In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DENNIS TERRY MARTINEZ, Defendant and Appellant.	Case No. S219970

SUPREME COURT
FILED

FEB 26 2015

Frank A. McGuire Clerk

Deputy

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

REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
LISE S. JACOBSON
Deputy Attorney General
MICHAEL PULOS
Deputy Attorney General
State Bar No. 246474
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3034
Fax: (619) 645-2044
Email: Michael.Pulos@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Introduction 1

Argument 2

I. Hit-and-run victims have a constitutional and statutory right to seek and secure restitution for injuries suffered as a result of the collision 2

A. Hit-and-run victims have a constitutional and statutory right to seek restitution for injuries suffered as a result of the collision; victims only secure restitution if the sentencing court determines the defendant caused the injuries 2

B. Appellant has only cursorily addressed the other factors that support interpreting the victim restitution laws to permit victims to seek restitution for losses caused by the collision in a hit-and-run case 7

C. Most of the cases upon which appellant relies in support of his position do not address the issue before this court; and, of the out-of-state cases that do, appellant has failed to explain how their analysis applies in the context of Penal Code section 1202.4 and California's constitutional right to victim restitution, which those states do not have 10

D. The Court of Appeal in this case created a categorical rule that a victim of a "hit and run" may never recover in restitution for injuries caused by the collision—regardless of fault—and did not base its decision on any factual findings 14

1. The Court of Appeal based its decision on a categorical rule, not factual findings 14

2. This court is not bound to, and should not, accept the Court of Appeal's factual inferences 15

TABLE OF CONTENTS
(continued)

Page

E. The sentencing court found that appellant was at fault for the collision, and substantial evidence supports that finding; if the record is insufficient, the remedy is remand to the sentencing court for further findings 16

II. Alternatively, this court should reverse the Court of Appeal and uphold the sentencing court's finding that appellant's unlawful driving caused the victim's injuries 20

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Bonner v. City of Santa Ana
(1996) 45 Cal.App.4th 1465 21

Brooks v. E.J. Willig Truck Transp. Co.
(1953) 40 Cal.3d 669 18

Cedars–Sinai Medical Center v. Superior Court
(1998) 18 Cal.4th 1 19

City of Billings v. Edward
(Mont. 2012) 285 P.3d 523 12

Corenbaum v. Lampkin
(2013) 215 Cal.App.4th 1308 11

Doe v. Harris
(2013) 57 Cal.4th 64 22

Johnson v. Austin
(Mich. 1979) 280 N.W.2d 9 20

Katzberg v. Regents of University of California
(2002) 29 Cal.4th 300 21

People v. Baker
(2005) 126 Cal.App.4th 463 17

People v. Braz
(1998) 65 Cal.App.4th 425 11

People v. Carbajal
(1995) 10 Cal.4th 1114 .... passim

People v. Ceja
(1993) 4 Cal.4th 1134 17

People v. Crow
(1993) 6 Cal.4th 952 7

People v. Doolin
(2009) 45 Cal.4th 390 22

People v. Escobar
(1991) 235 Cal.App.3d 1504 11

People v. Giordano
(2007) 42 Cal.4th 644 17

People v. Holmberg
(2011) 195 Cal.App.4th 1310 6

People v. Jones
(2010) 187 Cal.App.4th 418 .... 6, 22, 23

People v. Millard
(2009) 175 Cal.App.4th 7 6

People v. Perry
(1972) 7 Cal.3d 756 17

People v. Rubics
(2006) 136 Cal.App.4th 452 .... 6, 14, 17

People v. Valdez
(2010) 189 Cal.App.4th 82 11

People v. Wood
(2000) 83 Cal.App.4th 862 11

Reeves v. MV Transp., Inc.
(2010) 186 Cal.App.4th 666 19

State v. Domingo
(Haw. Ct. App. 2009) 216 P.3d 117 6

State v. Eastman
(Or. 1981) 637 P.2d 609 .... 12, 13, 14

State v. Kappelman
(Or. Ct. App. 1999) 986 P.2d 603 12

STATUTES

Civil Code § 1436 3

Code Civil Procedure § 1021.4 11

Evidence Code § 413 19

Oregon Revised Statutes § 811.706 (1995) 12

Penal Code
- § 667 11
- § 1202.4 .... passim
- § 1202.4, subd. (a)(1) 2, 3, 4, 12
- § 1202.4, subd. (f) 3, 6, 9
- § 1260 20
- § 12022.7 11

Vehicle Code § 20001 .... passim

CONSTITUTIONAL PROVISIONS

Alaska Constitution art. I, § 24 11

Arizona Constitution art. II, § 2.1 11

California Constitution art. I
- § 28 .... passim
- § 28, subd. (b), par. (13) 5, 7, 8, 9
- § 28, subd. (c), par. (1) 5, 7, 8, 9

Connecticut Constitution amend. 17(b) 11

Idaho Constitution art. I, § 22 11

Illinois Constitution art. I, § 8.1 11

Louisiana Constitution art. I, § 25 11

Michigan Constitution art. I, § 24 11

Montana Constitution art. I, § 32 11

Montana Constitution art. II, § 28 12

New Mexico Constitution art. II, § 24 11

North Carolina Constitution art. I, § 37 12

Oklahoma Constitution art. II, § 34 12

Oregon Constitution art. I, § 42 11

Rhode Island Constitution art. I, § 23 12

South Carolina Constitution art. I, § 24 12

Tennessee Constitution art. I, § 35 12

Texas Constitution art. I, § 30 12

Wisconsin Constitution art. I, § 9(m) 12

COURT RULES

California Rules of Court
rule 8.500(c)(2) 15
rule 8.520(b)(3) 21

OTHER AUTHORITIES

11 American Jurisprudence Proof of Facts 3d 395 § 6 .... 18, 19

11 American Jurisprudence Proof of Facts 3d 395 § 12 20

11 Williston on Contracts § 32:5 (4th ed.) 22

29 American Law Report, Second Series 963 22

9 American Law Report, Fifth Series 826 18

CALCRIM No. 2140 3

California Tort Guide (Cont.Ed.Bar 3d ed., updated Feb. 2015)
Automobiles § 4.24 18

CALJIC No. 12.70 3

INTRODUCTION

A hit-and-run victim can seek restitution for injuries caused by the collision because a defendant's involvement in the collision is an element of the offense; whether the defendant is liable for the injuries—and if so, to what extent—is a separate matter for the sentencing court to determine, as it does in all restitution cases. Appellant disagrees, proposing instead a "condition precedent" rule—a variant of the Court of Appeal's "gravamen" rule, which appellant has now abandoned. His rule would disallow victim restitution for the collision in hit-and-run cases because the collision, in his view, is not part of the criminal offense, but rather a mere "condition precedent." That is not true; involvement in the collision is an element of the offense just like any other. And, in any event, nothing in article I, section 28 of the California Constitution or Penal Code section 1202.4 permits a sentencing court to parse a criminal offense in search of its "gravamen" or to excise its "condition precedents" before accepting a victim's claim for restitution. This court should apply the victim restitution law as written and decline appellant's invitation to create a judicial exception out of whole cloth. Appellant also suggests that it does not even matter what the correct rule is because, according to him, he was not at fault for hitting 12-year-old Jacob with his truck. But the sentencing court found that he was at fault, and substantial evidence supports that court's exercise of discretion in so finding. In any event, even if the record were insufficient to support the sentencing court's fault finding, the proper remedy would be to remand for further findings, not to affirm the Court of Appeal's decision. For all the reasons set forth in respondent's Opening Brief on the Merits, and as further explained herein, this court should reverse the Court of Appeal.

ARGUMENT

I. Hit-and-Run Victims Have a Constitutional and Statutory Right to Seek and Secure Restitution for Injuries Suffered as a Result of the Collision

This court should reject appellant's challenge to the rule that a victim can seek restitution for the injuries he or she suffered as a result of the collision in a hit-and-run case. First, appellant's argument requires judicial revision of the statute; and his policy objections ignore that a victim is permitted to seek restitution for injuries suffered as a result of the collision but will only secure restitution if the sentencing court determines that the defendant is actually liable. Second, respondent discussed many factors that support interpreting the victim restitution laws to permit hit-and-run victims to seek collision losses, and appellant has failed to rebut them. Third, appellant's lower-court decisions and out-of-state authority do not address the specific constitutional and statutory issue in this case, and they are therefore of little help to this court. Fourth, appellant is incorrect about the scope of the Court of Appeal's decision in this case, and he is also incorrect that this court is bound to accept the factual statements that court made in dicta. Fifth, and finally, the sentencing court here did find that appellant was at fault for the collision, and substantial evidence supports that finding.

A. Hit-and-Run Victims Have a Constitutional and Statutory Right to Seek Restitution for Injuries Suffered as a Result of the Collision; Victims Only Secure Restitution If the Sentencing Court Determines the Defendant Caused the Injuries

A victim has a constitutional and statutory right to seek restitution for injuries suffered "as a result of the commission of a crime." (Pen. Code, § 1202.4, subd. (a)(1).) Because "involve[ment] in an accident resulting in injury" is an element of the offense of "hit and run" (Veh. Code, § 20001),

it necessarily occurs in "the commission of [that] crime" (Pen. Code, § 1202.4, subd. (a)(1)), and a hit-and-run victim therefore may obtain restitution for collision injuries to the extent "defendant's conduct" caused them (*id.*, subd. (f)). Whether the defendant is actually liable for the injuries—and if so, to what extent—is a matter for the sentencing court to determine, as it does in all restitution cases.

Appellant disputes this rule in two main ways: First, he argues that a defendant's involvement in the collision is not an element of the hit-and-run offense, but rather a mere "condition precedent." (See, e.g., ABM 22.)[1] Second, he maintains that applying this rule would be unfair because it could lead to the "impos[ition] of a lifetime of debt" on hit-and-run drivers who are not at fault for the underlying collisions. (See, e.g., ABM 2.) Neither contention is valid.

First, appellant's attempt to re-label involvement in a collision from an "element" of the offense to a "condition precedent" is mere wordplay. As a preliminary matter, it is unclear the idea of a "condition precedent" has any place outside of contract law. (See Civ. Code, § 1436 [defining "condition precedent"].) Indeed, except for the few cases appellant cites dealing with the crime of hit-and-run, he has pointed to no authority establishing that "condition precedents" are even a concept in criminal law. (See ABM 20–22.) In any event, as respondent explained in the Opening Brief, a defendant's involvement in the collision *is* an element of the offense—it is a constituent part essential to the crime's commission and the prosecution has to prove it beyond a reasonable doubt. (OBM 13; see also Veh. Code, § 20001; CALCRIM No. 2140; CALJIC No. 12.70.) Indeed, a

[1] Throughout this reply brief, respondent's Opening Brief on the Merits is abbreviated "OBM" and appellant's Answer Brief on the Merits is abbreviated "ABM."

person who flees the scene of a gruesome accident in which he or she was not involved may be morally blameworthy, but that person is not criminally liable under Vehicle Code section 20001. Thus, involvement in a collision is just as much an element of the offense as the failure to render assistance, the failure to give one's name and address, or the failure to stop and remain at the scene.

What appellant is really trying to get at is the fact that the underlying collision is not itself a crime. But the mere fact that the occurrence of the accident, in itself, is not punishable as a criminal act, is not relevant to whether restitution is permissible. As respondent explained in the Opening Brief (OBM 13–15), numerous crimes are comprised of elements that on their own are not themselves crimes; this does not mean that the losses caused by those elements are not subject to restitution even when they are aspects of the "commission of a crime." (See Pen. Code, § 1202.4, subd. (a)(1).) Indeed, appellant answers respondent's hypothetical about car theft by saying that, while the taking or moving of property may be innocent acts alone, "[o]nce the crime has been proved or admitted, [those] elements . . . are *not* wholly 'innocent acts.'" (ABM 22 fn. 13, quoting OBM 14.) But this is precisely *respondent's* point. This is also true of "hit and run"; as respondent explains at length—and appellant appears to ignore—the Legislature's criminalization of hit-and-run driving evinces a belief that in many cases people who flee the scene of a collision in which they are involved do so because they were at fault. (OBM 18–21.) Consequently, rather than parsing the hit-and-run crime into two unconnected pieces—the presumably 'innocent' collision and the separately 'criminal' flight—it makes sense to view them together. Doing so raises at the very least the inference of fault in a hit-and-run case; and, in light of the robust constitutional right of victims to seek and secure restitution in any court,

permits victims to claim their losses from the initial collision in criminal restitution hearings.

Appellant's proposed "condition precedent" rule is just a variant of the Court of Appeal's "gravamen" rule, which appellant appears to have forsaken in this court. As respondent has already explained (OBM 9–13), nothing in article I, section 28 of the California Constitution or Penal Code section 1202.4 permits a sentencing court to parse a criminal offense in search of its "gravamen" or to excise its "condition precedents" before accepting a victim's claim for restitution. Not only are these proposed rules wrong and unworkable, they are unprecedented. Indeed, neither the Court of Appeal nor appellant has identified a single other example where a crime has been parsed and divided in this fashion—much less an example where a defendant has been relieved from paying victim restitution, not because his conduct did not cause a loss, but simply because the loss was caused by a part of the crime that a court has deemed to be a mere "condition precedent" or not part of the crime's "gravamen." This court should reject these new rules in favor of the plain language of the statute, as it has been applied to all other crimes for which victims seek restitution in California courts.

Second, appellant's fear of the "impos[ition] of a lifetime of debt" on hit-and-run drivers who are not at fault for the underlying collisions is misplaced. Appellant's argument, like the Court of Appeal's analysis below, conflates the inquiry of what is permissible restitution with the ultimate question of causation. Certainly a person convicted of "hit and run" will not be liable for losses he or she did not cause. But the ultimate determination of causation does not foreclose a victim from seeking restitution in the criminal proceeding in the first place. (See Cal. Const., art. I, § 28, subd. (b), par. (13) & subd. (c), par. (1) [crime victims have right to "seek" restitution "in any trial or appellate court with jurisdiction

over the case"].) As respondent explained in the Opening Brief, whether a defendant is actually liable for the losses—and, if so, to what extent—is a determination to be made by the sentencing judge at the restitution hearing. (OBM 1, 11, 15–16; see also, e.g., *People v. Rubics* (2006) 136 Cal.App.4th 452, 461–462 (*Rubics*); *People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1323–1324; *People v. Jones* (2010) 187 Cal.App.4th 418, 427 (*Jones*); *People v. Millard* (2009) 175 Cal.App.4th 7, 39.) Appellant does not dispute this general proposition.

That appellant has conflated the permissible scope of restitution with the separate causation inquiry is evident in the couple of hypotheticals he has proffered. For example, appellant points to the facts of an actual hit-and-run case in Hawai'i. (See ABM 22–23, citing and discussing *State v. Domingo* (Haw. Ct. App. 2009) 216 P.3d 117.) In that case, a drunk driver sideswiped the defendant, who fled the scene and was later convicted of a "hit and run." (*Domingo*, at pp. 118–119.) "[T]he State asserted that [the drunk driver], not [the defendant], caused the accident and that [the drunk driver] died at the scene of the accident." (*Id.* at p. 195.) Alluding to this example, appellant says that "[t]o impose a lifetime of debt on a person blindsided by a drunk driver—because that person became scared and drove away—is arguably unjust." (ABM 2.) Respondent agrees. The family of the hit-and-run victim—i.e., the drunk driver—would be permitted to *seek* victim restitution for economic losses related to the collision. However, that claim would go nowhere, as any sentencing court applying Penal Code section 1202.4 would have to reject it because—on the undisputed facts of that case—the "defendant's conduct" (Pen. Code, § 1202.4, subd. (f)) did not in any way cause the losses.

Appellant's tax-fraud example suffers from a similar flaw. (See AMB 21–22.) Borrowing his analogy from an Oregon case, appellant points to the "crime of failing to file a tax return for a year in which the person

earned taxable income." (AMB 21.) He then says that having taxable income is not criminal activity and argues, accordingly, that "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." (AMB 22.) Again, respondent agrees. In this hypothetical, the victim of the crime of failing to file a tax return is the government (if anyone at all), not some unknown competitor in the market. (See *People v. Crow* (1993) 6 Cal.4th 952, 957 ["A 'victim' is a 'person who is the object of a crime . . . '"], citations omitted.) Penal Code section 1202.4 limits restitution to "victim[s] of crime"; respondent has not argued otherwise.

B. Appellant Has Only Cursorily Addressed the Other Factors That Support Interpreting the Victim Restitution Laws to Permit Victims to Seek Restitution for Losses Caused by the Collision in a Hit-and-Run Case

In addition to the plain language of the victim restitution laws, respondent pointed to other factors that weigh in favor of victims' ability to pursue restitution in the criminal courts for collisions in hit-and-run cases. (See OBM 17–30.) Reducing these to mere "policy considerations" that are "mixed," appellant gives them all relatively short shrift. (See ABM 27.) Yet, in doing so, appellant ends up ignoring major points—like, for example, respondent's constitutional claim that interpreting the statute as he suggests would violate victims' rights to "seek and secure" restitution "in any trial or appellate court with jurisdiction over the case" and to have courts "act promptly" in adjudicating those rights. (See Cal. Const., art. I, § 28, subd. (c), par. (1) & subd. (b), par. (13).) Appellant's failure to seriously address these points suggests that he has no answer for them.

Specifically, respondent has explained that hit-and-run victims should be permitted to seek recovery of collision damages in criminal restitution

hearings because: (1) this effectuates the primary purpose of the hit-and-run statute, which is to ensure that injured victims can recover for their losses by preventing at-fault drivers from fleeing and to prevent the destruction of evidence (OBM 17–24); (2) it is required by article I, section 28 of the California Constitution, which grants victims the right to "seek and secure" restitution "in any trial or appellate court with jurisdiction over the case" and to have courts "act promptly" in adjudicating this right (see Cal. Const., art. I, § 28, subd. (c), par. (1) & subd. (b), par. (13) (OBM 24–27); and (3) many of the reasons in *People v. Carbajal* (1995) 10 Cal.4th 1114 (*Carbajal*)—which held that direct victim restitution as a probation condition is proper in a hit-and-run case—apply with equal force in prison cases (OBM 27–30). Appellant dismisses these contentions summarily.

First, appellant does not address respondent's argument that disallowing victim restitution for collisions undermines the very purpose of the hit-and-run statute, except to say that "the central deterrent to flight remains embedded in the law . . . [because] if the collision caused serious injury, the act of leaving the scene risks a felony conviction and custody in state prison." (See ABM 28.) Not only does this contention ignore much of respondent's analysis of Vehicle Code section 20001 (see OBM 17–24), it amounts to a bald assertion that respondent already has shown to be untrue in the Opening Brief. Specifically, respondent analyzed—in some detail—how a hypothetical drunk driver who recklessly collides with a pedestrian causing grave injury has virtually no incentive to stay as required by Vehicle Code section 20001 if this court were to adopt the Court of Appeal's (and appellant's) position. (See OBM 23–24.) Appellant did not challenge that hypothetical and therefore has not overcome the broader truth it represents: that forbidding a victim from asking for restitution in a hit-and-run case can create a specific incentive for

culpable drivers to flee the scene of the collisions they cause and thereby destroy the evidence that they caused the collision.

Second, appellant ignores respondent's constitutional claim that interpreting the statute as he suggests would violate victims' rights to "seek and secure" restitution "in any trial or appellate court with jurisdiction over the case" and to have courts "act promptly" in adjudicating those rights. (See OBM 24–27; see Cal. Const., art. I, § 28, subd. (c), par. (1) & subd. (b), par. (13).) Instead, he reduces parts of this *constitutional* claim to mere "policy considerations" that must "yield to *statutory* limits" (ABM 27, italics added) and contends that victims are "*already* required to pursue civil action in order to recover . . . noneconomic losses—such as pain and suffering" (ABM 28, italics original). It is well-established that statutes yield to the Constitution—and not the other way around. And whether a victim is required to seek noneconomic losses in civil proceedings is not relevant to the scope of that victim's right, under the California Constitution, to "seek and secure" restitution for economic losses "in any trial or appellate court with jurisdiction over the case" and to have courts "act promptly" in adjudicating those right. (See Cal. Const., art. I, § 28, subd. (c), par. (1) & subd. (b), par. (13).) A sentencing court has "jurisdiction over the case" and thus a victim has the constitutional right to "seek" restitution for economic losses and—if the "defendant's conduct" caused them (Penal Code, § 1202.4, subd. (f))—"secure" restitution for those losses. Appellant has not addressed this constitutional claim at all.

Third, with respect to this court's decision in *Carbajal*, *supra*, 10 Cal.4th 1114, appellant simply states the obvious: *Carbajal* was a probation case, and this is a prison case. (See ABM 8–12.) But respondent never contended otherwise. Instead, respondent explained that "[w]hile *Carbajal* dealt expressly with "restitution as a condition of probation" . . . , much of *Carbajal*'s reasoning supports victim restitution in cases, like this

one, where a defendant is sentenced to prison." (OBM 27, quoting *Carbajal*, *supra*, 10 Cal.4th at p. 1120.) Indeed, *Carbajal* is instructive in this case for the various reasons set forth in the Opening Brief. (See OBM 27–30.) In addition, allowing victims to seek victim restitution in hit-and-run prison cases would not erode the well-established distinction between prison cases and probation cases. (Cf. ABM 9–10.) As appellant acknowledges, *Carbajal* would seem to permit victim restitution for collision losses in hit-and-run probation cases even where the defendant's conduct did not necessarily cause them. (See ABM 9.) Not so in prison cases. In prison cases, like this one, a victim would be able to *seek* compensation for collision losses in a restitution hearing, but the sentencing court would only be permitted to grant them if it found by a preponderance of the evidence that the defendant's conduct actually *caused* those losses.

C. Most of the Cases upon Which Appellant Relies in Support of His Position Do Not Address the Issue Before This Court; and, of the Out-of-State Cases That Do, Appellant Has Failed to Explain How Their Analysis Applies in the Context of Penal Code section 1202.4 and California's Constitutional Right to Victim Restitution, Which Those States Do Not Have

Whether a victim may seek restitution for the collision in a hit-and-run case rests on this court's interpretation of a victim's right to restitution as found in article I, section 28 of the California Constitution and Penal Code section 1202.4. Yet appellant relies heavily on cases from the California Courts of Appeal addressing "hit and run" crimes in other contexts and on cases from others states with distinct restitution frameworks. (ABM 16–20.) These cases provide little guidance to this court's inquiry.

Of the cases appellant cites as representing the "[l]ongstanding law in California," not a single one analyzes article I, section 28 of the California Constitution or deals at all with direct victim restitution under Penal Code

section 1202.4. (See *People v. Valdez* (2010) 189 Cal.App.4th 82 [addressing whether there could be a Penal Code section 12022.7 criminal enhancement in a hit-and-run case]; *People v. Wood* (2000) 83 Cal.App.4th 862 [addressing whether a hit-and-run conviction could be a "serious felony" under Penal Code section 667 where there is serious injury]; *People v. Braz* (1998) 65 Cal.App.4th 425 [narrowly interpreting the hit-and-run statute to require the fleeing itself to cause damage in order to be felony conduct, despite legislative intent to the contrary; superseded by statute the very next year]; *People v. Escobar* (1991) 235 Cal.App.3d 1504 [disallowing victim restitution for collisions in hit-and-run probation cases and overruled by this court in *Carbajal, supra*, 10 Cal.4th 1114]; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 [analyzing whether California Code Civil Procedure section 1021.4 permitted attorney's fees in civil hit-and-run cases].)

The out-of-state cases appellant cites are similarly unhelpful because they deal necessarily with victim restitution frameworks that are unique to each of them. Indeed, appellant has not identified anything about those states' restitution frameworks or hit-and-run statutes that would provide a basis for a good analogy to California. One glaring difference between California and those states is that none of those states appears to have a constitutional right to victim restitution, except for Oregon, which did not have that constitutional right in place until after the decision appellant relies upon was decided. (See ABM 17–19, citing Oregon, South Dakota, North Dakota, Iowa, Florida, and Maine cases; see also Or. Const., art. I, § 42 [adding victim right to restitution in 1999].) California is not alone, however; many states give victims this right. (See, e.g., Alaska Const., art. I, § 24; Ariz. Const., art. II, § 2.1; Cal. Const., art. I, § 28; Conn. Const., amend. 17(b); Idaho Const., art. I, § 22; Ill. Const., art. I, § 8.1; La. Const., art. I, § 25; Mich. Const., art. I, § 24; Mo. Const., art. I, § 32; N.M. Const.,

art. II, § 24; N.C. Const., art. I, § 37; Okla. Const., art. II, § 34; R.I. Const., art. I, § 23; S.C. Const. art. I, § 24; Tenn. Const., art. I, § 35; Tex. Const., art. I, § 30; Wis. Const., art. I, § 9(m); see also Mont. Const., art. II, § 28 [punishment of crime includes restitution to crime victims].) Notably, of the high-court decisions appellant cites, it is a Montana case—where victim restitution *is* enshrined in the state constitution—that found victim restitution to be permissible for collisions in hit-and-run cases. (*See City of Billings v. Edward* (Mont. 2012) 285 P.3d 523 (*Edward*), cited at ABM 19.)[2]

In addition, appellant urges this court to follow the Oregon Supreme Court's lead in *State v. Eastman* (Or. 1981) 637 P.2d 609 (*Eastman*), and to find no victim restitution is permitted for collisions in hit-and-run convictions, letting the Legislature work it out if that interpretation of the law is wrong.[3] (See ABM 30–31.) Appellant's argument suffers from two main flaws.

First, *Eastman* already conflicts with this court's precedent in *Carbajal, supra*, because *Eastman* was a consolidated case—one prison

---

[2] Appellants seeks to narrow *Edward* by describing Montana as having a "more lenient standard for causation." (ABM 19 & fn. 12.) *Edward* is not the outlier that appellant suggests. The *Edward* court explicitly addressed the question of "whether [the victim]'s losses were 'a result of the commission of an offense'" in finding that the collision in a hit-and-run meets that requirement. (See *Edward*, *supra*, 285 P.3d at p. 529.) There is no reason to think that this standard is more "lenient" than California's "as a result of the commission of a crime" standard. (See Pen. Code, § 1202.4, subd. (a)(1).)

[3] As appellant points out, the Oregon Legislature responded to *Eastman*—albeit years later—by allowing for restitution in hit-and-run cases where a defendant causes the losses in the collision. (See Or. Rev. Stat. § 811.706 (1995); see also *State v. Kappelman* (Or. Ct. App. 1999) 986 P.2d 603, 606 [stating that statutory provision was in response to *Eastman*].)

case and one probation case—but the court treated them as analytically indistinguishable and found no restitution in either. (See *Eastman*, *supra*, 637 P.2d at pp. 610–611 [Eastman was "placed . . . on probation and sentenced . . . to pay . . . restitution; Kovach was sentenced to "serve 15 days in county jail" and to pay restitution].)

Second, the Oregon Legislature had to amend the statute, not to fix it, but rather to correct the *Eastman* court's overly narrow reading of the restitution statute as it already existed. The dissent in *Eastman* cogently explained where the majority went wrong. Contrary to the majority's view, "[t]he offense 'with respect to which' Eastman [stood] convicted [was] not 'leaving the scene of an accident.' The offense has four elements. The occurrence of the accident is an element of the offense with respect to which Eastman was convicted; it is also one of the 'facts or events constituting the defendant's (offense).' (*Eastman*, *supra*, 637 P.2d at p. 613 (dis. opn. of Peterson, J.).) As the dissenting justice explained, "if pecuniary damages result from any element of the offense[,] . . . restitution is permissible." (*Id.* at pp. 613–614.) He then pointed out the majority's failure to apply the statute as the Legislature wrote it: "On page 611 of the majority opinion it is stated that the term 'criminal activities' 'is a broader term than 'crime' or 'elements of crime' and is intended to communicate a larger meaning'. . . . Yet, on page 612, the majority give[s] the term a restrictive meaning, saying it includes only 'activities which were criminal,' whatever that means." (*Id.* at p. 614.) Finally, he explained, the majority's "difficulty in grappling with this case stems from a reluctance to permit restitution for damages which, though they flow from an element of a crime, do not flow from the performance of an act which is by itself a crime." The dissent then said that the majority failed to "apply the statute according to its meaning," but instead, injected its own judicially made limitations on restitution to address the "problem that [was] bothering" it.

(See *ibid.*) Appellant here has the same "difficulty" and the same "reluctance"; and, appellant's "condition precedent" argument, like the Court of Appeal's "gravamen" analysis, would do the same thing the *Eastman* majority court did: Inject a judicially created limitation into the victim restitution statute. The Oregon Legislature had to correct the *Eastman* majority's mistake; this court has the opportunity to avoid that mistake in the first instance.

D. The Court of Appeal in This Case Created a Categorical Rule That a Victim of a "Hit and Run" May Never Recover in Restitution for Injuries Caused by the Collision—Regardless of Fault—and Did Not Base Its Decision on Any Factual Findings

1. The Court of Appeal based its decision on a categorical rule, not factual findings

Appellant contends that the Court of Appeal decision "did not create a 'per se' rule foreclosing restitution" for a collision in a "hit and run," but rather based its decision on the facts "in this particular case." (AMB 6, italics omitted.) Yet if the Court of Appeal were to have found that a victim could seek restitution for damages in a collision, and that it was just a matter of determining whether the defendant caused the damages in a given case, respondent would have agreed; indeed, this is what respondent says the rule is and, for that matter, what the court did in *Rubics*. (See *Rubics*, *supra*, 136 Cal.App.4th at pp. 461–462.) This is not, however, what the Court of Appeal here held. Instead, the Court of Appeal categorically foreclosed victim restitution for injuries resulting from a collision in a hit-and-run case. (Slip opn. at 6.) While the court's opinion is at times murky—referencing the absence of a factual determination of appellant's responsibility for the collision (slip opn. at pp. 5 & 17)—the court itself clarified that it was "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," but rather, was simply "not[ing]" that the evidence "appear[ed] . . . at best . . . inconclusive and, at worst, negated any culpability of defendant for the collision." (Slip opn. at pp. 9 & 17.) In addition to its discussion of the limiting nature of the crime's "gravamen" and its explicit statement that it was "in no way here making any factual determination" of responsibility, the court limited its remand to *only* those damages "which reflect the degree to which the victim's injuries were exacerbated, if at all, by defendant's flight." (See Slip opn. at p. 18.) In other words, if it is true that there was no clear factual finding of fault for the collision, but that such a finding would entitle appellant to restitution for the collision, then the Court of Appeal would have remanded the case to the sentencing court to make that determination, too.

2. This court is not bound to, and should not, accept the Court of Appeal's factual inferences

Appellant contends that this court is bound to accept the Court of Appeal's statements of fact because respondent did not petition for rehearing. (ABM 4 fn. 2.) As a preliminary matter, factual disputes have no effect on the resolution of this case, because the Court of Appeal applied a categorical standard, not a fact-based one. (See *ante*.) In any event, the fact that appears to be in contention is whether the victim's mother actually witnessed the collision and, if so, whether her passing remark in a victim-impact statement calling the collision an "accident" should be credited as evidence that appellant was not at fault for the collision.

It is true that this court "as a policy matter . . . *normally* will accept the Court of Appeal opinion's statement of the . . . facts unless [a] party has called the Court of Appeal's attention to any [factual misstatements] in a petition for rehearing." (Cal. Rules of Court, rule 8.500(c)(2), italics added.) Several reasons weigh in favor of deviating from that normal

practice here. First, the Court of Appeal's formal statement of facts—which is based on the felony complaint and police report—is accurate; it is only a later inference it draws that is inaccurate. (Compare slip opn. at pp. 3–5 with slip opn. at p. 16.) Second, the Court of Appeal explicitly stated that it was "in no way making any factual determination" of responsibility; the mother's statement would be part of any such factual determination, and this court should credit the Court of Appeal's representation that it was not engaging in appellate factfinding. Third, because the Court of Appeal's holding was a categorical rejection of restitution for collisions in hit-and-run cases—regardless of the facts—any inferences it drew from the facts were pure dicta.

In addition, as respondent explained in the Opening Brief (OBM 3–4 fn. 1), there was no evidence the victim's mother observed the "accident." And, in any event, the word "accident" does not suggest, as appellant contends, 'faultlessness'; rather, it refers simply to a lack of intent or volition. (See Webster's 3d New Internat. Dict. (2002) p. 11 ["accident" in the traffic context means "sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result"].) Thus, the victim's mother's use of the term "accident" is immaterial because no one contends that appellant hit the victim on purpose. That certainly does not mean, however, that he was not at fault for doing so.

E. The Sentencing Court Found That Appellant Was at Fault for the Collision, and Substantial Evidence Supports That Finding; If the Record Is Insufficient, the Remedy Is Remand to the Sentencing Court for Further Findings

As explained throughout respondent's briefing, whether the defendant is actually liable for the injuries—and if so, to what extent—is a matter for the sentencing court to determine, as it does in all restitution cases. The

sentencing court here appeared to believe mistakenly that *Rubics* permitted victim restitution for hit-and-run collisions even where the defendant was not at fault. (See RT 37; cf. *Rubics*, *supra*, 136 Cal.App.4th at pp. 461–462 [reviewing the sentencing court's finding of fault for the collision and determining no abuse of discretion].) Nonetheless, the court said that even if a finding of fault is necessary under *Rubics*, "because he was on felony probation and unlicensed, I think the whole incident occurred even before he got into the accident." (RT 36–37.)[4] Moreover, substantial evidence supports the sentencing court's exercise of discretion in finding fault and awarding restitution here. (See *People v. Baker* (2005) 126 Cal.App.4th 463, 469 [in restitution cases, reviewing court determines whether there is substantial evidence to support the factual inferences drawn by the trier of fact], citing *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 and *People v. Perry* (1972) 7 Cal.3d 756, 785; see also *People v. Giordano* (2007) 42

---

[4] Because appellant did not challenge this finding as an abuse of discretion, and because the Court of Appeal created a categorical rule against restitution for collisions in hit-and-run cases, that court was not presented with, and did not address, whether the fault finding itself was supported by substantial evidence. Appellant's argument, and the one the Court of Appeal adopted, was that a collision in a hit-and-run case—regardless of fault—is not criminal conduct and therefore could not be the basis of restitution. As appellant points out in his Answer Brief, he separately argued in the Court of Appeal that the sentencing court could not base its restitution order on the uncharged crime of driving without a license. (ABM 15; see AOB 12–14.) There is a distinction, however, between arguing that the sentencing court abused its discretion in finding fault for the collision (albeit based on driving without a license) in imposing restitution for the *hit-and-run* offense and, on the other hand, arguing that it would be an abuse of discretion to impose restitution for the offense of *unlicensed driving* itself. Indeed, each party has addressed that issue separately in its briefing before this court. (See OBM 30–31; AMB 31–38.) In any event, because the Court of Appeal adopted appellant's categorical rule, it never discussed the sentencing court's finding of fault.

Cal.4th 644, 665 ["[i]n a criminal case an award of restitution is committed to the sound discretion of the trial court" and that discretion is "broad"].)

First, appellant was not only driving unlawfully without a license, he fled the scene of the collision. This is evidence of his consciousness of responsibility for the collision under California law. (See *Brooks v. E.J. Willig Truck Transp. Co.* (1953) 40 Cal.3d 669, 676; Cal. Tort Guide (Cont.Ed.Bar 3d ed., updated Feb. 2015) Automobiles § 4.24, p. 4-20.)

Second, appellant's own version of the facts supports a finding of fault. According to appellant, he saw Jacob riding his scooter and "approaching the path of his vehicle very rapidly." (CT 94.) At some point, appellant "suddenly realized [Jacob] was not going to stop[,] and [appellant] attempted to swerve out of the victim's path." (CT 94.) Appellant was unable to do so and struck Jacob, knocking him onto the roadway and causing the severe injuries Jacob suffered. (CT 95.) That appellant saw a 12-year-old child approaching "very rapidly" on his path yet did not slow down until he "suddenly realized [the boy] was not going to stop," is a basis for fault. Because appellant saw Jacob approaching, he had the "last clear chance" to stop—regardless of Jacob's own actions. (See 9 A.L.R.5th 826 [even "[w]hen a pedestrian or a bicycle rider carelessly moves into a place of danger in the face of oncoming traffic . . . where the driver has the 'last clear chance' to avoid this accident, he is required to do so, and will be held responsible for the resulting injuries if he does not"].) This is especially true because Jacob was only 12 years old, and "where children are involved, a higher or greater amount of care than would be the case with adults is usually required." 11 Am. Jur. Proof of Facts 3d 395, § 6 [Children and traffic; duty of motorist toward child bicyclists].) Thus, adult drivers—like appellant—who "know[] of the presence of a child . . . in, near, or adjacent to the street, . . . must anticipate childish conduct," such as the possibility that the "child will suddenly dart

from the side of the road or suddenly run across the road in front of his vehicle." (*Ibid.*) When appellant saw Jacob coming, he had a duty to anticipate that Jacob might not stop and to adjust his driving to account for that possibility before it became a reality.

Third, appellant's flight destroyed physical evidence of the cause of the collision. In light of his Vehicle Code section 20001 duty to stay and preserve the evidence, his "[d]estruction of evidence . . . can support an inference that the evidence would have been unfavorable" to him. (See *Reeves v. MV Transp., Inc.* (2010) 186 Cal.App.4th 666, 681, citing among other cases, *Cedars–Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11; see also Evid. Code, § 413 ["In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's . . . willful suppression of evidence relating thereto, if such be the case"].) At least two key pieces of evidence were destroyed by appellant's flight in violation of Vehicle Code section 20001: (1) leaving the scene meant he was not discovered until almost a day later, which destroyed any chance of determining whether he was under the influence of drugs or alcohol; and (2) his moving and secreting his truck thwarted the ability to do an accident reconstruction, or to document his truck's condition right after the collision.

The possibility that appellant was driving under the influence at the time was substantial, as appellant admitted that he had smoked marijuana that day. (CT 96.) While appellant claimed he was no longer "feeling the effects of the marijuana" at the time of the accident (CT 96), by leaving the scene—not to be discovered until almost 24 hours later—he guaranteed that this self-serving statement could not be refuted. Because appellant destroyed the evidence of whether he was driving under the influence, and because he admitted having used drugs that day, an inference can be drawn

that a test at the scene would have revealed he was, in fact, under the influence of marijuana or some other substance.

In moving and secreting his truck, appellant destroyed some of the evidence that experts need to determine fault—such as the post-collision position of his truck with respect to Jacob's scooter, and the condition of his truck before he had any opportunity to alter it. (See 11 Am. Jur. Proof of Facts 3d 395, § 12; see also *Johnson v. Austin* (Mich. 1979) 280 N.W.2d 9, 14 [driver who leaves the scene of a collision covers up evidence of the circumstances that caused the collision—e.g., the "width, location, direction and surface of the roadway where the accident occurred, the weather conditions and the time of day of the accident, and the location and position of the injured person"].) "Accident reconstruction, in one form or another, plays an important part in the trial of nearly all automobile cases." (11 Am. Jur. Proof. 3d 395, § 12.) Yet by leaving the scene, appellant destroyed evidence essential to accident reconstruction. Again, an inference can be drawn that accident reconstruction and analysis of the truck's condition following the collision would reveal that appellant was at fault.

In any event, to the extent the record is insufficient to support the sentencing court's finding of fault, the remedy is for this court to reverse the Court of Appeal decision and remand to the sentencing court to make further findings. (See Penal Code, § 1260 ["The court . . . may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

II. ALTERNATIVELY, THIS COURT SHOULD REVERSE THE COURT OF APPEAL AND UPHOLD THE SENTENCING COURT'S FINDING THAT APPELLANT'S UNLAWFUL DRIVING CAUSED THE VICTIM'S INJURIES

This court also could uphold the sentencing court's finding that restitution was proper because appellant's unlawful driving without a

license caused the victim's injuries, and appellant's *Harvey* waiver permitted the sentencing court to consider that in ordering restitution. Appellant challenges this argument by saying that it has been forfeited, that restitution for his uncharged driving is beyond the scope of the *Harvey* waiver, and that his unlicensed driving was a but-for cause, but not the proximate cause, of the victim's injuries. (ABM 31–38.) This court should reject these arguments.

First, this court should not find this issue to be forfeited. While respondent did not address it in its Court of Appeal briefing, both appellant and the Court of Appeal did address the issue. (See AOB 12–14; slip opn. p. 16.) The main reason behind the forfeiture doctrine—that it is unfair to the lower court and to the opposing party—is thus absent here. (See *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1476, disapproved on other ground by *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300 ["As a general principle, of course, a litigant cannot raise a new issue for the first time on appeal; among other things, the practice is unfair to the trial court and any opposing litigants"].) Moreover, because this argument goes to part of the basis for the sentencing court's restitution order, it is "fairly included" in the issue on review. (See Cal. Rules of Court, rule 8.520(b)(3).)

Second, appellant says that while "he does not dispute that [r]espondent's position would be valid under the language of a 'typical' waiver," appellant's *Harvey* waiver was more limited in scope. (AMB 33–35.) Yet it is apparent from the standard-form nature of the *Harvey* waiver in this ease (see CT 10), that this *is* the "typical" *Harvey* waiver in San Bernardino County, not some special "more limited" version appellant negotiated. Appellant wishes to read the *Harvey* waiver narrowly to cover only counts that were dismissed or that the district attorney's office explicitly agreed not to file. (See AMB 33–35.) But doing so would

violate a basic tenet of contract interpretation: That "[c]ourts must interpret . . . contractual language to give force and effect to every provision and avoid an interpretation that 'renders some clauses nugatory, inoperative or meaningless.'" (See *People v. Doolin* (2009) 45 Cal.4th 390, 414 fn. 17; see also 11 Williston on Contracts § 32:5 (4th ed.) ["An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable"]; *Doe v. Harris* (2013) 57 Cal.4th 64, 69 ["a negotiated plea agreement is a form of contract and is interpreted according to general contract principles"].) As appellant points out, there is no record that the district attorney's office dismissed any counts or explicitly agreed not to file any charges. (See ABM 34.) Thus, to give the *Harvey*-waiver provision any meaning, the phrase "any charges the district attorney agrees not to file" must be read broadly to include not just those that the district attorney's office *explicitly* agreed not to file, but also those that were obvious from the facts of the case yet the district attorney's office *implicitly* agreed not to file. Appellant's unlicensed driving squarely fit that category. (See RT 6; CT 95.)

Third, and finally, appellant argues that his unlicensed driving was a but-for cause, but not the proximate cause, of the collision. The role unlicensed driving plays in determining a driver's negligence is debated across the various jurisdictions. (See 29 A.L.R.2d 963 [Lack of proper automobile registration or operator's license as evidence of operator's negligence].) But, importantly, appellant has not identified what independent and intervening cause absolves him of liability here. (See *Jones*, *supra*, 187 Cal.App.4th at p. 427 [the question of "proximate cause" in victim restitution "is whether, despite the direct causal connection between [the] criminal conduct and the damage . . . , defendant's conduct cannot be considered the proximate cause of the damage because some

other cause . . . must be deemed an intervening cause that relieves defendant of liability for restitution"].) In *Jones*, the Court of Appeal remanded a restitution case to the trial court to allow it to consider whether the defendant's criminal offense was the proximate cause of costs the victim incurred in repairing her car that was damaged—not at the scene of the crime—but in the courthouse parking lot while the victim was attending a restitution hearing following the defendant's conviction. (*Jones*, at p. 421.) The *Jones* case illustrates how even the most attenuated cause may suffice if there is no intervening cause relieving a defendant of liability. Here, the connection is much closer. Appellant was not lawfully permitted to drive a vehicle; he did so anyway, and while doing so, he crashed into a 12-year-old boy who was riding a scooter.

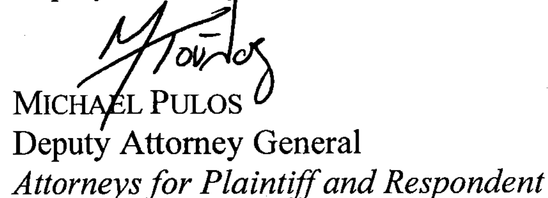
CONCLUSION

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

Dated: February 25, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
LISE S. JACOBSON
Deputy Attorney General



MICHAEL PULOS
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SD2014808960
81021124.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 7,121 words.

Dated: February 25, 2015

KAMALA D. HARRIS
Attorney General of California

MICHAEL PULOS
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

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

I declare:

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

On February 25, 2015, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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

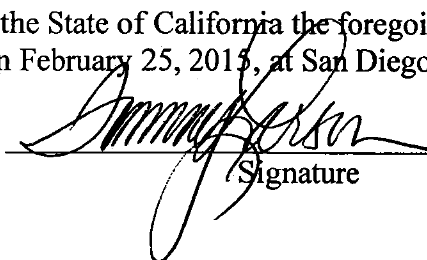
Fourth Appellate District, Division Two
Court of Appeal of the State of California
3389 Twelfth Street
Riverside, CA 92501

Clerk of the Court
San Bernardino Justice Center
San Bernardino County Superior Court
247 W. Third Street, 2nd Floor
San Bernardino, CA 92415-0063

and furthermore, I declare in compliance with California Rules of Court, rules 2.251(i)(1) and 8.71(f)(1), I electronically served a copy of the above document on February 25, 2015, on Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and on Appellant's attorney Thomas E. Robertson via the registered electronic service address thomas@robertsonsdlaw.com by 5:00 p.m. on the close of business day. The Office of the Attorney General's electronic service address is ADIEService@doj.ca.gov.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 25, 2015, at San Diego, California.

Tammy Larson
Declarant



Signature

SD2014808960
81022129.doc