

The background of the slide features a large, faint, teal-colored seal of the Supreme Court of the Commonwealth of Massachusetts. The seal is circular with a scalloped outer edge. Inside the circle, a figure of a Native American stands holding a bow and arrow. The Latin words "OFFICII JUSTITIAE" are written in a circle around the figure. At the bottom of the seal, the year "1796" is inscribed.

Restitution & Court Costs

MARCH 2023 JUDICIAL CONFERENCE

Judge Angelita Blackshear Dalton

Judge Tom Greenholtz



The Basics of Restitution



- ▶ Purposes & Authority to Impose Restitution
- ▶ Procedures in Imposing Restitution
- ▶ Payment Schedule Issues
- ▶ The Victim and Pecuniary Loss
- ▶ The Defendant's Ability to Pay
- ▶ Adjustment to a Restitution Order



Purposes & Authority

The seal of the Tennessee Judiciary is a circular emblem. It features a central figure of a person holding a scale of justice. The words "SEAL OF THE TENNESSEE JUDICIARY" are inscribed around the top half of the circle. Below the figure, the Latin phrase "QUI PRO DOMINA JUSTITIA SEQUITUR" is written. At the bottom, the year "1796" is displayed. The seal is rendered in a light, semi-transparent style on a dark teal background.

Purposes

► Back to Basics: why do we order restitution?

► To compensate the victim; and

► To punish the defendant

► ***State v. Johnson***, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997) (“The purpose of restitution is not only to compensate the victim[,] but also to punish and rehabilitate the guilty.”).

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Inherent Authority

- ▶ Do trial courts have ***inherent authority*** to order restitution?
 - ▶ No.
 - ▶ ***State v. Alford***, 970 S.W.2d 944, 945 (Tenn. 1998) (“As a general rule, courts exercising criminal jurisdiction are without inherent power or authority to order payment of restitution except as is derived from legislative enactment.”).

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Probation Conditions

- ▶ Do trial courts have **statutory** authority to order restitution as a **condition of probation**?
- ▶ Yes.
- ▶ Tenn. Code Ann. § 40-35-304(a)
 - ▶ “(a) A sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation.”

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Sentence of Confinement

► Do trial courts have **statutory** authority to order restitution in combination with a **sentence of confinement**?

► Yes.

► Tenn. Code Ann. § 40-35-104(c)(2) (in combination with confinement)

► (c) The following sentencing alternatives in any appropriate combination are authorized for defendants otherwise eligible under this chapter: . . .

► (2) Payment of restitution to the victim or victims either alone or in addition **to any other sentence authorized by this subsection (c)**;

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Sentence of Confinement

► Case Authority:

► E.g., ***State v. Crabtree***, No. M2021-01154-CCA-R3-CD, 2023 WL 2133831, at *21 (Tenn. Crim. App. Feb. 21, 2023) (“Relative to Defendant’s commentary that she did not anticipate both a restitution order and incarcerative sentence, we note that trial courts possess the authority to order confinement in conjunction with restitution.”).

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Mandatory Restitution

► Is an order of restitution ever **mandatory**?

- Yes, at least in felony cases.
- Tenn. Code Ann. § 40-20-116(a) ("Whenever a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another of property, the jury shall ascertain the value of the property, if not previously restored to the owner, and the court **shall, thereupon, order** the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases.")

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. Inside the circle, the words "THE TENNESSEE JUDICIARY" are written in a circular path. In the center, there is a shield with a scale of justice and a sword. Below the shield, the year "1796" is inscribed. The words "QUI PRO DOMINA JUSTITIA SEQUITUR" are written in a smaller circle around the central shield.

Mandatory Restitution

► Is an order of restitution ever mandatory in a **guilty plea**?

► Seemingly, yes.

► “Restitution is mandatory in theft cases.” **State v. Greene**, No. E2019-01877-CCA-R3-CD, 2020 WL 6744084, at *6 (Tenn. Crim. App. Nov. 17, 2020) (open plea) (citing Tenn. Code Ann. § 40-20-116(a)).

► “Restitution itself is mandatory in theft convictions.” **State v. Jewell**, No. M2015-02141-CCA-R3-CD, 2017 WL 65242, at *5 (Tenn. Crim. App. Jan. 6, 2017) (best interest plea) (citing Tenn. Code Ann. § 40-20-116(a)).



Procedures in Imposing Restitution

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Plea Agreements

- ▶ In cases where the restitution is proposed by **a plea agreement**, the trial court must ensure that the agreement includes:
 - ▶ the amount of restitution; and
 - ▶ the other performance requirements set out in subsection (c) [including payment schedule]."
 - ▶ Tenn. Code Ann. § 40-35-304(g)(1).

The seal of the Tennessee Court of Criminal Appeals is a circular emblem. It features a central shield with a scale of justice and a sword. The words "THE TENNESSEE COURT OF CRIMINAL APPEALS" are inscribed around the perimeter, with "1796" at the bottom. The seal is rendered in a light teal color against a dark teal background.

Contested Hearings

► In ***State v. Saffles***, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030 (Tenn. Crim. App. Sept. 8, 2021), the Court of Criminal Appeals outlined the steps that must occur in a contested hearing:

► **Prior to Hearing:** In a felony case, the trial court “shall order the presentence service officer to include in the **presentence report** documentation regarding the nature and amount of the victim's pecuniary loss.”

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Contested Hearings

► ***State v. Saffles***, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030 (Tenn. Crim. App. Sept. 8, 2021):

► **Evidence at Hearing:** Detailed evidence and testimony must be presented regarding:

- the **victim's pecuniary loss**, including any available appraisals and insurance payments; and
- the Defendant's **financial resources** and **future ability to pay**.

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Contested Hearings

► ***State v. Saffles***, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030 (Tenn. Crim. App. Sept. 8, 2021):

- **Findings of Fact:** Based on this evidence, the trial court must then make appropriate findings of fact:
- the victim's pecuniary loss;
 - the Defendant's financial resources and future ability to pay restitution, "which will provide a clearer picture of the Defendant's overall financial situation."

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Contested Hearings

► **State v. Saffles**, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030 (Tenn. Crim. App. Sept. 8, 2021):

► **Restitution Order:**

► **Amount:** If, at the conclusion of this hearing, the trial court finds that it is appropriate to order the Defendant to pay restitution, then the court must set a restitution amount based on the Defendant's ability to pay.

► Note change in law effective Jan. 1, 2022.

► **Payment Schedule:** The Court must also establish a payment schedule that can be completed during the term of the Defendant's probationary period.

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Contested Hearings

► ***State v. Saffles***, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030 (Tenn. Crim. App. Sept. 8, 2021):

► **Modification:** Following entry of any such restitution order, the Defendant, the victim, or district attorney may petition the trial court at any time to waive, adjust, or modify this restitution order.

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Multiple Victims

► Where multiple victims exist, is a trial court **required** to issue **separate restitution orders** for each victim?

► No.

► But, the single order must make findings as to:

► the pecuniary loss of each victim; and

► how the payments are to be allocated to each victim.

► See ***State v. Jenkins***, No. W2020-00577-CCA-R3-CD, 2021 WL 3144952, at *7 (Tenn. Crim. App. July 22, 2021).

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Judgment

► **When** should the judgment enter?

► Likely not until the **amount** of restitution has been calculated and ordered.

► ***State v. Steverson***, No. E2018-01832-CCA-R3-CD, 2019 WL 4739229, at *5 (Tenn. Crim. App. Sept. 26, 2019) (“It is unclear from the record why the uniform judgment form was entered while sentencing issues (restitution) remained unresolved.”).

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Judgment

► Should a final judgment be entered if the **payment schedule** has not been established?

► Under current law, probably not.

► **State v. Cavin**, No. E2020-01333-CCA-R3-CD, 2021 WL 5122029, at *6 (Tenn. Crim. App. Nov. 3, 2021) (2-to-1); **State v. Gevedon**, No. M2020-00359-CCA-R3-CD, 2021 WL 5561056, at *2 (Tenn. Crim. App. Nov. 29, 2021) (2-to-1).

► But, the supreme court granted permission to appeal in both cases and heard argument in September 2022.



Payment Plan and Schedule Issues



Reasons to Establish Payment Plan

- ▶ As a condition of probation, what are the **reasons why** a payment schedule would be beneficial?
- ▶ It helps to determine how the defendant is complying with the probationary conditions:
 - ▶ “[W]hen a trial court does not set payment terms, it has provided no framework for assessing the defendant's payment performance as a condition of probation. Without terms for periodic payment, non-payment cannot be an issue of breach of probation until the very end of the probation term.” ***State v. Cavin***, No. E2020-01333-CCA-R3-CD, 2021 WL 5122029, at *7 (Tenn. Crim. App. Nov. 3, 2021) (2-to-1) (Witt, J., concurring), ***perm. app. granted, Mar. 24, 2022.***

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Statutory Authority

- ▶ Is a trial court **required** to establish a payment schedule?
- ▶ Maybe Not?
 - ▶ Tenn. Code Ann. § 40-35-304(c) provides:
 - ▶ “The court **shall** specify at the time of the sentencing hearing the **amount and time** of payment or other restitution to the victim and **may permit** payment or performance in installments. . . .”

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Statutory Authority

► But

► **State v. Cavin**, No. E2020-01333-CCA-R3-CD, 2021 WL 5122029, at *4 (Tenn. Crim. App. Nov. 3, 2021) (holding that a payment schedule is required for a final judgment), **perm. app. granted, Mar. 24, 2022.**

► **State v. Appelt**, No. E2020-01575-CCA-R3-CD, 2022 WL 2236316, at *15 (Tenn. Crim. App. June 22, 2022) ("[T]he trial court did not consider the Appellant's ability to pay or specify the time or amount of payment. Therefore, the trial court's order of restitution is reversed, and the case is remanded to the trial court for a hearing on the matter of restitution."), *no perm. app.*

► **State v. Dodson**, No. M2018-01087-CCA-R3-CD, 2019 WL 3946097, at *3 (Tenn. Crim. App. Aug. 21, 2019) ("The trial court failed to determine the amount and method of payment and did not consider the financial resources and future ability of the Defendant to pay. Accordingly, the trial court has failed to properly establish an amount and payment schedule for restitution. We remand the case to the trial court for a hearing to properly determine the amount of restitution, as well as an appropriate payment schedule."), *no perm. app.*

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Establishment of Plan

►Are there circumstances where the trial court may **delegate** the setting of a payment plan to the **probation** or **parole officer**?

►No.

►**State v. Melvin**, No. M2012-02661-CCA-R3-CD, 2014 WL 265708, at *14 (Tenn. Crim. App. Jan. 23, 2014) (“Based on the statutory procedure, it is improper to delegate the duty of determining the restitution payment schedule to the probation officer.”), *no perm. app.*;

►**State v. North**, No. M2020-00221-CCA-R3-CD, 2021 WL 3235317, at *10 (Tenn. Crim. App. July 30, 2021) (finding abuse of discretion in restitution order, in part, when the trial court “directed the parole and probation officer who would later supervise the Defendant to establish a monthly payment amount upon the Defendant's release from confinement.”)], *no perm. app.*

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Timing Issues

► What is the ***maximum length of time*** for which a trial court can establish a payment plan?

► **With Probation Sentence:**

► Tenn. Code Ann. § 40-35-304(c)
("The court may not establish a payment or performance schedule extending **beyond the statutory maximum term of probation** supervision that could have been imposed for the offense").

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Timing Issues

► What is the **maximum length of time** for which a trial court can establish a payment plan?

► **With Confinement Sentence:**

► Tenn. Code Ann. § 40-35-304(g)(2) (“(2) A defendant sentenced in whole or in part to the payment of restitution **pursuant to § 40-35-104(c)(2)**, or otherwise, shall be responsible for the payment of the restitution until the **expiration of the sentence** imposed by the court, and any payment or performance schedule established by the court shall not extend beyond the expiration date”).

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Timing Issues

- ▶ Note the Sentencing Commission Comments to Tenn. Code Ann. § 40-35-303 and Class D felony example.
- ▶ 2021 Tenn. Pub. Acts, ch. 409, § 20: maximum term of probation is now 8 years for a single offense (codified at Tenn. Code Ann. § 40-35-303(c)(1)).

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Timing Issues

► Are there any circumstances where the court can set a minimum payment that **will not fully pay** the restitution by the end of the term?

► Perhaps not? (at least not prior to Jan. 1, 2022).

► **State v. Crabtree**, No. M2021-01154-CCA-R3-CD, 2023 WL 2133831, at *21 (Tenn. Crim. App. Feb. 21, 2023) (“Finally, as noted by the State, the court’s payment schedule of \$100 per month would extend far past Defendant’s total sentence of twelve years; at that rate, it would take Defendant 132 years to repay \$158,485.99. Accordingly, we remand the case for a new restitution hearing complying with the procedure mandated by Code section 40-35-304.”).

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Timing Issues

► But see ***State v. Tucker***, No. M2021-00839-CCA-R3-CD, 2022 WL 2308988, at *3 (Tenn. Crim. App. June 28, 2022), *no perm. app.*:

► (“Finally, we note, both parties suggest the trial court’s restitution order does not comply with the applicable statute because the defendant cannot satisfy the \$39,028.49 amount under the imposed payment schedule before the expiration of his sentence. Upon our review of the statute, **however, we conclude the defendant is not required to satisfy the full restitution amount by the conclusion of his sentence. Rather, the trial court is simply not permitted to impose a payment schedule beyond the expiration of the sentence imposed.**” (citing *State v. Moffitt*, No. W2014-02388-CCA-R3-CD, 2016 WL 369379, at *5 (Tenn. Crim. App. Jan. 29, 2016); Tenn. Code Ann. § 40-35-304(g)(2))).

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Timing Issues

► May the trial court extend a payment schedule over the term of **consecutive sentences**?

► No.

► ***State v. Jenkins***, No. W2020-00577-CCA-R3-CD, 2021 WL 3144952, at *7 (Tenn. Crim. App. July 22, 2021) (“[A]lthough the defendant's aggregate sentence is 16 years, the payment schedule **may not extend** beyond the maximum sentencing term permissible **for the specific offense for which restitution is ordered**. Restitution is not per se payable over the term of the aggregate sentence.” (quoting Tenn. Code Ann. § 40-35-304(c))), *perm. app. denied* (Tenn. Dec. 8, 2021).

The seal of the Tennessee Judicial Branch is visible in the background. It is a circular seal with a scalloped edge. The outer ring contains the text "SEAL OF THE TENNESSEE JUDICIAL BRANCH" and the year "1796". The inner circle features a central emblem, possibly a sun or a similar symbol, surrounded by the words "JUDICIAL BRANCH".

Contingent on Civil Lawsuit

► May the trial court order restitution that is **contingent** upon a civil recovery?

► No.

► **State v. Johnson**, 968 S.W.2d 883, 887 (Tenn. Crim. App. 1997) (“The terms of restitution should be definitive, consistent, and separate from other judgments. The length and terms of probation and restitution should be set so as to compensate the victim and punish the appellant. Should the appellant’s financial status change during the probationary period, the court can adjust the restitutionary amounts and terms accordingly.”)

► But, the award can later be modified to prevent “double dipping.” should the victim prevail in the civil lawsuit. See **State v. Greene**, No. E2019-01877-CCA-R3-CD, 2020 WL 6744084, at *7 (Tenn. Crim. App. Nov. 17, 2020), *no perm. app.*

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Conversion to Civil Judgment

► In setting a plan, may the trial court consider that the victim **can convert** unpaid amounts to a civil judgment?

► Maybe No, Maybe Yes?

► **No: *State v. Ballew***, No. M2016-00051-CCA-R3-CD, 2017 WL 1103034, at *3 (Tenn. Crim. App. Mar. 24, 2017) (reversing and remanding, stating “[t]hat statutory provision **does not release** a trial court from the obligation to set an amount of restitution and payment terms that the defendant can reasonably be expected to satisfy.”), *no perm. app.*

► **Yes: *State v. Tucker***, No. M2021-00839-CCA-R3-CD, 2022 WL 2308988, at *3 (Tenn. Crim. App. June 28, 2022) (approving plan that did not “pay out” at end of probation, and noting in part “the restitution statute makes clear that any portion of restitution that remains unpaid at the expiration of the defendant’s sentence can be converted into a civil judgment.”), *no perm. app.*



Victim's Pecuniary Loss

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Victim's Loss

- ▶ The amount of restitution should be based on the victim's "pecuniary loss."
- ▶ ***State v. Smith***, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994) (The amount of restitution that the defendant may be directed to pay is limited to 'the victim's pecuniary loss.'" (citing Tenn. Code Ann. § 40-35-304(b))).

The seal of the Tennessee Judiciary is a circular emblem. It features a central figure of a person holding a scale of justice, with the words "FIAT JUSTITIA RUAT COELUM" (Let justice be done, and the heavens will fall) inscribed around the figure. The outer ring of the seal contains the text "SEAL OF THE TENNESSEE JUDICIARY" and the year "1796" at the bottom.

Victim's Loss

► Can the restitution amount ever **be different** from the victim's loss?

► Yes.

► "It is important for trial courts to distinguish between the victim's pecuniary loss and the restitution amount ordered after consideration of a defendant's financial resources and ability to pay. **The pecuniary loss and restitution amount are distinct** and in many cases may not be the same amount."

► **State v. Saffles**, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *17 (Tenn. Crim. App. Sept. 8, 2021), *no perm. app.*

► *Note effect of change in law on January 1, 2022.*

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Burdens of Proof

► **Who** has the burden to establish the loss?

► “A victim seeking restitution must present sufficient evidence so the trial court can make a reasonable determination as to the amount of the victim’s loss.”

► ***State v. Bottoms***, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001).

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Burdens of Proof

- ▶ **What** is the burden of proof?
- ▶ Likely close to preponderance of the evidence.
 - ▶ “Because an order of restitution may be converted to a civil judgment, the burden of proof **may not fall far below** that required in a civil suit[.]”
 - ▶ **State v. Thomas**, No. E2020-00044-CCA-R3-CD, 2021 WL 246184, at *6 (Tenn. Crim. App. Jan. 26, 2021).
 - ▶ “The amount of restitution need not be proven beyond a reasonable doubt, but a victim seeking restitution ‘must present sufficient evidence so the trial court can **make a reasonable determination** as to the amount of the victim's loss.’”
 - ▶ **State v. Lewis**, No. M2014-01912-CCA-R3-CD, 2015 WL 3541424, at *3 (Tenn. Crim. App. June 5, 2015)(quoting **State v. Bottoms**, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001)).

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Amount of Pecuniary Loss

- ▶ “Pecuniary loss” can include
 - ▶ Special damages; and
 - ▶ “Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense.” Tenn. Code Ann. § 40-35-304(e)(2).
- ▶ The amount ordered to be paid “does not have to equal or mirror the victim’s precise pecuniary loss,” but “the sum must be reasonable.” See **State v. Bottoms**, 87 S.W.3d 95, 106 (Tenn. Crim. App. 2001).

The seal of the Tennessee Judiciary is a circular emblem with a serrated edge. It features a central figure of a person standing, with the words "SEAL OF THE TENNESSEE JUDICIARY" around the top and "1796" at the bottom. The text "Amount of Pecuniary Loss" is overlaid on the seal in a large, white, sans-serif font.

Amount of Pecuniary Loss

- ▶ Can the victim's "pecuniary loss" include **general damages**, as in a civil case?
 - ▶ No.
 - ▶ Tenn. Code Ann. § 40-35-304(e)(1) defines "pecuniary loss" as "All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant[.]"



Amount of Pecuniary Loss

► What types of **special damages** are allowed?

► Value of property or its damage, **State v. Truette**, No. M2005-00927-CCA-R3CD, 2006 WL 2000540, at *4 (Tenn. Crim. App. July 19, 2006);

► Hospital or medical expenses necessary for the treatment of a victim, **State v. Lewis**, 917 S.W.2d 251 (Tenn. Crim. App. 1995);

► Except where the amounts have been forgiven by hospital, **State v. Moffitt**, No. W2014-02388-CCA-R3-CD, 2016 WL 369379, at *6 (Tenn. Crim. App. Jan. 29, 2016), perm. app. denied (Tenn. June 24, 2016).

► Lost wages and rehabilitation expenses, **State v. Johnson**, 968 S.W.2d 883 (Tenn. Crim. App. 1997) (lost wages, rehabilitation expenses).

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Amount of Pecuniary Loss

- ▶ Do special damages include reimbursement to an **insurance company** for a paid claim?
 - ▶ Generally, no.
 - ▶ **State v. Alford**, 970 S.W.2d 944, 947 (Tenn. 1998) (“[W]e conclude that the Tennessee Legislature neither envisioned nor intended restitution to apply to insurers which pay claims made under an insurance contract.”).
 - ▶ But, if the insurance company **is the victim**, i.e., insurance fraud, it may receive restitution. **State v. Cross**, 93 S.W.3d 891, 895 (Tenn. Crim. App. 2002) (“Nationwide’s loss was the result of the fraudulent claim made directly against it by the defendant. That, of course, is different from the circumstances in *Alford*, where the loss to the insurer was the result of the victim’s claim.”).

The seal of the Tennessee Judicial Branch is visible in the background on the left side of the slide. It is a circular seal with a scalloped edge. The outer ring contains the text "SEAL OF THE TENNESSEE JUDICIAL BRANCH" at the top and "1796" at the bottom. The inner circle features a central figure, likely a personification of Justice, holding a scale and a sword. The words "EQUITY" and "JUSTITIA" are also visible within the inner circle.

Amount of Pecuniary Loss

► **When** is the value of the “pecuniary loss” measured?

► At the time of the offense.

► As such, testimony only as to the purchase price, by itself, may not be sufficient to sustain a restitution order.

► ***State v. Thomas***, No. E2020-00044-CCA-R3-CD, 2021 WL 246184, at *8 (Tenn. Crim. App. Jan. 26, 2021) (“[W]hile the value of property can be established through the victim’s testimony alone, Mr. Spurling admitted that he had not seen the trailer in three years and had no idea what condition it was in at the time it burned. Therefore, Mr. Spurling’s estimates could not have been based upon the value of the trailer at the time of the offense.” (emphasis in original)).

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Proving Loss: Documents

► Is a victim required to have **documentation** supporting the loss?

► No (or at least likely not).

► “Documentation supporting testimony regarding loss is ‘helpful,’ but such is not required.”

► **State v. Thomas**, No. E2020-00044-CCA-R3-CD, 2021 WL 246184, at *6 (Tenn. Crim. App. Jan. 26, 2021) (citing *Jewel I*, **State v. Jewell**, No. M2015-02141-CCA-R3-CD, 2017 WL 65242, at *8 (Tenn. Crim. App. Jan. 6, 2017)).

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Proving Loss: Documents

► But, in at least one case, the Court of Criminal Appeals remanded for a new hearing in part because the **victim's testimony** was unsupported by documentation (appraisals or insurance payments received).

► ***State v. Saffles***, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *9 (Tenn. Crim. App. Sept. 8, 2021), *no perm. app.*

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Proving Loss: Documents

► And, where the **presentence investigation report** does not contain documentation, the Court of Criminal Appeals has recognized that the loss **may not** be “substantiated by evidence in the record.”

► **State v. Beauregard**, No. W2017-00536-CCA-R3-CD, 2018 WL 446687, at *4-*5 (Tenn. Crim. App. Jan. 16, 2018) (remanding, in part, when neither the PSI report nor the victim provided documentation of loss or of insurance payments), *no perm. app.*

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Proving Loss: Testimony

► Can the victim's **generalized statements** of the loss sustain a restitution order?

► Likely not: "While a victim's testimony alone may be sufficient to establish special damages for purposes of restitution, general statements regarding the amount of loss **without explanation as to how the value was determined** are insufficient."

► **State v. Davis**, No. M2015-00262-CCA-R3-CD, 2015 WL 5564204, at *2 (Tenn. Crim. App. Sept. 22, 2015) (emphasis added), *perm. app. denied* (Tenn. Jan. 19, 2016).

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Proving Loss: Testimony

► Example:

► Where a victim testifies that “the tools were worth \$50,000 and that he provided no specific evidence regarding **which tools** were missing, merely stating that they were ‘**expensive**’ and ‘everything a mechanic would need,” the generalized testimony is “insufficient to allow the trial court to make a reasonable or reliable determination of value regarding these items.”

► **State v. Thomas**, No. E2020-00044-CCA-R3-CD, 2021 WL 246184, at *7 (Tenn. Crim. App. Jan. 26, 2021) (citing facts from **State v. Bohanon**, No. M2012-02366-CCA-R3-CD, 2013 WL 5777254, at *8 (Tenn. Crim. App. Oct. 25, 2013)).

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Proving Loss: Testimony

► Example:

► Where a victim “provided an estimate from a contractor for approximately \$28,600 worth of repairs, but only provided an invoice for approximately \$6,096 of repairs and testified that he had completed many repairs himself and had not brought his other bills,” the loss is “uncertain[]” and that the trial court could not determine the loss with reliability.”

► ***State v. Thomas***, No. E2020-00044-CCA-R3-CD, 2021 WL 246184, at *7 (Tenn. Crim. App. Jan. 26, 2021) (citing facts from ***State v. Bottoms***, 87 S.W.3d 95, 108-09 (Tenn. Crim. App. 2001)).



Defendant's Ability to Pay

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. Inside the circle, the words "THE TENNESSEE JUDICIARY" are written in a circular path. In the center, there is a shield with a scale of justice and a sword. Below the shield, the year "1796" is inscribed. The Latin phrase "QUI PRO DOMINA JUSTITIA SEQUITUR" is written in a smaller circle around the central shield.

Change in the Law

► Prior to January 1, 2022:

► Tenn. Code Ann. § 40-35-304(d) (2018) (“In determining the amount and method of payment or other restitution, the court **shall consider** the financial resources and future ability of the defendant to pay or perform.”).

► A failure to consider “the financial resources and future ability of the defendant to pay or perform” was reversible error.

► E.g., **State v. Appelt**, No. E2020-01575-CCA-R3-CD, 2022 WL 2236316, at *15 (Tenn. Crim. App. June 22, 2022) (“[W]e do not think the trial court abused its discretion by setting the amount of restitution at \$2,000. However, the trial court did not consider the Appellant's ability to pay or specify the time or amount of payment.”), *no perm. app.*

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Change in the Law

► After January 1, 2022:

- Tenn. Code Ann. § 40-35-304(d) (Supp. 2021) ("In determining the amount and method of payment or other restitution, the court **may consider** the financial resources and future ability of the defendant to pay or perform.").
- Original bill also proposed giving the restitution order the effect of a civil judgment immediately, but this provision did not pass.
- In combination, it would have been similar to the federal system.

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Change in the Law

► After January 1, 2022:

► It is not clear how this change affects the calculation of restitution.

► For example, are we in a world defined by ***State v. Tucker***, No. M2021-00839-CCA-R3-CD, 2022 WL 2308988, at *3 (Tenn. Crim. App. June 28, 2022)?

► ***Tucker*** approved a plan that did not “pay out” at end of probation, and it noted in part “the restitution statute makes clear that any portion of restitution that remains unpaid at the expiration of the defendant’s sentence can be converted into a civil judgment.”

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. It features a central figure of a person standing, flanked by two stars. The text "THE TENNESSEE JUDICIARY" is arched across the top, and "1796" is at the bottom. The words "SEAL OF THE" and "RUAT" are also visible.

Change in the Law

- ▶ And, if you “may” consider the defendant’s ability to pay, this term only implies discretion to consider the factor.
- ▶ As with all sentencing, the trial court would still likely have to state on the record why this factor was not considered.
- ▶ If so, are we practically under the same system as current law?

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. Inside the circle, the words "SEAL OF THE TENNESSEE JUDICIARY" are written in a circular path. In the center, there is a smaller circle containing the Latin phrase "QUI PRO DOMINA JUSTITIA SEQUITUR" and the year "1796" at the bottom. The seal is rendered in a light teal color against a dark teal background.

Why Consider?

► **Why** would trial courts consider a defendant's ability to pay?

► Courts should consider the defendant's financial ability to pay "because '[a]n order of restitution which obviously cannot be fulfilled serves no purpose for the [defendant] or the victim.'"

► ***State v. Johnson***, 968 S.W.2d 883, 886 (Tenn. Crim. App. 1997).

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Factors to Consider

- ▶ What are some **types of factors** to consider?
 - ▶ Prior findings of indigence;
 - ▶ Incarceration for a significant period of time;
 - ▶ Unemployment, history of unemployment, limited prospects of future employment due to transportation, or low amount of weekly pay
 - ▶ Defendant's age and education level;
 - ▶ Evidence of willful underemployment;
 - ▶ An ability to obtain additional income;
 - ▶ Lack of assets;
 - ▶ Significant debts;
 - ▶ Including medical bills and court-ordered child support payments;
 - ▶ "over the top" expenses, or those that are excessive, may support a greater restitution award.

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Factors to Consider

- ▶ Findings as to a future ability to can, to some extent, be speculative.
- ▶ What impact, then, does this **uncertainty** have on the trial court's duty (under prior law) to make findings?
 - ▶ Because the law "requires that a trial court, in ordering restitution, consider not only the amount of the victim's loss but also the amount which a defendant can reasonably pay, this consideration, although substantially affected by future events, **must be made.**"
 - ▶ See ***State v. Bottoms***, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001).

The seal of the Tennessee Judiciary is a circular emblem with a serrated edge. It features a central figure of a person holding a scale of justice. The text "SEAL OF THE TENNESSEE JUDICIARY" is written around the top inner edge, and "1796" is at the bottom. The title "Proof of Inability to Pay" is overlaid in large white text.

Proof of Inability to Pay

- ▶ What happens if the defendant offers **no proof** on ability to pay?
 - ▶ It may depend on whether the order is entered by agreement or by the trial court after a hearing.

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Proof of Inability to Pay

► If by agreement, the defendant may have the burden of showing that he or she cannot honor the agreement:

► “Further, the Defendant did not present any evidence that she was unable to honor the agreement, so any conclusion by the trial court that the Defendant could not pay the outstanding balance would have been ‘mere speculation.’”

► ***State v. Davis***, No. M2015-00262-CCA-R3-CD, 2015 WL 5564204, at *3 (Tenn. Crim. App. Sept. 22, 2015), perm. app. denied, Jan. 19, 2016.

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Proof of Inability to Pay

- ▶ If after a hearing, and under old law, the failure of the defendant to present proof of indigency did not relieve the trial court of the obligation to make a finding as to the defendant's ability to pay.
- ▶ To what could you look?
 - ▶ Look to the record, including the Uniform Affidavit of Indigency and presentence investigation report.
 - ▶ ***State v. Jenkins***, No. W2020-00577-CCA-R3-CD, 2021 WL 3144952, at *6 (Tenn. Crim. App. July 22, 2021), *perm. app. denied* (Tenn. Dec. 8, 2021).

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Social Security Income

► Can a trial court consider **social security income** in establishing a restitution order?

► Yes, maybe?

► “[W]e conclude that a trial court may consider a defendant's Social Security benefits when making an ability to pay determination because consideration of these benefits helps provide a clear picture of a defendant's complete financial status.”

► **State v. Saffles**, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *17 (Tenn. Crim. App. Sept. 8, 2021), *no perm. app.*

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Social Security Income

► But see ***State v. Dixon***, No. E2019-00228-CCA-R3-CD, 2020 WL 1426681, at *2 (Tenn. Crim. App. Mar. 20, 2020).

► The Court of Criminal Appeals expressly rejected the argument that a restitution order is improper if the only source of funds for repayment are social security funds

► But, unlike ***Saffles***, the supreme court denied review, and designated the opinion as **not for citation** on August 7, 2020.

The seal of the Tennessee Judiciary is a circular emblem with a serrated edge. It features a central figure of a person standing on a pedestal, with the words "SEAL OF THE TENNESSEE JUDICIARY" around the top and "1796" at the bottom.

Social Security Income

► Can the trial court **revoke probation** for a willful failure to pay restitution from social security funds?

► No.

► “[T]he trial court may not compel the Defendant to satisfy his restitution obligation out of his Social Security benefits by revoking his probation and imprisoning him because the Defendant ‘is entitled to the protections of 42 U.S.C. § 407(a).’”

► “At a probation revocation hearing, the Defendant would be entitled to use Section 407(a) as a ‘**personal defense**’ to having his probation revoked, and incarceration ordered, for his non-payment of restitution.”

► **State v. Saffles**, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *17 (Tenn. Crim. App. Sept. 8, 2021), *no perm. app.*

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Social Security Income

► If you can establish, but not enforce, a restitution order, what can the trial court do?

► As an alternative, the Court of Criminal Appeals noted that “[b]ecause the Defendant ‘may have assets or may receive income from other sources in the future,’ ***periodic probation revocation hearings*** may be utilized to determine the Defendant’s income and assets, from which the restitution order may be satisfied.”

► ***State v. Saffles***, No. E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *17 (Tenn. Crim. App. Sept. 8, 2021) (*underline in original*), no perm. app.



Modification of Order

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. It features the text "THE TENNESSEE JUDICIARY" around the top and "1796" at the bottom. In the center, there is a shield with a scale of justice and the words "FIDELITY BRAVERY INTEGRITY" and "QUI PRO DOMINA JUSTITIA SEQUITUR".

Authority to Modify

- ▶ May **the victim** request an adjustment apart from the State or the defendant?
 - ▶ Yes.
 - ▶ Tenn. Code Ann. § 40-35-304(f) provides that the State, victim, or defendant may “at any time” petition for an adjustment of the restitution.

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Findings Required

► What **findings** are required to modify a restitution order?

► After a hearing, the trial court may modify the restitution order, **if it finds** that

► the circumstances upon which it based the imposition or amount and method of payment or other restitution ordered **no longer exist**; or

► it otherwise **would be unjust** to require payment or other restitution as imposed

► Tenn. Code Ann. § 40-35-304(f).

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Ability to Pay

► Must the trial court also consider the defendant's ability to pay before **increasing restitution?**

► Yes, at least under old law.

► See **State v. Petty**, No. M2020-00303-CCA-R3-CD, 2021 WL 1721378, at *2 (Tenn. Crim. App. Apr. 30, 2021) (“[T]here must be evidence supporting the trial court’s [modification] decision. . . . The trial court, based on no facts in evidence, speculated that the Defendant actually earned more than she claimed she earned on her tax return. He alleged that she committed another criminal offense by not reporting all of her income, and he based his decision to increase her restitution on that speculation. This was clearly an abuse of the trial court’s discretion.”).

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Scope of Modification


- ▶ Does the trial court have authority to **waive all unpaid** restitution payments that it previously ordered?
 - ▶ Yes.
 - ▶ The trial court may
 - ▶ **adjust** or **waive** payment of the unpaid portion of the restitution;
 - ▶ **modify** the time or method of making restitution; or
 - ▶ may **extend** the restitution schedule, but not beyond the term of probation supervision.
- ▶ Tenn. Code Ann. § 40-35-304(f).



Court Costs



- ▶ Types of Costs
- ▶ Indigency
- ▶ Authority to Waive of Costs
- ▶ Factors to Consider in Waiving Costs

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Types of Court Costs

- ▶ Authority to collect costs is given by statute.
 - ▶ Based on the type of action, such as appeals from lower court, revocation proceedings, etc.;
 - ▶ Based on clerk's actions, such as for continuances, providing certifications, etc.;
 - ▶ Litigation taxes;
 - ▶ Special fees, such as appointed counsel fees, drug court fees, jailer fees, etc.
- ▶ Clerk is typically entitled to a 5% commission on many fees. Tenn. Code Ann. § 8-21-401 and others.

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Waiver of Court Costs

►The General Assembly has granted authority to the criminal courts to reconsider the assessment of certain costs and fees upon a finding that the defendant is indigent or lacks the ability to pay.

►**Tenn. Code Ann. § 40-25-129(a)(2)**
(shifting to state to pay costs in “[a]ll cases where the defendant has been convicted in a court of record and the court has made a finding at any evidentiary hearing that the defendant is indigent and remains indigent at the time of conviction”).

►**Tenn. Code Ann. § 40-25-123(c)(1)(A)**
 (“Notwithstanding any law to the contrary, a general sessions or criminal court judge may either: (A) Suspend the court costs and litigation tax as required by §§ 67-4-602 -- 67-4-606, for any indigent criminal defendant, as in the judge’s opinion the equities of the case require . . .”).

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Waiver of Court Costs

► Is waiver required where the defendant has been found to be indigent?

► No.

► **State v. Halton**, No. M2004-02738-CCA-R3-CD, 2005 WL 2139813, at *2 (Tenn. Crim. App. Aug. 31, 2005) (holding that “the trial court has the discretion to waive court costs and fees” and rejecting argument that no such discretion exists upon a finding of indigency).

► Rather, the Court may also consider whether the “**equities of the case**” would otherwise suggest that reconsideration is appropriate.

► **State v. Rickman**, No. W2020-00882-CCA-R3-CD, 2021 WL 2255509, at *8 (Tenn. Crim. App. June 3, 2021) (“There is no statutory or decisional authority to support the proposition that a trial court must waive court costs upon a finding of indigency.” (quoting **State v. Black**, 897 S.W.2d 680, 683 (Tenn. 1995)), *perm. app. denied* (Tenn. Sept. 22, 2021)).

The seal of the Tennessee Judiciary is a circular emblem. It features a central figure of a person holding a scale of justice, surrounded by the words "SEAL OF THE TENNESSEE JUDICIARY". Below the figure are three stars and the year "1796". The words "EQUITY JUSTITIA RUAT" are also visible around the inner circle.

Indigency

- ▶ How is indigency defined for waiver of court costs?
 - ▶ It's not defined. There is no definition of what it means to be "indigent" in Tenn. Code Ann. § 40-25-129 or in Tenn. Code Ann. § 40-25-123.
 - ▶ In cases where a court considers indigence for appointment of counsel, the court is required to consider, among other things, the Federal Poverty Guidelines and real and personal property. Tenn. Code Ann. § 40-14-202(c)(4), (5).
 - ▶ In other cases where the General Assembly has defined "indigence" with respect to the federal poverty guidelines, it has done so with respect to income meeting 100% or 200% of the guidelines.
 - ▶ See Tenn. Code Ann. § 68-1-109(2)(A)(ii) ("Indigence income means an amount not to exceed one hundred percent (100%) of the federal poverty guidelines."), repealed Mar. 25, 2020; Tenn. Code Ann. § 63-10-501(8) ("'Indigent' means a person with an income that is below two hundred percent (200%) of the federal poverty level.").

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Factors to Consider

► There is no comprehensive list of factors to consider in exercising discretion. Some factors could be:

- whether the defendant has now, or will have in the foreseeable future, the financial ability to pay the costs and fees in full, including the extent to which the defendant's gross monthly income exceeds, or is likely to exceed, the current **federal poverty guidelines**, if any;
- whether full payment of costs and fees may be accomplished in a reasonable time through establishment of a **payment plan**;
- whether the defendant may have **undocumented sources of income**, or a demonstrated ability to obtain additional financial resources to pay other expenses, as evidenced by the payment of a significant bond or by payment for retained legal counsel, for example;
- whether the defendant has been **previously granted relief** with respect to a portion of court costs and fees;

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. It features a central figure of a person standing on a pedestal, flanked by two stars. The text "SEAL OF THE TENNESSEE JUDICIARY" is written around the top half of the circle, and "1796" is at the bottom. The words "QUI PRO DOMINA JUSTITIA SEQUITUR" are inscribed in a smaller circle around the central figure.

Factors to Consider

- ▶ Factors, continued,
 - ▶ whether the defendant receives **public assistance**, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, or resides in public housing;
 - ▶ whether the defendant is currently **serving a sentence** in a correctional institution or is housed in a mental health facility;
 - ▶ whether the payment of court costs and fees would interfere with satisfaction of **restitution** or other obligations owed in favor of victims of crime; and
 - ▶ whether, considering proof of extraordinary expenses, full payment of court costs and fees would impose an **undue burden** upon the defendant or upon those for whom the defendant may be responsible for caring.

The seal of the Tennessee Judiciary is a circular emblem with a serrated outer edge. The outer ring contains the text "SEAL OF THE TENNESSEE JUDICIARY" at the top and "1796" at the bottom, separated by small floral motifs. The inner circle features a central figure of a person holding a scale of justice, with the Latin phrase "QUI PRO JUSTITIA RUAT" (Who dies for justice) inscribed around the figure. Three stars are positioned below the central figure.

Conclusion

Any
Questions?

The background of the slide features a large, faint, teal-colored seal of the Supreme Court of the Commonwealth of Massachusetts. The seal is circular with a scalloped outer edge. Inside the circle, a figure of a Native American stands holding a bow and arrow. The Latin words "OFFICII JUSTITIAE" are written in a circle around the figure. At the bottom of the seal, the year "1796" is inscribed.

Restitution & Court Costs

MARCH 2023 JUDICIAL CONFERENCE

Judge Angelita Blackshear Dalton

Judge Tom Greenholtz