In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DENNIS TERRY MARTINEZ,

Defendant and Appellant.

Case No. S219970

SUPREME COURT
FILED

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Fourth Appellate District, Division Two, Case No. E057976
San Bernardino County Superior Court, Case No. FMB1200197
The Honorable Daniel Detienne, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Can a trial court order victim restitution for injuries suffered as a result of the collision in a hit and run where the defendant is sentenced to prison, not probation?

INTRODUCTION

While driving a pickup truck, appellant collided with 12-year-old Jacob who was riding his scooter. After alighting and seeing the extent of Jacob's injuries, appellant fled the scene. Jacob sustained multiple injuries from the collision, including a traumatic brain injury, which required lengthy hospitalization. The sentencing court ordered appellant to pay $425,654.63 in direct victim restitution for the boy's medical expenses. But the Court of Appeal reversed, holding that a victim cannot seek victim restitution for injuries caused as a result of the collision in a hit-and-run case—regardless of whether the defendant is at fault for the collision—because the "gravamen" of the crime is not the initial collision, but the defendant's flight. This court should reverse the Court of Appeal.

A victim has a constitutional and statutory right to restitution for injuries suffered "as a result of the commission of a crime." Because the right to victim restitution is constitutionally mandated, it must be liberally and broadly construed. So construed—indeed, even plainly construed—the "commission of a crime" must include at the very least the acts that form the constituent parts of the crime; in other words, the crime's elements. Accordingly, a hit-and-run victim can seek restitution for injuries caused by the collision because a defendant's involvement in the collision is an element of that offense. Whether the defendant is liable for the injuries—and if so, to what extent—is a separate matter for the sentencing court to determine, as it does in all restitution cases.

In addition to the plain language of the victim restitution law, other factors dictate that victims should be able to pursue restitution in the criminal courts for collisions in hit-and-run cases. First, it effectuates the primary purpose of the hit-and-run statute: To ensure that injured victims can recover for their losses by preventing at-fault drivers from fleeing. Second, allowing victims to seek restitution in the criminal courts only for the portion of their injuries caused or exacerbated by the defendant's flight, while forcing victims to pursue separate civil actions for the injuries caused by the initial collision, would violate their right to "seek and secure" restitution "in any trial or appellate court with jurisdiction over the case" and to have courts "act promptly" in adjudicating this right (see Cal. Const., art. I, § 28, subd. (c), par. (1) & subd. (b), par. (13)), and would further contravene basic principles of judicial economy. Third, and finally, many of the reasons this court set forth in *People v. Carbajal* (1995) 10 Cal.4th 1114, 1124 (*Carbajal*)—which held that direct victim restitution as a probation condition is proper in a hit-and-run case—apply with equal force in prison cases. Moreover, as victim restitution is permitted in probation cases, it also must be allowed in prison cases because a victim's constitutional right to restitution should not depend on what sentence a defendant receives.

STATEMENT OF THE CASE AND FACTS

On April 26, 2012, appellant was driving a pickup truck when he collided with 12-year-old Jacob, who was riding a scooter. (CT 88.) Realizing that Jacob was gravely injured, appellant fled the scene. (CT 1, 94.) Police began an investigation to identify and find appellant. (CT 90.) Through various leads, the police were able to find the truck's original owner, which led the police to appellant's son, and eventually to appellant. (CT 90, 91–93.) This took approximately 24 hours. (CT 88, 94.)

Appellant admitted hitting Jacob with his truck. (CT 94–95.) He said that he saw the boy "bounce" off his truck and hit the road hard. (CT 95.) Appellant further acknowledged the extent of the injuries, telling police that he got out of his truck and found the boy lying unconscious in the road with a "puddle" of blood and "green liquid" around his head. (CT 95.) Jacob's mother then appeared at the scene screaming. (CT 95.) Appellant said that he walked back to his truck, he watched an ambulance arrive and load the boy, and then he drove off. (CT 95.)

According to appellant's statements to the police, he knew that fleeing was a crime, but he did so anyway because he was on felony probation and unlicensed. (CT 95.) Appellant also told the police that he and his son later drove the truck to the home of one of his son's friends. (CT 95.) According to appellant, he did this not to hide the truck from law enforcement, but rather because he usually brought the truck there. (CT 95.) This conflicted with appellant's son's early statements to police that he did not know where the truck was. (CT 95, 98.) The son later said that he lied to police because he did not want appellant to get in trouble for hitting the victim with his truck. (CT 98.) Appellant further claimed that he had not washed or altered the truck in any way since the accident. (CT 96.) Finally, appellant admitted that he had smoked marijuana the morning of the accident, but he claimed that he had long since stopped feeling the marijuana's effects, did not smoke any additional marijuana after that, and did not believe his driving was impaired at the time of the accident. (CT 96.) None of appellant's statements were made under penalty of perjury.

Besides appellant, the only witnesses to the collision were Jacob and another 12-year-old boy. (CT 88, 90.)[1] The police could not interview

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[1] In its opinion, the Court of Appeal states that the mother witnessed the accident. (Slip opn. at pp. 4, 16.) There is no support in the record for (continued...)

Jacob because he was unconscious. (CT 90.) Once he awoke, he was unable to recall the accident due to the traumatic brain injury he suffered. (RT 17.) The police interviewed the other 12-year-old boy; at the time appellant's identity was still unknown, and the interview focused exclusively on identifying the truck that had struck Jacob. (CT 91.)

On June 12, 2012, appellant pleaded guilty to "hit and run" with injury in violation of Vehicle Code section 20001, subdivision (a). (CT 9–11; RT 6, 26.) The plea agreement contained a *Harvey*[2] waiver. (CT 10.) The parties stipulated that the factual basis for the plea was in the felony complaint and the police report. (RT 6; see also CT 1–2 [felony complaint] & CT 88–107 [police report].)

At sentencing, the court heard from Jacob's mother. (RT 13.) She related how her son "had multiple facial fractures, a fractured clavicle and was diagnosed with traumatic brain injury." (RT 14.) After the collision, Jacob was in intensive care for nine days as doctors tried to save his life. (RT 14.) Jacob was later moved to a children's hospital in another county where he began extensive rehabilitation therapy. (RT 15.) He had to wear diapers, and other people had to feed and bathe him. (RT 15–16.) After

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(...continued)
that conclusion. The police report does not list her as a witness (CT 88) and by all accounts she appeared on the scene at some time after the collision took place (CT 95). The court appears to have based its conclusion on the mother's comment during her victim-impact statement that, "The fact that my son collided with the vehicle was an accident. The fact that Martinez left my son in the roadway is cowardly." (RT 13; see also slip opn. at p. 4.) This victim-impact statement was certainly not meant as testimony about the cause of the collision and, absent any evidence that the mother saw the accident, is of no probative value whatsoever.

[2] *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*) [absent waiver the facts of uncharged or dismissed counts cannot be used at sentencing against a defendant who pleads guilty to other charges].

five weeks, he was sent home to continue physical, occupational, and speech therapy locally. (RT 16.) Jacob's recovery was predicted to take years. (RT 16.)

The court denied appellant probation. (RT 25.) It then sentenced him to the midterm of three years for the "hit and run," and based on appellant's admission that the new case was a violation of his current probation, imposed an additional three years for his original conviction to run concurrently. (RT 25–27.)

Five months later, the court heard argument on the issue of victim restitution under Penal Code section 1202.4. (RT 29.) Defense counsel argued that the court could not impose direct victim restitution because appellant was not "necessarily at fault for the accident" and the victim's economic losses flowed from the injuries suffered as a result of the collision itself and not appellant's flight from the scene. (RT 31–32.) Relying on *People v. Rubics* (2006) 136 Cal.App.4th 452 (*Rubics*), the sentencing court found that appellant could be ordered to pay restitution because the accident was an element of the offense and, thus, part of appellant's criminal conduct. (RT 37.) The court also observed that the collision occurred while appellant was on felony probation and unlicensed. (RT 36–37.)

Following the court's decision to grant restitution, the parties entered into a stipulation agreeing to an amount of $425,654.63. (RT 39; CT 80–81.)

Appellant appealed the imposition of restitution, asserting the same argument he presented below—that he was not liable for the economic losses suffered by the victim because the losses were attributable to the collision. He argued that the "gravamen" of a hit-and-run offense is the "running," not the "hitting." The Court of Appeal agreed with appellant and expressly disagreed with the holding in *Rubics*. (Slip opn. at pp. 10–

11.) Accordingly, the court reversed the restitution award and remanded the case to the sentencing court for a hearing to determine if any of the economic losses could be attributed to appellant's flight and, if so, to order restitution on just those losses. (Slip opn. at p. 17.)

Respondent filed a petition for review, which this court granted on September 10, 2014.

ARGUMENT

I. HIT-AND-RUN VICTIMS HAVE A CONSTITUTIONAL AND STATUTORY RIGHT TO SEEK RESTITUTION FOR INJURIES SUFFERED AS A RESULT OF THE COLLISION

A victim has a constitutional and statutory right to restitution for injuries suffered "as a result of the commission of a crime." Because "involve[ment] in an accident resulting in injury" is an element of the offense of "hit and run" (Veh. Code, § 20001), it necessarily occurs in "the commission of [that] crime" (Pen. Code, § 1202.4, subd. (a)(1)), and a hit-and-run victim therefore may obtain restitution for collision injuries to the extent "defendant's conduct" caused them (*id.*, subd. (f)). Indeed, this rule effectuates the primary purpose of the hit-and-run laws, ensures a victim's right to promptly secure restitution in any court, and aligns with this court's decision in *Carbajal*, *supra*, 10 Cal.4th 1114.

A. Victims' Constitutional Right to Restitution Mandates a Liberal and Broad Construction of Penal Code Section 1202.4

Victims of crime have a constitutional right to restitution. (Cal. Const., art. I, § 28.) As this court has explained, this right derives from a "constitutional mandate" and it is therefore "not to be interpreted according to narrow or supertechnical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government."

(*People v. Giordano* (2007) 42 Cal.4th 644, 655 (*Giordano*), quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244–245.)

A review of the history and language of article I, section 28 further reveals just how broad and robust this right was meant to be. In creating this right in 1982, as part of Proposition 8, "The Victims' Bill of Rights," California voters declared the "*unequivocal* intention of the People of the State of California that . . . [r]estitution shall be ordered from the convicted person in *every* case . . . in which a crime victim suffers loss[.]" (Cal. Const., art. I, § 28, as adopted on June 8, 1982, italics added.) Yet despite this unequivocal mandate, the voters found that "[s]ometimes . . . judges [did] not order restitution." (Official Voter Information Guide, Gen. Elec. (Nov. 4, 2008),[3] Analysis by the Legislative Analyst, p. 58.)

In response, the California electorate in 2008 *again* voted to amend the California Constitution to reiterate the "require[ment] that, *without exception*, restitution be ordered from offenders who have been convicted, in *every* case in which a victim suffers a loss." (Official Voter Information Guide, Gen. Elec. (Nov. 4, 2008), Analysis by the Legislative Analyst, p. 58, italics added.) This 2008 amendment, known popularly as "Marsy's Law," further clarified the intended meaning of the term "victim" and, in doing so, also broadened the meaning of "loss." As for the term "victim," the California Constitution now clearly includes as "victims" not just the object of the crime, but also "the person's spouse, parents, children, siblings, or guardian, and . . . [the] lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated." (Cal. Const., art. I, § 28, subd. (e).) The California Constitution also

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[3] The 2008 Official Voter Information Guide is included in respondent's motion for judicial notice filed concurrently with this brief.

describes the breadth of the term "loss" as including not only "*direct* . . . physical, psychological, or financial harm" but also "*threatened* physical, psychological, or financial harm as a result of the commission *or attempted* commission of a crime *or delinquent act*." (*Ibid.*, italics added.) The amendment also gave victims the power to "seek and secure" restitution "in any trial or appellate court with jurisdiction over the case as a matter of right" and required that courts "act promptly" in adjudicating such requests. (*Id.*, art. I, § 28, subd. (b), par. (13), subpar. (A) & subd. (c), par. (1).)

To implement victims' constitutional right to restitution, the Legislature enacted various statutes which led to today's version of Penal Code section 1202.4. (See *Giordano*, *supra*, 42 Cal.4th at pp. 652–653 [chronicling the lengthy history of the Legislature's implementation of statutes and codes responsive to article I, section 28]; see also *People v. Broussard* (1993) 5 Cal.4th 1067, 1075 (*Broussard*) [article I, section 28 mandated the Legislature "to enact laws requiring trial courts to order restitution 'in every case . . . in which a crime victim suffers a loss . . .'"].) Consistent with the Legislature's initial constitutional mandate, and the voters' later amendment of article I, section 28 to reflect a broadening of victims' right to restitution, Penal Code section 1202.4 should be interpreted "liberally and on broad lines" and not in a "narrow or supertechnical" manner. (See *Giordano*, *supra*, 42 Cal.4th at p. 655.) Indeed, courts have frequently observed that Penal Code section 1202.4 should be so construed. (See, e.g., *People v. Beaver* (2010) 186 Cal.App.4th 107, 127 ["[a] victim's restitution right is to be broadly and liberally construed"]; *People v. Phelps* (1996) 41 Cal.App.4th 946, 950 ["the word 'loss' must be construed broadly and liberally to uphold the voters' intent"]; *People v. Beck* (1993) 17 Cal.App.4th 209, 219 ["Because the constitution speaks of "comprehensive provisions and laws," "restitution . . . for financial losses," and "[r]estitution . . . from the

convicted persons in every case," the mandate is clearly to interpret implementing statutes broadly and liberally to the end that the 'unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution,' may be served"]; but see *People v. Runyan* (2012) 54 Cal.4th 849, 865 (*Runyan*) [broad and liberal construction does not merit expansive definition of "victim" beyond what the Constitution and statute cover].)

Accordingly, this court should liberally and broadly construe Penal Code section 1202.4 in determining its application in this case.

B. The Plain Language of Penal Code Section 1202.4, Applied to Vehicle Code Section 20001, Permits a Sentencing Court to Order Victim Restitution for Injuries Suffered as a Result of a Hit-and-run Collision

Penal Code section 1202.4 requires victim restitution for economic losses incurred as a result of a criminal offense for which a defendant is convicted. According to the statute, "a victim of crime who incurs an economic loss *as a result of the commission of a crime* shall receive restitution directly from a defendant convicted of that crime." (*Id.*, subd. (a)(1), italics added.) Thus, "in 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 or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (*Id.*, subd. (f), italics added.) Liberally and broadly construed—indeed, even plainly construed—the "commission of a crime" and "defendant's conduct" must include at the very least the acts that form the constituent parts of the crime; in other words, the crime's elements.

The crime of "hit and run" is governed by Vehicle Code section 20001 et seq. Vehicle Code section 20001, subdivision (a) provides: "The driver of any vehicle involved in an accident resulting in injury to any

person . . . or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004." Vehicle Code section 20003 requires the driver involved in an accident resulting in injury or death to stop and provide information and render aid to the victim. (*Id.*, subd. (a).) Section 20004 requires the driver, if there is no police officer present, to immediately report the accident to authorities. Failure to comply is a crime. (See Veh. Code, § 20001, subds. (b)(1) and (b)(2).) Thus, as pertinent here, the elements of the crime of "hit and run" are: (1) While driving, the defendant was involved in a vehicle accident; (2) the accident caused serious injury to someone else; (3) the defendant knew that he or she had been involved in an accident that injured another person or knew from the nature of the accident that it was probable that another person had been injured; and (4) the defendant willfully failed to perform one or more of the statutorily required duties. (See CALCRIM No. 2140; see also CALJIC No. 12.70.)

Because "involve[ment] in an accident resulting in injury" is an element of the offense of "hit and run" (Veh. Code, § 20001), it necessarily occurs in "the commission of [that] crime" (Pen. Code, § 1202.4, subd. (a)(1)), and a court therefore can impose victim restitution for the injury to the extent it was caused by "defendant's conduct" (*id.*, subd. (f)). The Court of Appeal in *Rubics*, *supra*, 136 Cal.App.4th 452[4] adopted this very analysis. There the defendant's truck collided with the victim's motorcycle, killing him. (*Id.* at p. 455.) The trial court ordered victim

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[4] This court has thrice cited *Rubics* approvingly. (See *Runyan*, *supra*, 54 Cal.4th at p. 861 [citing *Rubics* as a "cf." for the proposition that "defendant convicted of fatal hit-and-run [was] properly ordered to pay restitution *to victim's family* for funeral expenses"]; *People v. Anderson* (2010) 50 Cal.4th 19, 32 [citing *Rubics* for idea that probation is an act of clemency not a matter of right]; *Giordano*, *supra*, 42 Cal.4th at p. 663, fn. 7 [same].)

restitution to cover the family's funeral expenses. (*Id.* at p. 456.) Applying the victim restitution statute to the crime of "hit and run," the Court of Appeal affirmed the trial court's restitution order, explaining that the "[defendant's] involvement in an accident causing . . . death is an element of his felony hit-and-run offense" and that the defendant in that case "admitted these same facts in his guilty plea." (*Rubics*, *supra*, 136 Cal.App.4th at p. 458.) Thus, the court concluded, "the elements of section 20001 require [the defendant's] involvement in the accident and responsibility for the loss incurred" as a result. (*Ibid.*) This does not mean that a defendant will be liable for the losses in every hit-and-run case. As the *Rubics* court implicitly acknowledged, whether a defendant is actually liable for the losses—and, if so, to what extent—is a determination to be made by the sentencing judge at the restitution hearing. (*Id.* at pp. 461–462 [finding the sentencing court did not abuse its discretion in finding defendant at fault for the collision].)

The Court of Appeal here reached the opposite conclusion. It held that restitution is never permissible for injuries resulting from the collision in a hit-and-run case because the "gravamen" of that crime is not the initial injury of the victim, but the leaving of the scene. (Slip opn. at p. 6.) Consequently, a victim is entitled to restitution solely for any additional harm caused by a defendant's flight. (Slip opn. at pp. 17–18.) The Court of Appeal's reasoning suffers from three main flaws.

First, the term "gravamen" does not appear in either the California Constitution or Penal Code section 1202.4. By reducing a victim's right to seek restitution to those losses incurred as a result of the "gravamen" of the crime, the Court of Appeal injected its own judicially created limitation into Penal Code section 1202.4. (See *People v. Guzman* (2005) 35 Cal.4th 577, 587 ["'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to

statutes'"], citations omitted.) Article I, section 28 of the California Constitution and Penal Code section 1202.4 require a court to impose victim restitution for "economic loss as the result of the defendant's conduct" that constitutes any part of a defendant's "criminal activity" (Cal. Const., art. I, § 28, subd. (b), par. (13), subpar. (A)) or "commission of a crime" (Pen. Code, § 1202.4, subd. (a)(1)). (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [plain language of a statute controls].) Thus, as the *Rubics* court explained, while it "may be a true statement" that the gravamen of the crime was leaving the scene, such a reading of "[Vehicle Code] section 20001, for *restitution* purposes, [is] too narrow[]." (*Rubics*, *supra*, 38 Cal.App.4th at p. 459; see also *Giordano*, *supra*, 42 Cal.4th at p. 655 [constitutional mandate of victim restitution is not to be read in a "narrow or supertechnical" manner].) In sum, if the People or the Legislature wished to limit victim restitution to only those losses that flowed from the "gravamen" of a defendant's crime, they easily could have done so. They did not.

Moreover, there is no precedent for parsing a criminal statute to find its "gravamen" in deciding what losses a crime victim is permitted to pursue in restitution. And with good reason. Inquiring into the "gravamen" of a given crime is a thorny endeavor not envisioned by the California Constitution or statutes. Even with respect to the crime of "hit and run" itself, courts may disagree about what the "gravamen" actually is. (Compare slip opn. at p. 6 ["[t]he gravamen of a [hit-and-run] offense . . . is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid"] with *People v. Walmsley* (1985) 168 Cal.App.3d 636, 639 ["[t]he gravamen of the offense of hit-and-run driving is the offender's attempt to evade responsibility for his actions while driving a motor vehicle"].) Again, Penal Code section 1202.4 requires only that a victim's losses occur "as a result of the commission of a crime." (*Id.*,

at subd. (a)(1).) Because involvement in the collision is an element of the crime of "hit and run," losses suffered as a result of hit-and-run collisions easily meet that requirement.

Second, and along those same lines, the Court of Appeal here relied too heavily on its belief that the "illegal act of a hit-and-run [is] fleeing the scene, not causing the collision." (Slip opn. at p. 5.) It is true that driving a vehicle that is involved in an accident—even an accident involving injury—is not, in itself, a criminal act in the sense that the mere occurrence of the accident is conduct for which imprisonment or a fine can be imposed. But driving a vehicle that is involved in an accident in which there is injury to a person is, indisputably, an element of the offense of "hit and run." That a person was "involved in an accident resulting in injury to any person" is an essential element of the crime that the prosecution must prove beyond a reasonable doubt. (See *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 1073, 25 L.Ed.2d 368] [due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]; see also CALJIC No. 12.70 [describing these facts as "elements" that "must be proved"]; CALCRIM No. 2140 [describing these facts as things "the People must prove"].) Indeed, a person who flees the scene of a gruesome accident in which he or she was *not* involved may be morally blameworthy, but that person is not criminally liable under Vehicle Code section 20001. Thus, involvement in the collision is just as much a part of the offense as the failure to render assistance, the failure to give one's name and address, or the failure to stop and remain at the scene.

And the mere fact that the occurrence of the accident, in itself, is not punishable as a criminal act, is not relevant to whether restitution is permissible. Indeed, Penal Code section 1202.4 says that a convicted person is subject to the imposition of restitution for the economic losses a

victim suffered "as a result of [his or her] *conduct*," not "as a result of [his or her] *criminal* conduct." (See *id.*, subd. (f).) A narrow reading of "conduct" is not warranted. Numerous crimes are comprised of elements that on their own are not crimes. This does not mean that losses caused by those elements are not subject to restitution even when they *are* aspects of the "commission of a crime." (See Pen. Code, § 1202.4, subd. (a)(1).) Imagine that a person decides to steal a car. She takes the victim's keys, waits until nightfall, and then drives the car to her own home, where she parks the car and goes inside. Minutes later, a drunk driver slams into the car, causing severe damage. The person who stole the car pleads guilty to theft by larceny. (Pen. Code, § 484.)[5] The "gravamen" of theft is arguably the intent to permanently deprive, and a car being damaged is not part of the crime at all. Indeed, while taking possession and asportation of the property are necessary elements, without the separate element of intent, they can be wholly innocent acts. And a defendant's mere act of "possession of the [victim's] property" or "move[ment] [of] the property" does not in every case necessarily cause the victim any loss. That is, if the victim instead got the car back intact the next day, there would be no (or only very minimal) losses. Under the facts of the hypothetical scenario, however, there were losses and restitution undoubtedly would be appropriate. As this example shows, even when some of the elements of a

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[5] The elements of theft by larceny are: (1) The defendant took possession of property owned by someone else; (2) The defendant took the property without the owner's [or owner's agent's] consent; (3) When the defendant took the property (he/she) intended (to deprive the owner of it permanently [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property); and (4) The defendant moved the property, even a small distance, and kept it for any period of time, however brief. (CALCRIM No. 1800.)

crime are not independently culpable or criminal on their face, restitution is appropriate where under the facts of a particular case, a "defendant's conduct" (Pen. Code, § 1202.4, subd. (f)) during "the commission of a crime" (*id.*, at subd. (a)(1)) actually does cause injury.

Third, by outright foreclosing victim restitution for the initial collision in all hit-and-run cases, the Court of Appeal conflates the inquiry of what is permissible restitution in general with the ultimate question of causation. Certainly a person convicted of "hit and run" will not be liable for losses he or she did not cause. For example, if a person jumps in front of a car in a failed suicide attempt, presumably the driver would not be liable for his or her injuries even if the driver flees the scene. But the ultimate determination of causation does not foreclose a victim from seeking restitution in the criminal proceeding in the first place. (See Cal. Const., art. I, § 28, subd. (b), par. (13) & subd. (c), par. (1) [crime victims have right to "seek" restitution "in any trial or appellate court with jurisdiction over the case"].) Whether a defendant is actually liable for the losses—and, if so, to what extent—is a determination to be made by the sentencing judge at the restitution hearing. (See, e.g., *Rubics*, *supra*, 136 Cal.App.4th at pp. 461–462 [sentencing court did not abuse its discretion in finding defendant at fault for the hit-and-run collision]; *People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1323–1324 [sentencing court did not abuse its discretion in awarding losses it found to be caused by defendant's conduct]; *People v. Jones* (2010) 187 Cal.App.4th 418, 427 [remand to sentencing court to determine whether defendant's offense was the proximate cause of costs victim incurred in repairing car that was damaged in courthouse parking lot while victim was attending restitution hearing]); *People v. Millard* (2009) 175 Cal.App.4th 7, 39 (*Millard*) [sanctioning the sentencing court's application of the doctrine of comparative negligence in determining

amount of restitution against defendant convicted of driving under the influence for injuries caused by the collision].)

Again, application of the Court of Appeal's reasoning to another set of facts reveals its flaws. Imagine a burglar entered a house through a window. Entering the house is an essential element of the crime of residential burglary,[6] but it is not necessary that the burglar break any windows. In this case, if the burglar broke the window, he is liable to pay for it in victim restitution; if he did not, he is not. The status of the window at the time of the burglary is not necessarily clear from the face of the case and the prosecution would not have to prove that the burglar broke the window as part of the crime. If the defendant pleaded guilty, applying the Court of Appeal's analysis, the "defendant was not convicted for any offense involving responsibility for" the breaking of a window. (See slip opn. at p. 5) Yet if he did, in fact, break the window, it is clear he should pay for it as restitution. The causation question would be resolved in the restitution hearing itself; it would not be used as a per se bar to the victim's right to seek restitution in the first place.

In sum, in light of the constitutional mandate for victim restitution, and the plain language of the victim restitution statute, a victim can seek restitution for injuries caused by the collision in a hit-and-run case because the collision is part of "the commission of [that] crime"; indeed, it is an element of that offense. Whether the defendant is actually liable for the injuries—and if so, to what extent—is a matter for the sentencing court to determine, as it does in all restitution cases.[7]

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[6] The elements of residential burglary are: (1) entry into an inhabited house; and (2) doing so with the intent to commit a felony. (See CALCRIM No. 1700, 1701; Pen. Code, §§ 459, 460.)

[7] Although the sentencing court here did not appear to believe fault was required to impose restitution (RT 35), it found appellant at fault. (RT (continued...)

C. Victim Restitution for Collisions in Hit-and-run Cases Effectuates the Primary Purpose of Vehicle Code Section 20001

"[T]he primary purpose of [the hit-and-run statute] is to protect persons who while lawfully using the public highways suffer financial loss as a result of another's negligent use of the highways." (*Byers v. Justice Court for Ukiah Judicial Dist. of Mendocino County* (1969) 71 Cal.2d 1039, 1054–1055, vacated on other grounds by *California v. Byers* (1971) 402 U.S. 424 [91 S.Ct. 1535; 29 L.Ed.2d 9] ["The California Supreme Court noted that [the hit-and-run statute] was . . . intended . . . to promote the satisfaction of civil liabilities arising from automobile accidents."].)[8] The Court of Appeal's per se rule disallowing victim restitution for losses incurred as a result of the initial collision disregards and upsets this purpose in two main ways. First, it treats a person convicted of a hit-and-run offense as facially faultless for the initial collision where, if anything, the opposite inference inheres in the statute. Second, it encourages the most culpable drivers to flee the scene of a collision, directly frustrating the statute's very *raison d'être*.

(...continued)
36–37.) Because appellant did not challenge this finding as an abuse of discretion, and because the Court of Appeal created a per se rule against restitution for collisions in hit-and-run cases, that court was not presented with, and did not address, whether the fault finding itself was supported by substantial evidence. (Cf. *Rubics*, *supra*, 136 Cal.App.4th at pp. 461–462.)

[8] The hit-and-run statute is often described as having two principal goals: first, it prohibits drivers from seeking to avoid potential liability resulting from the accident; and, second, it prevents drivers from leaving injured persons in distress and danger from lack of medical care. (See, e.g., *Karl v. C. A. Reed Lumber Co.* (1969) 275 Cal.App.2d 358, 261.) By focusing on the first of these two goals, respondent does not suggest in any way that the second is unimportant.

1. The Legislature's criminalization of hit-and-run driving evinces a belief that in many cases people who flee the scene of a collision in which they are involved do so because they were at fault

The Court of Appeal in this case created a per se rule foreclosing victim restitution for injuries caused by the initial collision in hit-and-run cases, even where the defendant is completely at fault for the collision. In advancing this rule, the court explained that appellant "was not convicted for any offense involving responsibility for the actual accident and no factual determinations of his responsibility for the collision or the victim's injuries ha[d] been made." (Slip opn. at p. 5.) It is certainly true that actual fault for the collision itself is not an element of the hit-and-run crime, and that, in some cases, drivers may flee from collisions even when they are not at fault. But the Court of Appeal's analysis treats the initial collision and the subsequent fleeing as isolated events. And, in doing so, it implies that the initial collision is facially innocent conduct. This conflicts with the Legislature's view of hit-and-run cases. (Cf. *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 572 ["Under general settled canons of statutory construction, [the court] ascertain[s] the Legislature's intent in order to effectuate the law's purpose"].)

In criminalizing hit-and-run driving, one of the problems the Legislature sought to address was that of negligent drivers fleeing the scene to avoid responsibility for the losses they caused. (*Byers v. Justice Court for Ukiah Judicial Dist. of Mendocino County*, *supra*, 71 Cal.2d at pp. 1054–1055.) It is true that hit-and-run laws make it a crime for anyone, regardless of fault, to flee the scene of a collision in which they were involved. But the impetus behind the laws shows that the Legislature must have believed that in many cases a driver who flees the scene of a collision does so because he or she is responsible for the collision itself. The Court of Appeal's parsing the hit-and-run crime into two unconnected pieces—

the presumably 'innocent' collision and the separately 'criminal' flight—conflicts directly with this rationale. Instead, the Legislature's clear intent to stop drivers from fleeing collisions that they caused suggests that the two pieces must be viewed together.

If anything, the legislative intent behind criminalizing hit-and-run driving suggests that the driver's ultimate flight actually creates an inference of fault for the initial collision. This inference—which parallels the inference of guilt permissible in criminal cases when suspects flee the scene of a crime (see Pen. Code, § 1127c)—finds great support in civil law on collision liability.[9] Indeed, this court has held that in a civil action a trier of fact may reasonably infer that the "failure to stop and render aid is some evidence of a consciousness of responsibility for [the] accident." (*Brooks v. E. J. Willig Truck Transp. Co.* (1953) 40 Cal.2d 669, 676.) Numerous courts across the country have agreed. (See, e.g., *Johnson v. Austin* (Mich. 1979) 280 N.W.2d 9, 14] ["because violation of the statutory duties may subject a fleeing driver to severe penalty and it is unlikely, weighing the probabilities, that there would be a reason unrelated to culpability in the accident that would outweigh the risk of that penalty, it is reasonable to draw the inference that he fled to avoid revealing such culpability"];

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[9] Courts have often turned to principles of civil law to determine the scope of victim restitution in criminal cases. (See, e.g., *Runyan*, *supra*, 54 Cal.4th at pp. 861–862 [referring to the "analogous field of civil law" in determining whether a victim's estate can recover restitutionary losses]; *Giordano*, *supra*, 42 Cal.4th at p. 658 [defining the scope of decedent–victim's spouse's losses by reference to "civil wrongful death actions"]; *Jones*, *supra*, 187 Cal.App.4th at p. 425 [drawing upon tort law for principles of causation]; *Millard*, *supra*, 175 Cal.App.4th at pp. 37–38 [applying civil law comparative negligence analysis to victim restitution]; *People v. Harvest* (2000) 84 Cal.App.4th 641, 648–649 (*Harvest*) [explaining that victim restitution, although imposed during criminal proceedings, is a civil remedy].)

Olofson v. Kilgallon (Mass. 1973) 291 N.E.2d 600, 602–603 ["[e]vidence that [driver] left the scene of the accident without identifying himself could properly be considered as some further proof of his liability"]; *Jones v. Strelecki* (N.J. 1967) 231 A.2d 558, 561 ["purpose of [the hit-and-run statute] is to prevent a driver from evading his responsibility by escaping from the scene . . . [and thus] the failure to stop permits an inference of consciousness of lack of care and of liability for the occurrence"]; *Shaddy v. Daley* (Idaho 1938) 76 P.2d 279, 282 ["[f]ailure of the driver of a motor vehicle to stop at the scene of an accident in which he is involved and, if it be such a one that the law requires a report of it to be made to the authorities, his failure to so report, are admissible in evidence as a circumstance tending to show a consciousness on his part of his responsibility for the accident"]; *Grzys v. Connecticut Co.* (Conn. 1938) 198 A. 259, 262; *Peterson v. Henning* (Ill.App.Ct. 2003) 452 N.E.2d 135, 138 ["defendant's flight from the scene of the accident can be interpreted as an admission of his negligence"]; *Busbee v. Quarrier* (Fla.App. 1965) 172 So.2d 17, 22 [if driver involved in a collision decides to flee "it calls into operation the presumption of conscious guilt, commonly inferred therefrom in criminal cases and properly to be considered in civil cases"]; *Battle v. Kilcrease* (Ga.App. 1936) 189 S.E. 573, 573 (1936) ["[a]lthough when taken alone, [the] conduct may have no causal connection with the act which caused the injuries, the conduct of the driver in hitting, running, and failing to stop, etc., is a circumstance which may be considered, in connection with his other acts preceding the injury, as tending to establish his conduct in causing the injury as being negligence"]; *Vuillemot v. August J. Claverie & Co.* (La.Ct.App. 1929) 125 So. 168, 169–170 ["attempting to escape was tantamount to an admission of guilt"].)

In sum, the goal behind Vehicle Code section 20001 suggests the Legislature's determination that hit-and-run drivers are likely at fault for

the collisions from which they flee. At the very least, the inference of fault underlying the purpose of the hit-and-run statutes—in light of victims' robust constitutional rights to seek and secure restitution—should permit victims to claim their losses from the initial collision in criminal restitution hearings.

2. Disallowing victim restitution for the underlying collision in a hit-and-run case frustrates the purpose of Vehicle Code section 20001 by promoting the destruction of evidence and encouraging culpable drivers to flee the scene

Preventing victims from claiming restitution for their losses from hit-and-run driving further frustrates the purpose of the hit-and-run statute by permitting at-fault drivers to benefit from their destruction of evidence and by encouraging at-fault drivers to flee the scenes of the collisions they cause.

There is no doubt that a hit-and-run driver flees with evidence of the collision and frustrates the victim's ability to seek compensation in numerous ways. For example: (1) by leaving the scene, the fleeing driver necessarily shifts the focus of the investigation away from who *caused* the collision to the necessary predicate question of who was *involved* in it; (2) if there are passengers in the car, the driver takes with him or her key eyewitnesses to the collision; (3) the driver who leaves the scene of a collision covers up evidence of the circumstances that caused the collision—e.g., the "width, location, direction and surface of the roadway where the accident occurred, the weather conditions and the time of day of the accident, and the location and position of the injured person" (*Johnson v. Austin*, *supra*, 280 N.W.2d at p. 14); (4) the condition of the driver's car—including blood or paint markings—is evidence that may be altered after departure; and (5) if the driver was under the influence of alcohol or drugs—often key factors in determining fault—the driver destroys that

evidence by leaving the scene and allowing for time to sober up (see Veh. Code, § 23153, subd. (b) [presumption of .08 blood alcohol percentage while driving only if chemical test is taken within three hours after the driving]).

As the facts of the instant case illustrate, these risks are not just hypothetical. Here appellant fled the scene and was not discovered until 24 hours later. According to his unsworn pre-conviction statements, he was driving alone, he had smoked marijuana earlier that day but was no longer high while driving, and he did not alter the car in any way after the collision. But how do we know any of that is true? We do not. Appellant's flight—in violation of Vehicle Code section 20001—destroyed some of the most crucial physical evidence in this case, leaving us with only his self-serving statements as evidence of what happened. Moreover, during the investigation, police interviewed another 12-year-old boy who witnessed the accident. But because police had no idea who had struck the victim in this case, the only questions police asked the young boy were directed at identifying the driver. That the investigation was focused on finding appellant rather than assessing whether appellant was at fault for the accident is a direct result of appellant's flight. As a consequence, eyewitness testimony was potentially lost as time passed and memories faded. The victim was also deprived of appellant's contemporaneous statements, which gave way to statements appellant made to police after he had ample opportunity to reflect and possibly alter his story.

Having deprived the victim in this case of his statutory right to have appellant stay at the scene, provide information, and call the police, it would be perverse to use the lack of information potentially caused by appellant's flight as a basis to deny the victim restitution in this case. (*Carbajal*, *supra*, 10 Cal.4th at p. 1124 ["By leaving the scene of the accident, the fleeing driver deprives the nonfleeing driver of his or her right

to have responsibility for the accident adjudicated in an orderly way according to the rules of law"].) Yet that is precisely what the Court of Appeal did here. That court held that a victim may not exercise his or her constitutional right to seek restitution "when a defendant is solely convicted of fleeing the scene and no factual predicate for the defendant's responsibility for the accident can be found in the record," even if the collision is entirely the defendant's fault. (See slip opn. at p. 7; see also *id.* at p. 9 ["We are in no way here making any factual determination as to whether [appellant] was responsible for the collision which resulted in the victim's injuries and damages"].) In reaching this holding, the Court of Appeal further noted that "if the People believed [appellant] guilty for causing the collision, they could have charged [him] with reckless driving (§ 23103), driving under the influence (§ 23152, subd. (a)), or some other charge which would have incorporated at least some culpability for the collision and not just fleeing afterward." (Slip opn. at p. 15.) But this fails to recognize that appellant's flight from the scene virtually guaranteed that the prosecution would be unable to prove that appellant was driving recklessly or under the influence. By the time the police identified appellant as the driver who struck the victim in this case, any drug or alcohol effects had long since dissipated, and appellant had ample time to construct a version of events in which he was not at fault for the accident.

Indeed, the Court of Appeal's rule would gut the hit-and-run laws by incentivizing at-fault drivers to flee the scene of the collisions they cause. For example, if a drunk driver recklessly collided with a pedestrian causing grave injury, the incentive to remain, render aid, and call the police—as required by statute—would be virtually non-existent. If the drunk driver stayed, it would be discovered that he or she was drunk and fault would be assigned accordingly. The drunk driver would be subject to criminal prosecution for causing injury while driving under the influence and would

be ordered to pay victim restitution. If, however, the drunk driver fled, by the time he or she was discovered (if at all), the evidence that he or she was under the influence would most likely have dissipated. Depending on when the drunk driver was found, the only crime that might be provable is "hit and run," and under the Court of Appeal's rule, no victim restitution could be awarded for the initial injury itself—regardless of fault. Both "hit and run" and driving under the influence causing injury are "wobblers."[10] (Compare Veh. Code, § 20001, subd. (b)(1) with Veh. Code, § 23554.) Accordingly, the at-fault drunk driver has a choice: The driver can stay, face an almost certain "wobbler" conviction, along with almost certain liability for the damages from the collision; or the driver can flee, face only the risk of a "wobbler," with no risk of paying restitution for the collision, potentially escape all responsibility, and simultaneously destroy with impunity the evidence of his or her drunkenness. Given these choices, a driver who is involved in a collision for which he or she is at fault has a much greater incentive to flee rather than stay. This subverts the very purpose of Vehicle Code section 20001.

D. Requiring a Victim to Pursue Compensation for His or Her Losses in Two Separate Actions in Two Separate Courts Violates a Victim's Constitutional Right to "Promptly" Enforce His or Her Restitution Rights in "Any Trial or Appellate Court with Jurisdiction over the Case" and Undermines Principles of Judicial Economy

The California Constitution dictates that "[a] victim, . . . or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with

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[10] "Wobblers" are crimes that "are chargeable or, in the discretion of the court, punishable as either a felony or a misdemeanor; that is, they are punishable either by a term in state prison or by imprisonment in county jail and/or by a fine." (*People v. Park* (2013) 56 Cal.4th 782, 789.)

jurisdiction over the case as a matter of right." (Cal. Const., art. I, § 28, subd. (c), par. (1).) Among those enumerated rights is the right to "seek and secure restitution." (*Id.*, subd. (b), par. (13).) As the express purpose of the constitutional amendment was to "preserve and protect a victim's rights to justice and due process" (*id.*, subd. (b)), the California Constitution further requires that "[t]he court . . . act promptly on . . . a request" to enforce the right to seek and secure restitution. (*Id.*, subd. (c), par. (1); see also *id.*, subd. (b), par. (13).) Indeed, "direct victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits." (*People v. Pangan* (2013) 213 Cal.App.4th 574, 585 (*Pangan*); see also *Broussard*, *supra*, 5 Cal.4th at p. 1075 [noting that early implementing legislation failed to give victims their constitutional right to restitution as an alternative avenue to civil remedies].)

A crime victim's right to "seek and secure" restitution "in any trial or appellate court with jurisdiction over the case" and to have courts "act promptly" in adjudicating this right dictates that a hit-and-run victim may pursue in criminal restitution hearings claims for *all* injuries resulting from the hit-and-run incident. Indeed, no one disagrees that, at the very least, a hit-and-run victim would be entitled to victim restitution for the "amount, if any, which reflects the degree to which [a] victim's injuries were exacerbated, if at all, by [a] defendant's flight." (Slip opn. at pp. 17–18 [remanding to allow the sentencing court to determine whether such losses existed and to order restitution accordingly]; see also *Carbajal*, *supra*, 10 Cal.4th at p. 1127 (dis. opn. of Mosk, J.) ["restitution could properly be ordered . . . when the very act of fleeing the scene of an accident results in damage, injury, or death"].) But splitting the injuries into those caused by the initial collision (securable only in a separate civil action) and those exacerbated by the defendant's flight (securable in the victim restitution

hearing) is impracticable and threatens to undermine the victim's right to prompt adjudication of any losses at all.

As a preliminary matter, it is a fiction that injuries can be so easily divided. It will often be difficult to tell what a matter of minutes—or even seconds—made in exacerbating a victim's injuries. In cases of serious injury or death, this would no doubt frequently involve a "battle of experts" testifying on each side about how much of the injury was inevitable following the initial impact and how much of it could have been prevented by prompt action by the defendant. All the while, the sentencing court would be bound to artificially ignore the collision itself.

And even if a victim is able to prove in a restitution hearing his or her losses caused by the defendant's flight, he or she would still have to pursue any claim for the defendant's liability for the collision itself in a separate civil action. This creates three main problems.

First, it undermines the victim's constitutional right to adjudication of restitution claims in the criminal courts without having to pursue separate civil actions. (See Cal. Const., art. I, § 28, subd. (c), par. (1) ["[a] victim . . . may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right."]; *Pangan*, *supra*, 213 Cal.App.4th at p. 585 ["direct victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits"]; *Broussard*, *supra*, 5 Cal.4th at p. 1075 [noting that early implementing legislation failed to give victims their constitutional right to restitution as an alternative avenue to civil remedies].) In fact, rather than testifying just once, all of the witnesses—including the injured victim—likely would have to testify again in depositions and then again in the civil proceeding itself. Some of the same damages experts from the criminal restitution hearing will have to be called—and paid—yet again for

their testimony in the civil action. In effect, a victim's right to avoid civil courts and costs would be made illusory.

Second, concurrent civil and criminal actions likely would result in delay in one or both actions, thus frustrating a victim's rights to "justice and due process" (Cal. Const., art I., § 28, subd. (b)) and to "prompt[]" action (*id.*, subd. (b), par. (13)) on his or her request for restitution. Because all the claims derive from the very same incident—likely spanning only a matter of minutes—one court may wish to wait to see what happens in the other before proceeding. Worse yet, if the two tribunals proceed without respect for one another, they might rule inconsistently on the facts of the incident.

Third, splitting the victim's claim for losses violates notions of judicial economy. It makes sense as a practical matter that a single court adjudicate all issues related to the single event in a single proceeding.

In sum, to avoid violating the victim's rights—and for reasons of common sense and judicial economy—the sentencing court, which already has "jurisdiction over the case" (Cal. Const., art. I, § 28, subd. (c), par. (1)), should entertain restitution requests for *all* injuries resulting from the hit-and-run incident that form the factual predicate of the crime.

E. The Reasons for Victim Restitution in Prison Cases Are Consistent with, and in Some Ways Stronger Than, the Reasons Justifying Victim Restitution in Probation Cases as This Court Set Forth in *Carbajal*

In *Carbajal*, this court held that a sentencing court may condition probation following a hit-and-run conviction for the injury caused by the underlying collision. (*Carbajal*, *supra*, 10 Cal.4th at pp. 1126–1127.) While *Carbajal* dealt expressly with "restitution as a condition of probation" (*id.* at p. 1120), much of *Carbajal*'s reasoning supports victim restitution in cases, like this one, where a defendant is sentenced to prison.

First, *Carbajal* justified the imposition of restitution as a probation condition, at least in part, because the Legislature permits as a primary consideration of probation "the loss to the victim." (10 Cal.4th at p. 1120, quoting Pen. Code, § 1202.7.) While the discretion to impose probation conditions is broad, this court acknowledged that a court may impose only "reasonable conditions" that, among other things, make "amends . . . for the breach of the law, [and] for any injury done to any person *resulting from that breach*." (*Carbajal*, *supra*, 10 Cal.4th at p. 1121, italics added, quoting Pen. Code, § 1203.1, subd. (j).) Indeed, while *Carbajal* permitted victim restitution principally for rehabilitative and deterrent purposes, for the restitution to have those effects, this court must have determined that there was a strong nexus between the criminal conduct to be rehabilitated and deterred, and the losses the victim incurred. (Cf. *Carbajal*, *supra*, 10 Cal.4th at p. 1128 (dis. opn. of Mosk, J.) ["[n]o rehabilitative or deterrent purpose is served by ordering restitution for an act that did not involve any dishonesty or other culpable mental state"].) Moreover, in addition to rehabilitation and deterrence, "victim compensation" was one of the express goals *Carbajal* relied upon in permitting the probation condition. (*Id.*, at p. 1127.) All of this analysis applies with equal force to victim restitution in prison cases.

Second, probation conditions are imposed as *punishment* (see *People v. Richards* (1976) 17 Cal.3d 614, 620), whereas victim restitution in a prison case is about *victim compensation* (see *Harvest*, *supra*, 84 Cal.App.4th at pp. 648–649). In probation cases, "restitution cannot be based on mere civil claims." (See *People v. Lent* (1975) 15 Cal.3d 481, 487; see also *Richards*, *supra*, 17 Cal.3d at p. 620 [describing "resolv[ing] the civil liability of the criminal" in a probation condition as an "ill-conceived purpose"].) In contrast, the very purpose of victim restitution under Penal Code section 1202.4 is to serve as "a substitute for a civil

remedy so that victims of crime do not need to file separate civil suits." (*Pangan, supra*, 213 Cal.App.4th at p. 585; see also *Broussard, supra*, 5 Cal.4th at p. 1075 [noting that early implementing legislation failed to give victims their constitutional right to restitution as an alternative avenue to civil remedies].) Accordingly, whereas the imposition of a victim restitution order in a probation case is susceptible to the criticism that it serves the improper purpose of merely compensating the victim, restitution in a prison case is not subject to that same criticism—indeed, that is its very purpose. (Compare *Carbajal, supra*, 10 Cal.4th at p. 1126, fn. 13 with *id.* at pp. 1127–1128 (dis. opn. of Mosk, J.).)

Third, as discussed at length above, a victim has a constitutional right to restitution. Refusing to permit victim restitution for *prison* cases, while permitting it for *probation* cases (see *Carbajal, supra*, 10 Cal.4th at pp. 1126–1127), would create a rule where the victim's right hinged on a defendant's sentence. This dichotomy would contravene a victim's "rights to justice and due process." (Cal. Const., art. I, § 28, subd. (b).) As this court has observed, one of the motivating reasons behind the constitutional amendment mandating victim restitution in criminal cases "regardless of the sentence or disposition imposed" (Cal. Const., art. I., § 28, subd. (b), as adopted on June 8, 1982) was to eliminate "the anomalous result that the most serious offenders in the system [i.e., those not eligible for probation] [could *not*] be compelled to make restitution to their victims[,]" whereas those eligible for probation *could* be. (*Broussard, supra*, 5 Cal.4th at pp. 1075–1076, quoting legislative history; see also California Ballot Pamphlet, Primary Elec. (June 8, 1982),[11] Analysis by the Legislative Analyst, p. 32 ["Under existing law, victims are not automatically entitled to receive

[11] The 1982 California Ballot Pamphlet is included in respondent's motion for judicial notice filed concurrently with this brief.

'restitution' . . . . In some cases, however, the courts release a convicted person on probation, on the condition that restitution be provided to the victim or victims."].) Allowing victim restitution for collisions in those hit-and-run cases resulting in prison sentences, but not in those cases resulting in probation sentences, would resurrect this anomaly. Indeed, the instant case illustrates the very problem the *Broussard* court described: Because appellant was on felony probation and driving without a license he was a more serious offender, which led the sentencing court to deny him probation out of hand. (RT 18, 25.)

Moreover, to the extent a victim restitution award in a hit-and-run case can be justified only as a probation condition geared toward rehabilitation, it leaves the award susceptible to the criticism that it is no longer legitimate in cases where probation is prematurely revoked (see, e.g., *People v. Kleinman* (2004) 123 Cal.App.4th 1476 [defendant convicted of hit-and-run offense arguing that restitution, while originally valid under *Carbajal* while on probation, is no longer valid following revocation of probation and sentencing to prison]), or where probation reaches its mandatory end before payment is complete (see, e.g., *People v. Sem* (2014) 177 Cal.App.4th 838, 848–852 [trial court may not indefinitely extend revocation to collect restitution].) A victim's right to secure restitution should not be so vulnerable.

II. ALTERNATIVELY, THIS COURT SHOULD REVERSE THE COURT OF APPEAL AND UPHOLD THE SENTENCING COURT'S FINDING THAT APPELLANT'S UNLAWFUL DRIVING WITHOUT A LICENSE ALSO CAUSED THE VICTIM'S INJURIES

This court also could uphold the sentencing court's finding that restitution was proper because appellant's unlawful driving without a license caused the victim's injuries. (*See In re A.M.* (2009) 173 Cal.App.4th 668, 673 [collision injuries were "as a result of" minor's

driving without a license and thus proper basis for ordering victim restitution].)

During the restitution hearing, the court pointed out that the collision occurred while appellant was on felony probation and unlicensed, and found that "the whole incident occurred even before he got into the accident." (RT 36–37.) Appellant's plea included a waiver under *Harvey*, *supra*, 25 Cal.3d 754, which "waive[d]" his "rights regarding . . . any charges the district attorney agrees not to file to the extent that the [c]ourt may consider these factors . . . as to restitution." (CT 10.) Given the *Harvey* waiver, the sentencing court was permitted to consider appellant's lack of a license in ordering restitution. Indeed, appellant admitted he was unlicensed in the police report, which served as the factual basis for his plea. (RT 6; CT 95.)

The Court of Appeal rejected a *Harvey* waiver analysis because "there were no other charges in the felony complaint and [appellant's] plea did [not] incorporate any agreement by the People not to file further charges." (Slip opn. p. 16.) But there is no requirement that the District Attorney formally and explicitly agree not to file charges in order for a *Harvey* waiver to take effect. Moreover, the charges could have been added at a later time.

Accordingly, this court could find that the sentencing court's alternative ground for imposition of the restitution order was sufficient, reverse the Court of Appeal, and affirm the sentencing court's restitution order on that basis.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this court to reverse the Court of Appeal.

Dated: November 6, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 9,532 words.

Dated: November 6, 2014

KAMALA D. HARRIS
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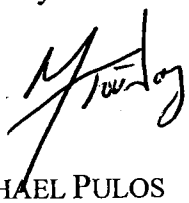

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Dennis Terry Martinez**
No.: **S219970**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 7, 2014, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Appellate Division
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District Attorney's Office
412 West Hospitality Lane, 1st Floor
San Bernardino, CA 92415-0042

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Appeals Division
San Bernardino County Superior Court
247 W. Third Street, 2nd Floor
San Bernardino, CA 92415-0063

Court of Appeal of the State of California
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

and furthermore, I declare in compliance with California Rules of Court, rules 2.251(i)(1) and 8.71(f)(1); I electronically served a copy of the above document on Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and on Thomas E. Robertson, appellant's attorney, via the registered electronic service address thomas@robertsonsdlaw.com by 5:00 p.m. on the close of business day. The Office of the Attorney General's electronic service address is ADIEService@doj.ca.gov.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 7, 2014, at San Diego, California.

Tammy Larson
Declarant

Signature

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