IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) Supreme Ct. ) No. S170778 |
| Plaintiff and Respondent, | ) Court of Appeal ) No. D050432 |
| v. | ) Superior Court |
| ELI J. ANDERSON, | ) No. SCE262419 |
| Defendant and Appellant. | ) |

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO

Honorable Allan J. Preckel, Judge

# APPELLANT'S OPENING BRIEF

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Attorney for Appellant

By appointment of the Supreme Court
with the assistance of Appellate
Defenders, Inc.

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Table of Authorities

**Cases**



**Statutes**

**Other Authorities**

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| | |
|---|---|
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# APPELLANT'S OPENING BRIEF

## ISSUE PRESENTED

**(California Rules of Court, rule 8.516 (a)(1))**

Appellant Eli J. Anderson was convicted of felony hit and run. On April 27, 2007, appellant was ordered to pay $34,092.02 in restitution. (Aug. 1 C.T. p. 2.) Of this amount, $31,397.55 was ordered paid to Sharp Memorial Hospital, for costs of treating the victim. (Aug. 1 C.T. p. 2.)

The issue presented is "did the trial court err in awarding restitution to the hospital that treated the victim of defendant's hit-and-run-offense?"

## STATEMENT OF APPEALABILITY

This appeal is from a final judgment and sentence after trial, made appealable by Penal Code section 1237, subdivision (a).

## STATEMENT OF THE CASE

An information filed on August 8, 2006, charged appellant with felony hit and run, in violation of Vehicle Code section 20001, subdivision (a). (1 C.T. p.1.) Trial commenced on October 2, 2006. The jury was unable to reach a verdict and a mistrial was declared on October 30, 2006. (4 C.T. p.647, 690.)

A second trial commenced on December 28, 2006. (4 C.T. p. 694.) On January 10, 2007, appellant was found guilty of the charge. (4 C.T. p. 722.) On February 28, 2007, appellant was placed on formal probation for a period of five years. He was committed to county jail for 365 days, stayed pending appeal. (4 C.T. p. 725.) On April 27, 2007, appellant was ordered to pay $34,092.02 in restitution. (Aug. 1 C.T. p. 2.)

Appellant filed a timely notice of appeal on February 28, 2007. (4 C.T. p. 637.)

## STATEMENT OF FACTS

Appellant Eli J. Anderson was eighteen years old and a recent high school graduate, in July, 2005. He was working as a production assistant for a company filming commercials in Los Angeles. (4 R.T. p. 682.) As there was no work available over the July 4th holiday weekend, appellant

drove home to East San Diego County on the evening of July 1. (4 R.T. p. 684.)

Appellant's intention was to see his girlfriend, Jenin Abdullah. Jenin worked at Hollywood Video and got off work about 1:00 a.m. (4 R.T. p. 698.) Appellant met a friend, Jesse McKee, and went over to several other friends' houses over the course of the evening. Appellant did not drink any alcohol or take any drugs during this period of time. Appellant had a video camera with him and took some short videos of his friends. (4 R.T. pp. 688, 690, 692-696.)

Appellant began his drive to Jenin's place of work shortly after midnight on July 2. (4 R.T. p. 698.) He drove down Fletcher Parkway, in El Cajon, in the fourth of five traffic lanes. The sky was clear, and appellant observed no other cars or people as he drove in the vicinity of a shopping mall. Appellant reached down to change the radio station on his stereo. He heard and felt a thump, followed by his windshield shattering, with glass getting into his eyes and mouth. (4 R.T. pp. 699-700.)

Appellant did not know what happened to cause his windshield to shatter. (4 R.T. p. 701.) In the months preceding this incident, the media had reported on a series of incidents in which rocks were thrown at cars. Appellant's initial thought was that an unknown person had thrown a rock at him. (4 R.T. p. 702.) Appellant felt fear and confusion, and as he slowed his vehicle down he called Jenin. She advised him to look at his car and he

pulled off into a well lit parking structure at one end of the shopping mall. Appellant recorded on his video camera his inspection of his car, and noted that there was blood at the top of his shattered windshield. He speculated on the video that perhaps he had hit a raccoon. He acknowledged on cross-examination that the possibility that he had hit a human being was one of many thoughts that occurred to him. (4 R.T. pp. 704-706, 728.)

Appellant stated that he next drove slowly along the parking lot fronting Fletcher Parkway, looking into the roadway for what he might have collided with. Appellant wasn't certain of exactly where the collision had taken place, but he did not see any evidence of a collision or what he might have hit. Appellant then drove onto the freeway and called Jenin, telling her he was driving to her house in Lakeside. (4 R.T. p. 711.) Jenin told him it was unsafe to drive with a shattered windshield and to pull off the freeway at a restaurant called Janet's Café, which he and Jenin frequented. (4 R.T. p. 712.) A friend of his, Ian Tanner, showed up at Janet's Café, followed by Jenin. Appellant and Jenin then drove in Jenin's car to her house. (4 R.T. p. 713.)

Gregory Gilbride[1] was driving with two friends down Fletcher Parkway after midnight on the morning of July 2, 2005, when he saw a

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[1] Mr. Gilbride was ruled unavailable for trial. He had previously testified at the first trial, and that testimony, redacted by the trial court, was read to the jury for the re-trial. The transcript of the earlier testimony was included in the clerk's transcript, and by stipulation of the parties, was not

figure on the side of the road. He assumed it was a drunken bum. (2 C.T. pp. 413-415.) The person was in the fifth lane of traffic, all the way on the right side of the road. Gilbride pulled off into the mall parking lot to render assistance. (2 C.T. p. 417.)

As Gilbride approached the person he saw blood, as well as "a mangled body." He called 911 for assistance. (2 C.T. p. 420.) The person, a male, was making noises and attempting to get up, but could only lift himself about six inches. (2 C.T. pp. 422-423.) Gilbride diverted traffic away from the injured man until the police arrived. (2 C.T. p. 431.)

Officer Peter Faubel responded to the call for assistance. (5 R.T. p. 849.) He encountered Gilbride and his companions at the scene. (5 R.T. p. 863.) Officer Brian Ehers arrived and followed the ambulance carrying the injured man to the hospital. He was able to determine that the injured man was Robert Milligan. (1 R.T. pp. 137, 139.)

Doctor Herman Hammerstead was a trauma surgeon at Sharp Hospital. He examined Milligan at about 1:00 a.m. (1 R.T. p. 156.) Milligan had massive head and face injuries as well as chest damage. (1 R.T. pp. 156-157.) Milligan died at 2:55 a.m. (1 R.T. p. 167.) Jonathan Lucas was the medical examiner that performed the autopsy on Milligan. Lucas noted that Milligan had extensive damage to the right side of his body, as well as the inside of his left leg. (1 R.T. pp. 180-183, 192.) The

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recorded by the court reporter at the second trial.

cause of death was ruled as blunt force trauma. (1 R.T. p. 194.) Lucas opined that Milligan was standing and could have been walking at the time of impact, and could have been walking from the left side of the road to the right side of the road, or walking from the right side of the road to the left side of the road. Lucas further opined that Milligan's injuries were probably not survivable. (1 R.T. pp. 199-201.)

Officer Jeffrey Mowers was one of the investigators of the collision. He created diagrams of the lighting on the roadway and where the evidence was located. (1 R.T. pp. 225-226.) Mowers found 16 individual pieces of evidence, as well as blood in the roadway, and indicated most of the evidence was in the fifth lane of traffic, closest to the curb. (1 R.T. pp. 214, 217, 237.) Mower observed no skid marks on the road, and noted that there was no pedestrian crossing in the area of the incident. (2 R.T. pp. 250, 259.)

Jenin stated that after she and appellant arrived at her house, she and her brother, Andy Kunz, drove in Andy's truck back down to where appellant indicated the collision occurred, in an effort to learn what had happened. As they approached the scene, they were stopped by Officer James Bray, who informed them that a pedestrian had been hit by a car. They returned home and informed appellant. Jenin stated that appellant was "shocked" by the news. Appellant stated that he immediately wanted to turn himself into the authorities. Jenin's father, Omar Abdullah, suggested he

wait until an attorney could be contacted. It was approximately 2:00 a.m. at this point. (3 R.T. pp. 486-489, 491; 4 R.T. pp. 676-679, 717, 817.)

Officer Richard Whitman conducted investigation into the collision. He felt the lighting on the roadway at the time of the incident was sufficient to observe a pedestrian standing in the road. (2 R.T. p. 280.) He opined that the cause of the collision was jaywalking, and that Milligan was jaywalking when struck. (2 R.T. pp. 299, 302.) Whitman received an anonymous phone call providing him with the first name of the driver who had been involved in the collision. (2 R.T. p. 294.)

Officer Stephen McDaniel drove to Janet's Café on July 3, having been informed that the vehicle involved in the collision might be located there. He found appellant's car, noted the damage to it, and had it impounded. He noted there was a camcorder sitting on the front seat. (2 R.T. pp. 345-349, 351.) Evidence Technician Julie Palos examined the vehicle. She located hair and blood samples imbedded in the windshield. (2 R.T. p. 360.) Michelle Hassler from the crime lab determined that the DNA in the blood samples taken from the windshield matched that of Milligan. (2 R.T. p. 392.)

Detective John Pearsley was the lead investigator in the case. He determined that appellant had driven .4 miles from the point of impact to where appellant examined his vehicle in the mall parking structure. From there, appellant drove another 4 miles to where he left his car at Janet's

Café. (3 R.T. pp. 533-534.) Pearsley matched debris from the collision scene to appellant's car, and opined that a mark on the bumper of the car was left by jeans that Milligan was wearing that evening. (3 R.T. pp. 539, 551.) Pearsley determined from examining the video tape recovered from the front seat of appellant's car that appellant was the driver of the vehicle at the time of the collision. (3 R.T. p. 553.) Pearsley determined that the video tape taken by appellant of his car in the mall parking structure was taken at 12:31 a.m. (3 R.T. p. 565.) Pearsley obtained appellant's cell phone records indicating that appellant called Jenin at 12:27 a.m., 12:31 a.m., and 12:36 a.m., on the night in question. (3 R.T. p. 556.)

Pearsley offered his opinion as to how the collision occurred. He believed that Milligan was traveling from left to right across the lanes of traffic, and probably running at the time. Milligan's right leg was off the ground at the point of impact, accounting for the damage to the inside of Milligan's left leg, and the right side of Milligan's upper body. (3 R.T. pp. 568-571.)

Dr. Harry Bonnell was a forensic pathologist. Based on his examination of all of the evidence in the case amassed by the police, Dr. Bonnell opined that he could not say which way Milligan was moving across the street, and whether Milligan was walking, running, or tripped at the time of impact. (5 R.T. pp. 884-885.)

Officer Steve McDonald testified that on May 27, 2005, there were a series of incidents that involved rocks thrown at cars in various locations around San Diego County. One of those incidents resulted in a fatality to a passenger in a car struck by a rock that came through the windshield. As part of McDonald's investigation into the incidents, he notified the press and asked them to appeal to the public for help in locating the assailants. (5 R.T. pp. 867-869.)

On rebuttal, Officer Whitman testified that shrubbery between Fletcher Parkway and the mall parking lot would block the view of anyone driving through the mall parking lot and looking at the fifth lane of traffic. (5 R.T. pp. 926-927.)

## ARGUMENT

## I.

## THE TRIAL COURT IMPERMISSABLY AWARDED RESTITUTION TO A HOSPITAL, AS A HOSPITAL CANNOT BE NAMED A "VICTIM" FOR PURPOSES OF RESTITUTION IN THIS CASE

### A. Summary of Argument

The trial court awarded restitution to the hospital that treated the decedent. The decedent was not a "direct victim" of appellant's criminal conduct, and the award is therefore statutorily improper.

B. The Standard of Review

The court does have broad discretion to impose probation conditions which foster rehabilitation and protect the public. (*People v. Lent* (1975) 15 Cal.3d 481, 486, *People v. Beach* (1983) 147 Cal.App.3d 612, 620.) However, "[t]he discretion granted is not boundless. In the first place, the authority is wholly statutory; the statute [Pen. Code, sec. 1203.1] furnishes and limits the measure of authority which the court may thus exercise. [Citations.]" (*People v. Keller* (1978) 76 Cal.App.3d 827, 832.) The trial court's imposition of probation conditions is reviewed for an abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65.) The court takes a "highly deferential" approach in assessing the challenged condition. (*Id.* at p. 63.)

C. The Restitution Award Was an Abuse of Discretion

On April 27, 2007, appellant was ordered to pay $34,092.02 in restitution. (Aug. 1 C.T. p. 2.) Of this amount, $31,397.55 was ordered paid to Sharp Memorial Hospital, for costs of treating the victim. (Aug. 1 C.T. p. 2.)

On October 28, 2008, the Third District Court of Appeal held, in a published case, that a hospital cannot be considered a "victim" for purposes

of restitution under Penal Code[2] section 1202.4, subdivision (f). (*People v. Slattery* (2008)167 Cal.App.4th 1091.)

The trial court in *Slattery* ordered restitution to be paid to a hospital under the authority of section 1202.4, subdivision (f). This subdivision provides in relevant part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim ...." (§ 1202.4, subd. (f).) Under the plain language of this statute, then, the court may order restitution only to a "victim." (See *People v. Martinez* (2005) 36 Cal.4th 384, 392.)The term "victim," as it relates to any kind of business or governmental entity, is defined in section 1202.4, subdivision (k)(2): "(k) For purposes of this section, 'victim' shall include all of the following: [¶] ... [¶] (2) Any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity *when that entity is a direct victim of a crime.*" (§ 1202.4, subd. (k)(2), italics added.) "Thus, section 1202.4, subdivision (k) permits restitution to a business or governmental entity only when it is a *direct victim* of crime." (*People v. Martinez, supra,* 36 Cal.4th at p. 393, original italics.)

In this context, this court has defined "direct" as " 'straightforward, uninterrupted, [or] immediate' in time, order or succession, or 'proceeding

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[2] All further references are to the Penal Code, unless noted

[in logic] from antecedent to consequent, from cause to effect, etc., uninterrupted,' or generally '[e]ffected or existing without intermediation or intervening agency; immediate.' [Citation.]" (*People v. Birkett* (1999) 21 Cal.4th 226, 232-233, fn. 6.) Employing this definition of "direct victim," this court has held that insurance companies that reimburse their insureds whose cars were stolen are not direct victims of car theft. (*Id.,* at pp. 245-247.)

Similarly, this court has held that the California Department of Toxic Substance Control is not a direct victim of attempted methamphetamine production in incurring costs cleaning up waste material from the production. (*People v. Martinez, supra,* 36 Cal.4th at pp. 386, 393-394.) And appellate courts have held that a police department is not a direct victim when it incurs economic losses in the course of a criminal investigation. (*People v. Torres* (1997) 59 Cal.App.4th 1, 4-5; *People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077.)

Applying this definition, the Third District Court of Appeal held that a hospital is not a "direct victim." "Defendant's criminal conduct consisted of inflicting injury upon an elder adult. Marshall Hospital is not a "direct victim" because it was not the " 'immediate object[ ]' " of the conduct, nor the entity " ' *against which* the ... crimes had been committed.' " (*People v. Martinez, supra,* 36 Cal.4th at p. 393, quoting *People v. Birkett, supra,* 21 Cal.4th at pp. 233-232, respectively, italics in *Birkett.*) Rather, defendant's

mother was the " 'immediate object[ ]' " of the offense. (*People v. Martinez, supra,* 36 Cal.4th at p. 393.) Also, the hospital incurred its economic loss indirectly from defendant's conduct: first, defendant illegally inflicted injuries upon her mother; second, Marshall Hospital treated defendant's mother for the injuries; third, defendant's mother did not pay the hospital bills." (*People v. Slattery, supra,* 167 Cal.App.4th 1091, 1096-1097.)

The court went on to say: "Like the Department of Toxic Substance Control in *Martinez,* Marshall Hospital must recoup its costs through other means. Section 1202.4, subdivision (f) explicitly requires that the immediate victim, defendant's mother, be made whole for her economic losses, including medical expenses, resulting from defendant's criminal conduct. (§ 1202.4, subd. (f) & (f)(3)(B).) Because defendant's mother is deceased, the court must order the restitution to be paid to her estate. Diverting the restitution due to defendant's mother to a third party, such as Marshall Hospital, violates the statute because it fails to make defendant's mother whole. (*People v. Birkett, supra,* 21 Cal.4th at pp. 245-247.) As the People concede, Marshall Hospital may bring a civil claim against the mother's estate to ensure payment of the debt." (*People v. Slattery, supra,* 167 Cal.App.4th 1091, 1097.)

The identical issue is present in this case. Sharp Memorial Hospital was the entity that treated the decedent's injuries. (1 R.T. pp. 156-157,

167.) As such it is not a "victim," for purposes of restitution under section 1202.4, subdivision (f). Rather, the decedent was the " 'immediate object[ ]' " of the offense. (*People v. Martinez, supra,* 36 Cal.4th at p. 393.) Also, the hospital incurred its economic loss indirectly from defendant's conduct: first, defendant illegally inflicted injuries upon the decedent; second, Sharp Memorial Hospital treated the decedent for the injuries; third, the decedent did not pay the hospital bills.

Appellant was granted probation in this case, and the Fourth District Court of Appeal that decided this case saw that as a critical distinction: "Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria. Thus, even if in cases where a defendant is sentenced to state prison a hospital is not considered a victim for purposes of restitution, under *Carbajal* and *Lent*, the court properly exercised its discretion to order restitution to the hospital that treated Milligan because he was unable to pay those expenses. Forcing the hospital to bear those expenses, under the facts of this case, would defeat the purposes of the restitution statutes where it was ordered as a condition of probation." (Court of Appeal opinion (modified) at p. 30)

This analysis is at odds with the express statutory language of Section 1203.1, subdivision (a)(3), governing restitution orders where a defendant is granted probation, which specifically requires a restitution

order to comply with the requirements of section 1202.4. Section 1203.1 furnishes and limits the measure of authority which the court may thus exercise. (*People v. Keller, supra,* 76 Cal.App.3d 827, 832.) The holding in *Slattery* should therefore be equally applicable here, regardless of whether a defendant is granted probation or sent to prison.

The court went on to say:

"Further, to the extent *Slattery* intended its holding to be broad enough to include restitution orders where probation is granted, we decline to follow its holding. In reaching its decision, the *Slattery* court relied heavily on *People v. Birkett, supra,* 21 Cal.4th 226 (*Birkett*), in which the California Supreme Court held that a court could not order restitution as a condition of probation to be paid to insurance companies who paid out claims to the defendant's victims whose cars were stolen. (*Id.* at pp. 234-235.)

Here, however, the victim was not an insurance company but the direct provider of emergency medical services to the victim. Insurance companies conduct risk assessments and enter into contracts in which they promise to cover certain losses in exchange for premiums. A hospital, by contrast, when presented with a gravely injured victim, has an obligation to treat the victim regardless of whether the victim has insurance or the costs of care will ever be recoverable. (See *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (Jan. 8, 2009) 2009 WL 36855, *1,

*3.) When a hospital suffers this type of economic loss as a result of a defendant's criminal acts it is a *direct* victim." (Court of Appeal opinion (modified) at p. 30.)

This holding is also at odds with established case law. As noted above, employing this definition of "direct victim," this court has held that insurance companies that reimburse their insureds whose cars were stolen are not direct victims of car theft. (*People v. Birkett, supra,* 21 Cal.4th 226, 245-247.) This holding was not based on the fact that the insurance companies conduct risk assessments and enter into contracts in which they promise to cover certain losses in exchange for premiums. The holding is based on the express language of the statute requiring restitution to a "direct" victim. "Direct" was defined as " 'straightforward, uninterrupted, [or] immediate' in time, order or succession, or 'proceeding [in logic] from antecedent to consequent, from cause to effect, etc., uninterrupted,' or generally '[e]ffected or existing without intermediation or intervening agency; immediate.' [Citation.]" (*Id.* at pp. 232-233, fn. 6.) By this definition the hospital was not a "direct" victim.

Similarly, this court has held that the California Department of Toxic Substance Control is not a direct victim of attempted methamphetamine production in incurring costs cleaning up waste material from the production. (*People v. Martinez, supra,* 36 Cal.4th at pp. 386, 393-394.) And appellate courts have held that a police department is not a direct

victim when it incurs economic losses in the course of a criminal investigation. (*People v. Torres, supra,* 59 Cal.App.4th 1, 4-5; *People v. Ozkan, supra,* 124 Cal.App.4th 1072, 1077.) Lastly the *Slattery* court directly addressed this question in ruling that a hospital was not a "direct victim" for purposes of restitution.

D. The Restitution Order Should be Modified

This court should modify the restitution order striking the $31,397.55 ordered paid to Sharp Memorial Hospital, for costs of treating the victim.

## CONCLUSION

Appellant was ordered to pay $31,397.55 in restitution to Sharp Memorial Hospital, for costs of treating the victim in this case. The hospital is not a "victim" of this crime, and the restitution amount should be stricken

Dated: June 15, 2009

Respectfully submitted,

Stephen M. Hinkle
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE**

**WITH CALIFORNIA RULES OF COURT, RULE 8.360.**

Case Name: People v. ELI J. ANDERSON

Supreme Court No. S170778

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached APPELLANT'S OPENING BRIEF contains 4193 words as calculated by Microsoft Word 2003.

Dated: June 15, 2009

_____

Stephen M. Hinkle

Stephen M. Hinkle
Attorney at Law
3529 Cannon Road, Ste 2B-311
Oceanside, CA 92056

SUPREME COURT CASE NO. S170778
SUPERIOR COURT CASE NO. SCE262419

**People v. ELI J. ANDERSON**

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 3529 Cannon Rd, Suite 2B-311, Oceanside, CA 92056. I served the following document:

**APPELLANT'S OPENING BRIEF**

of which a true copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee names hereafter, addressed to each addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Vista, California, on June 16, 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 16, 2009, at Oceanside, California.

_____
Stephen Hinkle