IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. LEROY GENE STANLEY, Defendant and Appellant.	S185961

APPELLANT'S OPENING BRIEF ON THE MERITS

Third District Court of Appeal, No. C063661
Yolo County Superior Court, No. 093110, Hon. David Rosenberg, Judge

ROBERT NAVARRO
Attorney at Law
Bar No. 128461
P.O. Box 8493
Fresno, California 93747
TEL: 559.452.0934
FAX: 559.452.0986

Attorney for Appellant
Leroy Gene Stanley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

STATUTES AND OTHER AUTHORITIES

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEROY GENE STANLEY, Defendant and Appellant.	S185961

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE UNDER REVIEW

The court granted review on the following issue: Did the trial court err in awarding the victim restitution for the costs of repairing her damaged truck, when the estimated cost of the repairs was over three times the purchase price she paid 18 months earlier?

COMBINED STATEMENT OF THE FACTS AND CASE

Appellant, who was intoxicated, banged on the victim's door demanding to be let in. She called the police, and saw that appellant had moved by her truck, and then she heard loud banging noises. After police arrived, an inspection of the truck found the driver's side door was dented with damage to the door trim and antenna as well. (CT 11.)

Appellant was charged with having vandalized the truck (CT 54-55), and entered a no contest plea to vandalism in exchange for a 16-month sentence and dismissal of other charges. (CT 56-58; RT 2-3.)

Stanley was sentenced in accordance with the plea agreement. (CT 60-61, 72; RT 11-14.) The parties were directed to submit briefs on the issue of restitution. (CT 60.) The probation report recommended a direct victim restitution order based on the cost of repair charged by the auto body shop. (CT 66; RT 11.)

At the preliminary hearing, the victim said her truck was a 1975 four-door Dodge pickup truck (CT 39-40) which she bought 18 months earlier for $950 in cash. (CT 44.) She said the truck had been in good physical and operating condition. (CT 43-44.) Repair of the truck was estimated at $2,812.94. Thus, the cost of repair was about three times the worth of the vehicle at purchase. (CT 38, 48; RT 9.)

Under *People v. Yanez* (1995) 38 Cal.App.4th 1622, appellant argued that restitution should be set at the purchase price paid by the victim and not the cost of repair. The prosecution said that restitution equals the cost of repair, citing *In re Dina V.* (2007) 151 Cal.App.4th 486, which refused to follow the opinion in *Yanez*. (CT 79-81.) The court found that the victim was entitled to an amount that it determined would make her "whole" which was the $2,812.94 cost of repairing the vehicle. (CT 83; RT 21-22.)

A timely notice of appeal was filed on December 10, 2009. (CT 86.) The Court of Appeal affirmed the trial court's restitution order in a decision certified for partial publication, dated August 3, 2010.

STATEMENT OF APPEALABILITY

The judgment from which appellant appeals finally dispose of all issues between the parties (California Rules of Court, rule 14(a)(2)(B)), and are appealable pursuant to Penal Code §1237, subdivision (a).

ARGUMENT

RESTITUTION FOR REPAIRING PROPERTY DAMAGE SHOULD BE SET AT OR REASONABLE CLOSE TO THE REPLACEMENT VALUE OF THE ITEM

As this Court's statement of the issue on this appeal makes clear, the restitution in this case was three times the cost of fully replacing the victim's four-door Ford Adventurer pickup truck, which was 24 years old (CT 39-40, 44) at the time it was damaged by appellant's conduct in 2009. The victim had purchased the truck for $950 one year and one half earlier. (CT 44.) The court awarded restitution based on the cost of repair in the amount of $2,812.94. (RT 9.)

Appellant submits that it is instructive that under long established civil tort law the financial liability to the tortfeasor for damaging personal property beyond repair is the replacement value of the lost item. In *Shook v. Beals* (1950) 96 Cal.App.2d 963, the representative of a five-man fishing trip was warned by the plaintiff owner that the airplane he was renting was limited to four persons total and the owner was assured only four persons would ride in it. (*Id.* at 965.) However, all five men boarded the plane. (*Id.* at 970.) Although told not to try to land at Garberville because of the short runway, enroute the men sought directions to that airport, but were again told that the airport was too small for the aircraft. The evidence was in conflict as to whether they were also warned off of landing at Ft. Bragg, where they tried

landing, but the plane flipped and was destroyed. (*Id.* at 965.) The jury awarded the owner $10,000, based on his testimony that the sum represented the worth of his plane, which was in excellent condition, at the time of its loss. The appellate court affirmed the award stating "The proper measure of damages is the reasonable market value of the personal property destroyed." (*Id.* at 974; see also *Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 ["If the property is wholly destroyed, the usual measure of damages is the market value of the property"].)

If instead of vandalizing the victim's 1975 truck, had appellant been a drunk driver who crashed into it and rendered the vehicle unrepairable, the restitution available to the victim would have been its value at the time of destruction, which was not precisely determined in this case, but which would be at or near the $950 she paid for it not long before.[1] Other than a possible "surcharge" for costs associated with replacing the truck, no other measure of damages regarding the truck would be possible.

However, it should not be the case that destroying property beyond repair works to the financial advantage of a criminal defendant rather than his injuring it, but leaving it in a fixable state. The restitution

---

[1] As in *Shook v. Beals, supra*, the victim testified the truck was in excellent condition. (CT 43.)

statute, Penal Code section 1202.4, subdivision (f), and all the case law recognize that the actual cost of repair is an appropriate measure of restitution, but it must be *reasonable* in relation to the particular loss at issue.

In *People v. Chappelone* (2010) 183 Cal.App.4th 1159, the appellate court identified the borders of appropriate victim restitution:

> A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall. ([*People v.*] *Millard* [(2009) 175 Cal.App.4th 7] at p. 28; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1017-1018.) While the court need not order restitution in the precise amount of loss, it "must use a rational method that could *reasonably* be said to make the victim whole, and may not make an order which is arbitrary or capricious." (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992; see also *In re Brian S.* (1982) 130 Cal.App.3d 523, 527 ["court may use any rational method of fixing the amount of restitution which is *reasonably* calculated to make the victim whole and which is consistent with the purpose of rehabilitation"]; *People v. Ortiz* (1997) 53 Cal.App.4th 791, 800 ["While the amount of restitution cannot be arbitrary or *capricious*, there is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action."]; *People v. Akins* (2005) 128 Cal.App.4th 1376, 1382 [same].)

(*Id.* at 1172-1173, italics added, parallel citations and internal quote marks and brackets omitted.)

Presented with figuring out restitution in a massive stolen merchandise crime, the *Chappelone* court reversed the trial court's award because, while the trial court relied on the victim's proffered basis for

the valuation of the merchandise established by an inventory service (*id.* at 1168), "it clearly resulted in a merchandise value that was highly inflated over the actual value of the merchandise to Target." (*Id.* at 1175.)

Appellant submits that where, as here, restitution is based on the cost of repair but results in a monetary award set at three times the value of the damaged merchandise that restitution is "highly inflated over the actual value" of the item and should not be allowed.

The trial court below essentially based its victim restitution order on an analysis of whether the issue was controlled by *People v. Yanez* (1995) 38 Cal.App.4th 1622, as argued by appellant, or by *In re Dina V.* (2007) 151 Cal.App.4th 486, as the prosecution contended. Neither case fully supports the award made here.

Under civil law, *Yanez* found that a plaintiff is entitled only to the lower amount of either the item's market value at the time of the loss, or the cost of reasonable repair to the item. (*Id.* at 1626.) The court believed that the civil law rule provided the plaintiff with full compensation for the loss, in other words the victim was made whole, and therefore a crime victim's recovery for damages should not be greater than that permitted by civil law. (*Id.* at 1627.) The market value at the time the *Yanez* victim's car was stolen was not determined in the trial court, but the Blue Book value was known to be less than the cost of

repair, thus the reviewing court reversed the restitution order and remanded the matter for a proper determination, under civil law, of its replacement value. (*Id.* at 1628.)

The *Yanez* decision is open to criticism because of its insistence on the lower of the two valuations, fair market replacement or reasonable repair. Section 1202.4, subdivision (f), does not require that restitution be limited to a the "lower amount;" it requires only that the victim be made whole.

The question then is – when does the cost of repair become unreasonable in relation to the replacement cost? In *Yanez*, the court relied on *Smith v. Hill* (1965) 237 Cal.App.2d 374, for the statement of the civil rule of damages to personal property. (*Yanez*, at 1626.)

The *Smith* case gives an indication of the limits of reasonable repair, at least under civil law.

> The measure of damage for wrongful injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value. The amount actually paid for repairs is some evidence of the reasonable value of necessary repairs; and if such repairs have in fact been made, though there is no evidence as to depreciation in value, the court may not assume that the depreciation was of lesser amount than the cost of repairs. If repairs have in fact not been made, the estimated cost of repairs reasonably necessary calls for expert testimony.

(*Id.* at 388, citations omitted; see also *Hand Electronics, Inc., supra,* 21 Cal.App.4th at 870 ["If the cost of repairs exceeds the depreciation in

value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs"].)

An automobile reaches full cumulative depreciation when the amount "claimed over the years is equal to your original cost or other basis for the asset." (See 2003, CCH Inc.; http://taxguide.complete-tax.com/text/Q14_2980.asp; http://www.irs.gov/businesses/small/article/0,,id=137026,00.html) Thus, if reasonable repairs cannot exceed depreciation, and depreciation cannot exceed the purchase cost to the victim, then an amount equal to the cost of the item is ostensibly an upper limit on the reasonable cost of repair.

Because criminal restitution is not bound by civil law limits, it can be envisaged that a reasonable cost of repair might be somewhat more than the original cost of the damaged asset, but appellant submits that it should not be much more. This measure is similar to those in other jurisdictions. A proposed model criminal jury instruction from Florida reads:

> Any damage to Jane Doe's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair. You shall also take into consideration any loss Jane Doe sustained for towing or storage charges and by being deprived of the use of her automobile during the period reasonably required for its repair.

(See *In re Standard Jury Instructions in Criminal Cases – Report No. 2010-01* (Fla. 2010) ___ So.3d ___, 2010 WL 4117070, *30.)

Kansas criminal courts have developed a similar formula. The appropriate amount of restitution is the amount required to reimburse the victim for the actual loss suffered. (*State v. Hunziker* (Kan. 2002) 274 Kan. 655, 663-664, 56 P.3d 202.) If damaged property can be restored to its previous undamaged condition, the measure of restitution is the reasonable cost of repairs plus the reasonable amount necessary to compensate for loss of its use. (*State v. Casto* (Kan.App. 1996) 22 Kan.App.2d 152, 154, 912 P.2d 772.) However, Kansas courts have consistently held that *an award of restitution that exceeds fair market value constitutes an abuse of discretion*. (*Hunziker, supra*, 274 Kan. at 664, italics added; *State v. Baxter* (Kan.App. 2005) 34 Kan.App.2d 364, 366, 118 P.3d 1291.) The court's determination of restitution must be based on reliable evidence which yields a defensible restitution figure. (*Hunziker, supra,* 274 Kan. at 660, 56 P.3d 202; but see *Miller v. State* (Tex.App., Feb. 23, 2011) ___ S.W.3d ___, 2011 WL 653034 at *3 [reversing $6,299 cost of repair restitution order regarding vandalized car, noting that in Texas "restitution does not include cost of repair; it includes the value of the property on the date of the damage, or the value of the property on the date of sentencing less the value of any part of the property that is returned on the date the

property is returned"].)

The other case relied on below, *In re Dina V., supra,* 151 Cal.App.4th 486, affirmed, in a stolen car case, a victim restitution order of $4,419.72 as the cost of repairing the car which had a replacement value of only $3,000. (*Id.* at 488.) *Dina V.* rejected the contention in *Yanez* that victim restitution was limited to the amount of damages recoverable in a civil action, and found that restitution was not limited to the item's replacement cost because "Limiting the amount of restitution to the replacement cost would not make the victim whole." (*Id.* at 488-489.) The rationale was that the replacement value does not compensate the victim for the associated troubles of actually obtaining another, but virtually identical, vehicle. (*Id.* at 489.)

The award in *Dina V.* effectively valued that cost of inconvenience at $1,419, the amount of the repair bill over the amount of the replacement value. Arguably, this amounted to a 47 percent "surcharge." In appellant's case, the "surcharge" amounted to a 300 percent surcharge on the value of the vehicle. Even if one disagrees with it, the *Yanez* court set a limit on reasonable restitution while *Dina V.* did not make any venture into that territory.

In a very recent opinion, the *Yanez* and *Dina V.* conflict was again analyzed, this time in the context of restitution under the Welfare and Institutions Code in a juvenile delinquency case. The court in *In re*

Alexander A. (Feb. 10, 2011) 192 Cal.App.4th 847, 2011 WL 453253, the court upheld the cost of inconvenience theory in a damaged car case:

> Choosing repair over replacement is not intended to reimburse the victim for noneconomic injury but acknowledges the practicalities involved in cleaning up after a crime spree. The victim is entitled to a resolution.

(*Id.* at *5.) The court also added to the rationale the proposition that making the minor pay an amount substantially over the cost of replacement was instructive and rehabilitative. (*Id.* at *6.) The cost of repair was set at $8,219.19 for a 1992 Honda Accord, and the highest estimated replacement value was $5,300, so the "surcharge" was almost $3,000, or 57 percent of the cost of replacement. (*Id.* at *1.) Based on these factors, the court affirmed the restitution order as reasonable, while noting that –

> There may be some point at which the costs to repair stolen or damaged property so exceed its value that a restitution order for repair costs may no longer be rational in that it results in a windfall to the victim or does not serve a rehabilitative purpose.

(*Id.* at *6.) The opinion cites *People v. Kelly* (2010) 189 Cal.App.4th 73 and *People v. Fortune* (2005) 129 Cal.App.4th 790, for the above proposition, but neither case decides or suggests where the "point" of unreasonableness lies, and neither are physical property damage cases. Clearly, however, the steep cost of repair in *Alexander A.* is still, in proportional terms, only one-sixth of the order made in this case.

Appellant submits that the appellate decisions in *Alexander A.*, *In re Dina V.*, and this case are incorrect. While appellant cannot postulate a precise formula, he argues that the cost of repair must remain close to the cost of replacement while allowing for a reasonable surcharge of perhaps ten or fifteen percent for the inconvenience to the victim. Appellant recognizes that a surcharge or cost of inconvenience is not necessarily related to the cost of replacement. Theoretically, replacing a $100,000 luxury car would be no costlier than replacing the $950 1975 Ford Adventurer here. However, that may not hold true with some types of property, as in arson damage to a residence. Conceivably, the greater the cost of repair to the home, the greater the effort that would be expended in obtaining the repairs.

But, the reasonableness of the cost of repair must be subject to some standard that so far no court has identified. Under any theory, the award in this case was excessive and must be reversed.

CONCLUSION

Appellant respectfully requests that the judgments of the superior court and the Court of Appeal be reversed.

Dated: March 10, 2011

Respectfully submitted,

/s/ Robert Navarro
ROBERT NAVARRO
Attorney for Appellant

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)

I, Robert Navarro, appointed counsel for Leroy Stanley, under penalty of perjury under the laws of the State of California, hereby certify that the attached brief contained 3,053 words (excluding cover and tables) as calculated by WordPerfect X3.

Dated: March 10, 2011

/s/ Robert Navarro
ROBERT NAVARRO
Attorney at Law
Bar No. 128461
P.O. Box 8493
Fresno, California 93747
TEL: 559.452.0934
FAX: 559.452.0986

Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I am a resident of the State of California, over the age of eighteen and am not a party to this action. My business address is P.O. Box 8493, Fresno, California 93747. I am readily familiar with the business practices of the law office of Robert Navarro for the collection and processing of correspondence for mailing with the United States Postal Service, as described in Code of Civil Procedure section 1013(a). In the ordinary course of business, correspondence placed for collection and mailing is on the same day deposited with United States Postal Service in a sealed envelope with the postage fully prepaid. I am employed in the county where said collection and processing of mail takes place.

On March 10, 2011, the attached: **APPELLANT'S OPENING BRIEF ON THE MERITS** in *People v. Stanley*, California Supreme Court, No. S185961, was placed in envelopes for collection and mailing following our ordinary practice at P.O. Box 8493, Fresno, California 93747. The envelopes were addressed as indicated below:

Respondent
Jeffrey Firestone
California Attorney General's Office
P.O. Box 944255
Sacramento, CA 94244-2550

Program
Deborah Prucha
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

Trial Counsel
Richard Van Zandt, D.P.D.
Yolo County Public Defender's Office
814 North Street
Woodland, California 95695

Appellant
Leroy Stanley

Trial Court
Hon. David Rosenberg, Judge
Yolo County Superior Court
One Court Street
Oroville, California 95965

Prosecution
Martha Hopzapfel, D.D.A.
Yolo County District Atty's Office
301 2nd Street
Woodland, California 95695

Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 10, 2011, at Fresno, California.

/s/ Robert Navarro