Where there is no proof of loss or damage, there can be no restitution. *Id.* at 987-988. Moreover, "[b]ecause restitution is a sentence, the amount ordered must be supported by the record; it may not be speculative or excessive." *Commonwealth v. Wright*, 722 A.2d 157, 159 (Pa. Super. 1998).

### a. Examples

#### ***Commonwealth v. Harner, 617 A.2d 702 (Pa. 1992)***

The defendant pleaded guilty to "two counts of interference with custody of children . . . after she took her son and daughter, without consultation, from their father's legal custody in Harrisburg, Pennsylvania, to the State of Louisiana." *Commonwealth v. Harner*, 617 A.2d 702, 703 (Pa. 1992). The trial court sentenced the defendant to serve 12 months of probation and to pay the father restitution for the amounts he expended for "private investigators, trying to locate his children, for legal fees, within Louisiana and Pennsylvania, and for expenses for trips to Louisiana." *Id.* The trial court did not specify whether the restitution was imposed as a direct sentence under 18 Pa.C.S.A. § 1106 or as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10).

The Supreme Court held that the restitution order was not permissible as a direct sentence under Section 1106. *Id.* at 706. However, the Supreme Court held that the order of restitution was permissible as a condition of probation. *Id.* at 707. The Supreme Court then vacated the judgment of sentence and remanded the case to the trial court, so that the trial court could determine "what loss or damage has been caused, [] what amount of restitution [the defendant] can afford to pay, and how it should be paid." *Id.* (footnote omitted).

#### ***Commonwealth v. Kelly, 836 A.2d 931 (Pa. Super. 2003)***

The defendant pleaded *nolo contendere* to three counts of receiving stolen property. The property consisted of two cell phones and a CD player that had been removed from inside of a truck; the person who originally stole the items had broken into and damaged the truck to steal the property. *Commonwealth v. Kelly*, 836 A.2d 931, 932 (Pa. Super. 2003). The trial court ordered the defendant to pay "restitution in the amount of \$2,269.80 as a condition of probation. Of that amount, \$1,938.41 represented the cost for repair to [the] truck and \$330.67 represented the value of the CD player." *Id.* at 933.

On appeal, the defendant claimed the trial court erred in ordering him to pay restitution for the damage to the truck, as his convictions were for receiving stolen property and "he was not criminally responsible for the damage to the truck." *Id.* The *Kelly* Court rejected this argument and held that the trial court properly ordered the

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defendant to pay this restitution, as a condition of his probation, for the indirect damage his criminal activity caused. The Superior Court reasoned:

We recognize that a restitution order as a condition of probation cannot be indiscriminate. It is true that the court in this case heard no testimony as to how [the defendant] obtained the CD player, and “assumed he paid 20 bucks on the street from some unknown guys.” However, the verdict means [the defendant] was convicted of buying the goods, and he either knew they were stolen or reasonably should have known they were stolen. We note that [the trial court] reasoned that “if those people aren’t out there buying stolen property, people aren’t breaking in.” In other words, [the defendant] provided a market for that person who is criminally responsible for the break-in and damage to the truck. While this would not be enough to be considered a “direct” result of the criminal activity, we do agree with [the trial court] that this can be considered “indirectly” connected to the criminal activity.

*Id.* at 934 (citations and corrections omitted).

### ***Commonwealth v. Popow, 844 A.2d 13 (Pa. Super. 2004)***

While holding a box-cutter knife, the defendant was involved in an altercation with numerous people, including the victim. During the altercation, the victim “suffered an injury to his right bicep, which required surgery.” *Commonwealth v. Popow*, 844 A.2d 13, 15 (Pa. Super. 2004).

The jury found the defendant guilty of simple assault (making a threat with a deadly weapon); however, the jury found the defendant not guilty on the charges of aggravated assault and simple assault, which were related to the stabbing of the victim. *Id.* The trial court sentenced the defendant to serve a term of probation and to pay the victim mandatory restitution, under 18 Pa.C.S.A. § 1106, in the amount of \$12,212.17, for the injuries the victim sustained to his arm. *Id.*

The defendant appealed his judgment of sentence to the Superior Court and, among other things, argued that “the trial court illegally imposed restitution for [the victim’s] injuries, since [the defendant] was acquitted of aggravated assault and simple assault for stabbing [the victim].” *Id.* at 16. The Superior Court agreed with the defendant.

The Superior Court initially held that, under the plain language of the trial court’s sentencing order, the trial court imposed the restitution as a direct sentence, under 18 Pa.C.S.A. § 1106, and not as a condition of probation. *Id.* at 19. The *Popow* Court held that, because the restitution was imposed as a direct sentence, there needed to be a direct causal connection between the crime for which the defendant was convicted and

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the loss or damage sustained by the victim. *See id.* In *Popow*, however, the defendant was acquitted on the charges related to the stabbing of the victim – and he was only convicted of simple assault for making a threat with a deadly weapon. Therefore, the *Popow* Court held that the restitution order was illegal because the victim’s “injuries were not directly caused by the simple assault, since that conviction was for threatening conduct and placing others in fear.” *Id.*

Nevertheless, the *Popow* Court held that the trial court had authority to impose restitution as a condition of the defendant’s probation, pursuant to 42 Pa.C.S.A. § 9763. The Court reasoned:

following the acquittal on the assault charges with respect [to the stabbing of the victim], the jury finding indicates that [the defendant] was not directly responsible for the injuries to [the victim]. However, [the defendant] could be held to be indirectly responsible for them. It is not certain from the jury’s verdict whether [the victim] was cut accidentally during the scuffle, or whether he was stabbed in self-defense because he was choking [the defendant]. In either event, the illegal actions of [the defendant] triggered the entire event and therefore he is indirectly responsible for the injuries.

*Id.* at 18-19.

The Superior Court vacated the defendant’s illegal sentence and remanded the case “for resentencing in accordance with this decision.” *Id.* at 20.

### ***Commonwealth v. Harriott, 919 A.2d 234 (Pa. Super. 2007)***

The defendant was convicted of crimes including resisting arrest and DUI. She also spit on the arresting officers and, as a result, the officers underwent precautionary blood tests. The trial court sentenced the defendant to a probationary term for the resisting arrest conviction and to county intermediate punishment for the DUI conviction. Further, “[a]s part of [the defendant’s] DUI penalty, she was ordered to make restitution to . . . the insurance company that paid for the blood tests performed on the arresting officers.” *Commonwealth v. Harriott, 919 A.2d 234, 236-237 (Pa. Super. 2007).*

On appeal, the defendant claimed the trial court erred in ordering that she pay restitution because she was acquitted of simple assault and, according to the defendant, “even if the police did suffer some injury from the spitting, it did not result from the crimes for which she was convicted.” *Id.* at 237. The Superior Court rejected this claim.

At the outset, the Superior Court ruled that, under the plain terms of the sentencing order, the trial court imposed the restitution for the DUI conviction – not the resisting arrest conviction. As a result, the Superior Court held that the restitution order could not

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be justified as a direct sentence under 18 Pa.C.S.A. § 1106 or as a condition of probation under 42 Pa.C.S.A. § 9763. The Superior Court explained:

While driving, [the defendant] did not wreck into another vehicle, collide with property, strike a pedestrian or injure anyone. In fact, the restitution had nothing to do with any such matters. [The defendant's] drunk driving did not directly cause the officers to require precautionary blood testing. Therefore, the direct nexus required by § 1106(a) is lacking, and the statute does not authorize, as part of the DUI sentence, restitution for the blood tests in this case.

Second, [the defendant] was not placed on probation for DUI. Therefore, we cannot affirm the restitution as a condition of probation under 42 Pa.C.S.A. § [9763(b)(10)].

*Id.* at 240.

However, the **Harriott** Court held that the restitution order was permissible as a condition of (the now-repealed) county intermediate punishment restitution provision. The Superior Court held:

[The defendant] was . . . ordered to serve intermediate punishment as part of the DUI sentence. While the act of spitting was plainly not the same as drunk driving, it certainly was a part of [the defendant's] overall conduct which stemmed from her DUI. We believe that there is an undeniable, albeit indirect, link connecting [the defendant's] drunk driving, her presence at the hospital for DUI blood alcohol testing, her act of spitting on officers who arrested her for DUI, and their need for precautionary blood testing. Restitution will serve the purposes of helping to teach [the defendant] the egregiousness of her conduct, to deter her from re-offending, and to encourage her to live responsibly. The restitution also will provide reimbursement to the insurance company. The insurance company is properly considered to be a victim for restitution purposes. [*Commonwealth v. Colon*, 708 A.2d 1279, 1281 (Pa. Super. 1998)] (finding that restitution to insurer was a proper condition of intermediate punishment imposed for DUI conviction). Based on the foregoing analysis, we find that the restitution is supportable as a condition of [county intermediate punishment].

*Id.* The **Harriott** Court affirmed the defendant's judgment of sentence. *Id.* at 241.

***Commonwealth v. Nuse*, 976 A.2d 1191 (Pa. Super. 2009)**

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The Superior Court summarized the underlying facts:

[The defendant] was driving a car belonging to her purported common law husband when it collided with the vehicle in front of her, which was owned and operated by [the victim]. [The victim's] vehicle struck the vehicle in front of him. [The victim] was injured and his vehicle "totaled." [The defendant], who was driving with a suspended license, told [the victim] to pull over to exchange information, but when he did, [the defendant] fled. [The victim] had no collision coverage. Because [the defendant] was driving while her license was suspended, her insurance company refused to indemnify [the victim's] loss.

*Commonwealth v. Nuse*, 976 A.2d 1191, 1192 (Pa. Super. 2009).

The defendant pleaded guilty to "accidents involving damage to an attended vehicle or property" and "driving while operating privilege is suspended or revoked." At sentencing, the trial court ordered the defendant "to pay restitution to [the victim] in the amount of \$5,224.69, his property loss, as a condition of probation." *Id.*

The defendant appealed and claimed that the restitution order was erroneous because "the loss resulted from the accident, not from her criminal act of leaving the scene of an accident involving damage to the attended vehicle." *Id.* The *Nuse* Court found the claim meritless and held that the restitution order was permissible as a condition of the defendant's probation:

The connection between [the defendant's] criminal conduct and the loss suffered by the victim is even stronger than in either *Commonwealth v. Kelly*, 836 A.2d 931 (Pa. Super. 2003) or *Commonwealth v. Harriott*, 919 A.2d 234 (Pa. Super. 2007)]. Burglary is not an element of the crime of receiving stolen property. *See* 18 Pa.C.S.A. § 3925. Spitting on an officer is not an element of a DUI offense. Yet, this Court concluded that there was still a sufficient indirect connection between the damage and the criminal conduct in both *Kelly*[] and *Harriott*[] . Here, it is uncontested that defendant struck the victim's vehicle causing damage, and then left the scene of the accident. Causing damage to an attended vehicle is a pre-requisite element of the crime to which defendant pleaded guilty, creating a more direct connection between the damage and the criminal conduct than in either of the aforementioned cases. Furthermore, [the victim's] vehicle would not have been damaged if [the defendant] had not been driving, as she should not have been given the suspension of her license, the companion offense to which she pleaded guilty. The facts of record support a finding of at least an indirect connection between the damage and the commission of either crime.

*Nuse*, 976 A.2d at 1194.

### b. Where There Is No Proof of Loss or Damage

#### ***Commonwealth v. Kinnan*, 71 A.3d 983 (Pa. Super. 2013)**

The defendant was seen stealing a large quantity of metal from his employer. The police investigated and recovered all of the metal the defendant stole; further, “there [wa]s nothing in the record indicating that the metal, or the premises from which it was taken, was damaged in any way.” *Commonwealth v. Kinnan*, 71 A.3d 983, 985 (Pa. Super. 2013).

The defendant pleaded guilty to theft by unlawful taking. At sentencing, the trial court ordered the defendant to pay the employer \$3,010.41 in restitution as a condition of his probation; the amount constituted the value of the metal the defendant stole. *Id.* at 985-986.

The defendant appealed and claimed the trial court erred in ordering him to pay any restitution because “the police had recovered all of the stolen metal and returned it, undamaged, to” the employer. *Id.* at 986. The Superior Court agreed with the defendant. The Court reasoned that, since there was no permanent loss and no property damage, the trial court could not impose restitution as a condition of probation under either 42 Pa.C.S.A. § 9763(b)(10) or the “catchall” provision in 42 Pa.C.S.A. § 9763(b):<sup>5</sup>

Although [the employer] was temporarily deprived of its property, it suffered no permanent loss as a result of the theft. See [*Commonwealth v. Hall*, 994 A.2d 1141, 1145 n. 3 (Pa. Super. 2010) (en banc), affirmed on other grounds, 80 A.3d 1204 (Pa. 2013)] (stating that “to the extent a sentence of probation is imposed to make restitution for losses caused by the defendant’s criminal conduct, there should be proof of the damages suffered”). Further, [the Pennsylvania Superior] Court has stated that “a court may properly impose restitution as a probationary condition if the court is satisfied that the restitution is designed to rehabilitate the defendant and to make some measure of reimbursement to the victim.” [*Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. 2007)]. Here, the sentencing court ordered [the defendant] to pay \$3,010.41 in restitution to [the employer] as a condition of [the defendant’s] probation. However, [the employer] suffered no loss, and, therefore, the sentencing court’s imposition of restitution could not have been designed to reimburse [the employer]. *See Harriott*, 919 A.2d at 238 (stating that “a court may properly

<sup>5</sup> The “catchall” probationary condition is now found at 42 Pa.C.S.A. § 9763(b)(15). It currently reads: “[t]he court may attach any of the following conditions upon the defendant as it deems necessary: . . . (15) To do other things reasonably related to rehabilitation.” 42 Pa.C.S.A. § 9763(b)(15). We note that this provision is worded slightly differently than the catchall provision that existed at the time *Kinnan* was decided. *See Kinnan*, 71 A.3d at 987-988 (quoting the catchall provision that existed at the time).

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impose restitution as a probationary condition if the court is satisfied that the restitution is designed [(1)] to rehabilitate the defendant[;]  
and [(2)] to make some measure of reimbursement to the victim.”

...

In its Pa.R.A.P. 1925(a) Opinion, the sentencing court explained that its imposition of restitution as a probationary condition was [rehabilitative] in nature and opined that this condition was authorized by [the “catchall” probation condition, which, at the time, provided that, as a condition of probation, a sentencing court may order a defendant “[t]o satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience”]. However, after a thorough review of the case law interpreting section 97[63], we cannot agree that [the “catchall” provision] authorized the imposition of restitution under the circumstances of this case. There is no appellate case in Pennsylvania upholding a sentencing court’s imposition of restitution as a condition of probation under [the “catchall” provision] where, as here, the victim of the crime suffered no permanent loss.

*Id.* at 987-988 (footnotes, emphasis, and some citations omitted).

The **Kinnan** Court concluded that the trial court improperly ordered restitution as a condition of probation under 42 Pa.C.S.A. § 9763. Therefore, the Court vacated the illegal sentence and remanded for resentencing. *Id.* at 988.

### 5. Amount of Restitution in Relation to the Loss

When mandatory restitution is imposed as a direct sentence, 18 Pa.C.S.A. § 1106 demands that the sentencing court “order full restitution . . . so as to provide the victim with the fullest compensation for the loss.” 18 Pa.C.S.A. § 1106(c)(1)(i). On the other hand, when restitution is imposed as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10), the statute declares that the trial court “may” require the defendant “[t]o make restitution of the fruits of the crime or to make reparations, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.” 42 Pa.C.S.A. § 9763(b)(10).

As the Pennsylvania Supreme Court has held, Section 9763 provides the sentencing court with a broad measure of discretion to fashion an award of restitution as a condition of probation that is “appropriate to the circumstances of the individual case.” See **Commonwealth v. Hall**, 80 A.3d 1204, 1215 (Pa. 2013); **Commonwealth v. Walton**, 397 A.2d 1179, 1184 (Pa. 1979) (“courts . . . are traditionally and properly invested with a broader measure of discretion in fashioning conditions of probation appropriate to the

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circumstances of the individual case"). However, this discretion is not unbridled and, when restitution is imposed as a condition of probation, the restitution order cannot be indiscriminate, speculative, or excessive. Rather, “[b]ecause restitution is a sentence, the amount ordered must be supported by the record.” **Commonwealth v. Weir**, 201 A.3d 163, 171 (Pa. Super. 2018), *appeal granted*, 215 A.3d 966 (Pa. 2019). The trial court has the obligation to determine, at sentencing, “the loss or damage the defendant has caused, what amount of restitution he can afford to pay[,] and how he should pay it.” **Commonwealth v. Seminko**, 443 A.2d 1192, 1192-1193 (Pa. Super. 1982); *see also Hall*, 80 A.3d at 1216 (holding that the trial court’s probationary condition that the defendant pay \$200.00 per month in child support, to support the children of the victim he killed, failed, in part, because “the award here seems so speculative, as a matter of child support, as to approach being arbitrary. . . There is, in fact, nothing in the record to reflect how the court fixed the support amount at \$200 monthly. Nor did the court make findings regarding the actual financial needs of the victim’s children (including needs unmet by the resources available to their mother), or to what extent the victim actually provided financial support for his children — in any dollar amount — prior to his death. Rather, the amount fixed by the court seems to be unmoored — and perhaps purely symbolic. . . The probationary condition imposed by the trial court is not sustainable on the record here”).

### 6. Determination of the Defendant’s Ability to Pay

Under the mandatory restitution provision of 18 Pa.C.S.A. § 1106, the sentencing court “shall order full restitution . . . [r]egardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss.” 18 Pa.C.S.A. § 1106(c).<sup>6</sup> Thus, under Section 1106(c), the sentencing court is required to order full restitution, regardless of the defendant’s ability to pay. Contrariwise, when restitution is ordered as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10), the statute requires the trial court to determine “what loss or damage has been caused, and what amount of restitution [the defendant] can afford to pay, and how it should be paid.” **Commonwealth v. Harner**, 617 A.2d 702, 707 (Pa. 1992) (footnote omitted). The trial court may then only order the defendant to make restitution as a condition of probation “in an affordable amount and on a schedule that the defendant can afford to pay.” 42 Pa.C.S.A. § 9763(b)(10).

### 7. Expiration of Payment Obligation

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<sup>6</sup> 18 Pa.C.S.A. § 1106(c)(2)(iii) goes on to say: “the court . . . [s]hall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender’s inability to pay.” 18 Pa.C.S.A. § 1106(c)(2)(iii); *see also* 18 Pa.C.S.A. § 1106(f) (procedure when the “offender shall fail to make [mandatory] restitution”); **Commonwealth v. Rush**, 909 A.2d 805, 811 (Pa. Super. 2006) (under 18 Pa.C.S.A. § 1106, “the court need not consider the defendant’s ability to pay at the time of imposing restitution[.] the defendant’s ability to pay need only be considered upon default”); **Commonwealth v. Petrick**, 217 A.3d 1217, 1225 (Pa. 2019) (declaring that, while Section 1106 requires that the original sentencing court order mandatory, full restitution regardless of the defendant’s ability to pay, “[t]he Legislature did not foreclose a sentencing court’s consideration of a defendant’s ability to pay restitution; it merely eliminated ability to pay as a prerequisite consideration. . . The Legislature simply placed the consideration of a defendant’s ability to pay at the more pertinent stage, when a sentencing court must assess a defendant’s compliance with the order”).

In *Commonwealth v. Griffiths*, 15 A.3d 73 (Pa. Super. 2010), a panel of the Superior Court stated, in dicta, that “an order of restitution [as a direct sentence under 18 Pa.C.S.A. § 1106] is enforceable until paid.” *Commonwealth v. Griffiths*, 15 A.3d 73, 78 (Pa. Super. 2010); *see also* 42 Pa.C.S.A. § 9728(c) (“[n]otwithstanding [42 Pa.C.S.A. §] 6353 (relating to limitation on and change in place of commitment) or 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property), the period of time during which such judgments shall have full effect may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crimes of which he was convicted or the maximum term of confinement to which the offender was committed”). Conversely, when restitution is ordered as a condition of probation under 42 Pa.C.S.A. § 9763(b) (10), the restitution must be viewed as “a ‘condition’ that is required to be met in order to successfully complete [] probation.” *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. 2010). Therefore, “[o]nce the term of probation expires, so, too, must any conditions attached thereto,” including any condition requiring that the probationer pay restitution – regardless of whether the amount of restitution ordered has been paid in full. *Id.*; *see also Commonwealth v. Holmes*, 155 A.3d 69, 87 (Pa. Super. 2017) (en banc) (plurality) (explaining that, when restitution is ordered as a condition of probation, the obligation to pay restitution “is discharged upon the expiration of the term of probation regardless of whether the obligation has been paid in full”).

### 8. As a Condition of a Term of Probation

It bears mentioning that, since restitution imposed under 42 Pa.C.S.A. § 9763 is imposed as “a condition of probation,” the restitution condition must be attached to a term of probation. *See* 42 Pa.C.S.A. § 9754(a) and (b); 42 Pa.C.S.A. § 9763(b); *see also Commonwealth v. Harriott*, 919 A.2d 234, 240 (Pa. Super. 2007) (holding that, since the defendant “was not placed on probation for DUI . . . , [the Superior Court could not] affirm the restitution as a condition of probation under 42 Pa.C.S.A. § 9763(b)(10)”; *Commonwealth v. Thier*, 663 A.2d 225, 229 (Pa. Super. 1995) (holding that the trial court erred when it purported to impose a probationary condition upon the defendant when the trial court did not sentence the defendant to probation, reasoning: “[the ‘catchall’ probationary condition provision] applies only when the trial court wishes to impose a condition on a sentence of probation. No probationary sentence was imposed in the present case, and therefore, [the catchall provision] cannot be used to justify the sentencing court’s additional sentence”); *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. 2010) (“[o]nce the term of probation expires, so, too, must any conditions attached thereto,” including any condition requiring that the probationer pay restitution – regardless of whether the amount of restitution ordered has been paid in full)).

## II. PROCEDURE

### A. Pennsylvania Rule of Criminal Procedure 705.1.

Pennsylvania Rule of Criminal Procedure 705.1 provides the backbone procedure

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for any restitution order. The rule declares:

### **Rule 705.1. Restitution**

(A) At the time of sentencing, the judge shall determine what restitution, if any, shall be imposed.

(B) In any case in which restitution is imposed, the judge shall state in the sentencing order:

(1) the amount of restitution ordered;

(2) the details of a payment plan, if any, including when payment is to begin;

(3) the identity of the payee(s);

(4) to which officer or agency the restitution payment shall be made;

(5) whether any restitution has been paid and in what amount; and

(6) whether the restitution has been imposed as a part of the sentence and/or as a condition of probation.

Pa.R.Crim.P. 705.1.

The Comment to Rule 705.1 states:

*Comment:* This rule provides the procedures for the statutory requirement for the judge to impose restitution. In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution at the time of sentencing. **See** 18 Pa.C.S. § 1106 and 42 Pa.C.S. §§ 9721, 9728.

The extent of restitution also may be provided by statute. **See, e.g.**, 18 Pa.C.S. § 1107 (restitution for timber theft); § 1107.1 (restitution for identity theft); and § 1110 (restitution for cleanup of clandestine labs).

When imposing restitution, the sentencing judge should consider whether the defendant has received notice of the intention to seek restitution prior to the hearing and whether the defendant intends to object to the imposition of restitution. The sentencing hearing may need to be continued as a result.

Paragraph (B)(6) requires that the sentencing order make clear

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whether any restitution is being imposed as a part of the sentence pursuant to 18 Pa.C.S. § 1106 or as a condition of probation pursuant to 42 Pa.C.S. § 97[63].

Unlike restitution imposed under § 1106 that is penal in nature, restitution imposed as a condition of probation is primarily aimed at rehabilitation.<sup>7</sup> Sentences of probation give a trial court the flexibility to determine all the direct and indirect damages caused by a defendant. *Commonwealth v. Harner*, 617 A.2d 702 (Pa. 1992); *Commonwealth v. Hall*, 80 A.3d 1204 (Pa. 2013). Because a term of probation may not exceed the maximum term for which the defendant could be confined, and a court cannot enforce a restitution sentence past the statutory maximum date, a court may not require that restitution imposed as a condition of probation be paid beyond the statutory maximum date. *Commonwealth v. Karth*, 994 A.2d 606 (Pa. Super. 2010).

Certain costs are mandatory and must be imposed. *See, e.g.*, Section 1101 of the Crime Victims Act, 18 P.S. § 11.1101.

Pa.R.Crim.P. 705.1 cmt.

## B. Prior Notification

As stated in the comment to Rule 705.1, “[w]hen imposing restitution, the sentencing judge should consider whether the defendant has received notice of the intention to

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<sup>7</sup> This sentence paraphrases similar language found in a Pennsylvania Superior Court opinion and unpublished Superior Court memoranda. *See Commonwealth v. Karth*, 994 A.2d 606, 607 (Pa. Super. 2010). However, the sentence can cause confusion. The Pennsylvania Supreme Court has, many times, declared that restitution ordered under 18 Pa.C.S.A. § 1106 is “penal in nature” (and, thus, that the statute must be strictly construed) and, in the same breath, declared that this type of restitution (like all restitution) serves the “primary purpose” of rehabilitation. *See, e.g., Commonwealth v. Runion*, 662 A.2d 617, 618-619 (Pa. 1995) (holding that Section 1106 is a “penal provision” that demands a strict interpretation and also declaring: “[i]t is a well-established principle that the primary purpose of restitution is rehabilitation of the offender by impressing upon him that his criminal conduct caused the victim’s loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible”), superseded by statute as recognized in *Commonwealth v. Veon*, 150 A.3d 435, 450 (Pa. 2016); *Commonwealth v. Brown*, 981 A.2d 893, 895-896 (Pa. 2009) (speaking of restitution ordered under 18 Pa.C.S.A. § 1106, the Supreme Court held: “restitution is penal in nature. . . . It is well established that the primary purpose of restitution is rehabilitation of the offender by impressing upon him or her that his criminal conduct caused the victim’s loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible”). Further, the Pennsylvania Supreme Court recently reaffirmed that mandatory restitution under 18 Pa.C.S.A. § 1106 has, as its primary purpose, the rehabilitation of the offender. *Commonwealth v. Petrick*, 217 A.3d 1217, 1225-1226 (Pa. 2019).

In addition, when restitution is imposed as a condition of probation, the restitution obligation is still a part of the judgment of sentence and it is still imposed by a sentencing court, at a criminal sentencing proceeding, and as the result of a criminal conviction. Thus, like restitution imposed as a direct sentence under 18 Pa.C.S.A. § 1106, restitution imposed as a condition of probation is undoubtedly “penal in nature.” *See, e.g., Commonwealth v. Hall*, 80 A.3d 1204, 1212 (Pa. 2013) (“provisions for payment of monetary sums as the result of criminal convictions are penal in nature”).

Nevertheless, simply because a statute is penal does not mean that its primary purpose must be punitive, or that it cannot be rehabilitative. To be sure, criminal sentencing essentially serves one or more of the following four purposes: “(1) deterrence, (2) incapacitation, (3) rehabilitation, [and] (4) retribution.” Arthur W. Campbell, LAW OF SENTENCING § 2.1. Thus, the criminal justice system is “concerned not only with punishing the offender, but also with rehabilitating him.” *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). As such, it is not contradictory to view restitution as penal in character, but having the primary purpose of rehabilitating the defendant.

seek restitution prior to the hearing and whether the defendant intends to object to the imposition of restitution. The sentencing hearing may need to be continued as a result.” Pa.R.Crim.P. 705.1 cmt.

### C. Right to Counsel

“[T]here is no disputing that there exists a constitutional right to counsel at sentencing.” *Commonwealth v. Smith*, 69 A.3d 259, 265 (Pa. Super. 2013) (quotations and citations omitted); *Commonwealth ex rel. Wright v. Cavell*, 220 A.2d 611, 614 (Pa. 1966) (“[a] hearing on a guilty plea or at the time of sentencing is a ‘critical stage’ in the proceedings against the accused, at which the accused is entitled to be represented by [counsel]”) (quotations and citations omitted). Further, as the Superior Court has stated, “[a]n order of restitution is a sentence, whether it is imposed as a direct sentence or as a condition of probation.” *Commonwealth v. Griffiths*, 15 A.3d 73, 77 (Pa. Super. 2010); *see also Commonwealth v. Hall*, 80 A.3d 1204, 1211 (Pa. 2013) (“questions implicating the trial court’s power to impose restitution concern the legality of the sentence”). Thus, it is logical to conclude that a defendant has a constitutional right to counsel at any restitution hearing, including those imposing restitution as a condition of probation. *Cf. Commonwealth v. Zrncic*, 131 A.3d 1008, 1011 (Pa. Super. 2016) (holding that the defendant had a constitutional right to counsel at a sentencing hearing, where the sentencing hearing was limited to the issue of restitution under 18 Pa.C.S.A. § 1106).

### D. Restitution Must be Determined by the Trial Court at Sentencing

#### 1. Generally

Pennsylvania Rule of Criminal Procedure 705.1 clearly states that, for any restitution order, the judge must determine, “[a]t the time of sentencing, . . . what restitution, if any, shall be imposed.” Pa.R.Crim.P. 705.1(A). Thus, regardless of whether restitution is imposed as a direct sentence (under 18 Pa.C.S.A. § 1106) or as a condition of probation (under 42 Pa.C.S.A. § 9763), the trial court must determine, at sentencing, and then state, in the sentencing order: (1) the amount of restitution ordered; (2) the details of a payment plan, if any, including when payment is to begin; (3) the identity of the payee(s); (4) to which officer or agency the restitution payment shall be made; (5) whether any restitution has been paid and in what amount; and (6) whether the restitution has been imposed as a part of the sentence and/or as a condition of probation. *See* Pa.R.Crim.P. 705.1(B); *see also Commonwealth v. Deshong*, 850 A.2d 712, 715 (Pa. Super. 2004) (“whether [the restitution is imposed as] a condition of probation or a direct sentence, the amount and manner of restitution must be determined by the sentencing court”).

As is implicit in Rule 705.1 (and required by Pennsylvania statutory and case law), when restitution is imposed as a condition of probation, the trial court must determine, at sentencing, “the loss or damage the defendant has caused, what amount of restitution

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he can afford to pay[,] and how he should pay it.” *Commonwealth v. Seminko*, 443 A.2d 1192, 1192-1193 (Pa. Super. 1982); *see also* 42 Pa.C.S.A. § 9763(b)(10) (“[t]he court may attach any of the following conditions upon the defendant as it deems necessary: . . . [t]o make restitution of the fruits of the crime or to make reparations, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime”).

### 2. Non-Delegation

Also implicit in Rule 705.1 (and required by Pennsylvania case law), when restitution is imposed as a condition of probation, the trial court must itself determine the specifics of the restitution order, such as the amount and manner of restitution. The trial court may not delegate this duty to an agency, such as a probation or parole department. The Pennsylvania Superior Court held:

Even if [the restitution order] were a condition of probation, the sentencing court bears the duty of determining the specifics of restitution. The court is not free to delegate these duties to an agency. Here, the trial court improperly permitted the Fulton County Probation Department to determine the amount and recipients of restitution. . . . [T]his restitution order amount[s] to an illegal sentence. . . .

*Commonwealth v. Deshong*, 850 A.2d 712, 716 (Pa. Super. 2004) (quotations and citations omitted); *see also Commonwealth v. Erb*, 428 A.2d 574, 582 (Pa. Super. 1981) (“it was the lower court’s obligation to determine what loss or damage appellant had caused, and what amount of restitution he could afford to pay, and how he should pay it. The court was not free to delegate these duties to an agency”).

Relatedly, the Pennsylvania Board of Probation and Parole “has no authority to impose . . . restitution nor does it have the authority to excuse or eliminate the imposition of . . . restitution since the Board is without the authority to alter a judicially imposed sentence.” *Lawson v. Commonwealth, Bd. of Probation & Parole*, 524 A.2d 1053, 1056 (Pa. Cmwlth. 1987).

### 3. Non-Waivable

The trial court’s failure to specify restitution at the time of sentencing, and/or the court’s failure to determine the defendant’s ability to pay restitution, and/or the court’s delegation of the restitution amount to an agency will all result in an illegal sentence. See *Commonwealth v. Deshong*, 850 A.2d 712, 716 (Pa. Super. 2004). “[A] criminal defendant cannot agree to an illegal sentence.” *Commonwealth v. Gentry*, 101 A.3d 813, 819 (Pa. Super. 2014). Therefore, even if the defendant agrees, as part of a plea agreement, to deferral of the restitution amount “as determined by” a

probation department or agrees to pay a restitution amount absent any indication of ability to pay, the defendant's sentence is still illegal. *Deshong*, 850 A.2d at 713-716; *c.f. Commonwealth v. Ford*, 217 A.3d 824, 825 and 829 (Pa. 2019) (holding that "a defendant's mere agreement to pay a specific fine does not constitute evidence that he is or will be able to satisfy the financial obligation" to pay the fine; "[42 Pa.C.S.A. §] 9726(c) does not put the burden on defendants to inform the court that they might have trouble paying a fine. Instead, it instructs sentencing courts not to impose a fine absent record evidence of the defendant's ability to pay"). Further, since the sentence is illegal, any claim challenging the illegal sentence "cannot be waived." *Deshong*, 850 A.2d at 716.

### III. BURDEN OF PROOF

"An order of restitution is a sentence, whether it is imposed as a direct sentence or as a condition of probation." *Commonwealth v. Griffiths*, 15 A.3d 73, 77 (Pa. Super. 2010); *see also Commonwealth v. Hall*, 80 A.3d 1204, 1211 (Pa. 2013) ("questions implicating the trial court's power to impose restitution concern the legality of the sentence"). Therefore, regardless of whether restitution is imposed as a direct sentence (under 18 Pa.C.S.A. § 1106) or as a condition of probation (under 42 Pa.C.S.A. § 9763), the following holds true:

It is the Commonwealth's burden of proving its entitlement to restitution. *Commonwealth v. Boone*, 862 A.2d 639, 643 (Pa. Super. 2004) (stating that the amount of restitution must be supported by the record). When fashioning an order of restitution, the lower court must ensure that the record contains the factual basis for the appropriate amount of restitution. *Commonwealth v. Pleger*, 934 A.2d 715, 720 (Pa. Super. 2007). The dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. *Id.* The amount of the restitution award may not be excessive or speculative. *Commonwealth v. Rush*, 909 A.2d 805, 810 (Pa. Super. 2006). . . . [It is necessary that the amount of restitution] be determined under the adversarial system with considerations of due process." *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super. 2004).

*Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. 2010).<sup>8</sup>

Pennsylvania statutory and case law is silent on the specific burden of proof the Commonwealth bears to support a restitution award. However, a review of the case law indicates that the accepted procedure in Pennsylvania for imposing restitution as a condition of probation is to allow judges to determine, by a preponderance of the evidence, all of the direct and indirect losses and damages caused by the defendant and to then use this as the basis for any restitution order.

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<sup>8</sup> The above quotation was specifically concerned with restitution imposed as a direct sentence under 18 Pa.C.S.A. § 1106. We have tailored the quotation to the matter at hand: restitution imposed as a condition of probation.

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In the Reporters' Note to the proposed final draft of Model Penal Code: Sentencing § 6.04A ("Victim Restitution"), the reporters declare: "[m]ost judicial authorities have applied the preponderance-of-the-evidence standard [to proving a restitution award] even in the absence of statutory command." MPC: Sentencing § 6.04A PFD, Reporters' Note (k); *see also id.* at Reporters' Note (d) ("the lower courts are in near-universal accord that criminal restitution falls outside [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)] requirements"). Moreover, the proposed final draft of § 6.04A provides: "[t]he sentencing court shall determine the amount of economic losses [for victim restitution] by a preponderance of the evidence." MPC: Sentencing § 6.04A(9) PFD. Nevertheless, the reporters acknowledge:

Recent Supreme Court cases, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), raise the possibility that the Sixth Amendment and Due Process Clause require questions of fact necessary to support restitution awards to be decided by juries under the standard of proof beyond a reasonable doubt. Nearly all lower courts have concluded that jury factfinding is not constitutionally required in this setting, but the Supreme Court has not spoken to the question.

MPC: Sentencing § 6.04A PFD, Reporters' Note (d).

Of further note, Pennsylvania case law holds that "[a]n order of restitution is a sentence, whether it is imposed as a direct sentence or as a condition of probation." *Commonwealth v. Griffiths*, 15 A.3d 73, 77 (Pa. Super. 2010); *see also Commonwealth v. Hall*, 80 A.3d 1204, 1211 (Pa. 2013) ("questions implicating the trial court's power to impose restitution concern the legality of the sentence"). Pennsylvania law also provides that "provisions for payment of monetary sums as the result of criminal convictions are penal in nature." *Hall*, 80 A.3d at 1212. Notwithstanding these holdings, it appears that the accepted procedure in Pennsylvania for imposing restitution as a condition of probation is to allow judges to determine, by a preponderance of the evidence, all of the direct and indirect losses and damages caused by the defendant and to use this as the basis for any restitution order. Given that indirect damages are – by definition – not "submitted to a jury[] and proved beyond a reasonable doubt," an argument may be made that Pennsylvania's procedure for imposing restitution as a condition of probation (if not its entire structure of permitting restitution on the basis of indirect damages) is unconstitutional. *See Apprendi*, 530 U.S. at 490.

## IV. TRIAL COURT CONSIDERATIONS

The Commonwealth bears the burden of establishing its entitlement to restitution and the trial court has the obligation of determining the amount of restitution the defendant must pay and the specifics of any restitution order. When imposing restitution

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as a condition of probation, the trial court must determine and/or state in the sentencing order:

- 1) All of the direct and indirect damages caused by the defendant;
- 2) What amount of restitution the defendant can afford to pay;
- 3) What amount of restitution the defendant must pay, “so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way” (this amount is not necessarily equal to the amount of restitution the defendant can afford to pay – it may be less (but it may not be more));
- 4) The details of a payment plan, if any, including when payment is to begin;
- 5) The identity of the payee(s);
- 6) To which officer or agency the restitution payment shall be made;
- 7) Whether any restitution has been paid and in what amount; and,
- 8) Whether the restitution has been imposed as a part of the sentence and/or as a condition of probation.

### **A. Direct and Indirect Damages**

As noted above, when a trial court imposes restitution as a condition of probation, the trial court has the “flexibility to determine all the direct and indirect damages caused by a defendant and then [is] permit[ted] to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way.” *Commonwealth v. Harner*, 617 A.2d 702, 707 (Pa. 1992) (regarding restitution imposed as a condition of probation); *Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. 2007) (regarding restitution imposed as a condition of (the now-repealed) county intermediate punishment).

Examples regarding restitution imposed for direct damages are found in Chapter 2 of this book; examples regarding restitution imposed for indirect damages are found in Section I.J.4 of this Chapter.

### **B. Defendant’s Ability to Pay**

#### **1. May not exceed the total amount of direct and indirect damages**

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"An order of restitution is a sentence, whether it is imposed as a direct sentence or as a condition of probation." *Commonwealth v. Griffiths*, 15 A.3d 73, 77 (Pa. Super. 2010). "Because restitution is a sentence, the amount ordered must be supported by the record; it may not be speculative or excessive." *Commonwealth v. Wright*, 722 A.2d 157, 159 (Pa. Super. 1998). Thus, in imposing restitution as a condition of probation, the trial court must ensure that the amount awarded does not exceed the total amount of direct and indirect damages proved by the Commonwealth – even if the defendant's "ability to pay" exceeds the total amount of direct and indirect damages.

### 2. May not exceed the defendant's ability to pay

Moreover, when restitution is imposed as a condition of probation, the restitution amount must not "exceed the [defendant's] ability to pay." *Wright*, 722 A.2d at 159 (quotations and citations omitted).

Although an order of restitution imposed as a condition of probation may not exceed the defendant's ability to pay, "an order of restitution need not be in an amount which can be paid from a defendant's current earnings." *Commonwealth v. Boyles*, 595 A.2d 1180, 1189 (Pa. Super. 1991). The Superior Court explained:

We recognize that, in most cases, when a court sentences the defendant to a period of incarceration and the defendant is serving the period of incarceration, his income will frequently be drastically diminished and consequently he may not be able immediately to satisfy the sentence of restitution. In fact, some defendants, at the time of sentencing, will have already been incarcerated for a substantial period of time, and will have no income from which to pay restitution. However, a defendant's inability to presently pay restitution at the time of sentencing or immediately thereafter does not impede the court's authority to sentence the defendant to pay restitution if at the time of sentencing the record establishes the future possibility of the defendant satisfying the sentence of restitution. "There is no rule of law which holds that a defendant can be ordered to make restitution only if he has a present financial ability to make immediate restitution." *Commonwealth v. Galloway*, 448 A.2d 568, 579 (Pa. Super. 1982) (Wieand, J., concurring). Thus, in determining the defendant's ability to pay an order of restitution, the court can consider the education, vocational training, and employment history of the defendant as they may affect the defendant's future ability to make restitution in addition to considering any assets which defendant may have at present or is likely to acquire in the future and any present income.

*Commonwealth v. Mourar*, 504 A.2d 197, 207 (Pa. Super. 1986), vacated on other grounds, 534 A.2d 1050 (Pa. 1987) (emphasis omitted); *see also Commonwealth v.*

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**Stetler**, 95 A.3d 864, 888-889 (Pa. Super. 2014) (holding that, “[e]ven were the court required to consider Defendant’s ability to pay, evidence well supports the conclusion that Defendant’s education and business experience, reflected in Defendant’s testimony and that of character witnesses, render him able to comply with the restitution order”); **Commonwealth v. Celane**, 457 A.2d 509, 514 (Pa. Super. 1982) (holding that, notwithstanding the defendant’s bankruptcy, the trial court properly determined that the defendant had the ability to pay restitution in the amount of \$209,830.63, “based upon his education and experience, his representation of his on-going success and various business operations, all of which reflect on his potential capacity, giving consideration to the fact that he could be eligible for parole at the expiration of his minimum sentence and furlough or work release in one-half of the minimum;” the Superior Court, however, remanded because the trial court failed to specify “the appropriate method and timing for payment of restitution by [the defendant]”).

“[T]he true rehabilitative goal of restitution is defeated only when the payments ordered by the court are so unreasonable in view of the defendant’s financial circumstances and ability to work that despite good faith efforts, the defendant cannot hope to comply.” **Boyles**, 595 A.2d at 1189 (quotations and citations omitted).

### **a. Sacrifices may be required**

The Pennsylvania Superior Court has stated:

In many instances . . . it will be necessary for a defendant to make substantial sacrifices in order to make restitution to the victims of his crimes. This is not an obstacle to an order requiring such restitution. Rather, where sacrifice is necessary, the probationer or parolee may learn to consider more carefully the consequences of his or her acts and thereby strengthen the offender’s sense of responsibility. Thus, an order of restitution may properly require additional or alternative employment, a reduction of expenses, and even a temporary change in lifestyle in order to achieve that sense of responsibility which signals effective rehabilitation. The true rehabilitative purpose of restitution is well served when a probationer or parolee is called upon to make reasonable sacrifices in order to compensate those who have sustained losses as a result of his criminal conduct. The rehabilitative goal is defeated only when the payments ordered by the court are so unreasonable in view of the defendant’s financial circumstances and ability to work that, despite good faith efforts, the defendant cannot hope to comply.

**Commonwealth v. Wood**, 446 A.2d 948, 950 (Pa. Super. 1982).

### (1). Defendant may be required to sell property

In *Commonwealth v. Madron*, the trial court ordered the defendant to “make restitution jointly and severally with two co-defendants” to the victims, in the amount of \$45,000.00. On appeal, the defendant claimed that the restitution amount was excessive because “it cannot be paid from current income and will compel [the defendant] to sell a residence which she owns in order to make restitution to her victims.” *Commonwealth v. Madron*, 488 A.2d 331, 332 (Pa. Super. 1985). The Superior Court found this claim meritless. It explained:

Where the defendant owns assets in an amount sufficient to make restitution, he or she may be called upon to sell or borrow on the security of those assets and use the proceeds to make restitution. The rights of a victim to be made whole will not be made subservient to the criminal’s desire to retain an unencumbered title to capital assets.

In the instant case, the record discloses that [the defendant] is the owner of a residential property whose value is approximately \$60,000, with a mortgage of less than \$7,500.00. This suggests that [the defendant’s] financial circumstances are adequate to allow her to make restitution for the losses of \$45,000 which her criminal conduct caused to others. Finding no abuse of discretion on the part of the sentencing court, the judgment of sentence will be affirmed.

*Id.* at 332-333.

### C. Determining the Total Amount of Restitution

As the Pennsylvania Supreme Court explained:

Restitution may [] be imposed as a condition of probation and, under such circumstances, the courts are traditionally and properly vested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case. The reason for this attitude stems from the purpose of imposing conditions of probation which are primarily aimed at rehabilitating and reintegrating a law breaker into society as a law-abiding citizen. This is deemed a constructive alternative to imprisonment.

...

As [the Pennsylvania Supreme Court] noted in [*Commonwealth v. Walton*, 397 A.2d 1179, 1185 (Pa. 1979),] the practice of ordering restitution or reparation as such a condition is widely established and

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highly favored in the law, as an aid both to the criminal in achieving rehabilitation and to his victim in obtaining some measure of redress.

Such sentences are encouraged and give the trial court the flexibility to determine all the direct and indirect damages caused by a defendant and then permit the court to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way.

*Commonwealth v. Harner*, 617 A.2d 702, 706-707 (Pa. 1992) (some citations omitted).

From the above excerpt, it is apparent that trial courts retain broad discretion to impose restitution as a condition of probation and, correspondingly, retain broad discretion to fashion an appropriate restitution amount, “so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way.” *Id.* at 707.

Therefore, while the total restitution amount may not exceed the total amount of direct and indirect damages or the defendant’s ability to pay, the trial court is not obligated to order restitution for the full amount of the defendant’s ability to pay. Instead, if the trial court, in its discretion, determines that a lesser amount of restitution will make it “so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way,” the trial court has the discretion to impose restitution at this lesser amount.

The trial court must then expressly state, in the sentencing order, “the amount of restitution ordered.” Pa.R.Crim.P. 705.1.

### **D. Determining “the details of a payment plan, if any, including when payment is to begin”**

The trial court must determine the method and manner of restitution payment. *See* Pa.R.Crim.P. 705.1. As is true with everything else surrounding restitution orders, “the sentencing court bears the duty of determining the specifics of restitution,” including the method and manner of payment. *Commonwealth v. Deshong*, 850 A.2d 712, 716 (Pa. Super. 2004). “The court [is] not free to delegate these duties to an agency.” *Id.*

The trial court must then expressly state, in the sentencing order, “the details of a payment plan, if any, including when payment is to begin.” Pa.R.Crim.P. 705.1.

### **E. Identifying the Payee(s)**

The trial court must expressly state, in the sentencing order, “the identity of the

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payee(s)." Pa.R.Crim.P. 705.1.

### **F. Declaring "to which officer or agency the restitution payment shall be made"**

The trial court must specify, in the sentencing order, "to which officer or agency the restitution payment shall be made." Pa.R.Crim.P. 705.1.

42 Pa.C.S.A. § 9728 provides, in full:

#### **§ 9728. Collection of restitution, reparation, fees, costs, fines and penalties**

##### **(a) General rule.--**

(1) Except as provided in subsection (b)(5), all restitution, reparation, fees, costs, fines and penalties shall be collected by the county probation department or other agent designated by the county commissioners of the county with the approval of the president judge of the county for that purpose in any manner provided by law. However, such restitution, reparation, fees, costs, fines and penalties are part of a criminal action or proceeding and shall not be deemed debts. A sentence, pretrial disposition order or order entered under section 6352 (relating to disposition of delinquent child) for restitution, reparation, fees, costs, fines or penalties shall, together with interest and any additional costs that may accrue, be a judgment in favor of the probation department upon the person or the property of the person sentenced or subject to the order.

(2) In accordance with section 9730.1 (relating to collection of court costs, restitution and fines by private collection agency), the collection of restitution, reparation, fees, costs, fines and penalties under this section may be referred to a private collection agency. Any county that does not engage the services of a private collection agency shall operate a collections enforcement unit consistent with the provisions of paragraph (1) and dedicated to carrying out the duties therein provided. Statistical information relating to the amount of restitution collected by the county probation department or any agent designated by the county commissioners of the county with the approval of the president judge of the county shall be provided to the Pennsylvania Commission on Crime and Delinquency and Pennsylvania Commission on Sentencing on an annual basis. The statistical information shall be sufficiently

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detailed so as to show compliance with the requirements of this section, including subsection (g.1).

### **(b) Procedure.--**

(1) The county clerk of courts shall, upon sentencing, pretrial disposition or other order, transmit to the prothonotary certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, exceed \$1,000, and it shall be the duty of each prothonotary to enter and docket the same of record in his office and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

(2) The clerk of courts, in consultation with other appropriate governmental agencies, may transmit to the prothonotary of the respective county certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, do not exceed \$1,000, and, if so transmitted, it shall be the duty of each prothonotary to enter and docket the same of record in his office and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

(3) The county clerk of courts shall, upon sentencing, pretrial disposition or other order, transmit to the Department of Probation of the respective county or other agent designated by the county commissioners of the county with the approval of the president judge of the county and to the county correctional facility to which the offender has been sentenced or to the Department of Corrections, whichever is appropriate, copies of all orders for restitution and amendments or alterations thereto, reparation, fees, costs, fines and penalties. This paragraph also applies in the case of costs imposed under section 9721(c.1)(relating to sentencing generally).

(4) The total amount for which the person is liable pursuant to this section may be entered as a judgment upon the person or the property of the person sentenced or ordered, regardless of whether the amount has been ordered to be paid in installments.

(5) Deductions shall be as follows:

(i) The Department of Corrections shall make monetary deductions of at least 25% of deposits made to inmate wages and personal accounts for the purpose of collecting restitution, costs

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imposed under section 9721(c.1), filing fees to be collected under section 6602(c) (relating to prisoner filing fees) and any other court-ordered obligation.

(ii) The county correctional facility to which the offender has been sentenced shall:

(A) Be authorized to make monetary deductions from inmate wages and personal accounts for the purpose of collecting restitution, costs imposed under section 9721(c.1), filing fees to be collected under section 6602(c) and any other court-ordered obligation or fees owed to the county jail or prison related to the inmate's incarceration.

(B) Deduct an amount sufficient to satisfy any outstanding restitution, costs imposed under section 9721(c.1), filing fees to be collected under section 6602(c) or other court-ordered obligations before releasing funds on deposit.

(iii) Any amount deducted under this paragraph shall be in addition to the full amount authorized to be collected pursuant to any order for support. Any amount deducted shall be transmitted to the probation department of the county or other agent designated by the county commissioners with the approval of the president judge of the county in which the offender was convicted.

(iv) The Department of Corrections and each county correctional facility shall develop guidelines relating to its responsibilities under this paragraph. The guidelines shall be incorporated into any contract entered into with a correctional facility.

**(b.1) Restitution file.**--Upon receipt of each order from the clerk of courts as provided in subsection (b)(3), the department of probation of the respective county or other agent designated by the county commissioners of the county with the approval of the president judge of the county shall open a restitution file for the purposes of recording the amounts of restitution deducted by the Department of Corrections or county correctional facility or collected by the department of probation or the agent designated by the county commissioners of the county with the approval of the president judge of the county.

**(b.2) Mandatory payment of costs.**--Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing costs upon the defendant, the defendant shall nevertheless be liable for costs, as provided in section 9721(c.1),

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unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs). The absence of a court order shall not affect the applicability of the provisions of this section.

**(c) Period of time.**--Notwithstanding section 6353 (relating to limitation on and change in place of commitment) or 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property), the period of time during which such judgments shall have full effect may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crimes of which he was convicted or the maximum term of confinement to which the offender was committed.

**(d) Priority.**--Notwithstanding any other statutory provisions in this or any other title, any lien obtained under this section shall maintain its priority indefinitely and no writ of revival need be filed.

**(e) Preservation of assets subject to restitution.**--Upon application of the Commonwealth, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order under this section:

(1) upon the filing of a criminal complaint, information or indictment charging a criminal violation or a petition alleging delinquency for which restitution may be ordered and alleging that the property with respect to which the order is sought appears to be necessary to satisfy such restitution order and judgment; and

(2) if, after notice to persons appearing to have an interest in the property and an opportunity for a hearing, the court determines that:

(i) there is a substantial probability that:

(A) the Commonwealth will prevail on the underlying criminal charges or allegation of delinquency;

(B) restitution will be ordered exceeding \$10,000 in value;

(C) the property appears to be necessary to satisfy such restitution order; and

(D) failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court or otherwise made unavailable for payment of the anticipated

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restitution order; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

**(f) Temporary restraining order.**--A temporary restraining order under subsection (e) may be entered upon application of the Commonwealth without notice or opportunity for a hearing, whether or not a complaint, information, indictment or petition alleging delinquency has been filed with respect to the property, if the Commonwealth demonstrates that there is probable cause to believe that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this section and that provision of notice will jeopardize the availability of the property to satisfy such restitution order and judgment. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this subsection shall be held at the earliest possible time and prior to the expiration of the temporary order.

**(g) Costs, etc.**--Any sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

**(g.1) Payment.**--No less than 50% of all moneys collected by the county probation department or other agent designated by the county commissioners of the county with the approval of the president judge of the county pursuant to subsection (b)(1) and deducted pursuant to subsection (b)(5) shall, until the satisfaction of the defendant's restitution obligation, be used to pay restitution to victims. Any remaining moneys shall be used to pay fees, costs, fines, penalties and other court-ordered obligations.

**(h) Effect on contempt proceedings.**--This section shall not affect contempt proceedings mandated by 18 Pa.C.S. § 1106(f).

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42 Pa.C.S.A. § 9728.

### **G. Declaring “whether any restitution has been paid and in what amount”**

The trial court must determine and then expressly state, in the sentencing order “whether any restitution has been paid and in what amount.” Pa.R.Crim.P. 705.1.

### **H. Declaring “whether the restitution has been imposed as a part of the sentence and/or as a condition of probation”**

The trial court must expressly state, in the sentencing order, “whether the restitution has been imposed as a part of the sentence and/or as a condition of probation.” Pa.R.Crim.P. 705.1.

## **V. STANDARD OF REVIEW UPON APPEAL**

In *In re M.W.*, 725 A.2d 729 (Pa. 1999), the Pennsylvania Supreme Court held: “[w]here [] a challenge is directed to the trial court’s authority to impose restitution, it concerns the legality of the sentence; however, where the challenge is premised upon a claim that the restitution order is excessive, it involves a discretionary aspect of sentencing.” *In re M.W.*, 725 A.2d 729, 731 n.4 (Pa. 1999).

Thus, where the claim “challenge[s] the sentencing court’s statutory authority to impose restitution,” the claim attacks the legality of the sentence. *Commonwealth v. Weir*, 201 A.3d 163, 172 (Pa. Super. 2018), *appeal granted*, 215 A.3d 966 (Pa. 2019). “Legality of sentence questions are not waivable and may be raised *sua sponte* by [the Pennsylvania Superior] Court.” *Commonwealth v. Watley*, 81 A.3d 108, 118 (Pa. Super. 2013) (*en banc*). “Issues relating to the legality of a sentence are questions of law. [The Superior Court’s] standard of review over such questions is *de novo* and [the Court’s] scope of review is plenary.” *Commonwealth v. Ali*, 112 A.3d 1210, 1225 (Pa. Super. 2015), *vacated on other grounds*, *Commonwealth v. Ali*, 149 A.3d 29 (Pa. 2016) (corrections omitted).

Where the claim “concede[s] statutory] authority, but challenge[s] the court’s exercise of discretion in determining the appropriate amount of restitution,” the claim implicates the discretionary aspects of a sentence. *Weir*, 201 A.3d at 172. “Issues challenging the discretionary aspects of sentencing must be raised in a post-sentence motion or by raising the claim during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived.” *Commonwealth v. Watson*, 835 A.2d 786, 791 (Pa. Super. 2003) (quotations, citations, and corrections omitted). Further, pursuant to statute, an appellant does not have an automatic right to appeal the discretionary aspects of a sentence. *See* 42 Pa.C.S.A. § 9781(b). Instead, the

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appellant must petition the Pennsylvania Superior Court for permission to appeal the discretionary aspects of their sentence. *Id.*

As the Superior Court explained:

[t]o reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720 [and 708]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, [42 Pa.C.S.A.] § 9781(b).

*Commonwealth v. Cook*, 941 A.2d 7, 11 (Pa. Super. 2007).

"The determination of whether a particular case raises a substantial question is to be evaluated on a case-by-case basis. Generally, however, in order to establish that there is a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process." *Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa. Super. 2005) (citations omitted). "When considering the merits of a discretionary aspects of sentencing claim, [the Superior Court] analyze[s] the sentencing court's decision under an abuse of discretion standard." *Commonwealth v. Zeigler*, 112 A.3d 656, 661 (Pa. Super. 2015). "An abuse of discretion is more than just an error of judgment and, on appeal, a trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." *Commonwealth v. Lane*, 424 A.2d 1325, 1328 (Pa. 1981) (quotations omitted).

## VI. MODIFICATION

When restitution is imposed as a condition of probation, the trial court possesses the statutory authority to modify the restitution condition "at any time." 42 Pa.C.S.A. § 9771(a) ("[t]he court has inherent power to at any time terminate continued supervision, lessen the conditions upon which an order of probation has been imposed or increase the conditions under which an order of probation has been imposed upon a finding that a person presents an identifiable threat to public safety"); *c.f. Commonwealth v. Dietrich*, 970 A.2d 1131, 1135 (Pa. 2009) ("[t]he plain language of [18 Pa.C.S.A.] § 1106(c)(3) provides courts with broad authority to modify restitution amounts at any time if the court states reasons for doing so as a matter of record. 18 Pa.C.S. § 1106(c)(3). . . . There is no statutory requirement the reasons for modification be undiscoverable at the time of sentencing. Section 1106(c)(3)'s broad language indicates a legislative intent that courts have jurisdiction to modify restitution orders at any time without regard to

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when information should have been present for consideration. *Id.; cf.* 42 Pa.C.S. § 5505") (emphasis omitted).

In terms of the procedure regarding modification or revocation of an order of probation, Section 9771(d) declares:

**(d) Hearing required.--**There shall be no revocation or increase of conditions of sentence under this section except after a hearing at which the court shall consider the record of the sentencing proceeding together with evidence of the conduct of the defendant while on probation. Probation may be eliminated or the term decreased without a hearing.

42 Pa.C.S.A. § 9771(d).

## **VII. REVOCATION PROCEEDINGS - FAILURE TO PAY**

With respect to the revocation of probation, the Pennsylvania Supreme Court summarized:

[42 Pa.C.S.A. §] 9771 allows for termination of supervision or modification of the conditions of probation at any time. [42 Pa.C.S.A.] § 9771(a). Revocation of probation, however, is sanctioned only "upon proof of the violation of specified conditions of the probation." *Id.* § 9771(b)[]. If, after finding a violation, the court revokes a defendant's probation, it may only resentence the defendant to a term of incarceration if (1) the defendant was convicted of a new crime; (2) the defendant's conduct makes it likely that he or she will commit a new crime if not incarcerated; or (3) incarceration "is essential to vindicate the authority of the court." *Id.* § 9771(c). A hearing is required before a court may revoke probation or increase the terms of a defendant's probation, "at which the court shall consider the record of the sentencing proceeding together with evidence of the conduct of the defendant while on probation." *Id.* § 9771(d).

We find the language of the pertinent statutory provisions to be clear and unambiguous. The law provides a general condition of probation – that the defendant lead "a law-abiding life," *i.e.*, that the defendant refrain from committing another crime. *Id.* § 97[63](b). To [ensure] that general condition is met, or to assist the defendant in meeting that general condition, the order must also include certain "specific conditions" from the list enumerated in section 97[63(b)]. Only upon the violation of any of the "specified conditions" in the probation order (general or specific) may a court revoke the defendant's probation. *Id.*

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§ 9771(b). In other words, a court may find a defendant in violation of probation only if the defendant has violated one of the “specific conditions” of probation included in the probation order or has committed a new crime. The plain language of the statute does not allow for any other result.

*Commonwealth v. Foster*, 214 A.3d 1240, 1249-1250 (Pa. 2019) (emphasis and footnotes omitted).<sup>9</sup>

When restitution is ordered as a condition of probation, it is ordered as a specific condition of probation under 42 Pa.C.S.A. § 9763(b)(10).<sup>10</sup> Therefore, the trial court may revoke a defendant’s probation upon a finding that the defendant violated the “specific condition” of 42 Pa.C.S.A. § 9763(b)(10). Nevertheless, as the United States Supreme Court has held:

in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

*Bearden v. Georgia*, 461 U.S. 660, 672-673 (1983).

In following *Bearden*, the Pennsylvania Superior Court has declared:

The holding [in *Bearden*] has been interpreted by [the Pennsylvania

9 As the Pennsylvania Superior Court has explained, following a probation revocation hearing, a trial court must engage in a two-pronged analysis. First, the court must determine whether the facts warrant revocation. This step “involves a wholly retrospective factual question: whether the [ ] probationer has in fact acted in violation of one or more conditions of his parole or probation.” *Commonwealth v. Sims*, 770 A.2d 346, 349 (Pa. Super. 2001) (corrections omitted), quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973); *see also* 42 Pa.C.S.A. § 9771(b) (“[t]he court may revoke an order of probation upon proof of the violation of specified conditions of the probation”). “Only if it is determined that the [ ] probationer did violate the conditions does the second question arise: should the [ ] probationer be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?” *Sims*, 770 A.2d at 349 (corrections omitted), quoting *Gagnon*, 411 U.S. at 784; *see also* 42 Pa.C.S.A. § 9771(c).

10 We note that, in *Commonwealth v. Hall*, 80 A.3d 1204 (Pa. 2013), the Supreme Court declared that the “catchall” provision of 42 Pa.C.S.A. § 9763(b) “is written in broader terms” than Section 9763(b)(10). The *Hall* Court stated that the catchall “provision authorizes imposition of ‘any’ other conditions of probation reasonably related to the defendant’s rehabilitation, so long as they are not ‘unduly restrictive’ of the defendant’s constitutional liberty or conscience. This subsection neither approves nor excludes monetary obligations and is not oriented towards the past in the same manner as the terms in subsection [(b)(10)].” *Hall*, 80 A.3d at 1213.

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Superior Court] as requiring the revocation court to inquire into the reasons for a defendant's failure to pay and to make findings pertaining to the willfulness of the party's omission.

. . . A proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay. . . . After making those determinations, if the court finds the probationer "could not pay despite sufficient bona fide efforts to acquire the resources to do so," the court should then consider alternatives to incarceration in accordance with *Bearden*.

*Commonwealth v. Eggers*, 742 A.2d 174, 175-176 (Pa. Super. 1999); *see also Commonwealth v. Ballard*, 814 A.2d 1242, 1247 (Pa. Super. 2003) (holding that the trial court erred when it revoked the defendant's probation for "failure to pay fines, costs, and restitution," where the trial court "made no inquiry into [the defendant's] ability to pay, the reasons for his failure to pay, whether his failure to pay was willful, and if willful, whether any alternatives to incarceration were proper").

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## ***Chapter Four***

### ***Restitution in Juvenile Court***

#### **I. RESTITUTION IN JUVENILE COURT**

##### **A. Foundational Principles of the Juvenile Act**

1. This foundation of the Juvenile Act is rooted in the philosophy of “restorative justice,” which gives priority to repairing the harm done to crime victims and communities, and which defines offender accountability in terms of assuming responsibility and taking action to repair harm. The “balanced attention” mandates in the Juvenile Act provide the framework for implementing restorative justice in Pennsylvania’s juvenile justice system.

2. Also at the foundation of this mandate is the concept that crime victims and the community, as well as juvenile offenders, should receive balanced attention and gain tangible benefits from their interactions with Pennsylvania’s juvenile justice system.

##### **B. Basic Principles of Restitution in the Juvenile Act**

1. The Juvenile Act authorizes a judge who adjudicates a child delinquent to enter an order of disposition, which includes, *inter alia*, probation, commitment to an institution for delinquent juveniles, and restitution. 42 Pa.C.S. § 6352(a).

2. The disposition of the child shall be consistent with “the protection of the public interest and best suited to the child’s treatment, supervision, rehabilitation and welfare.” *Id.*

3. The disposition shall also be “appropriate to the individual circumstances of the child’s case” and “provide balanced attention to the protection of the community, the imposition of accountability for the offenses committed, and the development of competencies to enable the child to become a responsible and productive member of the community.” *Id.*

4. When considering whether to order that the child pay “reasonable amounts of money as fines, costs, fees or restitution,” the court should also consider “the nature of the acts that the child committed and the earning capacity of the child.” 42 Pa.C.S. § 6352(a)(5).

5. When considering the “earning capacity of the child,” the best practice is to consider the child’s **current** earning capacity; *i.e.*, the child’s earning capacity while

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juvenile court has jurisdiction over the juvenile. The juvenile court, however, may consider the child's earning capacity over a longer period of time if the juvenile court believes that considering a longer period of time will better meet the goals of the Juvenile Act.

### **C. Statutory Basis for Imposing Restitution**

1. The legislature amended the Juvenile Act to include Section 6352(a)(5) that authorizes the juvenile court to impose "fines, costs or restitution as deemed appropriate as part of the plan of rehabilitation considering the nature of the acts committed and the earning capacity of the child." 42 Pa.C.S. § 6352(a)(5); *In the Interest of Steven J.*, 491 A.2d 125, 128 (Pa. Super. 1985).

2. Pennsylvania Juvenile Court Procedural Rules provide that if the juvenile court orders restitution in its dispositional order, the order shall include:

- A specific amount of restitution to be paid by the juvenile;
- To whom the restitution shall be paid; and
- A payment schedule, if so determined by the court.

Pa.R.J.C.P. 515(B).

### **D. Policy Considerations in Ordering Restitution**

The juvenile court should consider the restorative justice aspect of ordering restitution so that the order is consistent with the protection of the public interest and the community. The rehabilitative purpose of the Juvenile Act is attained through accountability and the development of personal qualities that will enable the juvenile offender to become a responsible and productive member of the community. *In the Interest of M.W.*, 725 A.2d 729, 733 (Pa. 1999).

## **II. FACTORS IN DETERMINING RESTITUTION AMOUNT**

### **A. Juvenile Court's Broad Discretion in Determining Restitution**

1. The policies underlying the Juvenile Act and its restitution provision, as well as the plain language of Section 6352, grant the juvenile court a broad measure of discretion to apportion responsibility for damages based upon the nature of the delinquent act and the earning capacity of the juvenile. *In the Interest of M.W.*, 555 Pa. 505, 725 A.2d 729 (1999).

2. When considering the "earning capacity of the child," the best practice is to consider the child's **current** earning capacity; i.e., the child's earning capacity while juvenile court has jurisdiction over the juvenile. The juvenile court, however, may consider the child's earning capacity over a longer period of time if the juvenile

court believes that considering a longer period of time will better meet the goals of the Juvenile Act.

3. Even if a victim settles with another party in a civil suit that arose out of juvenile's delinquent act, the juvenile court may still impose restitution. **B.D.G.**, 959 A.2d at 371.

### **B. Factors Juvenile Court Should Consider in Ordering Restitution ("Dublinski Factors")**

#### **1. Generally**

The juvenile court must consider four factors before imposing restitution:

- The amount of loss the victim suffered;
- The fact that the juvenile's action caused the injury;
- The amount awarded does not exceed the juvenile's ability to pay; and
- The type of payment that will best serve the needs of the victim and the capabilities of the juvenile.

*In the Interest of Dublinski*, 695 A.2d 827 (Pa.Super. 1997).

#### **2. Dublinski Factor No. 1: Amount of Loss Suffered by the Victim**

- An order of restitution is not an order of damages. While the juvenile's payment of restitution may aid the victim, its true purpose and the reason for its imposition is the rehabilitative goal it serves by impressing upon the juvenile the loss he has caused and his responsibility to repair the loss to the extent that he is able to do so. **Commonwealth v. B.D.G.**, 959 A.2d 362, 371 (Pa.Super. 2008)(*en banc*)(citation omitted).
- In determining the amount of restitution, the juvenile court, in its discretion, may ignore insurance proceeds that a victim's insurance company paid the victim as a result of the loss the juvenile caused the victim. The juvenile court, however, may only do so if the juvenile court believes that ignoring the amount of insurance proceeds furthers the goal of rehabilitating the juvenile. **B.D.G.**, 959 A.2d at 371; **Commonwealth v. Kerr**, 444 A.2d 758, 760 (Pa. Super. 1982).

#### **3. Dublinski Factor No. 2: The Restitution Order Should Reflect the Damage that the Victim Would Not Have Suffered, "But For" the Juvenile's Delinquent Acts**

- The juvenile court should engage in a "but for" analysis, i.e. the juvenile will

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be liable for restitution for all damages that would not have occurred but for the juvenile's criminal conduct. *B.D.G.*, 959 A.2d at 367.

### **4. Dublinski Factor No. 3: Juvenile's Earning Capacity**

- Before ordering restitution, the juvenile court must make some inquiry into "earning capacity." *In re: Ryan*, 419 A.2d 1224, 1227 (Pa. Super. 1980).
- The juvenile court should evaluate relevant factors, such as, juvenile's mental ability, maturity and education, work history, if any, the likelihood of future employment and the extent to which a juvenile can reasonably meet a restitution obligation, the impact that the restitution award will have on the juvenile's ability to acquire higher education and thus increase the juvenile's earning capacity, and the juvenile's present ability to make restitution. *B.D.G.*, 959 A.2d at 368; *Dublinski*, 695 A.2d at 830.
- When considering the "earning capacity of the child," the best practice is to consider the child's **current** earning capacity; i.e., the child's earning capacity while juvenile court has jurisdiction over the juvenile. The juvenile court, however, may consider the child's earning capacity over a longer period of time if the juvenile court believes that considering a longer period of time will better meet the goals of the Juvenile Act.

### **5. Dublinski Factor No. 4: Juvenile Court shall impose the type of payment that will best serve the needs of the victim and capabilities of the juvenile**

- If the juvenile does not have the current ability to pay the restitution amount in a lump sum, the juvenile court may order that the juvenile pay over a period of years. *B.D.G.*, 959 A.2d at 369-70; *Dublinski*, 695 A.2d at 829.
- Similarly, if the juvenile has no present ability to pay restitution, the court may defer imposition of a payment plan until an appropriate time in the future. *B.D.G.*, 959 A.2d at 369-70; *Dublinski*, 695 A.2d at 829.
- When considering the "earning capacity of the child," the best practice is to consider the child's **current** earning capacity; i.e., the child's earning capacity while juvenile court has jurisdiction over the juvenile. The juvenile court, however, may consider the child's earning capacity over a longer period of time if the juvenile court believes that considering a longer period of time will better meet the goals of the Juvenile Act.

### **C. An Award of Restitution is Not an Award of Damages**

1. An order of restitution is not an award of damages. While a juvenile's payment of restitution may aid the victim, its true purpose and the reason for its imposition is the rehabilitative goal it serves by impressing upon the juvenile

the loss he has caused and his responsibility to repair the loss to the extent that he is able to do so. *B.D.G.*, 959 A.2d at 371 (citation omitted).

2. For example, juvenile recklessly drove a car that resulted in the death of one victim and severe injuries to two other victims. Superior Court found that it was in the discretion of the juvenile court to impose restitution as a rehabilitative goal. It is irrelevant that the insurance company of the juvenile's parents made a monetary payment to the injured victim seeking restitution or that the injured victim signed a release upon settlement with the insurance company. *Appeal of B.T.C.*, 868 A.2d 1203, 1205-06 (Pa. Super. 1997).

### D. Facts in the Record to Support an Order of Restitution

The order of restitution must be supported by the record and not be excessive or speculative. *Dublinski*, 695 A.2d at 829.

### E. Impact of Criminal Statutes and Cases Regarding Restitution on the Interpretation of Juvenile Cases and Statutes

1. Criminal statutes are not controlling on an interpretation of Juvenile Act, 42 Pa.C.S. § 6352. Similarly, cases interpreting such statutes are not binding on the juvenile court. The juvenile court, however, may rely on criminal law jurisprudence when those principles are consistent with the purposes of the Juvenile Act. *B.D.G.*, 959 A.2d at 367.
  - For example, in *Dublinski*, 695 A.2d at 830, the Superior Court found that the principles about the scope of restitution enunciated in an adult criminal case aligned with purposes of Juvenile Act and adopted the "but for" test to determine the scope of a juvenile's restitution.
  - In contrast, in *Dublinski*, the Superior Court refused to adopt the requirement set forth in 18 Pa.C.S. § 1106 because this provision is contrary to the Juvenile Act. Section 1106, which applies to an adult offender, provides that the trial court, when determining restitution, should not consider the adult offender's ability to pay. In contrast, 42 Pa.C.S. § 6352 requires the juvenile court to consider the juvenile's ability to pay. *Dublinski*, 695 A.2d at 830.

## III. DISPOSITIONAL COURT'S RESPONSIBILITIES

### A. Restitution Hearing

1. Before entering an order imposing restitution, a juvenile court should hold a hearing to ensure that the amount of restitution is not speculative, reflects the amount of loss the victim suffered, the juvenile's actions in causing the injury, the juvenile's earning capacity, and that the payment will best serve the needs of the victim and the capabilities of the juvenile.

2. When considering the “earning capacity of the child,” the best practice is to consider the child’s **current** earning capacity; i.e., the child’s earning capacity while juvenile court has jurisdiction over the juvenile. The juvenile court, however, may consider the child’s earning capacity over a longer period of time if the juvenile court believes that considering a longer period of time will better meet the goals of the Juvenile Act.
3. After the hearing, the court shall state on the record the amount of restitution and the basis for its decision. 42 Pa.C.S. § 6352(c).
4. If a victim submits a written or oral impact statement that addresses the economic, physical or psychological effect that the crime had on the victim, the juvenile court shall consider the statement when determining the disposition of the juvenile, including the imposition of restitution. 28 P.S. 11.201(5).

### B. Restitution Order

Pennsylvania Rule of Juvenile Court Procedure 515 requires that the court include the following information in an order for restitution:

1. A specific amount of restitution that the juvenile is to pay;
2. To whom the restitution shall be paid; and
3. A payment schedule, if so determined by the court.

Pa.R.J.C.P. 515(B).

### C. Parties To Whom Juvenile May Pay Restitution

1. Juvenile Court may order that the juvenile pay restitution to the victim or a third-party, such as an insurance company, or the State.
2. It is within the discretion of the juvenile court, when it determines that a victim or other party is entitled to restitution funds, whether it should be paid sooner than the time period in which the juvenile will be able to pay restitution, and may order that the juvenile pay restitution to the restitution fund. 42 Pa.C.S. § 6352(a)(5). In such case, the President Judge of a Court of Common Pleas, in his or her discretion, may make payments from the restitution fund to a victim or other party for financial losses resulting from delinquent acts. *Id.*
3. It is within the discretion of the juvenile court to order that the juvenile pay restitution to an insurance company that reimburses an insurance company for amounts that the insurance company paid the victim. *In re: J.G.*, 45 A.3d 1118 (Pa. Super. 2012). It is also within the discretion of the juvenile court

to order the juvenile to pay restitution to a victim even if the payment is duplicative. *In re: B.T.C.*, 868 A.2d 1203 (Pa. Super. 2005).

4. It is also within the discretion of the juvenile court to order as restitution that the juvenile reimburse the state for the investigation that led to the adjudication of delinquency of the juvenile. *In re R.S.*, 847 A.2d 685 (Pa. Super. 2004).

### D. Timeliness and Deferment of Restitution Order

1. The Juvenile Act, unlike the Crimes Code, does not require the juvenile court to impose restitution within thirty days of the dispositional order. *In the Interest of J.G.*, 45 A.3d 1118, 1121 (Pa. Super. 2012). Rather, the Juvenile Act provides the juvenile court with broad discretion in ordering that the juvenile pay restitution to the victim. This discretion includes determining the time period during the proceedings in which the juvenile court orders restitution. It was proper for the juvenile court to wait to order restitution until the information regarding the damages became available, even if it took 114 days to obtain the information. *Id.* at 1122. However, a court may not impose an open-ended order of restitution with the amount to be determined at a later date. 42 Pa.C.S. § 6352(a)(5) and (6). *See also Commonwealth v. Ramos*, 197 A.3d 766, 770 (Pa. Super. 2018).
2. Juvenile court did not violate a juvenile's due process rights when the juvenile court imposed restitution more than ninety days after final disposition and placement because the restitution order was a separate and appealable order. *In the Interest of J.G.*, 45 A.2d at 1122 (citing *In re: J.E.D.*, Jr. 879 A.2d 288 (Pa. Super. 2005) (providing that an order modifying restitution is an appealable order)).
3. If the juvenile court enters an order for restitution and the juvenile cannot pay the restitution at the time of the order, the juvenile court may defer the juvenile's restitution obligation or order that juvenile pay the restitution over a period of time. *B.D.G.*, 959 A.2d at 371.

### E. Restitution as Part of Probation Order

1. Section 6352(a)(2) authorizes a juvenile court to, inter alia, place a juvenile under the supervision of the probation officer of the court "under conditions and limitations the court prescribes." Although this section does not specifically list restitution as one of the conditions of probation, it is reasonable to interpret this provision as permitting the juvenile court to impose restitution as a condition of probation so long as the juvenile's payment of restitution is consistent with the policy of the Juvenile Act. *See In re M.W.*, 725 A.2d 729, 732 (Pa. 1999).

2. When a trial court, in an adult proceeding, imposes restitution as part of the sentence, rather than as a condition of probation, the courts have found different legal implications. See generally *Commonwealth v. Popow*, 844 A.2d 13, 19 (Pa. Super. 2004). The juvenile courts have not made such a distinction.
3. The goals and purposes of restitution in the juvenile context are the same for disposition orders and probation orders. A juvenile court should always impose restitution that is “appropriate to the individual circumstances of the child’s case” in light of “the nature of the acts that the child committed and the earning capacity of the child.” 42 Pa.C.S. § 6352(a).

### F. Determination of Restitution For Intercounty Transfers

When a juvenile commits an offense in a county that is not his home county and the juvenile judge in the county in which he committed the offense makes findings of facts about the offense, the juvenile judge should also make a finding about the amount of restitution.

### G. Retention of Jurisdiction Until Age 21 and Then Judgment Against Juvenile

The Juvenile Act provides that a court that orders restitution retains jurisdiction until there is full compliance with the order or until the juvenile is 21 years old. If a restitution order remains unpaid when the child turns 21, any remainder continues to be collectible as a judgment in favor of the county probation department under Section 9728. 42 Pa.C.S. § 6352(a)(5).

### H. Restitution Determined by Agreement

#### 1. Consent Decree

A court may impose restitution as a term of a consent decree voluntarily entered by the juvenile. The juvenile court, in either approving or setting the amount of restitution, must consider the juvenile’s ability to pay. *In re J.J.*, 848 A.2d 1014, 1015 (Pa. Super. 2004).

#### 2. Informal Adjustment

When making an informal adjustment to allegations under Juvenile Court Procedural Rule 312, a probation officer may include as a condition of the adjustment a payment of restitution to which the parties agreed. Pa.R.J.C.P. 312.

#### 3. Plea Agreement

The payment of restitution may be part of a plea agreement so long as the amount reflects amount of loss the victim suffered, the juvenile’s actions in

causing the injury, the juvenile's ability to pay the restitution award and that the payment will best serve the needs of the victim and the capabilities of the juvenile.

### 4. Juvenile Court's Discretion to Hold a Hearing

- Juvenile court has the discretion to hold a hearing before accepting the terms of a consent decree, informal adjustment or plea agreement that includes the payment of restitution. Juvenile court should ensure that the amount of restitution is not speculative, reflects amount of loss the victim suffered, the juvenile's actions in causing the injury, the juvenile's earning and that the payment will best serve the needs of the victim and the capabilities of the juvenile.
- When considering the "earning capacity of the child," the best practice is to consider the child's **current** earning capacity; i.e. the child's earning capacity while juvenile court has jurisdiction over the juvenile. The juvenile court, however, may consider the child's earning capacity over a longer period of time if the juvenile court believes that considering a longer period of time will better meet the goals of the Juvenile Act.

### 5. Victim Offender Conferencing

- Another method to determine restitution is to have the victim and juvenile engage in Victim/Offender Conferencing. This involves a facilitated dialogue between the victim and the juvenile offender. Victim/offender conferencing encourages offenders to take responsibility for their actions, understand the harm he caused and take action to make things right.
- Victim Offenders Conferencing is primarily about the restoration of crime victims. The research has shown that the use of VOC enhances the ability to collect restitution and empowers the victim to express their needs and wants regarding the repair of harm to them. While this practice has meaningful restorative justice value, it must be implemented carefully, primarily as a service to victims. It should only be an element of an appropriate disposition of a case, not the entire disposition of a case.

## IV. Parental Participation and Liability

### A. Parental Participation in Juvenile's Restitution Obligation

Section 6310 of the Juvenile Act, "Parental Participation," provides that a court **may** order a parent to participate in restitution. Parental "participation" in a juvenile's restitution order should be limited to attending the restitution hearing, helping the juvenile find employment, arranging transportation to employment, overseeing the juvenile's income, or ensuring that the juvenile

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remit the required payments. *In re C.W.*, 7 A.3d 891, 896-97 (Pa. Cmwlth. 2010).

### **B. Liability of Parents for Juvenile's Delinquent Acts that are Tortious.**

Liability for Tortious Acts of Children, 23 Pa.C.S. §§ 5501-5509 imposes liability on a parent if a court adjudicates a juvenile delinquent for committing a tortious act that caused an injury. 23 Pa.C.S. § 5502; 23 Pa.C.S. § 5505. The parent is only liable for damages up to \$1000 for one victim or \$2500 for multiple victims

- In a juvenile proceeding, the juvenile court shall ascertain the amount to reimburse any person who has suffered injury because of the delinquent and tortious act of the child and direct the parents to make a payment not to exceed \$1000 for one victim or \$2500 for multiple victims. 23 Pa.C.S. §§ 5503(a), 5505. If the parent fails to make the payment, the victim may recover the amount in a civil suit against the parent or parents. 23 Pa.C.S. § 5503(b).
- The limitations of \$1000 for one victim and \$2500 for multiple victims also apply when two or more children of the parent engaged jointly in one or more delinquent and tortious acts. 23 Pa.C.S. § 5505(c).
- A parent shall not be liable for the delinquent and tortious act of his child if at the time the child committed the act, the parent "has neither custody nor is entitled to custody of the child" or if the child is institutionalized or emancipated. 23 Pa.C.S. § 5508(a). A parent is still liable if the parent deserted the child. 23 Pa.C.S. § 5508(b).
- This Act only applies to "natural or adoptive" parents and does not apply to a Child and Youth Agency who had custody over the child at the time that the child committed the delinquent and tortious acts. *In re: C.W.*, 7 A.3d 891, 895 (Pa. Cmwlth. 2010).

## **V. Restitution Fund**

### **A. Contribution.**

In addition to authorizing the payment of restitution to a victim, the Juvenile Court may order that the juvenile contribute to a "restitution fund" the President Judge of the Court of Common Pleas of each county may create. 23 Pa.C.S. §6352(a)(5). Under the JCJC Standards Governing the Administration of Restitution Funds, any court that collects such contributions from juveniles must establish a fund for the deposit of the contributions. An established restitution fund will pay the victim before the time that the juvenile pays the fund.

### **B. Guidelines**

When establishing such a fund, the President Judge of the Court of Common Pleas should promulgate written guidelines for its administration. The guidelines should specify that no disbursements from the fund may occur without the signature of two persons designated by the President Judge. Disbursements from the fund shall be at the discretion of the President Judge, adhere to the written guidelines, and remain within the limitations of Chapter 63 of Title 42. 42 Pa.C.S. § 6352(a). Restitution funds should be audited annually, and an annual report must disclose individual and aggregate data on payments to and disbursement from the fund.

### **C. Judgment for Unpaid Restitution**

Under the JCJC Standards Governing the Collection and Disbursement of Restitution, each county must adopt a written policy requiring that the juvenile court enter a judgment for any unpaid restitution when the juvenile court's jurisdiction over the juvenile terminates. At least one-half of any amount collected under such a judgment must be applied to the payment of restitution to the victim, as opposed to fees, costs, fines, and other obligations. 42 Pa.C.S. § 9728(g.1). As a matter of best practices, however, all funds collected should be applied to the restitution obligation until it is fully satisfied.

## **VI. COLLECTION OF RESTITUTION AND ENFORCEMENT OF ORDER**

### **A. Probation Department**

The county probation department (or other agent designated by the county commissioners with the approval of the president judge) shall collect restitution, reparation, fees, costs, fines and penalties. 42 Pa.C.S. § 9728(a).

### **B. Procedure for Collection of Restitution Order**

1. Upon sentencing, pretrial disposition or other order, the county clerk of courts shall transmit copies of all orders for restitution. 42 Pa.C.S. §9728(b)(3).
2. The county probation department or designated agent, upon receipt of each order from the clerk of courts, will open a restitution file for the purposes of recording the amounts of restitution received, collected, or deducted. 42 Pa.C.S. § 9728(b.1).

### **C. Default in Payment**

1. If a juvenile fails to make restitution payments, it is the best practice of juvenile court to conduct a hearing to determine the reasons for the juvenile's failure

- to pay and take action consistent with the Juvenile Act.
2. If the juvenile court finds that it is necessary and appropriate to refer the juvenile's delinquent account to a private collection agency, the juvenile court may do so. 42 Pa.C.S. § 9730.
  3. If the juvenile court determines that the juvenile is **not** able to pay, it should assess the extent of that inability, the burden that payment imposes on the juvenile, and adjust the payment schedule or sentence the juvenile to a period of community service—whatever the court finds to be just and practicable under the circumstances. 42 Pa.C.S. § 6352.

### D. Judgment May Be Entered

If it is appropriate to enter a judgment for the juvenile's failure to pay restitution, the judgment shall be against the juvenile and in favor of the probation department. 42 Pa.C.S. § 9728(a).

## VII. PROPOSED AMENDMENT OF Pa.R.J.C.P. 515 AND 610 TO PERMIT THE JUVENILE COURT TO REDUCE THE AMOUNT OF RESTITUTION, FEES AND COSTS.

The Juvenile Court Procedural Rules Committee has proposed a comment to Pennsylvania Rules of Juvenile Court Procedure Section 515 (Dispositional Order) and 610 (Dispositional and Commitment review) making explicit that a juvenile may petition the juvenile court to reduce his obligations to pay restitution, fees and costs.

If the juvenile court modified a juvenile's obligation to pay restitution, fees, and costs and the juvenile was otherwise compliant, the juvenile court would have the discretion to decide that supervision is no longer necessary and to terminate supervision.

## VIII. APPELLATE REVIEW

### A. Standard of Review

1. "The Juvenile Act grants broad discretion to the juvenile court to determine an appropriate disposition. The appellate court will not disturb a disposition absent a manifest abuse of discretion." *In re J.G.*, 45 A.3d 1118, 1120 (Pa. Super. 2012) (citation omitted).
2. The appellate courts review whether the disposition is consistent with the protection of the public interest and the community, and the rehabilitative purpose of the Juvenile Act. The purpose of the disposition order is to ensure

accountability and the development of personal qualities that will enable the juvenile offender to become a responsible and productive member of the community. Thus the policies underlying the Juvenile Act and its restitution provision, as well as the plain language of Section 6352, serve to invest the juvenile court with a broad measure of discretion to apportion responsibility for damages based upon the nature of the delinquent act and the earning capacity of the juvenile. *In re M.W.*, 725 A.2d at 732-733.

### **B. Abuse of Discretion**

1. The Superior Court of Pennsylvania will not reverse the findings of the juvenile court, which is the finder of fact in a juvenile proceeding, unless it appears the court has abused its discretion or committed an error of law. *In re Love*, 563, 646 A.2d 1233, 1237 (Pa. Super. 1994).
2. When reviewing an order of restitution, the appellate court will find that the juvenile court abused its discretion when the restitution order is speculative, excessive, lacks support in the record, or fails to adhere to but-for analysis. *B.D.G.*, 959 A.2d at 367.

### **C. Claims Waived on Appeal**

When a juvenile failed to object before the juvenile court to a restitution order that required him to pay for funeral expenses, the juvenile waived his challenge on appeal that the juvenile court erred in not considering the nature of the delinquent act or his earning capacity. *In re B.T.C.*, 868 A.2d 1203 (Pa. Super. 2005).

## **IX. BEST PRACTICES AND CONSIDERATIONS WHEN ORDERING RESTITUTION IN JUVENILE CASES**

1. The juvenile court, when determining an amount of restitution, should set an amount that reflects:
  - the current earning capacity of the juvenile, including employment opportunities;
  - the harm the juvenile caused the victim,
  - the culpability of the juvenile in causing the harm,
  - the impact that restitution will have on rehabilitating the juvenile,
  - the juvenile's age,
  - the length of time that the juvenile might be under supervision in order to complete all other conditions of the disposition order, and
  - any other relevant factors.
2. The juvenile court must place on the record the basis for the amount of

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restitution ordered. If the amount of claimed restitution is in question, the court should conduct a hearing to determine the actual amount.

3. The juvenile court should ensure that the victim is notified and provided with an opportunity to be heard at dispositional and dispositional review hearings, especially when the juvenile court determines the amount of restitution or the juvenile files a motion to modify restitution.
4. Before setting an amount of restitution, the juvenile court must review proof of the victim's damages to establish the amount requested (i.e., victim claims forms, receipts, appraisals, estimates, etc.). The amount of restitution may not be speculative.
5. The juvenile court is not required to set restitution at the full amount of the victim's damages. Rather, the juvenile court should consider this factor as well as the factors listed above.
6. If the juvenile court determines that it is not in the best interest of the juvenile to order that the juvenile pay restitution in the full amount of the victim's damages, it is appropriate for the juvenile court to ask the victim about the victim's position on an alternative disposition as a means to repair harm in lieu of restitution, such as community service, that is consistent with the mission of balanced and restorative justice.
7. When more than one juvenile has committed the delinquent act(s) and the juvenile court determines that it is appropriate to impose restitution on each of the juveniles, the juvenile court should separately determine the appropriate amount of restitution for each juvenile. The juvenile court should not require one juvenile to be responsible for paying the amount of restitution that the juvenile court orders for the other juvenile.
8. When considering the juvenile's current ability to pay restitution, the juvenile court should not consider the financial resources of the juvenile's parents or guardians.
9. It is the responsibility of the juvenile court and the probation department to create and provide work and community service programs and restitution funds to assist juveniles with paying restitution.
10. The juvenile court should order that the juvenile make restitution payments in installments if the juvenile is unable to pay the full amount at one time.
11. If the juvenile fails to make one or more restitution payments, the juvenile court, when deciding whether to impose additional sanctions against the juvenile, should consider the juvenile's current earning capacity, the juvenile's

current behavior and rehabilitative needs.

12. When appropriate, the court should encourage victims to apply to the Crime Victims' Compensation Fund for recovery of financial loss, as permitted by the Fund, especially in cases where the amount of restitution sought is high or when the court has found that a juvenile is unable to pay any or all of the restitution.
13. Juveniles should not make payments directly to the victim. Rather, the juvenile should make the payments to the probation department or juvenile court who will in turn properly disburse the funds.
14. The juvenile court should require the juvenile to pay restitution for the period of time that is appropriate for juvenile and meets the goals of the Juvenile Act. In other words, the juvenile court should not automatically require the juvenile to pay restitution until the juvenile turns 21 years old; rather, the juvenile court should require the juvenile to pay restitution for the period of time that the juvenile court determines is appropriate under the Juvenile Act and is in line with other conditions of supervision.
15. The court should review the juvenile's progress towards making restitution payments at each dispositional review hearing. The juvenile court should also consider whether it is in a juvenile's best interest for the case to remain open until the age of 21 when the juvenile has otherwise satisfied all other obligations of the dispositional order. The juvenile court should consider the negative impact on a juvenile's transition to adulthood when a juvenile has a judgment entered against him for failing to pay restitution while under the jurisdiction of the juvenile court.

*Chapter Five*

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## *Chapter Five*

# *Statutory Provisions And Rules Of Court*

### **I. ENABLING STATUTES and RULES**

#### **RESTITUTION IN GENERAL (Crimes Code)**

##### **18 Pa.C.S.A. § 1106**

Restitution for injuries to person or property

**(a) General rule.**--Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

**(b) Condition of probation or parole.**--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order may be made a condition of such probation or parole.

**(c) Mandatory restitution.--**

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

(ii) If restitution to more than one person is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:

- (A) The victim.
- (B) The Crime Victim's Compensation Board.
- (C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.
- (D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

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- (i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.
  - (ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.
  - (iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.
  - (iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.
- (3) The court may, at any time or upon the recommendation of the district attorney that is based on information received from the victim and the probation section of the county or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution, alter or amend any order of restitution made pursuant to paragraph (2), provided, however, that the court states its reasons and conclusions as a matter of record for any change or amendment to any previous order.
- (4) (i) It shall be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered. This recommendation shall be based upon information solicited by the district attorney and received from the victim.
- (ii) Where the district attorney has solicited information from the victims as provided in subparagraph (i) and has received no response, the district attorney shall, based on other available information, make a recommendation to the court for restitution.
- (iii) The district attorney may, as appropriate, recommend to the court that the restitution order be altered or amended as provided in paragraph (3).
- (d) Limitations on district justices.**--Restitution ordered by a magisterial district judge shall be limited to the return of the actual property or its undisputed dollar amount or, where the claim for restitution does not exceed the civil jurisdictional limit specified in 42 Pa.C.S. § 1515(a)(3) (relating to jurisdiction) and is disputed as to amount, the magisterial district judge shall determine and order the dollar amount of restitution to be made.
- (e) Restitution payments and records.**--Restitution, when ordered by a judge, shall be made by the offender to the probation section of the county in which he was convicted or to another agent designated by the county commissioners with the approval of the president judge of the county to collect restitution according to the order of the court or, when ordered by a magisterial district judge, shall be made to the magisterial district judge. The probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution and the magisterial district judge shall maintain records of the restitution order and its satisfaction and shall forward to the victim the property or payments made pursuant to the restitution order.
- (f) Noncompliance with restitution order.**--Whenever the offender shall fail to

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make restitution as provided in the order of a judge, the probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution shall notify the court within 20 days of such failure. Whenever the offender shall fail to make restitution within 20 days to a magisterial district judge, as ordered, the magisterial district judge shall declare the offender in contempt and forward the case to the court of common pleas. Upon such notice of failure to make restitution, or upon receipt of the contempt decision from a magisterial district judge, the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

**(g) Preservation of private remedies.**--No judgment or order of restitution shall debar the owner of the property or the victim who sustained personal injury, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

**(h) Definitions.**--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

**"Crime."** Any offense punishable under this title or by a magisterial district judge.

**"Injury to property."** Loss of real or personal property, including negotiable instruments, or decrease in its value, directly resulting from the crime.

**"Offender."** Any person who has been found guilty of any crime.

**"Personal injury."** Actual bodily harm, including pregnancy, directly resulting from the crime.

**"Property."** Any real or personal property, including currency and negotiable instruments, of the victim.

**"Restitution."** The return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court.

**"Victim."** As defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.1 The term includes the Crime Victim's Compensation Fund if compensation has been paid by the Crime Victim's Compensation Fund to the victim and any insurance company that has compensated the victim for loss under an insurance contract.

### **MANDATORY RESTITUTION (Sentencing Code)**

#### **► Mandatory Restitution in subsection 9721(c)**

#### **42 PA.C.S.A. § 9721** Sentencing Generally

**(a) General rule.**--In determining the sentence to be imposed the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

- (1) An order of probation.
- (2) A determination of guilt without further penalty.

- (3) Partial confinement.
- (4) Total confinement.
- (5) A fine.
- (6) County intermediate punishment.
- (7) State intermediate punishment.

**(a.1) Exception.—**

- (1) Unless specifically authorized under section 9763 (relating to a sentence of county intermediate punishment) or 61 Pa.C.S. Ch. 41 (relating to State intermediate punishment), subsection (a) shall not apply where a mandatory minimum sentence is otherwise provided by law.
- (2) An eligible offender may be sentenced to State intermediate punishment pursuant to subsection (a)(7) and as described in 61 Pa.C.S. Ch. 41 or to State motivational boot camp as described in 61 Pa. C.S. Ch. 39 (relating to motivational boot camp), even if a mandatory minimum sentence would otherwise be provided by law.
- (3) An eligible offender may be sentenced to total confinement pursuant to subsection (a)(4) and a recidivism risk reduction incentive minimum sentence pursuant to section 9756(b.1) (relating to sentence of total confinement), even if a mandatory minimum sentence would otherwise be provided by law.

**(b) General standards.--**In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation).<sup>1</sup> In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resentence an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resentence following remand, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence or resentence outside the guidelines adopted by the Pennsylvania Commission on Sentencing under sections 2154 (relating to adoption of guidelines for sentencing), 2154.1 (relating to adoption of guidelines for county intermediate punishment), 2154.2 (relating to adoption of guidelines for State intermediate punishment), 2154.3 (relating to adoption of guidelines for fines), 2154.4 (relating to adoption of guidelines for resentencing) and 2154.5 (relating to adoption of guidelines for parole) and made effective under section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines to the commission, as established under section 2153(a) (14) (relating to powers and duties). Failure to comply shall be grounds for vacating the sentence or resentence and resentencing the defendant.

**(c) Mandatory restitution.--**In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of

his criminal conduct for the damage or injury that he sustained. For purposes of this subsection, the term "victim" shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.<sup>2</sup>

**(c.1) Mandatory payment of costs.**--Notwithstanding the provisions of section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties) or any provision of law to the contrary, in addition to the alternatives set forth in subsection (a), the court shall order the defendant to pay costs. In the event the court fails to issue an order for costs pursuant to section 9728, costs shall be imposed upon the defendant under this section. No court order shall be necessary for the defendant to incur liability for costs under this section. The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).

**(d) Detailed criteria.**--With respect to each alternative the criteria to be considered by the court are set forth in this subchapter.

**(e) Term of imprisonment.**--All sentences of imprisonment imposed under this chapter shall be for a definite term.

## **COLLECTION OF RESTITUTION**

- **Judgment in favor of Probation Department in subsection (a)(1)**
- **Restraining order to preserve assets in excess of \$10,000 in subsection (e)**

### **42 Pa.C.S.A. § 9728**

Collection of restitution, reparation, fees, costs, fines and penalties

#### **(a) General rule.—**

(1) Except as provided in subsection (b)(5), all restitution, reparation, fees, costs, fines and penalties shall be collected by the county probation department or other agent designated by the county commissioners of the county with the approval of the president judge of the county for that purpose in any manner provided by law. However, such restitution, reparation, fees, costs, fines and penalties are part of a criminal action or proceeding and shall not be deemed debts. A sentence, pretrial disposition order or order entered under section 6352 (relating to disposition of delinquent child) for restitution, reparation, fees, costs, fines or penalties shall, together with interest and any additional costs that may accrue, be a judgment in favor of the probation department upon the person or the property of the person sentenced or subject to the order.(2) In accordance with section 9730.1 (relating to collection of court costs, restitution and fines by private collection agency), the collection of restitution, reparation, fees, costs, fines and penalties under this section may be referred to a private collection agency. Statistical information relating to the amount of restitution collected by the county probation department or any agent designated by the county commissioners of the county with the approval

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of the president judge of the county shall be made available to the Pennsylvania Commission on Crime and Delinquency on an annual basis.

**(b) Procedure.--**

(1) The county clerk of courts shall, upon sentencing, pretrial disposition or other order, transmit to the prothonotary certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, exceed \$1,000, and it shall be the duty of each prothonotary to enter and docket the same of record in his office and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

(2) The clerk of courts, in consultation with other appropriate governmental agencies, may transmit to the prothonotary of the respective county certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, do not exceed \$1,000, and, if so transmitted, it shall be the duty of each prothonotary to enter and docket the same of record in his office and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

(3) The county clerk of courts shall, upon sentencing, pretrial disposition or other order, transmit to the Department of Probation of the respective county or other agent designated by the county commissioners of the county with the approval of the president judge of the county and to the county correctional facility to which the offender has been sentenced or to the Department of Corrections, whichever is appropriate, copies of all orders for restitution and amendments or alterations thereto, reparation, fees, costs, fines and penalties. This paragraph also applies in the case of costs imposed under section 9721(c.1)(relating to sentencing generally).

(4) The total amount for which the person is liable pursuant to this section may be entered as a judgment upon the person or the property of the person sentenced or ordered, regardless of whether the amount has been ordered to be paid in installments.

(5) The county correctional facility to which the offender has been sentenced or the Department of Corrections shall be authorized to make monetary deductions from inmate personal accounts for the purpose of collecting restitution or any other court-ordered obligation or costs imposed under section 9721(c.1). Any amount deducted shall be transmitted by the Department of Corrections or the county correctional facility to the probation department of the county or other agent designated by the county commissioners of the county with the approval of the president judge of the county in which the offender was convicted. The Department of Corrections shall develop guidelines relating to its responsibilities under this paragraph.

**(b.1) Restitution file.--**Upon receipt of each order from the clerk of courts as provided in subsection (b)(3), the department of probation of the respective county or other agent designated by the county commissioners of the county with the approval of the president judge of the county shall open a restitution file for the purposes of recording the amounts of restitution deducted by the Department of Corrections or county correctional facility or collected by the department of probation or the agent designated by the county commissioners of the county with the approval of the president judge

of the county.

**(b.2) Mandatory payment of costs.**--Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing costs upon the defendant, the defendant shall nevertheless be liable for costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs). The absence of a court order shall not affect the applicability of the provisions of this section.

**(c) Period of time.**--Notwithstanding section 6353 (relating to limitation on and change in place of commitment) or 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property), the period of time during which such judgments shall have full effect may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crimes of which he was convicted or the maximum term of confinement to which the offender was committed.

**(d) Priority.**--Notwithstanding any other statutory provisions in this or any other title, any lien obtained under this section shall maintain its priority indefinitely and no writ of revival need be filed.

**(e) Preservation of assets subject to restitution.**--Upon application of the Commonwealth, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order under this section:

- (1) upon the filing of a criminal complaint, information or indictment charging a criminal violation or a petition alleging delinquency for which restitution may be ordered and alleging that the property with respect to which the order is sought appears to be necessary to satisfy such restitution order and judgment; and
- (2) if, after notice to persons appearing to have an interest in the property and an opportunity for a hearing, the court determines that:

(i) there is a substantial probability that:

- (A) the Commonwealth will prevail on the underlying criminal charges or allegation of delinquency;
- (B) restitution will be ordered exceeding \$10,000 in value;
- (C) the property appears to be necessary to satisfy such restitution order;  
And
- (D) failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court or otherwise made unavailable for payment of the anticipated restitution order; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

**(f) Temporary restraining order.**--A temporary restraining order under subsection (e) may be entered upon application of the Commonwealth without notice or opportunity for a hearing, whether or not a complaint, information, indictment or petition alleging delinquency has been filed with respect to the property, if the Commonwealth demonstrates that there is probable cause to believe that the property with respect to which the order is sought appears to be necessary to satisfy

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an anticipated restitution order under this section and that provision of notice will jeopardize the availability of the property to satisfy such restitution order and judgment. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this subsection shall be held at the earliest possible time and prior to the expiration of the temporary order.

**(g) Costs, etc.--**Any sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

**(g.1) Payment.--**No less than 50% of all moneys collected by the county probation department or other agent designated by the county commissioners of the county with the approval of the president judge of the county pursuant to subsection (b)(1) and deducted pursuant to subsection (b)(5) shall, until the satisfaction of the defendant's restitution obligation, be used to pay restitution to victims. Any remaining moneys shall be used to pay fees, costs, fines, penalties and other court-ordered obligations.

**(h) Effect on contempt proceedings.--**This section shall not affect contempt proceedings mandated by 18 Pa.C.S. § 1106(f).

## **DISTRIBUTION OF FUNDS COLLECTED BY CRIMINAL DIVISION**

### **► Restitution addressed in subsection (1)(i)**

#### **204 Pa. Code § 29.405**

The Supreme Court of Pennsylvania, pursuant to general authority set forth by Art. V, § 10 of the Pennsylvania Constitution, and 42 Pa.C.S. § 1721, has authorized the Court Administrator of Pennsylvania to promulgate regulations in accordance with all applicable statutory provisions pertaining to the distribution and disbursement of all fines, fees, costs, reparations, restitution, penalties and other remittances imposed and collected by the Criminal Division of the Courts of Common Pleas, Philadelphia Municipal Court, and any other entity on behalf of the Court using the Common Pleas Criminal Court Case Management System (CPCMS).

(1) Schedule for Standard Distribution of Funds Collected by the Criminal Division of the Courts of Common Pleas, Philadelphia Municipal Court, and any other entity on behalf of the Court Using the Common Pleas Criminal Court Case Management System (CPCMS).

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(i) All fines, fees, costs, reparations, restitution, penalties and other remittances imposed and collected by the Criminal Division of the Courts of Common Pleas, Philadelphia Municipal Court and any other entity on behalf of the Court using the CPCMS shall be distributed in the following prioritized order:

(A) The collection agency fee provided for in 42 Pa.C.S. Section 9730.1 shall be paid first, but only in cases wherein the private collection agency has secured the funds from the defendant or a third party and the payment is made to the court. No more than 25% of each payment secured from the defendant by the private collection agency may be applied towards this fee.

(B) The Crime Victim Compensation Fund and Victim Witness Services Fund shall be paid, but only in cases in which the defendant has been sentenced to incarceration, probation or is admitted into an accelerated rehabilitative disposition program (see 18 P. S. § 11.1101). Otherwise, these costs shall be distributed in accordance with subsection (A)(6) of these regulations.

(C) At least 50% of any additional payment shall go to restitution until it is paid in full (see 42 Pa.C.S. § 9728(g.1)). When restitution is ordered to more than one recipient at the same time, the court shall set the priority of payment as follows, in accordance with 18 Pa.C.S. § 1106(c)(1)(ii)(A)--(D):

(I) the victim;

(II) the Crime Victim's Compensation Board;

(III) any other governmental agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct;

(IV) any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(D) Judicial Computer Project/Access To Justice (JCS/ATJ) Fee (see 42 Pa.C.S. § 3733(a.1)).

(E) Electronic monitoring fees, offender supervision fees (as set forth in 18 P. S. § 11.1102(c)), alcohol highway safety school fees (see 75 Pa.C.S. § 1548(b)), service fees (such as sheriff's fees set forth in 42 P. S. § 21101 et. seq., and constable's fees set forth in 42 Pa.C.S. § 2950), transcript fees (see Pa.R.J.A. No. 000.7), witness fees (as provided for in 42 Pa.C.S. § 5903), and other similar fees shall be paid based upon a pro-rated formula, unless the fees are prioritized by court order or the judicial district. The Administrative Office of Pennsylvania Courts may preclude a fee from being classified as an "other similar fee." The amount of the payment allocated to each outstanding item shall be determined by dividing the outstanding balance for the individual item by the combined total of the outstanding balances for all items. The resulting number is then multiplied by the amount of the payment to determine how much of the payment shall be allocated to the outstanding balance of the individual item involved.

For example, a defendant owes \$80.00 in electronic monitoring fees, \$10.00 in offender supervision fees, and \$10.00 in service fees, for a total of \$100.00 in outstanding fees. Defendant makes a payment of \$10.00 in his/her case. To determine the amount to be allocated to electronic monitoring fees,

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divide the outstanding balance of the electronic monitoring fee (\$80.00) by the combined total outstanding balances of all items ( $\$80.00 + 10.00 + 10.00 = \$100.00$ ). The result in this example is .8 (80/100). Multiply the resulting figure by the amount of the payment to determine the allocation to electronic monitoring fees, which in this example is \$8.00 (.8 x \$10.00= \$8.00).

(F) All other fines, fees, costs, reparations, penalties and other remittances except for judgment or satisfaction fees shall be distributed based upon a pro-rated formula. Specifically, the amount of the payment allocated to each outstanding item shall be determined by dividing the outstanding balance for the individual item by the combined total of the outstanding balances for all items. The resulting number is then multiplied by the amount of the payment to determine how much of the payment shall be allocated to the outstanding balance of the individual item involved.

For example, a defendant owes \$80.00 in costs, \$10.00 in fines, and \$10.00 in fees, for a total of \$100.00 in outstanding costs, fines and fees. Defendant makes a payment of \$20.00 in his/her case. To determine the amount to be allocated to the fines, divide the outstanding balance of the fines (\$10.00) by the combined total outstanding balances of all items ( $\$80.00 + 10.00 + 10.00 = \$100.00$ ). The result in this example is .1 (10/100). Multiply the resulting figure by the amount of the payment to determine the allocation to the fines, which in this example is \$2.00 (.1 x \$20.00= \$2.00).

(G) Fees charged by the clerk of courts, prothonotary, other entity in the county responsible for the distribution and disbursement of all fines, fees, costs, reparations, restitution, penalties, or other remittances, or the Clerk of Philadelphia Municipal Court for the entry or satisfaction of a civil judgment related to a criminal proceeding, as set forth in 42 Pa.C.S. § 1725, 42 P. S. §§ 21010, 21042, and 21071 shall be paid last. The amount of the payment allocated to each fee shall be determined by dividing the outstanding balance for the individual fee by the combined total of the outstanding balances for both fees. The resulting number is then multiplied by the amount of the payment to determine how much of the payment shall be allocated to the outstanding balance of the individual fee involved.

For example, a defendant owes \$60.00 in judgment fees and \$40.00 in satisfaction fees for a total of \$100.00 in outstanding fees. Defendant makes a payment of \$10.00 in his/her case. To determine the amount to be allocated to judgment fee, divide the outstanding balance of the judgment fee (\$60.00) by the combined total outstanding balances of all items ( $\$60.00 + 40.00 = \$100.00$ ). The result in this example is .6 (60/100). Multiply the resulting figure by the amount of the payment to determine the allocation to judgment fee, which in this example is \$6.00 (.6 x \$10.00 = \$6.00).

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- (ii) Each payment shall be applied to a single case, unless otherwise ordered by the court.
- (2) The county probation department or other agent designated to collect all fines, fees, costs, reparations, restitution, penalties and other remittances pursuant to 42 Pa.C.S. § 9728, shall use the Common Pleas Criminal Court Case Management System when performing collection related activities.
- (3) Nothing in these regulations shall be applicable to the collection and/or distribution of any filing fee which is authorized by law. Filing fees shall include but not be limited to the clerk of courts automation fee set forth in 42 Pa.C.S. Section 1725.4(b).

### **THE STATUTORY DEFINITION OF A “VICTIM” (Crime Victims Act)**

#### **42 PA. STAT. § 11.103** Definitions

**“Victim.”** The term means the following:

- (1) A direct victim.
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
- (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child’s family:  
Chapter 25 (relating to criminal homicide).  
Section 2702 (relating to aggravated assault).  
Section 3121 (relating to rape).
- (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiance, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

### **SUMMARY CONVICTION – SENTENCE INCLUDES RESTITUTION**

#### **► Requirements for Sentence of Restitution in section (F)(1)**

#### **Pa.R.Crim.P. 454** Trial in Summary Cases

- (A) Immediately prior to trial in a summary case:
- (1) the defendant shall be advised of the charges in the citation or complaint;
  - (2) if, in the event of a conviction, there is a reasonable likelihood of a sentence of imprisonment or probation, the defendant shall be advised of the right to counsel and  
(a) upon request, the defendant shall be given a reasonable opportunity to secure

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counsel, or

(b) if the defendant is without financial resources or is otherwise unable to employ counsel, counsel shall be assigned as provided in Rule 122; and

(3) the defendant shall enter a plea.

(B) If the defendant pleads guilty, the issuing authority shall impose sentence. If the defendant pleads not guilty, the issuing authority shall try the case in the same manner as trials in criminal cases are conducted in the courts of common pleas when jury trial has been waived; however, in all summary cases arising under the Vehicle Code or local traffic ordinances, the law enforcement officer observing the defendant's alleged offense may, but shall not be required to, appear and testify against the defendant. In no event shall the failure of the law enforcement officer to appear, by itself, be a basis for dismissal of the charges against the defendant.

(C) The attorney for the Commonwealth may appear and assume charge of the prosecution. When the violation of an ordinance of a municipality is charged, an attorney representing that municipality, with the consent of the attorney for the Commonwealth, may appear and assume charge of the prosecution. When no attorney appears on behalf of the Commonwealth, the affiant may be permitted to ask questions of any witness who testifies.

(D) The verdict and sentence, if any, shall be announced in open court immediately upon the conclusion of the trial, except as provided in paragraph (E).

(E) If the defendant may be sentenced to intermediate punishment, the issuing authority may delay imposing sentence pending confirmation of the defendant's eligibility for intermediate punishment.

(F) At the time of sentencing, the issuing authority shall:

- (1) if the defendant's sentence includes restitution, a fine, or costs, state the date on which payment is due. If the defendant is without the financial means to pay the amount in a single remittance, the issuing authority may provide for installment payments and shall state the date on which each installment is due;
- (2) advise the defendant of the right to appeal within 30 days for a trial *de novo* in the court of common pleas, and that if an appeal is filed:
  - (a) the execution of sentence will be stayed and the issuing authority may set bail or collateral; and
  - (b) the defendant must appear for the de novo trial or the appeal may be dismissed;
- (3) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period, and advise that, if the defendant fails to appear on that date, a warrant for the defendant's arrest will be issued; and
- (4) issue a written order imposing sentence, signed by the issuing authority. The order shall include the information specified in paragraphs (F)(1) through (F)(3), and a copy of the order shall be given to the defendant.

## II. Special Statutory Restitution Provisions

### IDENTITY THEFT

#### 18 Pa.C.S.A. § 1107.1 Restitution for Identity Theft

**(a) General rule.**--The court shall, in addition to any other restitution sentence or order authorized by law, sentence a person convicted of a violation of section 4106 (relating to access device fraud) or 4120 (relating to identity theft) to make restitution for all reasonable expenses incurred by the victim or on the victim's behalf:

- (1) to investigate theft of the victim's identity;
- (2) to bring or defend civil or criminal actions related to theft of the victim's identity; or
- (3) to take other efforts to correct the victim's credit record or negative credit reports related to theft of the victim's identity.

**(b) Types of expenses.**--The types of expenses recoverable under this section include, but are not limited to:

- (1) fees for professional services by attorneys or accountants;
- (2) fees and costs imposed by credit bureaus, associated with efforts to correct the victim's credit record, incurred in private investigations or associated with contesting unwarranted debt collections; and
- (3) court costs and filing fees.

### CLEANUP OF CLANDESTINE LABORATORIES

#### 18 Pa.C.S.A. § 1110 Restitution for Cleanup of Clandestine Laboratories

**(a) General rule.**--When any person is convicted of an offense under The Controlled Substance, Drug, Device and Cosmetic Act<sup>1</sup> involving the manufacture of a controlled substance, the court shall order the person to make restitution for the costs incurred in the cleanup, including labor costs, equipment and supplies, of any clandestine laboratory used by the person to manufacture the controlled substance.

**(b) Definitions.**--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Clandestine laboratory.” A location or site, including buildings or vehicles, in which glassware, heating devices, precursors or related reagents or solvents which are intended to be used or are used to unlawfully manufacture a controlled substance are located.

“Cleanup.” Actions necessary to contain, collect, control, identify, analyze, disassemble, treat, remove or otherwise disperse all substances and materials in a clandestine

laboratory, including those found to be hazardous waste and any contamination caused by those substances or materials.

"The Controlled Substance, Drug, Device and Cosmetic Act." The act of April 14, 1972 (P.L. 233, No. 64),<sup>1</sup> known as The Controlled Substance, Drug, Device and Cosmetic Act.

### **TERRORISTIC THREATS**

#### ► Restitution addressed in subsection (b)

### **18 Pa.C.S.A. § 2706** Terroristic Threats

**(a) Offense defined.**--A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

- (1) commit any crime of violence with intent to terrorize another;
- (2) cause evacuation of a building, place of assembly or facility of public transportation; or
- (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

**(b) Restitution.**--A person convicted of violating this section shall, in addition to any other sentence imposed or restitution ordered under 42 Pa.C.S. § 9721(c) (relating to sentencing generally), be sentenced to pay restitution in an amount equal to the cost of the evacuation, including, but not limited to, fire and police response; emergency medical service or emergency preparedness response; and transportation of an individual from the building, place of assembly or facility.

**(c) Preservation of private remedies.**--No judgment or order of restitution shall debar a person, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

**(d) Grading.**--An offense under subsection (a) constitutes a misdemeanor of the first degree unless the threat causes the occupants of the building, place of assembly or facility of public transportation to be diverted from their normal or customary operations, in which case the offense constitutes a felony of the third degree.

**(e) Definition.**--As used in this section, the term "communicates" means conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex and similar transmissions.

## **THREAT TO USE WEAPONS OF MASS DESTRUCTION**

### ► Restitution addressed in subsection (c)

#### **18 Pa.C.S.A. § 2715**

#### Threat to Use Weapons of Mass Destruction

**(a) Offense defined.**--A person who intentionally:

- (1), (2) Deleted.
- (3) reports without factual basis of knowledge the existence or potential existence of a weapon of mass destruction; or
- (4) threatens by any means the placement or setting of a weapon of mass destruction; commits an offense under this section. A separate offense shall occur for each report or threat to place or set a weapon of mass destruction.

**(b) Penalty.**--An offense under this section shall be graded as follows:

- (1) Except as set forth in paragraph (2), a misdemeanor of the first degree.
- (2) If the report or threat causes the occupants of a building, place of assembly or facility of public transportation to be diverted from their normal or customary operations, a felony of the third degree.
- (3) A felony of the second degree if the offense occurs during a declared state of emergency and the report or threat causes disruption to the operations of any person, business entity or governmental agency where the weapon of mass destruction is reported to exist or threatened to be placed or set.

**(c) Emergency response costs.**--A person convicted of violating this section shall, in addition to any other sentence imposed or restitution ordered under 42 Pa.C.S. § 9721(c) (relating to sentencing generally), be sentenced to pay restitution in an amount equal to the cost of the evacuation, including, but not limited to, fire and police response; emergency medical service or emergency preparedness response; and transportation of an individual from the building, place of assembly or facility.

**(c.1) Preservation of private remedies.**--No judgment or order of restitution shall debar a person, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

**(c.2) Application of section.**--This section shall not apply to lawful conduct by a party to a labor dispute as defined in the act of June 2, 1937 (P.L. 1198, No. 308),<sup>1</sup> known as the Labor Anti-Injunction Act, or to any constitutionally protected activity.

**(d) Definitions.**--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Biological agent.” A natural or genetically engineered pathogen, toxin, virus, bacteria, prion, fungus or microorganism which causes infections, disease or bodily harm.

“Bomb.” An explosive device used for unlawful purposes.

“Chemical agent.” Any of the following:

- (1) A nerve agent, including tabun (GA), sarin (GB), soman (GD), GF and VX.
- (2) A choking agent, including phosgene (CG) and diphosgene (DP).
- (3) A blood agent, including hydrogen cyanide (AC), cyanogen chloride (CK) and

arsine (SA).

(4) A blister agent. This paragraph includes:

- (i) Mustard (H).
- (ii) Sulfur mustard (HD).
- (iii) HN-1.
- (iv) HN-2.
- (v) Sulfur mustard (HN-3).
- (vi) An arsenical, such as lewisite (L).
- (vii) An urticant, such as CX.
- (viii) An incapacitating agent, such as B2.

(5) Any other chemical element or compound which causes death or bodily harm.

“Nuclear agent.” A radioactive material.

“Weapon of mass destruction.” A bomb, biological agent, chemical agent or nuclear agent.

### **WEAPONS OF MASS DESTRUCTION**

#### ► Restitution addressed in subsection (d)

### **18 Pa.C.S.A. § 2716** Weapons of Mass Destruction

**(a) Unlawful possession or manufacture.**--A person commits an offense if the person, without lawful authority to do so, intentionally, knowingly or recklessly possesses or manufactures a weapon of mass destruction.

**(b) Use.**--A person commits an offense if the person, without lawful authority to do so, intentionally, knowingly or recklessly sells, purchases, transports or causes another to transport, delivers or causes to be delivered or uses a weapon of mass destruction and if such action causes any of the following:

- (1) Illness or injury to another individual.
- (2) Damage to or disruption of a water or food supply or public natural resources, including waterways, State forests and parks, surface water, groundwater and wildlife.
- (3) Evacuation of a building, place of assembly or facility of public transportation.

**(c) Grading.—**

- (1) A first offense under subsection (a) constitutes a felony of the second degree. A subsequent offense under subsection (a) constitutes a felony of the first degree.
- (2) An offense under subsection (b)(1) constitutes a felony of the first degree. If the offense results in the death of an individual, the defendant shall be sentenced to life imprisonment.
- (3) An offense under subsection (b)(2) or (3) constitutes a felony of the first degree.

**(d) Restitution.**--A person convicted of violating this section shall, in addition to any other sentence imposed or restitution ordered under 42 Pa.C.S. § 9721(c) (relating to sentencing generally), be sentenced to pay restitution in an amount equal to the cost

of the evacuation, including, but not limited to, fire and police response; emergency medical service or emergency preparedness response; and transportation of an individual from the building, place of assembly or facility.

**(e) Preservation of private remedies.**--No judgment or order of restitution shall debar a person, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

**(f) Possession.**--For purposes of this section, an individual shall not be deemed to be in possession of an agent if the individual is naturally exposed to or innocently infected or contaminated with the agent.

**(g) Enforcement.—**

(1) In addition to the authority conferred upon the Attorney General under sections 205 and 206 of the act of October 15, 1980 (P.L. 950, No. 164),<sup>1</sup> known as the Commonwealth Attorneys Act, the Attorney General has the authority to investigate and to institute criminal proceedings for a violation of this section committed:

- (i) anywhere in this Commonwealth;
- (ii) in different counties; or
- (iii) in this Commonwealth and another jurisdiction.

(2) Each district attorney has the authority to investigate and to institute criminal proceedings for a violation of this section.

**(h) Jurisdiction.**--No person charged with a violation of this section shall have standing to challenge the authority of the Attorney General under subsection (g)(1). If a challenge is made in violation of this subsection, the challenge shall be dismissed, and no relief shall be available in the courts of this Commonwealth to the person making the challenge.

**(i) Definitions.**--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Biological agent.” A natural or genetically engineered pathogen, toxin, virus, bacteria, prion, fungus or microorganism which causes infections, disease or bodily harm.

“Bomb.” An explosive device used for unlawful purposes.

“Chemical agent.” Any of the following:

- (1) A nerve agent, including tabun (GA), sarin (GB), soman (GD), GF and VX.
- (2) A choking agent, including phosgene (CG) and diphosgene (DP).
- (3) A blood agent, including hydrogen cyanide (AC), cyanogen chloride (CK) and arsine (SA).
- (4) A blister agent. This paragraph includes:
  - (i) Mustard (H).
  - (ii) Sulfur mustard (HD).
  - (iii) HN-1.
  - (iv) HN-2.
  - (v) Nitrogen mustard (HN-3).
  - (vi) An arsenical, such as lewisite (L).
  - (vii) An urticant, such as CX.
  - (viii) An incapacitating agent, such as B2.

(5) Any other chemical element or compound which causes death or bodily harm.

“Nuclear agent.” A radioactive material.

“Weapon of mass destruction.” A biological agent, bomb, chemical agent or nuclear agent.

### **CRUELTY TO ANIMALS**

- **Reparations for guide, hearing or service dog addressed in subsection (a)(2.1)(i)(A)**
- **Reparations for guide, hearing or service dog addressed in subsection (a.1)(3)**
- **Restitution and Reparations for guide, hearing or service dog addressed in subsection (a.2)(2)**
- **Necessary expenses incurred when any animal is transported in a cruel or inhumane manner addressed in subsection (e)**

### **18 Pa.C.S.A. § 5511** Cruelty to Animals

#### **(a) Killing, maiming or poisoning domestic animals or zoo animals, etc.—**

(1) A person commits a misdemeanor of the second degree if he willfully and maliciously:

- (i) Kills, maims or disfigures any domestic animal of another person or any domestic fowl of another person.
- (ii) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any domestic animal of another person or domestic fowl of another person.
- (iii) Harasses, annoys, injures, attempts to injure, molests or interferes with a dog guide for an individual who is blind, a hearing dog for an individual who is deaf or audibly impaired or a service dog for an individual who is physically limited.

Any person convicted of violating the provisions of this paragraph shall be sentenced to pay a fine of not less than \$500.

(2) A person commits a felony of the third degree if he willfully and maliciously:

- (i) Kills, maims or disfigures any zoo animal in captivity.
- (ii) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any zoo animal in captivity.

(2.1) (i) A person commits a misdemeanor of the first degree if he willfully and maliciously:

- (A) Kills, maims, mutilates, tortures or disfigures any dog or cat, whether belonging to himself or otherwise. If a person kills, maims, mutilates, tortures or disfigures a dog guide for an individual who is blind, a hearing

dog for an individual who is deaf or audibly impaired or a service dog for an individual who is physically limited, whether belonging to the individual or otherwise, that person, in addition to any other applicable penalty, shall be required to make reparations for veterinary costs in treating the dog and, if necessary, the cost of obtaining and training a replacement dog.

(B) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any dog or cat, whether belonging to himself or otherwise.

(ii) Any person convicted of violating the provisions of this paragraph shall be sentenced to pay a fine of not less than \$1,000 or to imprisonment for not more than two years, or both. The court may also order a presentence mental evaluation. A subsequent conviction under this paragraph shall be a felony of the third degree. This paragraph shall apply to dogs and cats only.

(iii) The killing of a dog or cat by the owner of that animal is not malicious if it is accomplished in accordance with the act of December 22, 1983 (P.L. 303, No. 83),<sup>1</sup> referred to as the Animal Destruction Method Authorization Law.

(3) This subsection shall not apply to:

(i) the killing of any animal taken or found in the act of actually destroying any domestic animal or domestic fowl;

(ii) the killing of any animal or fowl pursuant to the act of June 3, 1937 (P.L. 1225, No. 316),<sup>2</sup> known as The Game Law, or 34 Pa.C.S. §§ 2384 (relating to declaring dogs public nuisances) and 2385 (relating to destruction of dogs declared public nuisances), or the regulations promulgated thereunder; or

(iii) such reasonable activity as may be undertaken in connection with vermin control or pest control.

**(a.1) Guide dogs.—**

(1) A person commits a misdemeanor of the third degree if he is the owner or co-owner of a dog that kills, maims or disfigures a guide dog of an individual who is blind, a hearing dog of an individual who is deaf or audibly impaired or a service dog of an individual who is physically limited without provocation by the guide, hearing or service dog or the individual.

(2) A person commits an offense under this subsection only if the person knew or should have known that the dog he owns or co-owns had a propensity to attack human beings or domestic animals without provocation and the owner or co-owner knowingly or recklessly failed to restrain the dog or keep the dog in a contained, secure manner.

(3) Any person convicted of violating the provisions of this subsection shall be sentenced to pay a fine of not more than \$5,000 and shall be ordered to make reparations for veterinary costs in treating the guide, hearing or service dog and, if necessary, the cost of obtaining and training a replacement guide, hearing or service dog.

**(a.2) Civil penalty and restitution.—**

(1) A person who is the owner or co-owner of a dog that kills, maims or disfigures a guide dog of an individual who is blind, a hearing dog of an individual who is deaf

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or audibly impaired or a service dog of an individual who is physically limited shall be subject to paragraph (2) if all of the following apply:

(i) The owner or co-owner knew the dog had a propensity to attack human beings or domestic animals.

(ii) The owner or co-owner failed to restrain the dog or keep the dog in a contained, secure manner.

(2) A court of common pleas may impose any of the following upon any person who is the owner or co-owner of a dog under paragraph (1):

(i) A civil penalty of up to \$15,000.

(ii) Reparations for veterinary costs in treating the guide, hearing or service dog and, if necessary, the cost of retraining the dog or of obtaining and training a replacement guide, hearing or service dog.

(iii) Loss of income for the time the individual is unable to work due to the unavailability of the guide, hearing or service dog.

**(b) Regulating certain actions concerning fowl or rabbits.**--A person commits a summary offense if he sells, offers for sale, barters, or gives away baby chickens, ducklings, or other fowl, under one month of age, or rabbits under two months of age, as pets, toys, premiums or novelties or if he colors, dyes, stains or otherwise changes the natural color of baby chickens, ducklings or other fowl, or rabbits or if he brings or transports the same into this Commonwealth. This section shall not be construed to prohibit the sale or display of such baby chickens, ducklings, or other fowl, or such rabbits, in proper facilities by persons engaged in the business of selling them for purposes of commercial breeding and raising.

**(c) Cruelty to animals.—**

(1) A person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses any animal, or neglects any animal as to which he has a duty of care, whether belonging to himself or otherwise, or abandons any animal, or deprives any animal of necessary sustenance, drink, shelter or veterinary care, or access to clean and sanitary shelter which will protect the animal against inclement weather and preserve the animal's body heat and keep it dry.

(2) (i) Except as provided in subparagraph (ii), a person convicted of violating paragraph (1) commits a summary offense.

(ii) A person convicted for a second or subsequent time of violating paragraph (1) commits a misdemeanor of the third degree if all of the following occurred:

(A) The action or omission for which the person was convicted for a subsequent time was performed on a dog or cat.

(B) The dog or cat was seriously injured, suffered severe physical distress or was placed at imminent risk of serious physical harm as the result of the person's action or omission.

(3) This subsection shall not apply to activity undertaken in normal agricultural operation.

**(d) Selling or using disabled horse.**--A person commits a summary offense if he offers for sale or sells any horse, which by reason of debility, disease or lameness, or for other cause, could not be worked or used without violating the laws against cruelty

to animals, or leads, rides, drives or transports any such horse for any purpose, except that of conveying the horse to the nearest available appropriate facility for its humane keeping or destruction or for medical or surgical treatment.

**(e) Transporting animals in cruel manner.**--A person commits a summary offense if he carries, or causes, or allows to be carried in or upon any cart, or other vehicle whatsoever, any animal in a cruel or inhumane manner. The person taking him into custody may take charge of the animal and of any such vehicle and its contents, and deposit the same in some safe place of custody, and any necessary expenses which may be incurred for taking charge of and keeping the same, and sustaining any such animal, shall be a lien thereon, to be paid before the same can lawfully be recovered, or the said expenses or any part thereof remaining unpaid may be recovered by the person incurring the same from the owner of said creature in any action therefor.

For the purposes of this section, it shall not be deemed cruel or inhumane to transport live poultry in crates so long as not more than 15 pounds of live poultry are allocated to each cubic foot of space in the crate.

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- **Commonwealth v. Lee**, 947 A.2d 199 (Pa. Super. 2008), *appeal denied*, 981 A.2d 218 (Pa. 2009)(table): Trial court had statutory authority to require defendant convicted of cruelty to animals to pay restitution in the amount of \$3,156.00 to shelter that had provided medical care to defendant's dog; section of crimes code governing cruelty to animals permitted authority imposing sentence upon conviction to require that owner pay cost of keeping, care and destruction of animal.

## **FACSIMILE WEAPONS OF MASS DESTRUCTION**

### **► Restitution addressed in subsection (b.1)**

#### **18 Pa.C.S.A. § 5516**

#### **Facsimile weapons of Mass Destruction**

**(a) Offense defined.**--A person commits an offense if the person intentionally, knowingly or recklessly manufactures, sells, purchases, transports or causes another to transport, delivers or causes another to deliver, possesses or uses a facsimile weapon of mass destruction and by such action causes any of the following:

- (1) Terrifying, intimidating, threatening or harassing an individual.
- (2) Alarm or reaction on the part of any of the following:
  - (i) A public or volunteer organization that deals with emergencies involving danger to life or property.
  - (ii) A law enforcement organization.
- (3) Serious public inconvenience not limited to the evacuation of a building, place of assembly or facility of public transportation.

**(b) Grading.**--An offense under this section is a felony of the third degree.

**(b.1) Restitution.**--A person convicted of violating this section shall, in addition to any other sentence imposed or restitution ordered under 42 Pa.C.S. § 9721(c) (relating to sentencing generally), be sentenced to pay restitution in an amount equal to the cost of the evacuation, including, but not limited to, fire and police response; emergency medical service or emergency preparedness response; and transportation of an individual from the building, place of assembly or facility.

**(b.2) Preservation of private remedies.**--No judgment or order of restitution shall debar a person, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

**(b.3) Enforcement.**--

(1) In addition to the authority conferred upon the Attorney General under sections 205 and 206 of the act of October 15, 1980 (P.L. 950, No. 164),<sup>1</sup> known as the Commonwealth Attorneys Act, the Attorney General has the authority to investigate and to institute criminal proceedings for a violation of this section committed:

- (i) anywhere in this Commonwealth;
- (ii) in different counties; or
- (iii) in this Commonwealth and another jurisdiction.

(2) Each district attorney has the authority to investigate and to institute criminal proceedings for a violation of this section.

**(b.4) Jurisdiction.**--No person charged with a violation of this section shall have standing to challenge the authority of the Attorney General under subsection (g)(1). If a challenge is made in violation of this subsection, the challenge shall be dismissed, and no relief shall be available in the courts of this Commonwealth to the person making the challenge.

**(c) Definitions.**--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Facsimile biological agent.” A material or substance which:

- (1) resembles in appearance and external qualities a natural or genetically engineered pathogen, toxin, virus, bacteria, prion, fungus or microorganism which causes infections, disease or bodily harm; but
- (2) does not have the capacity to cause infectious disease or bodily harm.

“Facsimile bomb.” A device which:

- (1) resembles in appearance and external qualities an explosive or incendiary device; but
- (2) does not have the capability to cause an explosion or fire.

“Facsimile chemical agent.” A material or substance which does not have the capacity to cause death or bodily harm but which resembles in appearance and external qualities any of the following:

- (1) A nerve agent, including tabun (GA), sarin (GB), soman (GD), GF and VX.
- (2) A choking agent, including phosgene (CG) and diphosgene (DP).
- (3) A blood agent, including hydrogen cyanide (AC), cyanogen chloride (CK) and arsine (SA).

(4) A blister agent. This paragraph includes:

- (i) Mustard (H).
- (ii) Sulfur mustard (HD).
- (iii) HN-1.
- (iv) HN-2.
- (v) Nitrogen mustard (HN-3).
- (vi) An arsenical, such as lewisite (L).
- (vii) An urticant, such as CX.
- (viii) An incapacitating agent, such as B2.

(5) Any other chemical element or compound which causes death or bodily harm.

“Facsimile nuclear agent.” A device, material or substance which:

- (1) resembles in appearance and external qualities a radioactive material; but
- (2) is not radioactive.

“Facsimile weapon of mass destruction.” A facsimile biological agent, facsimile bomb, facsimile chemical agent or facsimile nuclear agent.

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