IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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ARGUMENT

VICTIM RESTITUTION IS NOT LIMITLESS; THE COURT MUST CHOOSE A LEVEL OF COMPENSATION THAT MAKES THE VICTIM WHOLE BUT WITHOUT CROSSING THE BOUNDS OF REASONABLENESS

A. The Response Brief Fails to Establish that the Instant Case Presents a Proper Exercise of Discretion Regarding Direct Victim Restitution

Respondent's brief asserts that making a victim "whole" under the restitution scheme of Penal Code section 1202.4, subdivision (f), authorizes a trial court in a property damage case to award the victim the cost of repair even if it is three times the replacement value of the item, as occurred in this case.

The argument rests on various grounds, but respondent has cited no authority which has found or suggested that an award set at 300

percent of the replacement value of damaged property is within the bounds of the court's ample discretion; or, is permissible in the service of making the victim whole; or that such a disparity between replacement value and the cost of repair is reasonable because it operates as an instrument of deterrence and rehabilitation.

After describing the conflict represented by the divergent opinions of *People v. Yanez* (1995) 38 Cal.App.4th 1622 (which set restitution at the purchase price paid by the victim rather than a higher cost of repair) and *In re Dina V.* (2007) 151 Cal.App.4th 486 (which held that restitution could provide the victim the cost of repair even if it exceeds the property's replacement value) respondent cites *In re Alexander A.* (2011) 192 Cal.App.4th 847, because it granted restitution at a higher cost of repair because of the inconvenience of replacement and because the order served a rehabilitative purpose. (RABOM at 9-10.)

B. Restitution and the Goal of Rehabilitation

However, the issue of rehabilitation as a goal of direct victim restitution differs greatly between *Alexander A.* and this case. It was much emphasized in that case that the perpetrator was a juvenile: "In proceedings involving minors, the juvenile court is vested with discretion to order restitution consistent with the goals of the juvenile justice system." (*Id.* at 853.)

In fact, the reviewing court criticized the *Yanez* decision on this point, although *Yanez* was not a juvenile action:

> While *Yanez* addressed the goal to fully reimburse the victim for all determined economic losses incurred as a result of the minor's conduct, it did not fully consider the role restitution plays in rehabilitating the minor and deterring future criminal offenses.

(*Id.*, 192 Cal.App.4th at 856; see *Yanez, supra*, 38 Cal.App.4th at 1624 [defendant charged by felony complaint].) However, here, appellant was an adult offender who was sent to prison for his vandalism offense. (See CT 72 [abstract of judgment].)

This raises a further distinguishing factor with regard to the deterrent and rehabilitative goals of ordering restitution that may be greater than the actual cost of the damage or injury resulting from the criminal conduct. Cases, such a *Alexander A.*, emphasizing this policy goal are usually cases in which the perpetrator was ordered to pay victim restitution as a condition of probation. (See also *Yanez, supra*, 38 Cal.App.4th at 1625 [victim restitution ordered "as a condition of probation"].) The *Alexander A.* decision does not indicate whether the juvenile was placed on probation, but on the issue of the rehabilitative effect of restitution it cited *In re Tommy* A. (2005) 131 Cal.App.4th 1580, in which the minor was placed on probation with a condition of paying restitution. (*Id.*, 131 Cal.App.4th at 1583; see also *People v. Akins* (2005) 128 Cal.App.4th 1376, 1379 [restitution ordered as con-

dition of probation], and *People v. Vournazos* (1988) 198 Cal.App.3d 948, 952, 956-957 [same]; *People v. Garcia* (April 19, 2011) 194 Cal.App.4th 612, 2011 WL 1467950, *1 [same].)

Regarding deterrence and rehabilitation, *Alexander A.*, *supra*, 192 Cal.App.4th at 858, and also respondent's brief (RABOM at 21) further cite to *People v. Carbajal* (1995) 10 Cal.4th 1114, 1124, and *Kelly v. Richardson* (1986) 479 U.S. 36, 49 fn. 10. In each of these cases, the defendant was placed on probation on condition of paying direct victim restitution. As noted in *Carbajal*, a "hit-and-run" case, "[c]onditioning probation on restitution under these circumstances would serve the rehabilitative purposes specified in Penal Code section 1203.1." (*id.,*10 Cal.4th at 1125), and in *Kelly v. Richardson*, a defendant who had been ordered to pay restitution as a condition of probation sought to discharge that obligation as the debtor in a bankruptcy action. (*Id.*, 479 U.S. at 38-39, and see 52-53 [discussion of restitution as condition of probation], and, 56-57 (dis. opn. Marshall, J.) noting that the right to victim restitution "is enforceable by the threat of revocation of probation and incarceration . . . .")

Appellant's order of restitution was not predicated on a grant of probation in lieu of incarceration; he was sent to state prison. While restitution will continue to have a rehabilitative effect into a period of parole, it would appear to be secondary to the rehabilitative incentive

resulting from an already imposed significant loss of liberty. Moreover, the above decisions suggest that where the trial court has extended the leniency of probation it may employ an expansive notion of what might be required to make the victim whole and not be tied down to actual costs or to conduct derived solely from the counts of conviction. (See *People v. Rubics* (2006) 136 Cal.App.4th 452, 459.)

Appellant submits that such latitude is more restricted in non-probation cases, and the trial court should hew more closely to a reasonable calculation of the level of restitution that makes the victim sufficiently whole.

C. Restitution and the Goal of Monetary Compensation for Damage from Criminal Conduct

Respondent's implicit contention in this case is that so long as the trial court's restitution order purports to make the victim whole *any* degree of disparity between value and repair cost should be count-enanced as a rational method of setting restitution. Appellant's contention is that the facts present in this case establish an abuse of the court's power in the name of making the victim whole.

In his opening brief, appellant noted that *Alexander A.* expressly left open the question of when an item's cost of repair is so far greater than its replacement cost that it "may no longer be rational in that it results in a windfall to the victim or does not serve a rehabilitative

purpose." (*Id.* at 858.) The *Alexander A* court found that the victim could reasonably want to repair a damaged older vehicle and that the higher repair cost was acknowledgment of the practicalities of "cleaning up" after criminal conduct. Appellant's argument has been that the outer of limits of reasonable restitution in property damage cases is the replacement value plus an additional amount that compensates for the practicality of actually obtaining a replacement. If the cost of repair is a near equal amount, then it too would be reasonable restitution.

Comparing *Alexander A.* to appellant's case is instructive on both the issue of making the victim whole. In this case, appellant damaged the victim's 1975 four-door Dodge Adventurer pickup truck by denting a passenger door to the extent it could not be opened and the radio antenna was broken off. (CT 34-35.) At issue in *Alexander A.* was a 1992 Honda Accord. (*Id.* at 852.) The juvenile's "crime spree" included:

> After defacing a three-wall school mural, Alexander and his companion spray-painted graffiti on the [victim's] Accord, painted its rims and license plate, destroyed the windshield, broke the right rearview mirror, kicked out the front signal lights, dented the vehicle's hood and the roof and damaged the left side of the car. The car could not be driven after it was vandalized.

(*Id.* at 858.) Here, the victim had a fully driveable four door truck with one unopenable door and a missing antenna. There is significant difference in the level of damage, loss of use, and cost between the two

cases, and thus there should be a greater difference in what might be required to make a victim whole.

However, as noted in the opening brief, despite the far greater damage inflicted by the vandalism in *Alexander A.,* the $8,219 cost of repairing the Accord was about $3,000 more than, or 57 percent of, the car's replacement cost of $5,300. (See, *id.* at 851.) If the result reached and affirmed in *Alexander A.* meets the test of reasonableness, adequately makes the victim whole, and serves a rehabilitative purpose, then that formula applied in this case would set the upper limit of the cost of repair at about $1,492 instead of $2,812..

The heavily damaged 1991 Honda in *Alexander A.* was capable of being repaired for slightly more than half of its replacement value, whereas here the repair of the victim's truck was nearly 300 percent over that value. In contrast, other trial courts have been able to make restitution orders for significant amounts that reflect commonsense, and are nuanced to the needs of the victim, but without exceeding the bounds of reasonableness.

In *People v. Mearns* (2002) 97 Cal.App.4th 493, a brutal, armed rape in the victim's own mobilehome rendered the residence unlivable because of its traumatic associations and because it was not capable of accommodating greater security devices. The victim sold the unit for $13,000 and bought the least expensive mobilehome she could find in

a gated community, costing $26,575. (*Id.* at 497.) The opinion notes that a restitution order must exercise discretion to fully compensate the victim without being arbitrary or capricious, and such discretion is not "limitless." (*Id.* at 498.) The defendant was ordered to pay the difference in the two prices, $13,575. The court excluded other costs such as monthly private security guard response fees, space rental, and finance charges. (*Id.* at 502.) The victim's original property was a total loss by virtue of the criminal conduct as effectively as if it had been physically destroyed, and the victim was rendered whole by restitution which was awarded at just slightly more than the lost property's market value, but without other ostensibly related expenses.

The Court of Appeal in the case of *People v. Thygesen* (1999) 69 Cal.App.4th 988, where the property at issue was a stolen cement mixer of indeterminate age or model, highlighted the point that replacement is not predicated on the *same* property lost through the defendant's actions, but on *like* property sufficient to adequately restore the victim to his or her position before the offense.

> The correct award should have been predicated on the "replacement cost of *like* property." ([§ 1202.4] Subd. (f)(3)(A), italics added.) [¶] . . . . It would seem to have been a simple thing for someone connected with Bonner to testify as to the age of the mixer, its original price, and what it would cost to replace it with a mixer of like type and age.

(*Id.* at 995, italics in original.) The trial court instead awarded the victim

the amount it speculated it would have earned in rent over the 13 months before the victim determined the item had been stolen.

> We conclude that there was no evidence to warrant Bonner's failure to replace the mixer for 13 months, nor was there substantial evidence to support an award for 13 full months of rent. Further, in order to justify a restitution award that exceeds the loss caused by the defendant, the trial court must state that such excessive award was purposely made to serve a legitimate rehabilitative purpose. The trial court did not do so in the present case. Accordingly, the restitution award was in error.

(*Id.* at 995-996, citations omitted; see also *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1019.) It should be noted that in *Thygesen* the defendant was granted probation (*id* at 991 fn. 1), and that in ordering restitution in this case the trial court, also, did not make any mention of a rehabilitative purpose. (See RT 21-22.)

In *In re Eric S.* (2010) 183 Cal.App.4th 1560, a brutal assault caused the victim serious injury. The hospital presented a bill of $40,311 for its expenses. The trial court granted restitution in that amount, among other items of restitution. (*Id.* at 1563, 1566.) While that figure was an accurate representation of the medical expenses incurred by the hospital, the reviewing court modified the order to reflect the lower amount of $32,249, which was the amount the hospital accepted as payment from Medi-Cal. (*Id.* at 1566.) Even though the minor was placed on home probation (*id.* at 1562), the Court of Appeal lowered the medical expenses restitution and did not rely on deterrence

or rehabilitation to justify a greater, and thoroughly documented, award.

The trial court here claimed that the victim was "entitled to have what is was they [sic] had been owning all along" even though to achieve that result would be three times as expensive as replacing the truck with a "like" item, which, as noted above, is all that the statute requires. (§ 1202.4, subd. (f)(3)(A).) While the same provision permits feasible repair, the aim to make the victim whole does not justify an extravagant increase over the value of the item.

Can it be said as a matter of law that had the victim been able to acquire only a 1975 GMC pick-up truck or a 1980 Dodge truck for the same price she paid 18 months earlier, plus the incidental expense of acquiring the replacement, that the victim would not have been made whole?

D. Illustrative Out-of-State Restitution Cases

In response to out-of-state cases discussed in the opening brief, respondent has cited foreign cases suggesting a significantly higher cost of replacement over value is a permissible restitution order. (RABOM at 15.) The response brief cites the Colorado case of *People v. Smith* (Colo Ct. App. 2007) 181 P.3d 324, 327, holding that full restitution included the cost of repair. However, the case is of no assistance here.

In *Smith*, the defendant broke a restaurant window, and in deter-

mining the degree of the offense the jury placed the value of the window at not more than $500, even though the victim testified the window was valued at about $1,500. The victim requested $3,050 in restitution to replace the window, but the trial court limited payment to the $500 found by the jury. (*Id.* at 324-325.) The reviewing court reversed and ordered restitution in the amount of $3,050, which apparently included the all the costs included in replacing the window. (*Id.* at 327.)

The problem with *Smith*'s applicability here is that, unlike here, the original item was not capable of "feasible repair," as it had to be replaced. The "cost of repair" was more accurately a cost of installation since a new, but free standing, window would not make the victim whole. And finally, even if viewed as a cost of repair, the amount was equal in value to the cost of replacement, not three times that cost, as here.

Similarly, in *State v. Thole* (Minn. 2000) 614 N.W.2d 231, the defendant stole a car and then abandoned it. When stolen the vehicle was in good condition, but could barely run when recovered and required $720 in parts and repair to make it adequately operable. The victim was able to trade it in for $790. (*Id.* at 233-234.) The victim was awarded $2,500 in restitution for the car, which the evidence showed was $100 over the low Blue Book figure for the same car in excellent

condition. (*Id.* at 234, 236.) The case is highly distinguishable as, for one thing, there is no evidence in the opinion from which to refute a determination that $2,500 was sufficiently close to market value of the car when it was stolen. Thus, the case only stands for the proposition that, as a matter of returning the victim to her status quo ante, she was entitled to a fair approximation of the trade-in value of the car at the time it was stolen and allowed to severely deteriorate, rather than the lower cost of repair or trade-in after it had been made minimally serviceable. Neither the facts nor the analysis are applicable here.

Another case cited by respondent, *State v. Kennedy* (Wisc. 1994) 528 N.W.2d 9 (190 Wis.2d 252) at first appears to be more relevant to this case, but closer inspection shows that its uniqueness does not support respondent's contentions on this appeal. In *Kennedy*, the automobile at issue was a 1972 Javelin in which the victim had invested over 200 hours of time in restoring. The defendant stole the car, stripped it of parts, and salvaged the frame. (*Id.* at 255-256, 261.)

The victim said that before the theft he would have sold the car for $7,000 at its then current state of restoration. The trial court's award of $5,309 represented the total of monies invested by the victim in purchasing the car in its original form, plus parts, and the expense of restoring the body. The restitution order did not include the lost time and labor of the victim. (*Id.* at 261.) In affirming the award, the

reviewing court said:

> *Although requiring a defendant to pay repair costs greater than the fair market value of the property may not be appropriate in every case*, a sentencing court must have the discretion to consider unique factual circumstances and the rehabilitative component of restitution in order to further the goals of sentencing.

(*Ibid.*, italics added.)

Appellant submits that respondent has failed to demonstrate that the restitution awarded in this case was not an abuse of discretion under the applicable facts. The award in this case was excessive and must be reversed.

CONCLUSION

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

Dated: June 16, 2011

Respectfully submitted,

/s/ Robert Navarro
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CERTIFICATE OF WORD COUNT

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

I, Robert Navarro, appointed counsel for Leroy Stanley, under penalty of perjury under the laws of the State of California, hereby certify that the attached brief contained 3,069 words (excluding cover and tables) as calculated by WordPerfect X3.

Dated: June 16, 2011

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DECLARATION OF SERVICE BY MAIL

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

On June 17, 2011, the attached: **APPELLANT'S REPLY BRIEF ON THE MERITS** in *People v. Stanley*, California Supreme Court, No. S185961, was placed in envelopes for collection and mailing following our ordinary practice at P.O. Box 8493, Fresno, California 93747. The envelopes were addressed as indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 17, 2011, at Fresno, California.

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