S219970

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. E057976

SUPREME COURT
FILED

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Deputy

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

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE,
CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE CALIFORNIA SUPREME COURT:

Petitioner, the People of California, respectfully petitions this Court to grant review, pursuant to rule 8.500 of the California Rules of Court, of the above-entitled matter, following the issuance of a published opinion on June 6, 2010, by the Court of Appeal, Fourth Appellate District, Division Two, holding a victim of a hit-and-run (Veh. Code, § 20001, subd. (a)) cannot recover, via restitution, economic losses suffered as a result of the collision. A copy of the Court of Appeal's opinion is attached.

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?

REASONS FOR GRANTING REVIEW

Review of this case is necessary to secure uniformity of decision and to settle an important question of law. (Cal. Rules of Court, Rule 8.500, subd. (b)(1).

This Court has previously resolved the issue of whether trial courts can impose restitution for losses resulting from the collision in a hit and run case as a condition of probation. (*People v. Carbajal* (1995) 10 Cal.4th 1114 (*Carbajal*).) That decision left unresolved the present question—whether restitution can also be imposed where the court imposes a prison sentence. Two divisions of the Fourth District Court of Appeal have addressed this issue and reached contrary results. In *People v. Rubics* (2006) 136 Cal.App.4th 452 (*Rubics*), Division One of the Fourth District Court of Appeal concluded that ordering restitution was permissible

because the collision itself was an element of the offense. In the instant case, Division Two of the Fourth District Court of Appeal concluded restitution in hit and run cases is limited to the losses that flow from the defendant's flight, because the "gravamen" of the offense is the "running," not the "hitting." (Slip Op. 6.)

Accordingly, respondent respectfully requests that this Court grant review to secure uniformity of decision in this inter-divisional split and settle this important question of law. Granting review will provide needed guidance to lower courts tasked with ordering restitution in such cases.

STATEMENT OF THE CASE

On April 26, 2012, appellant was driving his truck when he collided with a 12-year old boy riding a scooter. (CT 88 [police report].) Appellant initially stopped to check on the victim, but then got back in his car and fled the scene. (Ibid.) The victim received immediate medical attention, but was seriously injured and required an extended hospital stay. (CT 90, 99.)

In July 2012, appellant pleaded guilty to hit and run with injury (Veh. Code, § 20001, subd. (a); count 1), and was sentenced to three years in prison. (RT 6, 26-27.)

The court conducted a restitution hearing on December 31, 2012. (RT 29.) There, defense counsel argued the court could not impose direct victim restitution because appellant did not cause 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, *Rubics*, *supra*, 136 Cal.App.4th 452, the trial court found 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.) At a separate hearing on April 2, 2013, the parties stipulated to the amount of restitution owed, which was $425,654.63. (RT 39; CT 80-81.)

Appellant appealed the imposition of restitution, asserting the same argument he presented below: he was not liable for the economic losses suffered by the victim because the losses were attributable to the collision, for which appellant claimed he was not at fault. He argued the "gravamen" of a hit and run offense is the "running," not the "hitting." The Court of Appeal agreed and expressly disagreed with the holding in *Rubics*. (Slip Op. 10-11.) The court reversed the restitution award and remanded the case to the trial court for a hearing to determine if any of the economic losses could be attributed to appellant's flight. (Slip Op. 17.)

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL AND TO PROVIDE GUIDANCE TO LOWER COURTS TASKED WITH ORDERING RESTITUTION IN HIT AND RUN CASES

In *Carbajal*, this Court held, "it is within the trial court's discretion in [ ] a [hit-and-run] case to *condition probation* on payment of restitution to the owner of the property damaged in the accident from which the defendant unlawfully fled." (*Carbajal, supra*, 10 Cal.4th at p. 1119, emphasis added.) The crux of the decision in *Carbajal* was that an award of restitution in a hit and run case is permissible because of the trial court's discretion to impose probation conditions that serve rehabilitative or deterrent purposes. (*Id.*, at pp. 1123-1125.) Thus, this Court evaluated the restitution award under the factors established in *People v. Lent* (1975) 15 Cal.3d 481, 486. (*Carbajal, supra*, 10 Cal.4th at p. 1124.)

This case presents the obvious follow-up question: can restitution be imposed where the defendant is not granted probation, but is instead sentenced to prison?

In *Rubics*, the court answered the question in the affirmative. (*Rubics, supra*, 136 Cal.App.4th at p. 454.) Here, a different division of the Fourth

District Court of Appeal reached the opposite conclusion. (Slip Op. 7.) Both opinions are published.

Similar to the instant case, the defendant in *Rubics* was involved in a collision. The defendant hit and killed a man on a motorcycle and eventually pleaded guilty to felony hit and run under Vehicle Code section 20001, subdivisions (a) and (b)(2). (*Id.*, at p. 454.) On appeal, *Rubics* claimed he was not responsible for direct victim restitution because he did not cause the vehicle collision. (*Ibid.*) He argued, as appellant did here, that his criminal conduct was fleeing the scene of the accident, not the accident itself. And because the injuries to the victim resulted from the accident, and not the flight, victim restitution could not be ordered. The Court of Appeal rejected this argument.

The *Rubics* court concluded restitution could be imposed because involvement in the accident was an element of the offense of which appellant was convicted. (*Rubics, supra*, 136 Cal.App.4th at p. 458.) In other words, there could be no "hit and run" without a collision. The *Rubics* court recognized the distinction between ordering restitution as a condition of probation, as in *Carbajal*, and ordering restitution where the defendant receives a prison sentence: "Thus, in our case, restitution must be for economic damages resulting from the crime of which *Rubics* was convicted, not merely those 'reasonably related' to the crime." (*Id.* at p. 460.)

Relying on language from *Carbajal, Rubics* noted this Court's description of the nature of the criminal act of fleeing as follows:

> 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. This commonly entails a real, economic loss, not just an abstract affront. Among other things, the crime imposes on the nonfleeing driver the additional costs of locating the fleeing driver and, in some cases, the total costs

> of the accident. "The cost of a 'hit and run' violation is paid for by every law-abiding driver in the form of increased insurance premiums. The crime with which the defendant is charged is complete upon the 'running' whether or not his conduct caused substantial or minimal (or indeed any) damage or injury; it is the running which offends public policy."

(*Rubics, supra*, 136 Cal.App.4th at pp. 460-461, quoting *Carbajal, supra*, 10 Cal.4th at p. 1124.) Based in part on the language from *Carbajal*, the *Rubics* court concluded the restitution award was permissible because the collision was an element of the offense, and the policy reasons that permitted the restitution award in *Carbajal* applied equally to a restitution award where the defendant is sentenced to prison. (*Rubics, supra*, 136 Cal.App.4th at p. 461.)

The Court of Appeal in this case rejected the holding in *Rubics*, and held that restitution in a hit and run case is limited to the economic losses that flowed directly from the defendant's flight, i.e. any exacerbation of the victim's injuries as a result of delayed medical attention, etc. (Slip Op. 2-3, 17.) In so finding, the court relied on a handful of earlier opinions that concluded that "[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." (Slip Op. 6; citing *People v. Escobar* (1991) 235 Cal.App.3d 1504, 1508 (*Escobar*); *People v. Valdez* (2010) 189 Cal.App.4th 82, 85 (*Valdez*); *People v. Wood* (2000) 83 Cal.App.4th 862, 866 (*Wood*); and *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1340 (*Corenbaum*).)

With the exception of *Escobar*, these cases addressed different, unrelated statutory interpretation issues. (*Valdez, supra*, 189 Cal.App.4th at p. 90 [whether injuries sustained in a hit and run accident were inflicted "*in*

the commission of a felony or attempted felony" under Penal Code[1] § 12022.7, subd. (a)]; *Wood, supra,* 83 Cal.App.4th at pp. 863-864 [whether a conviction for hit and run, during which the victim is seriously injured, automatically qualifies as a serious felony under § 667, subds. (b)-(i)]; *Corenbaum, supra*, 215 Cal.App.4th at p. 1339 [whether a plaintiff in a civil lawsuit could recover attorney fees under Code of Civil Procedure section 1021.4].)

In *Escobar, supra*, 235 Cal.App.3d at p. 1512, the court held imposition of restitution was prohibited even as a condition of probation. *Escobar* predated *Carbajal*, and thus, has been overruled.

Relying on the language in these cases regarding the "gravamen" of the hit-and-run offense, the Court of Appeal here expressly limited the restitution award to any amount that could be attributed to defendant's flight. Practically speaking this would preclude a victim from recovering any losses that flow from the collision itself in any hit and run case, even if it is abundantly clear from the record that the defendant was at fault for the accident. This conclusion conflicts with section 1202.4, subdivision (f), which requires trial courts to impose restitution for any economic losses suffered "as a result of the defendant's conduct." (§ 1202.4, subd. (f).) The statute says nothing of restricting restitution to only those losses that flow from the "gravamen" of the offense—the test used by the court here.

The facts of *Rubics* underscore the unfairness of the new rule espoused by Division Two in the present case. In *Rubics*, the record indicated that on the morning of the accident, *Rubics* took one hit of marijuana, and then drove to the beach where he drank five beers and smoked another "bowl" of marijuana. He left the beach to drive home. He approached an intersection, paused at a stop sign and turned left. As he was

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[1] Future unlabeled statutory references are to the Penal Code.

making the turn, he collided with a motorcycle. An accident reconstructionist determined the victim was travelling over the speed limit, but that *Rubics* caused the accident by failing to yield before he turned. (*Rubics, supra*, 136 Cal.App.4th at p. 454-455, 462.) The victim died at the scene. (*Id.*, at 455.) Presumably, *Rubics* could not be prosecuted for driving under the influence of drugs and alcohol because he fled the scene and thus avoided having to submit to timely chemical tests. If *Rubics* were governed by the opinion issued in the instant case, the victim could not recover any restitution because none of the economic losses his family suffered (i.e. funeral costs, etc.) flowed from *Rubics*' flight. The victim received immediate medical attention, and died at the scene. The substantial evidence that *Rubics* was indeed at fault for the collision and caused the economic losses suffered by the victim's family would not suffice to entitle them to recover any restitution because none of the victim's injuries were exacerbated by the defendant fleeing the scene.

Often, the difficulty in determining fault in a hit and run scenario is because of the flight. As this Court recognized in *Carbajal*, a defendant's flight prevents authorities from collecting contemporaneous witness statements, shifts the focus of the investigation, and allows a defendant an opportunity to craft a fabricated story and to hide or destroy evidence. (*Carbajal, supra*, 10 Cal.4th at p. 1124.) That happened in this case because the investigation focused on identifying appellant and his truck, rather than determining who was at fault for the collision. (CT 88.) Thus, the flight is connected to the determination of fault for the collision and it is equitable to hold the defendant responsible for the restitution that flows from the collision.

In addition, limiting restitution to the amount that can be tied to the flight creates an incentive for defendants to flee where it is clear they are at fault for the collision itself, and the victim is likely to receive immediate or

near-immediate medical attention (i.e. if the defendant is under the influence). Defendants may decide the risk of a conviction for a hit and run is better than the conviction *and* restitution for the driving under the influence or reckless driving offense of which they know they are guilty.

The opinion in this case also creates an incentive that undermines the purpose of a grant of probation for suitable defendants. Because *Carbajal* permits restitution in probation cases, prohibiting restitution in prison cases creates a perverse incentive for defendants to decline probation and choose prison, especially in cases like this one where the prison sentence was relatively short but the restitution award was relatively high.

Finally, Proposition 8 established a constitutional right to restitution for crime victims. (Cal. Const., art. I, § 28, subd. (b).) Permitting restitution in probation cases, while prohibiting it in prison cases, necessarily means that the victim's recovery of restitution is dependent on the trial court's exercise of its sentencing discretion. This conflicts with the clear intent of the citizens in establishing a victim's independent constitutional right to restitution.

In sum, in addressing the very same issue, the Court of Appeal in this case and the court in *Rubics* reached opposite conclusions. For the reasons set forth above, the opinion here is incorrect. With two published cases from the same appellate district addressing the issue and reaching diametrically opposing conclusions, the quest for uniformity and consistency is impossible without guidance from this Court. This Court's review is of the utmost importance to resolve the conflict and give the lower courts guidance on their authority to impose restitution awards in these cases.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant review in the present case.

Dated: July 16, 2014

Respectfully submitted,

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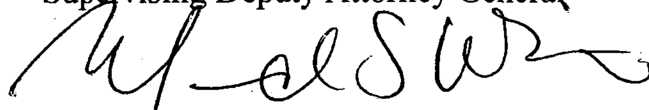

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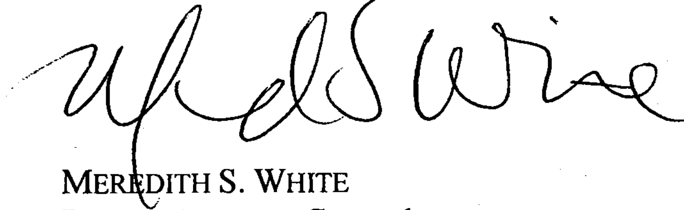
CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains **2, 447** words.

Dated: July 16, 2014

KAMALA D. HARRIS
Attorney General of California



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ATTACHMENT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Court of Appeal
Fourth Appellate District
Division Two
ELECTRONICALLY FILED

8:58 am, Jun 06, 2014

By: B. Gonzalez

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS TERRY MARTINEZ,

Defendant and Appellant.

E057976

(Super.Ct.No. FMB1200197)

OPINION

APPEAL from the Superior Court of San Bernardino County. Daniel W. Detienne, Judge. Reversed with directions.

Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Dennis Terry Martinez pled guilty to leaving the scene of an accident

(count 1; Veh. Code, § 20001, subd. (a))[1] and admitted the offense constituted a violation of his probation. In return for his plea, the People agreed to the low term of two years' incarceration on count 1 and a concurrent midterm of two years on his violation of probation. The sentencing court later indicated it would not permit the plea to the agreed upon term. The court offered to allow defendant to withdraw his plea and set the matter for a preliminary hearing or proceed with the plea with the understanding the court would sentence defendant to the midterm of three years' imprisonment with a concurrent three-year term for the violation of probation. Defense counsel indicated defendant's acquiescence to the court's proposed disposition.[2]

The court sentenced defendant to the three-year term, but reserved jurisdiction on the issue of victim restitution. After a contested restitution hearing, the court ordered victim restitution in the amount of $425,654.63. On appeal, defendant contends the court abused its discretion in awarding victim restitution for the injuries sustained by the victim because defendant did not plead to any criminal offense regarding the collision which caused those injuries and no factual determination was made that he was responsible for the accident. We reverse the restitution award. The matter is remanded to allow the People to file a motion, in their discretion, for restitution in which they will bear the burden of proving an amount, if any, which reflects the degree to which the victim's

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[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

[2] No new plea was taken either orally or in writing to reflect the new, agreed upon disposition. Defendant did not personally indicate his acceptance of the new term.

injuries were exacerbated, if at all, by defendant's flight. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY[3]

On April 26, 2012, at approximately 6:30 p.m., defendant, driving his vehicle, and the 12-year-old victim, riding on a scooter, collided in the street. Defendant stopped his vehicle and checked on the victim. The victim's mother came screaming over to her son. Defendant fled when he discovered the victim's injuries might be life threatening. Defendant was on probation and driving without a license.

The victim was taken to the Intensive Care Unit (ICU) of Loma Linda University Medical Center (LLUMC). He sustained multiple broken facial bones and a serious head injury resulting in brain swelling.

Within 24 hours of investigation, officers discovered defendant's identity. Defendant voluntarily came forward thereafter. He admitted knowing that leaving the scene of the accident was a criminal offense. Defendant admitted ingesting medical grade marijuana at 8:00 a.m. the day of the accident, but said he no longer felt the effects by 11:00 a.m. Defendant maintained the collision was an accident.

After defendant's plea, a probation report prepared for sentencing recommended defendant be sentenced to the upper term of four years, conflicting with the disposition agreed upon in the plea agreement. Defendant's felony probation had been previously

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[3] The parties stipulated the factual basis for the plea was contained in the felony complaint and police report. We take a portion of our factual recitation from those sources.

revoked once.

The probation officer noted the victim had been released from LLUMC's ICU after two weeks. The victim was transferred to the children's rehabilitation center in Orange County where he had since remained. The victim had no short-term memory and was unable to walk without assistance. The victim was relearning to walk and talk. It was anticipated the victim would undergo 12 weeks of intensive neurological therapy. Defendant had been uninsured at the time of the collision. The bill for the victim's stay at LLUMC alone was $500,000. The victim's mother's insurance deductible was $10,500.

The victim's mother made a statement at defendant's sentencing hearing. She noted "The fact that my son collided with the vehicle was an accident." The victim's mother indicated the victim had "multiple facial fractures, a fractured clavicle[,] and was diagnosed with traumatic brain injury." The victim suffered brain swelling for which doctors had to insert a brain swelling monitor in his skull. The victim had been moved to Orange County on May 11, 2012, and was sent home after five weeks.

Subsequent to sentencing, the parties briefed the issue of whether defendant could be ordered to pay restitution for the medical costs incurred by the victim as a result of the collision. The People noted the victim's bill for his stay at LLUMC alone was $425,654.63. At the contested restitution hearing, the court decided to follow the decision in *People v. Rubics* (2006) 136 Cal.App.4th 452 (Fourth Dist., Div. One) (*Rubics*), which held that a defendant convicted of fleeing the scene of an accident could be ordered to pay restitution for costs incurred by the victim as a result of the collision.

The court continued the matter for a hearing on the amount of restitution to order. Counsel filed a stipulation in the amount of $425,654.63 for a victim restitution order. The stipulation reserved defendant's right to appeal the court's determination it could order victim restitution for the results of the accident. The court granted victim restitution in the amount stipulated.

DISCUSSION

Defendant contends the court erred in following *Rubics* because decades of precedent have characterized the illegal act of hit-and-run as fleeing the scene, not causing the actual collision. Thus, because defendant was not convicted for any offense involving responsibility for the actual accident and no factual determination of his responsibility for the collision or the victim's injuries has been made, the court erred in ordering restitution to the victim for treatment of the injuries he received as a result of the accident. We agree.

We review a trial court's order of restitution for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) "While we review all restitution orders for abuse of discretion, we note that the scope of a trial court's discretion is broader when restitution is imposed as a condition of probation." (*Ibid.*, fn. 7.) "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." (Pen. Code, § 1202.4, subd. (a)(1).)

Penal Code "section 1202.4 contains no provision that permits an award of restitution for losses caused by uncharged crimes when the defendant is sentenced to state

prison." (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1248.) The rationale that restitution may be imposed for economic loss not directly resulting from the commission of a crime for which a defendant has been convicted "is inapplicable to a nonprobationary sentence, in which the broad discretion to impose probationary conditions does not exist." (*Ibid.*) "[W]hen a defendant is sentenced to state prison, [Penal Code] section 1202.4 limits restitution to losses caused by the criminal conduct for which the defendant was convicted." (*Id.* at p. 1246 [Remanding for deletion a restitutionary award ordered for acts occurring before the crimes for which the defendants were convicted].)

"The gravamen of a section 20001 offense . . . is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid. Thus, a plea of guilty to a 'hit-and-run' offense admits responsibility for leaving the scene but not for causing injury. Restitution is proper only to the extent that the victim's injuries are caused or exacerbated by the offender's leaving the scene." (*People v. Escobar* (1991) 235 Cal.App.3d 1504, 1508 [Restitutionary award of $2,000 for personal injuries resulting in lost wages and out of pocket expenses in a hit-and-run case reversed as "tantamount to an assignment of civil liability in violation of [defendant's] civil due process rights."]; accord *People v. Valdez* (2010) 189 Cal.App.4th 82, 85, 90 [Noting this "'decisional law that unequivocally holds that the purpose of section 20001, subdivision (a) is to punish "not the 'hitting' but the 'running'"'"]; *People v. Wood* (2000) 83 Cal.App.4th 862, 866; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1340 [declining to follow *Rubics*]; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1124; contra. *Rubics*, *supra*.)

The court below understandably relied on *Rubics* in rendering its judgment that defendant could be ordered to pay restitution for the effects of the collision. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4 ["As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so."].) Nevertheless, we find *Rubics* factually distinguishable from the instant case. Moreover, to the extent *Rubics* could be viewed as binding on the court below, we disagree with its holding. Unlike the lower court, we are not bound to follow *Rubics*. (*Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476, 1483, abrogated on another ground in *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 368.) We find that *Rubics* is an anomaly in an otherwise "unbroken line of cases stretching back more than 50 years." (*People v. Valdez, supra,* 189 Cal.App.4th at pp. 85, 89.) Thus, we hold that a court cannot order a defendant 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. (*People v. Escobar, supra,* 235 Cal.App.3d at p. 1509 ["Restitution is proper only to the extent that the victim's injuries are caused or exacerbated by the offender's leaving the scene."].)

In the first instance, *Rubics* is distinguishable from the present case for a number of reasons. First, much of *Rubics*'s analysis of the issue was premised on the fact that, in its case, the defendant had not only been convicted of fleeing the scene (§ 20001, subd. (a)), but had also admitted an allegation under section 20001, subdivision (b)(2), that the accident had resulted in death. (*Rubics*, *supra*, 136 Cal.App.4th at p. 454.) *Rubics* noted

one of the elements of the crime of which the defendant pled guilty required that it resulted in the death of any person. (*Id.* at p. 458.) It noted the jury instruction for the offense reflected knowing involvement in an accident resulting in the death of another person. (*Ibid.*) It summarized its analysis by noting the defendant's "involvement in an accident causing [] death is an element of his felony hit-and-run offense." (*Ibid.*) Here, defendant did not admit an allegation the accident resulted in death because no such allegation was charged as no one was killed.

Second, the restitution awarded in this case was of a different kind and in a much larger amount than that awarded in *Rubics*. The lower court in *Rubics* awarded $44,414 to the victim's family for funeral expenses. (*Rubics*, *supra*, 136 Cal.App.4th at p. 456.) Here, the court awarded $425,654.63, apparently for the victim's stay at LLUMC. Here, it would be incongruous to apply the *Rubics* rule when the *Rubics* case involved the death of the victim while the victim in the instant case did not die. In other words, a defendant should not benefit from the fact that the victim in his case has died, thereby resulting in a lesser amount of victim restitution than if that victim had lived, but required extended, expensive hospitalization and care.

Third, there was a factual predicate for determining the defendant's fault in the accident at issue in *Rubics*. The defendant in *Rubics* admitted to smoking copious amounts of marijuana and drinking five beers before the collision. (*Rubics*, *supra*, 136 Cal.App.4th at p. 455.) The defendant failed to stop at a stop sign, made an unsafe left turn, and collided with the victim's motorcycle. (*Id.* at pp. 455, 462.) The accident investigator determined the defendant caused the accident by failing to yield to the

victim. (*Id.* at p. 462.) The defendant admitted leaving the scene of the accident "because he was afraid that he was going to be arrested for driving under the influence." (*Id.* at p. 455.) Thus, the defendant in *Rubics* effectively admitted culpability for the collision and his responsibility had also been independently determined.

We are in no way here making any factual determination as to whether defendant was responsible for the collision which resulted in the victim's injuries and damages. Nevertheless, we note that no evidence below was adduced that defendant bore any culpability for the collision itself or that his flight exacerbated the injuries to the victim. The victim apparently collided with the defendant's vehicle while riding his scooter in the street. Although defendant admitted to using marijuana, he reported having done so at 8:00 a.m. on the day of the accident. He indicated he had stopped feeling its effects by 11:00 a.m. on that day. The collision occurred at 6:30 p.m., 10 and a half hours after using the intoxicant and seven and a half hours after its effects had worn off. Both defendant and the victim's mother described the collision as an accident.

Indeed, in *People v. Woods* (2008) 161 Cal.App.4th 1045, the court distinguished *Rubics* on this very basis, i.e., that the fleeing driver may only be held responsible "'*for the damages he or she has caused* by being involved in the accident itself.' [Citation.]" (*Id.* at p. 1053.) Similarly, the court in *Corenbaum v. Lampkin, supra,* 215 Cal.App.4th 1308, observed "[t]he occurrence of an injury accident is a condition precedent to the imposition of duties upon the driver under [section] 20001, subdivision (a) . . ., but is not an element of the crime . . . . [Citation.]" (*Id.* at p. 1340.) "To the extent that [*Rubics*] suggested that a conviction under [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 . . . . (*Id.* at p. 1341, fn. 22.) Here, there was no evidence defendant caused the accident or exacerbated the victim's injuries by fleeing.

Although we find the decision in *Rubics* factually distinguishable from the present case, we are also cognizant of the broad language in *Rubics* which would appear to make its holding applicable to restitution for any damages sustained by a victim as a result of a hit and run regardless of the facts. Indeed, *Rubics* held that "although a primary focus of section 20001 may be the act of leaving the scene, a conviction also acknowledges the fleeing driver's responsibility for *the damages* he or she has caused by being involved in the accident itself." (*Rubics, supra,* 136 Cal.App.4th at p. 459, italics added.) Similarly, the court held that "because an element of the crime of felony hit and run under section 20001, subdivisions (a) and (b)(2) is a defendant's involvement in an accident resulting in *the injury* or death of another, restitution is proper in such a situation because the loss was incurred as a result of the commission of the crime." (*Id.* at p. 454, italics added.) Thus, the expansive language of *Rubics*'s holding would appear to give trial courts broad discretion to order victim restitution for any damages sustained in a hit-and-run collision regardless of whether the defendant has been convicted of any offense involving his culpability in the collision, without any evidence of his responsibility for the accident, without any evidence that his flight exacerbated the victim's injuries, and in any amount. We disagree with this holding.

Although *Rubics* acknowledged two cases cited to it by defendant which directly

contradict its own holding, the court did not distinguish or disagree with either.[4] Indeed, the court declined to discuss those cases, or any of the others establishing the "unbroken line of cases stretching back more than 50 years" which ran contrary to its holding. (*People v. Valdez*, *supra*, 139 Cal.App.4th at p. 89; *Rubics*, *supra*, 136 Cal.App.4th at pp. 458-459.) Instead, *Rubics* relied primarily on the decision of our Supreme Court in *People v. Carbajal, supra,* 10 Cal.4th 1114. (*Rubics*, *supra*, at pp. 459-461.)

In *Carbajal*, the California Supreme Court held "it is within the trial court's discretion in [] a [hit-and-run] case to *condition probation* on payment of restitution to the owner of the property damaged in the accident from which the defendant unlawfully fled. A restitution condition in such a case can be reasonably related to the offense underlying the conviction and can serve the purposes of rehabilitating the offender and deterring future criminality." (*People v. Carbajal, supra,* 10 Cal.4th at p. 1119, italics added.) *Carbajal* acknowledged "that in the context of the hit-and-run statute, the restitution condition may relate to conduct that is not in itself necessarily criminal, i.e., the probationer's driving at the time of the accident." (*Id.* at p. 1123 [fn. omitted].) Nevertheless, the court held that "a trial court, in the proper exercise of its discretion, may condition *a grant of probation* for a defendant convicted of fleeing the scene of an accident on payment of restitution to the owner of the property damaged in the accident." (*Id.* at pp. 1126-1127, italics added.)

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[4] The court noted the defendant had exposited both *People v. Escobar, supra,* 235 Cal.App.3d at p. 1509, and *People v. Wood* (2000) 83 Cal.App.4th 862, 866, in support of his contention the court's ordered restitution should be reversed. (*Rubics*, *supra*, 136 Cal.App.4th at pp. 458-459.)

Of course, the primary difference between *Carbajal* and *Rubics* is the former court permitted victim restitution for a collision in a hit-and-run case, regardless of any determination of the defendant's culpability in the collision itself, *only when it was ordered as a condition of probation.* (*People v. Carbajal, supra,* 10 Cal.4th at pp. 1119, 1126-1127.) In *Rubics*, the court permitted such victim restitution in a case in which the defendant was sentenced to prison. (*Rubics*, *supra*, 136 Cal.App.4th at p. 454.) *Rubics* acknowledged this difference, but found the policy reasons for permitting an order of such restitution in a probation case did not differ from one in which the court sentenced a defendant to prison. (*Id.* at pp. 459-461.)

Rubics discerned *Carbajal*'s overall approval of victim restitution where the damages were reasonably related to the accident. (*Rubics*, *supra,* 136 Cal.App.4th at p. 460.) *Rubics* observed that *Carbajal* concluded restitution is related to the goal of deterring future criminality which the restitution ordered in *Rubics* also served. (*Id.* at p. 461.) It also noted *Carbajal* found restitution ""an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, *the harm his actions have caused.*""' [Citations.]" (*Ibid.*) [5] Thus, *Rubics* found *Carbajal* supported "the conclusion that the court's restitution order was proper in this case." (*Ibid.*)

However, an examination of *Carbajal* itself reveals the fact that the underlying court had ordered restitution *as a condition of probation* was not simply a factor in its

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[5] Though, notably, *Carbajal* made all these determinations within the *People v. Lent* (1975) 45 Cal.3d 481, framework analysis for determining whether *a term or condition of probation* is appropriate. (*People v. Carbajal*, *supra,* 10 Cal.4th at p. 1124.)

determination of whether such an order was appropriate, but *the* factor. *Carbajal* observed "California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a *condition of probation* even when the loss was not necessarily caused by the criminal conduct underlying the conviction." (*People v. Carbajal, supra,* 10 Cal.4th at p. 1121, italics added.) As a *condition of probation* "[t]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action." (*Ibid.*)

Carbajal disagreed with the defendant's contention a court could not order victim restitution for losses which did not result from the defendant's criminal acts because the statutory scheme could not "'be construed to limit the authority of the court to grant or deny probation or *provide conditions of probation.*' [Citation.]" (*People v. Carbajal, supra,* 10 Cal.4th at p. 1122.) Thus, it concluded that nothing in constitutional or statutory law "purports to limit or abrogate the trial court's discretion . . . 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, but where the trial court finds such restitution will serve one of the purposes" of reformation or rehabilitation inherent in a decision *to grant probation.* (*Ibid.*, italics added.) The court spent the remainder of its opinion analyzing whether the ordered victim restitution was appropriate within the context of the *Lent* framework for determining the propriety of conditions of probation. (*Id.* at pp. 1122-1127.) Therefore, *Carbajal* can in no way be construed as authority for the proposition that victim restitution may be ordered in a hit-and-run case for a collision

for which the defendant has not been convicted of any criminal offense and no evidence supports the defendant's culpability for the collision or exacerbation of the victim's injuries due to defendant's flight.

Indeed, *Rubics* itself acknowledged that "[a]t first blush, the *Carbajal* decision does not appear helpful because courts have far greater leeway in selecting appropriate restitution as a condition of probation. Our Supreme Court has observed that a trial court has broad discretion to impose probation conditions to foster rehabilitation and protect public safety. [Citation.]" (*Rubics, supra,* 136 Cal.App.4th at p. 459.) In fact, as noted above, it has long been acknowledged that courts retain broader discretion to order victim restitution when it is a *condition of probation.* (*People v. Giordano, supra,* 42 Cal.4th at p. 663, fn. 7.) As *Rubics* further noted, the discretion afforded courts in prescribing conditions of probation is broad "because probation is an '""act of clemency and grace,""' not a matter of right. [Citation.] '[T]he granting of probation is not a right but a privilege, and if the defendant feels that the terms of probation are harsher than the sentence for the substantive offense[,] he is free to refuse probation.' [Citations.] Because a defendant has no right to probation, the trial court can impose *probation conditions that it could not otherwise impose,* . . . It is not limited to damages specifically caused by the crime of which the defendant was convicted." (*Rubics,* at pp. 459-460, italics added.)

Here, however, we are not discussing a condition of probation. Rather, the court ordered defendant to pay victim restitution for the collision when he was not convicted of any offense involving responsibility for the collision, no evidence in the record appears to

indicate any culpability on his part in the collision, no evidence demonstrates the victim's injuries were exacerbated due to defendant's flight, and the court sentenced defendant to three years' imprisonment. Defendant was not afforded the freedom to refuse the ordered restitution even if he believed it was harsher than the sentence for the substantive offense because he was already sentenced for the substantive offense. Indeed, as *Rubics* further observed "[a]n entirely different set of constitutional considerations comes into play where, as here, the defendant is sentenced to prison. The constitutional guaranty of a jury trial and due process requires that the jury decide all material issues in support of the charges. [Citations.] A corollary to this guaranty is that a defendant will not be punished for a crime for which a jury has not determined the defendant's guilt." (*Rubics*, *supra*, 136 Cal.App.4th at p. 460.) Here, defendant was not afforded any constitutional protections in what amounted to a judicial determination of guilt and liability for the collision. The ordered $425,654.63 in victim restitution would, to many people, be deemed harsh punishment in and of itself.

Indeed, if the People believed defendant guilty for causing the collision, they could have charged defendant for 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. If defendant was convicted of such a charge, victim restitution for the collision would then be appropriate. In fact, even if defendant was not convicted of such a charge, but the plea agreement included a

Harvey[6] waiver, restitution could still be imposed for the consequences of the collision. (*People v. Snow* (2012) 205 Cal.App.4th 932, 937, fn. 5.) Here, although defendant executed a *Harvey* waiver as part of his plea, there were no other charges in the felony complaint and defendant's plea did incorporate any agreement by the People not to file any further charges.

The People might argue that by fleeing, defendant ensured any evidence of his culpability in the collision was thereby eradicated. (*People v. 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.") However, a review of the contents of the police report reveal this is not the case.

At least two individuals witnessed the accident: the individual who gave police a description of defendant's vehicle and the victim's mother. If defendant was driving recklessly, evidence from these two sources could have been adduced to establish such. As noted above, mother indicated it was the victim who collided with defendant. Defendant likewise indicated the victim hit defendant's vehicle when the victim failed to stop. Moreover, defendant's vehicle was found within 24 hours of the accident, apparently before any repairs could have been or were made. Defendant's vehicle had only two small dents from the accident; no blood was on the car. A blood draw of defendant was conducted, apparently for toxicology purposes, within 26 hours of the

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[6] *People v. Harvey* (1979) 25 Cal.3d 754.

accident. No results of this test appear in the record. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 448, fn. 6 [Information obtained by the social worker in a juvenile dependency case reflected "marijuana's negative [e]ffect on the user's driving skills lasts 'for at least 4-6 hours after smoking a single marijuana cigarette, long after the "high" is gone.'"]) Unlike in *Rubics*, no evidence of any accident reconstruction appears in the record. Thus, 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. Either way, no charges regarding the collision were brought against defendant. Because no determination regarding defendant's culpability for the collision had been made, restitution for the victim's medical care was an abuse of the court's discretion.

DISPOSITION

The order granting the victim restitution is reversed. The matter is remanded to allow the People to file a motion, in their discretion, for restitution in which they will bear the burden of proving an amount, if any, which reflects the degree to which the

victim's injuries were exacerbated, if at all, by defendant's flight. (*People v. Sy* (2014) 223 Cal.App.4th 44, 63 ["[T]he standard of proof at a restitution hearing is by a preponderance of the evidence . . . ."].)

CERTIFIED FOR PUBLICATION

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.

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

Case Name: **People v, Dennis Terry Martinez** Case No.: **E057976**

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 **July 16, 2014**, I served the attached **PETITION FOR REVIEW** 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:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on **July 16, 2014** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Appellant's attorney, Thomas Robertson, at thomas@robertsonsdlaw.com by 5:00 p.m. on the close of business day.

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 **July 16, 2014**, at San Diego, California.

Claudia Chavez-Estrada	
Declarant	Signature