In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DENNIS TERRY MARTINEZ, Defendant and Appellant.	**Case No. S219970** Court of Appeal Case No. E057976 Superior Court Case No. FMB1200197

On Review From
The Fourth Appellate District, Division Two,
And The San Bernardino County Superior Court
The Honorable Daniel Detienne, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Penal Code section 1202.4 limits victim restitution to harm caused by defendant's criminal conduct. Here, Martinez committed the criminal act of leaving the scene of an accident, but he was not at fault for the underlying accidental collision. Did the trial court abuse its discretion by imposing restitution under section 1202.4 for injuries from the accident?[1]

INTRODUCTION

Martinez was involved in an accidental collision. A boy's scooter entered the roadway and collided with his truck. Martinez exited his vehicle and bent down next to the injured boy until the boy's mother appeared. Martinez returned to his vehicle, waited at the scene until paramedics arrived, and watched the paramedics load the boy for transport. Martinez then drove away. He eventually pleaded guilty to leaving the scene of an accident involving injuries, and the sentencing court imposed a state prison term and victim restitution of $425,654.63—for the medical expenses arising from the accidental collision.

The Court of Appeal properly reversed the restitution order. Because Martinez was sentenced to state prison, section 1202.4 dictates that victim restitution is limited to those losses caused by defendant's "criminal conduct." Although Respondent argues a more expansive standard should

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[1] Statutory citations are to the Penal Code unless otherwise indicated.

apply in order to achieve parity between prison and probation restitution, the statutory framework rejects this argument. This Court has repeatedly held that section 1203.1, the statute governing probation, gives a trial court greater discretion—compared to section 1202.4—to impose restitution *as a condition of probation.*

Under the stricter standard of section 1202.4, the dispositive question is whether the boy's injuries were caused by criminal conduct. As to the "hit and run" offense, longstanding law in California—consistent with the majority position nationwide—holds that the criminal conduct is the running. The accidental collision, by contrast, is a noncriminal event. It is the condition precedent that triggers the duty to provide assistance and identifying information. It is not criminal conduct.

Respondent raises policy arguments supporting restitution, but there are also policy considerations that disfavor expanding restitution to losses arising from noncriminal conduct. To impose a lifetime of debt on a person blindsided by a drunk driver—because that person became scared and drove away—is arguably unjust. Especially where the person, like Martinez, stayed at the scene until paramedics arrived. But policy concerns, on either side, must yield to the plain language of the controlling statute. The boy's injuries arose from the accidental collision, not criminal conduct. Under section 1202.4, therefore, the restitution order was unlawful. This Court should affirm the order of the Court of Appeal.

STATEMENT OF FACTS AND CASE

A. Statement of Facts

On the evening of April 26, 2012, Martinez was driving to a local bus stop to pick up his son. (1 CT 90, 94.) Before reaching the bus stop, however, a boy on a scooter rode into the path of Martinez's truck. (1 CT 94.) Martinez attempted to avoid the boy's path, but the scooter collided with the front of the truck. (1 CT 94.) The boy landed on the roadway. (1 CT 95.) Martinez pulled over, exited his truck, and approached the injured boy. (1 CT 95.) He observed that the boy was unconscious with a pool of blood around his head. (1 CT 95.) Martinez placed his hand on the boy's chest and felt the boy's shallow breathing. (1 CT 95.)

The boy's mother appeared while Martinez was attending the boy. (1 CT 95.) The mother was screaming, and Martinez stood up and returned to his truck. (1 CT 95.) He waited at his truck and watched the ambulance arrive and load the boy for transport. (1 CT 95.) Martinez then left the scene without providing his identifying information to anyone. (1 CT 95.) The boy survived, but suffered serious bodily harm, including traumatic brain injury. (1 RT 16-17.)

Within 24 hours of investigation, law enforcement interviewed Martinez at the sheriff station. (1 CT 94.) Martinez admitted being an unlicensed driver and knowing that leaving the scene of the accident was a crime. (1 CT 95.) He further admitted ingesting medical grade marijuana

at 8:00 a.m. on the day of the incident, but stated he no longer felt the effects by 11:00 a.m., over seven hours before the collision. (1 CT 96.) Martinez consistently maintained that the collision was an accident. (1 CT 95, 97.)

Law enforcement also interviewed an eyewitness to the collision, a 12-year-old friend of the boy on the scooter. (1 CT 91.) The police report did not identify any statement by the witness indicating unsafe driving by Martinez. (1 CT 88-100.) Further, the mother of the injured boy later testified "[t]he fact that my son collided with the vehicle was an accident." (1 RT 13.)[2] And after concluding its investigation and booking Martinez into custody, law enforcement did not include any charges related to the nature of Martinez's driving. (1 CT 102.) Instead, the charges on the booking application were limited to a probation violation and the "hit and run" offense under Vehicle Code section 20001. (1 CT 102.)

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[2] The Court of Appeal's decision states, as a fact, that the boy's mother witnessed the incident and indicated it was her son who collided with Martinez. (Slip opn. at pp. 4, 16.) Even though the mother's testimony is arguably ambiguous—regarding whether she "ran from our house to render aid to my son" because she saw the collision (1 RT 13)—Respondent waived any challenge to this statement of fact. Specifically, this Court "accept[s] the Court of Appeal's statement of fact unless a party calls the Court of Appeal's attention to any alleged omission or misstatement in a petition for rehearing." (*People v. Anderson* (2010) 50 Cal.4th 19, 23, fn. 3, citing Cal. Rules of Court, rule 8.500(c)(2).) Here, the Attorney General did not petition for rehearing or otherwise notify the Court of Appeal of its challenge to the statement of fact.

B. Trial Court Proceedings

The prosecution did not charge any offense related to the nature of Martinez's driving. (1 CT 1-2.) Instead, Martinez was charged with leaving the scene of an injury accident without providing his identifying information. (1 CT 1; see also Veh. Code, § 20001, subd. (a).)

Martinez pleaded guilty to this offense. (1 CT 7; 1 RT 6.) The plea agreement included a *Harvey* waiver,[3] and the trial court sentenced Martinez to serve the middle term of three years in state prison. (1 CT 10, 30, 32; 1 RT 25-26.)

Months later, the court held a restitution hearing. (1 CT 74; 1 RT 29.) The defense argued that restitution should be limited to the aggravation of injuries, if any, caused by the criminal act of leaving the scene. (1 CT 37.) But the court ordered Martinez to pay restitution for the victim's medical expenses, which resulted from the collision, in the amount of $425,654.63. (1 CT 82; 1 RT 35-37.) In particular, the court found that the case of *People v. Rubics* (2006) 136 Cal.App.4th 452, was "right on point" and dictated restitution for the collision, "even if it was just a pure accident." (1 RT 37.)

A timely notice of appeal followed. (1 CT 83.)

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[3] *People v. Harvey* (1979) 25 Cal.3d 754 [absent contrary agreement, an uncharged allegation or dismissed counts cannot be used at sentencing against a defendant who pleads guilty to other charges].

C. Court of Appeal's Decision

The Court of Appeal reversed the restitution order. It held that (1) Penal Code section 1202.4 governed restitution because Martinez was sentenced to state prison; (2) the *Rubics* decision is unpersuasive, as a state prison case, because it relied on the unique rationale for expansive restitution in the probation context; and (3) the underlying accidental collision, *in this particular case*, was not an illegal act.

The court did not create a "per se" rule foreclosing restitution. Rather, it held "a court cannot order a defendant [to] pay victim restitution when sentenced to prison for the effects of a collision, not exacerbated by his leaving, when the 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." (Slip opn. at p. 7.) Based on the record, it noted "it would appear the evidence here, or lack thereof, was at best, for the People, inconclusive and, at worst, negated any culpability of defendant for the collision." (*Id.* at p. 17.) And "[e]ither way, no charges regarding the collision were brought against defendant." (*Ibid.*) As a result, the Court of Appeal held that restitution was limited to the harm caused or exacerbated by the criminal act of leaving the scene. (*Id.* at pp. 17-18.) The court remanded the matter so the government could file a motion, in its discretion, to seek such restitution. (*Ibid.*)

ARGUMENT

I.

PENAL CODE SECTION 1202.4 DOES NOT AUTHORIZE RESTITUTION FOR THE INJURIES SUSTAINED IN THE ACCIDENT, *IN THIS PARTICULAR CASE*, WHERE THE ACCIDENTAL COLLISION WAS NOT CRIMINAL CONDUCT AND MARTINEZ STAYED AT THE SCENE UNTIL PARAMEDICS ARRIVED.

A. After imposing a prison sentence, a trial court may not order restitution under section 1202.4 unless the harm was caused by defendant's criminal conduct.

The scope of victim restitution "depends on whether the restitution is ordered pursuant to section 1202.4 or as a condition of probation pursuant to section 1203.1." (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 190; see also *Anderson, supra,* 50 Cal.4th at pp. 28-29.) If defendant receives probation, section 1203.1 gives the trial court "broad" discretion to impose restitution, *even where the losses were not caused by criminal conduct.* (*Anderson, supra,* 50 Cal.4th at pp. 27, 29.) But if the sentence is state prison, section 1202.4 governs the scope of restitution with "explicit and narrow" limits. (*Id.* at pp. 28-29.)

In particular, section 1202.4 precludes victim restitution unless the crime actually caused the loss:

> It is the intent of the Legislature that 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.

(§ 1202.4, subd. (a)(1).) Thus, where "a victim has suffered economic loss

as a result of the defendant's conduct," the amount of restitution is limited to the "economic loss incurred as the result of the defendant's criminal conduct." (Compare § 1202.4, subd. (f), with § 1202.4, subd. (f)(3); see also *People v. Percelle* (2005) 126 Cal.App.4th 164, 180.) In other words, "when a defendant is sentenced to state prison, section 1202.4 limits restitution to losses caused by the criminal conduct for which the defendant was convicted." (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1249.)

Here, Martinez received a prison sentence for leaving the scene of the accident. The broad scope of restitution as a condition of probation under section 1203.1 does not apply. Instead, the strict rule of causation under section 1202.4 controls. In arguing the two separate statutory frameworks should collapse into one rule, Respondent misplaces reliance on this Court's decision in *People v. Carbajal* (1995) 10 Cal.4th 1114. (RBOM 27-30.)[4]

Contrary to Respondent's assertion, *Carbajal* does not apply with "equal force" to a prison case. (RBOM 28.) Rather, from the first sentence of the "Discussion" section, the opinion highlighted that "[w]e deal in this case with restitution as a condition of probation." (*Carbajal, supra,* 10 Cal.4th at p. 1120.) In its analysis, *Carbajal* drew a line between

[4] Citations to Respondent's Opening Brief on the Merits are abbreviated as (RBOM [page].) As to briefing in the Court of Appeal, citations to Appellant's Opening Brief are abbreviated as (AOB [page]), and citations to Respondent's Brief are abbreviated as (RB-COA [page]).

(1) "Proposition 8 and its implementing legislation";[5] and (2) section 1203.1, the statute governing conditions of probation. (*Id.* at p. 1122.) Notably, this Court held the limits of the implementing legislation did not trump the broader discretion for orders of probation:

> We . . . conclude that nothing in Proposition 8 or [the implementing legislation] purports to limit or abrogate the trial court's discretion, under Penal Code section 1203.1, to order restitution as a condition of probation *where the victim's loss was not the result of the crime underlying the defendant's conviction.*"

(*Ibid.*, italics added.) Under the central holding of *Carbajal*, therefore, the probation statute authorizes trial courts to impose restitution, as a condition of probation, even where the crime did not cause the harm. Thus, compared to section 1202.4, the probation statute provides a more expansive scope of restitution.

Respondent argues different standards for prison and probation restitution "would *create* a rule where the victim's right hinged on a defendant's sentence." (RBOM 29, italics added.) But as the *Carbajal* decision clarified, the distinction already exists. The two standards are a

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[5] At the time of the sentencing in *Carbajal*, the relevant implementing legislation was codified at section 1203.4. (*Carbajal, supra,* 10 Cal.4th at p. 1122.) In the mid-1990's, however, the legislature consolidated the state's victim restitution scheme, including provisions of section 1203.4, into section 1202.4. (See *People v. Giordano* (2007) 42 Cal.4th 644, 653.) Thus, the "implementing legislation" discussed in *Carbajal* currently exists in section 1202.4.

function of two independent statutes. (*Carbajal, supra,* 10 Cal.4th at p. 1122.) And as a result, "[t]rial courts continue to retain authority to impose restitution as a condition of probation in circumstances not otherwise dictated by section 1202.4." (*Anderson, supra,* 50 Cal.4th at p. 29.) In *Anderson*, for example, the defendant received probation for leaving the scene of an accident, and the trial court ordered that restitution be paid directly to the victim's treating hospital. (*Id.* at p. 22.) Defendant argued that the hospital was not a "victim" within the meaning of section 1202.4. (*Ibid.*) This Court upheld the restitution order, however, observing that even if the hospital did not qualify under the "explicit and narrow" requirements of section 1202.4, the trial court had broader discretion *under the probation statute* to order direct payment to the hospital. (*Id.* at pp. 29, 34.)

In resisting this well-settled rule that the scope of victim restitution is broader in probation cases, Respondent contends that "probation conditions are imposed as *punishment* [rather than furthering the purpose of victim compensation]." (RBOM 28, original italics, citing *People v. Richards* (1976) 17 Cal.3d 614, 620.) But *Richards* did not state probation conditions are "punishment." Instead, "[t]he major goal of section 1203.1 is to rehabilitate the criminal." (*Richards, supra,* 17 Cal.3d at p. 620; see also *Anderson, supra,* 50 Cal.4th at p. 27 ["While restitution under section 1203.1 may serve to compensate the victim of a crime, it also addresses the

broader probationary goal of rehabilitating the defendant."].) And it is this goal of rehabilitation that supports the expansive discretion to impose conditions of probation:

> When section 1203.1 provides the court with discretion to achieve a defendant's reformation, its ambit is necessarily broader, allowing a sentencing court the flexibility to encourage a defendant's reformation as the circumstances of his or her case require.

(*Anderson, supra,* 50 Cal.4th at p. 29) Thus, contrary to Respondent's suggestion, the primary purpose of probation (and the statute effectuating this purpose) transcends the limitations on restitution set forth by section 1202.4.[6] Put another way, a trial court may impose victim restitution as a condition of probation "even when the loss was not necessarily caused by the criminal conduct underlying the conviction." (*Id.* at p. 27, quoting *Carbajal, supra,* 10 Cal.4th at p. 1121.)

Unlike *Carbajal*, this case does not involve conditions of probation.

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[6] Respondent also argues that the broader scope of restitution, as a probation condition, is problematic in cases where probation is revoked. (RBOM 30.) But this argument ignores a central justification for the broad discretion to impose probation conditions. Specifically, "probation is an act of clemency and grace." (*Anderson, supra,* 50 Cal.4th at p. 32.) It is "not a matter of right." (*Ibid.*, citing *Rubics, supra*, 136 Cal.App.4th at p. 459.) Thus, "the trial court can impose probation conditions that it could not otherwise impose." (*Ibid.*) And "[i]f the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation." (*Ibid.*) But where he has "voluntarily agreed to the terms of probation, a defendant cannot use his own breach of those terms as a basis for evading the properly imposed restitution obligation he assumed." (*People v. Kleinman* (2004) 123 Cal.App.4th 1476.) Even after revocation, therefore, a restitution order remains legitimate and proper.

It is a state prison case, and the strict limits of section 1202.4 apply. If Martinez's criminal conduct did not cause the boy's harm, then restitution was improper. (*Lai, supra,* 138 Cal.App.4th at pp. 1246-1249; *Percelle, supra,* 126 Cal.App.4th at p. 180.)

B. The boy's injuries were neither caused nor aggravated by Martinez's criminal conduct of leaving the scene.

The criminal conduct of the hit and run offense is leaving the scene of the accident without presenting identification and rendering aid. (Veh. Code, § 20001, subd. (a); § 20003, subd. (a); *People v. Valdez* (2010) 189 Cal.App.4th 82, 89-90.) In other words, "the purpose of section 20001, subdivision (a) is to punish not the 'hitting' but the 'running.'" (*People v. Braz* (1998) 65 Cal.App.4th 425, 433, quoting *People v. Corners* (1985) 176 Cal.App.3d 139, 148.) Martinez does not challenge the Court of Appeal's conclusion, therefore, that restitution would be proper in the "amount, if any, which reflects the degree to which the victim's injuries were exacerbated, if at all, by defendant's flight." (Slip opn. at pp. 17-18.)

In the present case, however, Martinez's act of leaving the scene neither caused nor aggravated the victim's injuries. Following the collision, Martinez stopped, exited his truck, and attended the injured boy. (1 CT 95.) Further, when the boy's mother arrived, Martinez returned to his truck and waited until paramedics arrived and loaded the boy for transport. (1 CT 95.)

Because Martinez stayed at the scene until paramedics took control of the situation, the eventual act of leaving the scene—although criminal—did not cause the boy's injuries. In other words, the injuries "from the collision existed regardless of whether the appellant subsequently left the scene of the accident." (*Columbus v. Cardwell* (Ohio Ct. App. 2008) 893 N.E.2d 526, 528 [reversing restitution for injuries arising from underlying accident of hit and run conviction].) As the collision was the sole cause of the boy's injuries, therefore, the issue becomes whether this collision was "criminal conduct" within the meaning of section 1202.4.

C. The accidental collision between the scooter and Martinez's vehicle was not "criminal conduct."

In this particular case, the collision was not criminal conduct. First, there is no evidence that Martinez was driving recklessly or otherwise at fault for the incident. Instead, the collision was an accident. And second, under California law governing the offense of hit and run—consistent with the majority position nationwide—an accidental collision is not criminal conduct.

1. Martinez was not at fault for the collision, which was an accident.

The record does not establish Martinez was at fault for the collision. The boy's scooter entered the path of Martinez's truck, and even the boy's mother testified the collision was an accident. (1 CT 94;

1 RT 13.) Further, despite the availability of percipient witnesses, the government did not file any criminal charges related to Martinez's driving. (See *Commonwealth v. Cooper* (Pa. Super. Ct. 1983) 466 A.2d 195, 197 [reversing restitution in a hit and run case for losses arising from accident where "review of the guilty plea record suggests that such charges [for having struck the victim] may well have been considered and found unsupportable"].)

Respondent asserts that leaving the scene establishes an inference of fault for the collision. (RBOM 19, citing § 1127c.) But section 1127c does not support Respondent's assertion for two reasons. First, the statute addresses "[t]he flight of a person immediately after the commission of a crime." (§ 1127c.) Here, Martinez left the scene of a motor vehicle accident—rather than the scene of a crime—and did not leave "immediately." Rather, Martinez attended the injured boy and waited until paramedics arrived. (1 CT 95.) And second, the statute makes flight a *factor* for a jury to determine guilt. (§ 1127c.) Indeed, flight "is not sufficient in itself to establish [defendant's] guilt." (*Ibid.*; see also *Brooks v. E. J. Willig Truck Transp. Co.* (1953) 40 Cal.2d 669, 676 [approving jury instruction in civil case that "the fact that [the driver] left the scene of the accident could not, in and of itself, be the basis of a verdict [for negligence]

against defendants"].)[7] Standing alone, therefore, flight cannot establish an inference of guilt.

Respondent also contends that the trial court made a factual finding of fault for the accident and, further, that Martinez failed to challenge this finding on appeal. (RBOM 16, fn. 7.) Neither contention is accurate. The trial court premised "fault" on a legal finding that unlicensed driving was the "but for" cause of the accident, as follows: "because [Martinez] was on felony probation and unlicensed, I think this whole incident occurred even before he got into the accident." (1 RT 36-37.) But restitution requires both "but for" causation *and* proximate causation. (*People v. Jones* (2010) 187 Cal.App.4th 418, 424-425.) In other words, unlicensed driving—without more—cannot sustain restitution for the accident. (*Ibid.*; see also Section II(C), *infra*.) And in his Opening Brief on appeal, Martinez *did* challenge the court's finding that the unlicensed driving established fault for the accident.[8] (See, e.g., AOB 12-14 [including a subject heading on the issue].) In particular, Martinez argued "the record contains no evidence that the absence of a driver's license caused the collision between Martinez

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[7] The *Brooks* decision proceeded to hold that liability is automatic for the harm caused, or aggravated, by the act of leaving the scene. (40 Cal.2d at p. 678) Martinez does not dispute that this rule equally governs victim restitution.

[8] As set forth in Section II(A), *infra*, Respondent did not respond to this argument in the Court of Appeal.

and the scooter." (AOB 14.)

The Court of Appeal agreed, noting "the evidence here, or lack thereof, was at best, for the People, inconclusive and, at worst, negated any culpability of defendant for the collision." (Slip opn. at p. 17.) Instead, the collision between the truck and the scooter was an accident.

2. The accidental collision was not "criminal conduct" within the meaning of section 1202.4.

Longstanding law in California holds that the underlying accidental collision is not the "criminal conduct" of the hit and run offense. (See *Valdez, supra,* 189 Cal.App.4th 82, 87-90 [examining "cases stretching back more than 50 years"].) In other words, the statute "does not make criminal the actual accident or event which causes the physical contact with the victim." (*People v. Wood* (2000) 83 Cal.App.4th 862, 866.) And "[t]he fact that defendant *subsequently* fled does not retroactively alter the character of the accident from noncriminal to criminal." (*Valdez, supra,* 189 Cal.App.4th at p. 90, original italics; see also *Braz, supra,* 65 Cal.App.4th 425, 432-433; *People v. Escobar* (1991) 235 Cal.App.3d 1504, 1510-1512.)[9]

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[9] Before *Carbajal* was decided, several decisions in the Court of Appeal reversed restitution as a condition of probation, in hit and run cases, for losses from the underlying accident, by acknowledging the rule that the accident is "noncriminal conduct occurring prior to the defendant's unlawful flight." (*Escobar, supra*, 235 Cal.App.3d at p. 1510; see also *People v. Lafantasie* (1986) 178 Cal.App.3d 758, 762-763; *Corners, supra,*

The *Valdez* decision illustrates the distinction between the accidental hitting and the criminal conduct of running. In *Valdez*, the defendant was driving a vehicle, struck a pedestrian by accident, and left the scene without giving anyone his identifying information. (189 Cal.App.4th at p. 86.) In addition to the hit and run offense, the government alleged an enhancement under section 12022.7, subdivision (a), for inflicting "great bodily injury on any person other than an accomplice *in the commission of* a felony or attempted felony." (*Id.* at p. 87, original italics.) The *Valdez* court reversed the true finding on the enhancement, however, holding the defendant was not engaged in the commission of a felony "at the time of the traffic accident that caused the injuries in this matter." (*Id.* at p. 90.) The victim's injuries, therefore, "were caused by acts which occurred prior to the criminal act, not as a result of the criminal act." (*Ibid.*, internal quotations omitted.)

Of the high courts in other states that have addressed the issue in the context of victim restitution, the overwhelming majority agree that the criminal act is leaving the scene, not the underlying accident. For example, the Oregon Supreme Court consolidated two criminal cases to evaluate

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176 Cal.App.3d 139.) In light of *Carbajal*, this narrow vision *of probation conditions* is implicitly overruled. (See *Carbajal, supra*, 10 Cal.4th at p. 1121 [holding victim restitution can be a condition of probation "even when the loss was not necessarily caused by the criminal conduct underlying the conviction"].) The more fundamental rule that the accidental collision is not criminal conduct, however, remains good law.

"whether a defendant convicted of leaving the scene of an accident without performing statutory duties may be sentenced to pay restitution for damages resulting from the accident." (*State v. Eastman* (Or. 1981) 637 P.2d 609, 610, abrogated by Or. Rev. Stat. § 811.706 (1995).)[10] In *Eastman*, the defendants in both cases were involved in a traffic collision, fled the scene, and were convicted of leaving the scene of the accident. (*Id.* at pp. 610-611.) Restitution was imposed for the losses arising from the underlying accidents. (*Ibid.*) The Oregon Supreme Court held the restitution was unauthorized, because:

> (1) the applicable restitution statute did not permit recovery unless the damages were a "result" of defendants' "criminal activities";
>
> (2) "criminal activities" were defined as the "criminal conduct" for which defendant was convicted; and
>
> (3) even though the underlying accident was a necessary "event" under the hit and run statute, "the accident itself is neither criminal nor an activity."

(*Id.* at pp. 611-612.) Thus, because the victims' injuries resulted from a noncriminal event—and not from the criminal act of leaving the scene—the restitution orders were improper. (*Id.* at p. 612; see also, e.g., *State v. Joyce* (S.D. 2004) 681 N.W.2d 468 [same]; *State v. Steinolfson* (N.D. 1992) 483

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[10] As set forth in Section I(D), *infra*, the response of the Oregon Legislature exemplifies how lawmakers are best situated to make a policy decision to expand the scope of restitution to losses not caused by criminal conduct.

N.W.2d 182, 184 [holding restitution for damages from underlying accident was improper *under restitution statute*[11] because defendant's "criminal act of leaving the scene did not cause any damages"]; *State v. Starkey* (Iowa 1989) 437 N.W.2d 573 [reversing restitution based on victim's injuries from underlying accident where there was "no evidence here that [defendant's] act of leaving the scene, the basis of the charge, either caused or aggravated the victim's injuries"]; *State v. Williams* (Fla. 1988) 520 So.2d 276, 278 [same]; *State v. Beaudoin* (Me. 1986) 503 A.2d 1289 [same]; but see *City of Billings v. Edward* (Mont. 2012) 285 P.3d 523, 529 [relying on the more lenient standard for causation under Montana law,[12] the court affirmed the restitution for victim's injuries arising from collision].)

Relying on the *Rubics* decision, however, Respondent argues that the

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[11] The *Steinolfson* court ultimately affirmed the restitution order, however, because the written plea agreement explicitly stated that defendant "would pay any restitution which is due to the victim for medical expenses or for damage to the victim's vehicle." (483 N.W.2d at p. 185.) Martinez's plea agreement did not contain such an agreement.

[12] Under Montana law, the causal relationship requires only that "a sentencing condition must have some correlation or connection to the underlying offense for which the defendant is being sentenced." (*Edward, supra*, 285 P.3d at p. 529, quoting *State v. Ness* (Mont. 2009) 216 P.3d 773 [affirming restitution for damages arising from collision, even where defendant was solely convicted of *tampering with physical evidence* for the repairs made to his vehicle after leaving the scene of collision].) As this standard more closely approximates the standard for imposing conditions of probation under California law, neither *Edward* nor *Ness* is persuasive in the present case.

accidental collision is criminal conduct because the collision is ostensibly an "element" of the offense under Vehicle Code section 20001. (RBOM 10-11, citing *Rubics, supra,* 136 Cal.App.4th 452.) But such reliance is misplaced, as the *Rubics* holding is fundamentally flawed for two reasons. First, *Rubics* contradicts the well-established rule that the underlying accident is not a criminal act. (See *Valdez, supra,* 189 Cal.App.4th at p. 89.) Notably, a recent decision in the Court of Appeal rejected the position taken by the *Rubics* opinion:

> To the extent that *People v. Rubics* . . . suggested that a conviction under Vehicle Code section 20001, subdivision (a) is based in part on the defendant's causing or being involved in an injury accident, we decline to follow it for the reasons we have stated.

(*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1341, fn. 22.) These "reasons" included citations to the "[m]any courts [that] have concluded that the conduct made criminal by Vehicle Code section 20001, subdivision (b) is fleeing the scene of an injury accident without providing the required information or rendering assistance, rather than causing or being involved in the accident itself." (*Id.* at p. 1340.)

Second, even though the defendant in *Rubics* received a prison sentence, the court relied heavily on *Carbajal's* analysis of restitution as a condition of probation. (*Rubics, supra,* 136 Cal.App.4th at pp. 460-461.) But as set forth above, a trial court's authority to impose conditions of probation is more expansive than its authority to order restitution under

section 1202.4. (See Section I(A), *supra.*) The *Rubics* decision ultimately sidestepped the distinction, imported the wrong analysis, and established a minority position in the law. Under the longstanding majority position, by contrast, the underlying accident is not a criminal act. (*Valdez, supra,* 189 Cal.App.4th at pp. 87-90.)

Instead, the accidental collision is a "condition precedent to the imposition of duties upon the driver under Vehicle Code sections 20001, subdivision (a)." (*Corenbaum, supra,* 215 Cal.App.4th at p. 1340.) In other words, "driving a vehicle which is involved in an accident is an element of a crime only in the sense that it is a fact which must be proved under the criminal statute, but it is not an act which defendant performed in the course of committing the crime." (*Eastman, supra,* 637 P.2d at p. 612.) This is because the condition precedent remains an innocent act (or event) *even after the government has proved all elements of the charged crime.*

The Oregon Supreme Court illustrated the point with the crime of failing to file a tax return for a year in which the person earned taxable income. (*Eastman, supra,* 637 P.2d at p. 612) The *Eastman* decision noted that it "is not a criminal activity to have taxable income, but if that fact exists, there is a duty imposed to file a tax return and the performance of that duty is enforced by a criminal sanction." (*Ibid.*) And even after the crime of failing to file the return is proven or admitted, the original conduct of earning the income does not become criminal activity. For example, if

defendant's earning of taxable income somehow "harmed" another—such as a real estate agent taking market share (lawfully) from a competitor—victim restitution would be inappropriate. The taxable income is merely a condition precedent, not criminal conduct.

The nature of a condition precedent reveals that Respondent's burglary hypothetical is inapposite. Specifically, Respondent describes a burglar entering a home by breaking a window. (RBOM 16.) According to Respondent, even if defendant pleaded guilty to burglary, the Court of Appeal's holding would foreclose restitution for the window, because "the 'defendant was not convicted for any offense involving responsibility for' the breaking of a window." (*Ibid.*, quoting slip opn. at p. 5.) But this ignores that the entry of the home is not an innocent event that merely triggers certain legal duties. To the contrary, *once the crime of burglary has been proved or admitted*, the entry of the home is a criminal act.[13]

A more compelling "hypothetical" arises from the actual facts of a hit and run prosecution in Hawaii. (See *State v. Domingo* (Haw. Ct. App. 2009) 216 P.3d 117.) There, the defendant was lawfully driving in the highway's right hand lane. (*Id.* at p. 119.) The decedent, by contrast, was driving drunk and swerving between lanes. (*Ibid.*) The "decedent veered

[13] The same analysis applies to the Respondent's proposed hypothetical regarding theft by larceny. Once the crime has been proved or admitted, the elements of taking and moving the property are *not* "wholly innocent acts." (See RBOM 14.)

into the defendant, sidesweeping the defendant's driver side, thus causing the collision of both vehicles." (*Ibid.*) As a result of this collision, the decedent was ejected from his vehicle and died at the scene. (*Ibid.*) Defendant fled the scene and was ultimately convicted of a hit and run offense. (*Ibid.*) Under Respondent's position, this collision is a necessary element of the crime and, therefore, part of defendant's criminal conduct. But as the *Domingo* court concluded in reversing the restitution order, "[t]here is no evidence in the record that [defendant's] criminal misconduct caused [decedent's] injuries or death." (*Id.* at p. 121.) To the contrary, even after defendant was properly convicted of the hit and run offense, he remained the victim of a dangerous sideswipe collision. Thus, defendant's involvement in the collision was a condition precedent to his duty to remain at the scene. It was not criminal conduct.

Here, Martinez was involved in an accidental collision. This collision was not criminal conduct. Rather, it was an event that triggered his duty to remain at the scene and provide identifying information. In leaving the scene, Martinez committed his criminal act. As a result, restitution is limited to those losses caused, or aggravated, by his leaving the scene. The trial court abused its discretion by imposing restitution for the losses caused by the underlying accident.

D. The explicit causation requirement of section 1202.4 prevails over suggested policy arguments to the contrary.

Respondent relies on the legislative history of Proposition 8 and Marsy's Law to argue for an expansive interpretation of victim restitution that would include the losses arising from the accidental collision. But such reliance is misplaced for two reasons: (1) it ignores that Proposition 8 explicitly provided, and Marsy's Law preserved, the requirement of a causal link between the loss and "criminal activity"; and (2) even if the intent of the constitutional mandate were somehow ambiguous as to the causation requirement, the implementing legislation controls.

First, the constitutional mandate of victim restitution contemplates those losses actually caused by criminal conduct. Proposition 8 established the Victims' Bill of Rights in the California Constitution, stating, as to restitution, "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 from the persons convicted of the crimes for losses they suffer." (Cal. Ballot Pamp.,[14] Prim. Elec. (June 8, 1982), Text of Proposed Law, p. 33, italics added.) And in 2008, even though Marsy's Law removed a discretionary exception to restitution,[15] it made the

[14] The 1982 California Ballot Pamphlet is included in Respondent's motion for judicial notice, which Martinez does not oppose.

[15] Marsy's Law included an amendment to the Victim's Bill of Rights that removed a trial court's discretion to refuse victim restitution for

causation requirement *more explicit*:

> It is 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 seek and secure restitution from the persons convicted of the crimes *causing the* losses they suffer.

(Official Voter Info. Guide, Gen. Elec. (Nov. 4, 2008), Text of Proposed Laws, p. 130, italics in original to denote new language.) Thus, any "liberal" construction of the constitutional mandate must yield to the plain language of the causation requirement. (See, e.g., *State ex rel. McDougall v. Superior Court In and For County of Maricopa* (Ariz. App. 1996) 920 P.2d 784 [reversing restitution in a hit and run case, for injuries from underlying accident, where "[t]he plain language of both the constitutional and statutory provisions requires restitution only for losses caused by the criminal conduct for which defendant was convicted"].)

Indeed, the cases cited by Respondent for broad construction of victim restitution involved situations where the criminal conduct clearly caused the harm. (RBOM 8-9.) In *Broussard*, for example, it was undisputed that defendant's commission of grand theft and receiving stolen property directly resulted in the victims' economic losses. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1069-1070; see also *Giordano, supra* 42 Cal.4th at pp. 650-651 [no dispute that defendant's commission of

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"compelling and extraordinary reasons." (Official Voter Info. Guide, Gen. Elec. (Nov. 4, 2008), Text of Proposed Laws, p. 130.)

vehicular manslaughter caused death of victim]; *People v. Beaver* (2010) 186 Cal.App.4th 107, 129 [noting "it is not disputed SAT [victim] incurred the legal expenses as a result of defendant's criminal conduct"]; *People v. Phelps* (1996) 41 Cal.App.4th 946 [defendant did not dispute that he caused the injuries but, rather, argued that amount of restitution could not include future medical expenses]; *People v. Beck* (1993) 17 Cal.App.4th 209, 216 [undisputed that defendant's financial crimes caused the economic losses].) None of these cases dictates that a liberal construction of the constitutional mandate should override the mandate's explicit requirement of causation.

Second, even if the constitutional provision were somehow ambiguous regarding the causation requirement, "[i]t is well settled that when the Legislature is charged with implementing an unclear constitutional provision, the Legislature's interpretation of the measure deserves great deference." (*Giordano, supra*, 42 Cal.4th at pp. 655-656.) Here, the implementing legislation is section 1202.4. (*Ibid.*) And as set forth above, section 1202.4 limits the amount of restitution to losses actually caused by defendant's "criminal conduct." (§ 1202.4, subd. (f)(3); *Lai, supra,* 138 Cal.App.4th 1227, 1249; *Percelle, supra,* 126 Cal.App.4th 164, 180.)

Notably, the plain language of the implementing legislation must prevail over contrary policy considerations. (See, e.g., *People v. Runyan* (2012) 54 Cal.4th 849.) In *Runyan*, for example, while driving drunk in the

wrong direction on the freeway, the defendant struck and killed a fellow motorist. (*Id.* at p. 854.) The trial court sentenced defendant to prison and imposed victim restitution, including payment to decedent's estate for decedent's economic losses that accrued *after* his death. (*Id.* at pp. 854-855, 859) In reversing that portion of the restitution order, this Court acknowledged that strong public policy favored the opposite outcome:

> We are mindful of the concern . . . that denial of restitution to a deceased victim's estate under the circumstances presented here produces a perverse result the Legislature cannot have intended—i.e., that a criminal defendant may minimize his or her restitutionary obligation by instantly killing a victim, rather than by causing mere nonfatal injury.

(*Id.* at p. 866) But this "perverse result" was dictated by the statutory limits on the scope of restitution. Specifically, neither the constitutional mandate nor section 1202.4 authorized restitution for the losses that accrued after the victim's death. (*Ibid.*) As a result, ancillary policy concerns (and the general rule of broad construction for victim restitution) properly yielded to statutory limits.

Even if public policy could trump the plain language of a controlling statute, however, the policy considerations in the present case do not necessarily support restitution for noncriminal conduct. For example, Respondent argues that "splitting" restitution between the losses caused by the accidental collision and those aggravated by the flight will force the victim to seek the remainder of damages in civil court. (RBOM 25-26.)

But this argument fails to acknowledge that the victim of a crime is *already* required to pursue a civil action in order to recover complete damages. Specifically, the Penal Code "does not authorize direct restitution for noneconomic losses." (*Giordano, supra*, 42 Cal.4th at p. 656, citing § 1202.4, subd. (f).) Instead, a claim for noneconomic losses—such as pain and suffering—must be pursued in a civil action.

Notably, the civil court system employs procedures to facilitate a crime victim's right to "promptly" recover damages. First, the lawsuit in civil court is entitled to calendar preference. (Code Civ. Proc., § 37.) In addition, a prevailing plaintiff may recover "reasonable attorney's fees . . . against the defendant who has been convicted of the felony." (Code Civ. Proc., § 1021.4.) These statutes are in place because crime victims must already avail themselves of the civil court system to recover the full spectrum of damages.

Respondent also argues the Court of Appeal's holding would encourage drivers to flee the scene of an accident. But the central deterrent to flight remains embedded in the law. Specifically, if the collision caused serious injury, the act of leaving the scene risks a felony conviction and custody in state prison. (Veh. Code, § 20001, subd. (b)(2).) And even if a defendant expects and receives the leniency of probation, the sentencing court would have ample discretion to impose restitution *as a condition of probation*. (See *Carbajal, supra,* 10 Cal.4th 1114.) Moreover, if the act of

leaving the scene caused or aggravated the victim's injuries, restitution would be proper under either section 1202.4 or section 1203.1.

Finally, policy considerations of fundamental fairness are mixed. For example, even though a defendant's departure from the scene of the accident can frustrate the ensuing investigation, Respondent concedes that "in some cases, drivers may flee from collisions even when they are not at fault." (RBOM 18.) That situation arose in *Domingo*, where a drunk driver sideswiped defendant, who became scared and left the scene. (216 P.3d 117.) In addition, there are defendants, like Martinez, who attend the injured person and stay at the scene until paramedics arrive. In such cases, public policy disfavors (1) providing a windfall to a drunk driver who caused the accident and otherwise would be a civil *defendant*; and (2) imposing a lifetime of debt on a driver who did not cause the accident and did not leave the scene until the injured person was in the care of medical professionals.

Regardless, either side of the policy debate must yield to the plain language of the current statutory framework. And importantly, statutes are not necessarily permanent. As this Court recently reiterated, when the Judiciary applies the existing statutory framework to deny the recovery of restitution in a particular context, "it does not preclude the Legislature from providing for such recovery." (*Runyan, supra,* 54 Cal.4th at p. 867.)

Indeed, the history of hit and run restitution in Oregon illustrates the

interplay between the courts and the political process. First, as discussed above, the Oregon Supreme Court addressed whether a trial court may impose restitution for losses arising from the underlying accident. (*Eastman, supra*, 637 P.2d 609, 610.) At the time *Eastman* was decided, the restitution statute mirrored the current language of section 1202.4, permitting recovery for economic damages that "result" from defendant's criminal conduct. (*Id.* at p. 611.) Based on this requirement of causation—and the rule that the traffic accident is not a criminal act—the court reversed the restitution order. (*Id.* at p. 612.)

The Oregon Legislature responded by expanding a trial court's authority to impose restitution following a conviction for a hit and run offense:

> When a person is convicted of violating [one of the hit-and-run statutes], the court, in addition to any other sentence it may impose, may order the person to pay an amount of money equal to the amount of any damages caused by the person as a result of the incident that created the [statutory] duties . . . .

(Or. Rev. Stat. § 811.706 (1995).) As a result of this explicit authorization to impose restitution for noncriminal conduct, "if a defendant convicted of hit and run 'caused' the accident, the defendant may be ordered to pay restitution for damages resulting from the accident." (*State v. Kappelman* (Or. Ct. App. 1999) 986 P.2d 603, 605.)

The California Legislature could follow Oregon's lead, or it might

reach a different conclusion. It might determine the current law properly authorizes restitution limited to losses caused by criminal conduct. It might find "the criminal justice system is essentially incapable of determining that a defendant is in fact civilly liable, and if so, to what extent." (*Richards, supra*, 17 Cal.3d at p. 620.) Or it might decide the burden on a law enforcement investigation does not outweigh the risk of imposing insurmountable debt on a defendant who was the victim of another person's drunk driving. (See *Domingo, supra,* 216 P.3d 117.)

Unless and until the California Legislature takes action to expand the scope of victim restitution to losses caused by noncriminal conduct, however, the current version of section 1202.4 must govern the present case. Because the underlying accidental collision was not criminal conduct, the trial court abused its discretion in ordering Martinez to pay restitution.

II.

BECAUSE MARTINEZ'S UNLICENSED STATUS WHILE DRIVING WAS NEITHER CHARGED NOR THE PROXIMATE CAUSE OF THE ACCIDENT, SECTION 1202.4 DOES NOT AUTHORIZE RESTITUTION FOR THE INJURIES.

The Court of Appeal's decision to vacate the restitution order should not be reversed based on Respondent's new argument that the uncharged allegation of unlicensed driving somehow caused the accident. First, Respondent's Brief in the Court of Appeal never addressed the issue.

Second, even though Martinez initialed a *Harvey* waiver in the plea agreement, the scope of this particular waiver did not encompass an uncharged offense not contemplated by the parties' agreement. And third, firmly established law holds that the offense of unlicensed driving, standing alone, cannot establish fault for a motor vehicle accident.

A. This Court should exercise its discretion to deem Respondent's argument waived.

The issue of whether the trial court improperly imposed restitution based on the uncharged offense of unlicensed driving was raised in Martinez's Opening Brief in the Court of Appeal. (AOB 12-14.) Respondent did not respond to the argument, however, or even mention Martinez's status as an unlicensed driver. Instead, Respondent's Brief focused exclusively on whether the accidental collision was criminal conduct. (RB-COA 1-6.) The Petition for Review similarly omitted any mention of unlicensed driving.

Because Respondent did not raise or develop the issue of unlicensed driving in the Court of Appeal, Martinez requests that this Court use its discretion to deem the issue waived. (See generally *People v. Grimes* (2015) 60 Cal.4th 729, 757-758 [whether to find forfeiture where a party has failed to brief a particular issue "is entrusted to [the appellate court's] discretion"].)

B. As unlicensed driving was not charged, and the *Harvey* waiver was limited in scope, section 1202.4 does not permit restitution based on the uncharged offense.

Under the general rule, if a defendant is sentenced to state prison, restitution must be based on the criminal conduct *for which defendant was convicted.* (See *Lai, supra,* 138 Cal.App.4th 1227, 1249, citing § 1202.4.) Here, Martinez was neither charged with, nor convicted of, unlicensed driving. (1 CT 1-2, 34.) Unless an exception applies, therefore, the uncharged allegation of unlicensed driving cannot justify the restitution order.

Respondent contends this rule does not apply because Martinez executed a *Harvey* waiver in his plea agreement. But the scope of a *Harvey* waiver depends on the actual language in the plea agreement. (See *People v. Snow* (2012) 205 Cal.App.4th 932, 937-938.) Martinez does not dispute that Respondent's position would be valid under the language of a "typical" waiver, such as:

> I agree that the sentencing judge may consider my entire criminal history, the entire factual background of this case, including *any* unfiled, dismissed, stricken charges or allegations, *and all the underlying facts of this case* when granting probation, ordering restitution, or imposing sentence.

(*Id.* at p. 937, fn. 5, italics added.) Thus, under the typical waiver, the court can rely on *any* facts in the record.

In the present case, however, Martinez initialed a *Harvey* waiver with a more limited scope:

> I waive my rights regarding dismissed counts and/or allegation(s) and any charges the district attorney *agrees not to file* to the extent that the Court may consider these factors in deciding whether or not to grant probation and in deciding whether or not to impose a midterm, aggravated or mitigated prison term, the appropriate presentence credits, and as to restitution.

(1 CT 10, italics added.) Notably, this waiver provision does *not* permit the sentencing court to consider "all the underlying facts of this case." Rather, it limits consideration to dismissed counts and uncharged counts, and draws a distinction between them. First, the sentencing court may consider any *dismissed* count, regardless of why it was dismissed. (*Ibid.*) Presumably, this is because a defendant would be on notice, from the charging documents, as to exactly what criminal conduct is in play. Second, by contrast, the court may consider only those *uncharged* allegations that the prosecutor "agrees not to file." (*Ibid.*) This requirement of an agreement between the parties ensures that the defendant will understand the universe of conduct for which he might suffer adverse consequences.

Here, the record does not contain any agreement by the prosecutor not to file a charge for unlicensed driving. The first page of the plea agreement sets forth the full scope of the parties' agreement, which is a plea of guilty to the count of leaving the scene of the accident *in exchange for* (1) two-year state prison sentence, and (2) a concurrent term for the probation violation. (1 CT 9.) The colloquy at the change of plea hearing

confirmed the same terms.[16] (1 RT 3-4.) The guilty plea, therefore, did not involve any agreement by the prosecutor to withhold the charge of unlicensed driving. Under the plain language of the *Harvey* waiver, therefore, the sentencing court was not authorized to consider the unlicensed driving as the basis for restitution.

C. Even if the plea agreement somehow permitted consideration of the uncharged unlicensed driving, the lack of a valid driver's license was not the proximate cause of the collision.

Unless Martinez's unlicensed status while driving caused the victim's injuries, restitution is not proper. (*Lai, supra,* 138 Cal.App.4th 1227, 1249, citing § 1202.4.) An act does not "cause" a harm unless the act is both (1) the cause in fact ("but for" causation); and (2) the proximate cause. (*Jones, supra,* 187 Cal.App.4th 418, 424-425.) In other words, it is not sufficient that "but for" Martinez's unlicensed driving, the collision would not have happened. (*Ibid.*) Rather, Martinez's status as an unlicensed driver must have been "a substantial factor" contributing to the collision. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 657 [noting substantial factor test governs proximate cause].)

In general, being unlicensed is not a substantial factor in causing a

[16] Although the court changed its mind at the sentencing hearing regarding the length of the prison term, Martinez agreed to maintain his plea of guilty with the remainder of the agreement still in place. (1 RT 18-20.)

motor vehicle accident. Lack of a valid driver's license "is not of itself proof that a person is an incompetent or a careless driver." (*Wysock v. Borchers Bros.* (1951) 104 Cal.App.2d 571, 582; see also *People v. Taylor* (1986) 179 Cal.App.3d Supp. 1.) In *Taylor*, for example, defendant was involved in an accident while driving without a valid license. (*Taylor, supra*, 179 Cal.App.3d Supp. at p. 3.) The trial court imposed restitution, as a condition of probation, based solely on the unlicensed driving. (*Id.* at p. 4.) The reviewing court reversed the condition of restitution, holding "the lack of license was not a cause of the accident" and "is collateral to the cause of the injury." (*Id.* at p. 12; see also, e.g., *People v. Costa* (1953) 40 Cal.2d 160, 167 [assuming, without deciding, that trial court erred by allowing evidence of defendant's conditional license to prove defendant's gross negligence while driving].)

Other jurisdictions—those that similarly require proximate causation for restitution—follow the same general rule. Citing to the *Taylor* decision, the Supreme Court of Vermont observed that "[w]hile defendant should not have been driving in light of his license suspension, we do not see how the license suspension alone can be deemed a proximate cause of the victim's injuries." (*State v. LaFlam* (Vt. 2008) 965 A.2d 519, 523; see also, e.g., *State v. McDonough* (Me. 2009) 968 A.2d 549, 551 [stating "there is no nexus between the act of driving while one's license is suspended and driving negligently so as to cause an accident"]; *Schuette v. State*

(Fla. 2002) 822 So.2d 1275, 1283 [holding "suspension of the license was an existing circumstance, rather than a cause of the accident"].) Simply put, in "[d]riving without a license, defendant could have driven negligently or safely." (*LaFlam, supra*, 965 A.2d at p. 523.)

Thus, the allegation of unlicensed driving, without more, is insufficient to authorize restitution under section 1202.4. Instead, the record must establish "some causal relationship between the injuries and the failure to have a license. . . ." (*Strandt v. Cannon* (1938) 29 Cal.App.2d 509, 518; see also *Schuette, supra*, 822 So.2d at p. 1283 [upholding trial court's refusal to impose restitution because "[w]hat is missing in this case is a causal relationship between the act of driving without a license and the accident that resulted in damages"].) Such a causal relationship may exist in a case where the record shows that defendant's unlicensed status is a function of defendant's inability to drive safely. The decision of *In re A.M.* (2009) 173 Cal.App.4th 668, cited by Respondent, illustrates the point. There, the minor struck a bicyclist while driving without a license; she possessed only a driver's "permit," which requires an adult to be in the car. (*Id.* at pp. 670-671.) The minor admitted that the night of the accident "was the first time she drove alone." (*Id.* at p. 670.) The record showed that the minor "was unprepared for the common traffic encounter with a bicyclist, was unable to control the car despite traveling at only 37 miles per hour, and never even knew she hit the pedestrian." (*Id.* at p. 674) Based on this

record, the trial court "found as a matter of fact that 'the minor's lack of skill, her inexperience, . . . played a role in this.'" (*Id.* at p. 673, quoting juvenile court's oral findings.) Thus, the causal link between the injuries and the lack of a valid driver's license was clear. The minor did not have a license because she was not sufficiently experienced to drive safely.

But the present record contains no evidence that Martinez was unlicensed due to inexperience or unsafe driving. Further, the actual incident did not involve unlawful driving. To the contrary, even the victim's mother described the collision as an accident. (1 RT 13.) Based on the record, therefore, Martinez's status as an unlicensed driver was not the proximate cause of the victim's injuries. To the extent the trial court based restitution on unlicensed driving, the restitution order was an abuse of discretion.

CONCLUSION

After being involved in an accidental collision, Martinez stayed at the scene until paramedics arrived. His criminal act of eventually leaving the scene did not cause or aggravate the boy's injuries. Because the harm arose from the underlying accident—which is not a criminal act—the trial court abused its discretion by imposing victim restitution of $425,654.63. This Court should affirm the Court of Appeal's decision, which properly reversed the restitution order.

Respectfully submitted,

Dated: Febuary 3, 2015

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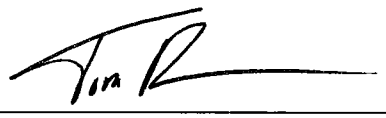
CERTIFICATION OF WORD COUNT

Appellate counsel certifies in accordance with California Rules of Court, rule 8.520, subdivision (c)(1), that this brief contains 9,226 words as calculated by the Microsoft Word software in which it was written.

I certify under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on February 3, 2015.



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Proof of Service

People v. Martinez

California Supreme Court No.: S219970

I, the undersigned, declare that I am over 18 years of age, residing or employed in the County of San Diego, and not a party to the instant action. My business address is listed above. I served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by placing true copies in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses on February 4, 2015:

Office of the District Attorney Appellate Division 412 West Hospitality Lane, 1st Floor San Bernardino, CA 92415-0042	California Court of Appeal Fourth Appellate District, Div. Two 3389 Twelfth Street Riverside, CA 92501
Clerk of Court, Appeals Division San Bernardino County Superior Ct. 247 W. Third Street, 2nd Floor San Bernardino, CA 92415-0063	Michael L. DeFrank (trial counsel) 35325 Date Palm Drive #123 Cathedral City, CA 92234-7030
Mr. Dennis Terry Martinez 7224 Woodward Avenue 29 Palms, CA 92277	

I additionally declare that I electronically served a copy of the above document from my electronic service address, *thomas@robertsonSDlaw.com*, by 5:00 p.m. on the date listed above, on the following persons and entities:

Appellate Defenders Inc.: *eservice-criminal@adi-sandiego.com*
Attorney General's Office: *ADIEService@doj.ca.gov*
Michael Pulos, Esq, attorney for Respondent: *Michael.Pulos@doj.ca.gov*
California Supreme Court, via the e-submission procedures

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 4, 2015.

Tom R

Thomas E. Robertson