IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court No.
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. D050432
v.	)
	) Superior Court
ELI J. ANDERSON,	) No. SCE262419
	)
Defendant and Petitioner.	)
	)

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO

Honorable Allan J. Preckel, Judge

PETITION FOR REVIEW

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Attorney for Appellant

By appointment of the Court
Of Appeal under the Appellate
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TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Defendant and petitioner Eli J. Anderson respectfully petitions this court for review of the published opinion by the Fourth District, Division One, which affirms the judgment, filed December 31, 2008, and ordered published on January 27, 2009. A copy of the opinion of the Court of Appeal is attached to this petition as Appendix A. (Cal. Rules of Court, rule 8.504(b)(4).)

QUESTIONS PRESENTED

1. Did the trial court commit error in excluding relevant evidence crucial to petitioner's defense?
2. Did the trial court commit error excluding evidence at a second trial that the judge at the first trial had ruled admissible?
3. Did the trial court commit error in awarding restitution to a hospital that treated the victim in this case?

NECESSITY FOR REVIEW

Review is necessary as there are conflicting opinions among the various Courts of Appeal as to resolution of the above questions.

PETITION FOR REHEARING

A Petition for Rehearing was filed by petitioner and denied by the court of appeal on January 27, 2009.

STATEMENT OF THE CASE

An information filed on August 8, 2006, charged petitioner with felony hit and run, in violation of Vehicle Code section 20001, subdivision (a). (1 C.T. p.1.) Trial commenced on October 2, 2006. The jury was unable to reach a verdict and a mistrial was declared on October 30, 2006. (4 C.T. p.647, 690.)

A second trial commenced on December 28, 2006. (4 C.T. p. 694.) On January 10, 2007, petitioner was found guilty of the charge. (4 C.T. p. 722.) On February 28, 2007, petitioner was placed on formal probation for a period of five years. He was committed to county jail for 365 days, stayed pending appeal. (4 C.T. p. 725.) On April 27, 2007, petitioner was ordered to pay $34,092.02 in restitution. (Aug. 1 C.T. p. 2.)

Petitioner filed a timely notice of appeal on February 28, 2007. (4 C.T. p. 637.)

STATEMENT OF FACTS[1]

A. *People's Case*

In July 2005 Anderson, who was 18 years old at the time, was working as a production assistant filming commercials in Los Angeles. On the Fourth of July weekend, he drove home to San Diego County.

On the evening of July 1 he socialized with some friends. He had a video camera with him and documented the evening's events. Although some of his friends were drinking, there was no evidence presented at trial that he drank or took any drugs that evening.

A little after midnight Anderson left his friends and began driving to his girlfriend's house in Lakeside. He drove east on Fletcher Parkway, near the Parkway Plaza shopping mall, in the fourth of five traffic lanes. He observed no other cars on the road or pedestrians nearby. He reached down

[1] Taken from the opinion of the Court of Appeal

to change the radio station on his car stereo and took his eyes off the road for between five and 10 seconds. He heard a bang, followed by his windshield shattering and glass getting in his hair, eyebrows and mouth.

Anderson testified he did not know what happened to cause his windshield to shatter. Based upon recent media accounts of rocks being thrown at cars, he thought an unknown person had thrown a rock through his windshield. Feeling fearful and confused, Anderson called his girlfriend, Jenin. He told her he was going to look at his car, and he pulled into the parking lot at one end of the mall. Anderson recorded on his video camera his inspection of the car and noted there was blood at the top of the windshield and significant damage to his car. He realized he had struck an animal or a person.

According to Anderson, he then drove slowly along the parking lot fronting Fletcher Parkway, looking onto the road to see what he might have collided with. He did not see any evidence of a collision or what he may have hit. He testified he could see through or around hedges separating the parking lot from Fletcher Parkway. However, he admitted he did not drive along the portion of the roadway where the accident occurred, there were places where he could not see through the hedges, and he did not leave his vehicle to take a closer look.

Anderson left the mall, drove onto the freeway and called Jenin to tell her he was driving to her home in Lakeside. Jenin told him it was

unsafe to drive with a shattered windshield and to pull off the freeway at a restaurant called Janet's Cafe, which the two frequented.

Anderson's friend, Ian Tanner, showed up at the cafe, followed by Jenin. Anderson and Jenin then drove to her house in Jenin's vehicle.

Gregory Gilbride was driving with two friends down Fletcher Parkway after midnight on the morning of July 2, 2005, when he saw a man lying across the fifth lane of traffic, who he assumed was a "drunken bum."[2] Gilbride pulled into the mall parking lot to render assistance. He testified he needed to walk through the hedges on the edge of the parking lot to see the body.

As Gilbride approached, he saw blood and "a mangled body." The man was grunting and trying to get up, but he could only lift himself a few inches before collapsing again. Gilbride diverted traffic around the victim until police arrived. During that time he did not observe any vehicles driving around the mall parking lot.

Gilbride's 911 call was placed at 12:35 a.m., and police officers arrived within a few minutes. Officers determined the critically injured man was Robert Milligan. Paramedics arrived and they transported Milligan to the hospital, where he subsequently died from his injuries. He had massive head and face injuries as well as chest damage.

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[2] Gilbride was ruled unavailable for the second trial, and his testimony from the first trial was read to the jury.

Jenin testified that after she and Anderson arrived at her house, she and her brother, Andy Kunz, drove in his truck back to the scene of the accident to learn what had happened. As they approached the scene they were stopped by a police officer. Jenin asked the officer what had happened, and he responded that a pedestrian was hit by a car. Jenin asked if it was a male or female. Jenin then told the officer that she "just wanted to know because [she] was looking for [her] mom." They then drove to Janet's Cafe, where she saw the blood on Anderson's shattered windshield.

When Jenin and Kunz returned to their home they reported the news to Anderson. According to Jenin, he appeared "shocked" and stated he wanted to immediately turn himself in. However, Jenin's father suggested he wait until an attorney could be contacted. Anderson's father, Michael Anderson, was also contacted and he arrived a short time later. Anderson never contacted police.

On the evening of July 2, 2005, an anonymous male caller provided police with the first name of the driver who collided with Milligan. The next day, another anonymous caller informed police that the vehicle involved in the incident was located in the parking lot where Janet's Cafe was located. When officers arrived at the scene they found Anderson's car and traced its registration to Anderson's parents. They also discovered Anderson's camcorder in the front passenger seat.

Evidence technician Julie Palos examined the vehicle. She found hair and blood samples imbedded in the windshield. Crime lab technician Michelle Hassler determined the DNA in the blood samples taken from the windshield matched Milligan's DNA.

Detective John Pearsley was the lead investigator on the case. He matched debris from the collision scene to Anderson's car. An examination of the videotape from Anderson's car revealed Anderson was the driver of the vehicle that struck Milligan. Based upon the injuries Milligan suffered to the right side of his body, a prominent scuff mark on the right side of his shoe, and his resting place in the fifth lane of traffic, Detective Pearsley opined Milligan was running from the median toward the sidewalk when he was struck. He testified that the significant damage to the inside of Milligan's left leg, which reflected the point of impact, could not have happened if Milligan were walking northbound. Detective Pearsley also stated that the scuff mark on the ball of Milligan's right shoe indicated his weight was on his right foot at the time he was struck. He also testified Milligan's resting place in the southern-most lane of traffic indicated he was headed, probably running, in a southerly direction at the time of impact because his forward momentum would continue the same direction after impact.

B. *Defense Case*

Anderson presented the testimony of Dr. Harry Bonnell, a forensic pathologist. Based upon his examination of the evidence, he opined one could not tell from the evidence which way Milligan was moving across the street when Anderson struck him or whether Milligan was walking, running or tripped at the time of impact.

San Diego Police Officer Stephen McDonald testified that on May 27, 2005, there was a series of incidents involving rocks thrown at cars in various locations around San Diego. In one of the incidents, a passenger in a car struck by a rock was fatally injured when the rock came through the windshield. As part of his investigation of the incidents, he notified the press and asked them to appeal to the public for help in locating the assailants.

ARGUMENT

I

PETITIONER'S STATE RIGHTS AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT EXCLUDED EVIDENCE GOING DIRECTLY TO TWO DISTINCT ELEMENTS OF THE CHARGE DISPUTED BY THE DEFENSE.

A. Introduction

Petitioner was tried twice for the same crime. The first trial resulted in a hung jury, with the jury voting seven to five in favor of acquittal, and

the trial court declaring a mistrial. (Aug. 15 R.T. p. 4329[3].) In the second trial, a different trial court excluded evidence that had been admitted at the first trial, and was both relevant and material to the defense. The exclusion of this evidence was an abuse of discretion, requiring reversal of petitioner's conviction.

B. The Trial Court Proceedings

In both trials, the jury was instructed with CALCRIM No. 2140, which reads, in relevant part, as follows:

> **2140 Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver (Veh. Code, §§ 20001, 20003 & 20004)**
>
> The defendant is charged with failing to perform a legal duty following a vehicle accident that caused death to another person in violation of Veh. Code, §§ 20001.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1 While driving, the defendant was involved in a vehicle accident;
>
> 2 The accident caused the death of someone else;
>
> 3 The defendant knew that he had been involved in an accident that injured another person or knew from the nature of the accident that it was probable that another person had been injured;
>
> AND
>
> 4 The defendant willfully failed to perform one or more of the following duties:
>
> (a) To stop immediately at the scene of the accident;
>
> (b) To provide reasonable assistance to any person injured in the accident;
>
> (e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.

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[3] The reporter's transcript of the first trial was augmented to the record, and is referred to as "Aug. R.T."

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation.

The driver of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

The prosecution's theory in the first trial was that the victim had been crossing five lanes of traffic from left to right. Petitioner was driving in the fourth or fifth lane to the right and must have seen the victim, who crossed in front of his car and was struck by the right front of petitioner's car. (Aug. 14 R.T. p. 4005.)

The defense theory in the first trial was that the victim had committed suicide. In so doing, it was likely that the victim had run out in front of the car from the right side of the road to the left, and done so in a furtive manner in order to carry out the victim's intent. Petitioner did not see anything and had no idea what he had struck. Petitioner's first thought was that someone had thrown a rock at his vehicle. Such an unexpected

assault triggered what is referred to in medical circles as the "fight or flight syndrome," in which the person assaulted is consumed with the need to escape from the perceived danger. The evidence of suicide and the "fight or flight syndrome" went to the third element of CALCRIM No. 2140, that "[T]he defendant knew that he had been involved in an accident that injured another person or knew from the nature of the accident that it was probable that another person had been injured." This was so because it made it reasonable for the jury to conclude that petitioner had not seen anything, due to the victim's furtive actions, and the "fight or flight syndrome" consumed petitioner with the need to escape from the danger, lessening the likelihood that petitioner would have thought that he had hit a person. In addition, the "fight or flight syndrome" would have impacted petitioner's ability to, in the words of the fourth element of CALCRIM No. 2140, "to willfully fail to perform one or more of the following duties. . ." (Aug. 14 R.T. pp. 4035, 4039, 4065.)

The prosecution objected to the introduction of evidence on either suicide or the "fight or flight syndrome" in both the first and second trials. In the first trial, the trial court researched the issue of the suicide evidence overnight. She cited eleven different cases she had researched, in addition to the Vehicle Code and the Witkin publications, in ruling that the defense could introduce evidence of suicide as going to the third element of CALCRIM No. 2140. (Aug. 1 R.T. pp. 114-115.) The trial court then held

an Evidence Code section 402 hearing in which it heard from Dr. Thomas Streed on the "fight or flight syndrome." At the conclusion of the hearing, the court ruled that the defense could use the evidence as going to petitioner's knowledge that he had hit a person. (Aug. 6 R.T. pp. 891-892.)

During the first trial, extensive evidence was presented that the victim had committed suicide, including mental health records, the testimony of friends of the victim, and the identification of a purported suicide note. The medical examiner, Dr. Jonathan Lucas, concluded that the victim had likely committed suicide. (Aug. 6 R.T. p. 919.) The investigating police officer, Detective John Pearsley, thought it was "possible" that the victim had committed suicide. (Aug. 8 R.T. p. 1370.) Dr. Harry Bonnell, a forensic pathologist, concluded that the victim had committed suicide. (Aug. 8 R.T. p. 1442.)

Also during the first trial, Dr. Thomas Streed testified that the "fight or flight syndrome" would have caused a different reaction in petitioner then what would otherwise be considered normal, and that petitioner would have no control over that reaction, needing to flee from the perceived danger. (Aug. 9 R.T. pp. 1644-1650.)

The trial court in the first trial ruled that whether the victim's suicide and the "fight or flight syndrome" had affected petitioner's knowledge that he had hit a person, were questions of fact for the jury to determine. (Aug 9 R.T. p. 1560.) As previously noted, the first trial resulted in a hung jury,

with the jury voting seven to five in favor of acquittal, and the trial court declaring a mistrial. (Aug. 15 R.T. p. 4329.)

Prior to the second trial, a different trial court ruled both evidence of the victim's suicide and evidence of the "fight or flight syndrome" irrelevant, and excluded mention of both. The court ruled that evidence of the victim's mental state was irrelevant to whether or not it was probable that petitioner knew another person was injured in the accident. (1 R.T. pp. 17, 18, 29-30.) Similarly, the evidence as to the "fight or flight syndrome" was excluded as lacking relevance, materiality, and probative value. (1 R.T. pp. 45-46.)

C. The Standard of Review

A trial court has wide discretion to determine whether proffered evidence is relevant and, if so, whether the probative value of the evidence is substantially outweighed by the danger of prejudice to the other party, confusion, or undue consumption of time. (Pen. Code § 1044; Evid. Code, § 352; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1135; *People v. Cooper* (1991) 53 Cal.3d 771, 816.) The standard of review for erroneous admission of irrelevant, unduly prejudicial, or inadmissible evidence is abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 214-215.) But, the court's discretion must always be exercised within the context of the fundamental rule that relevant evidence whose probative value is

outweighed by its prejudicial effect should not be admitted. (*People v. Williams* (1970) 11 Cal.App.3d 970, 976-977.)

D. The Court Committed An Abuse of Discretion in Excluding the Defense Evidence

Under Evidence Code section 352, the trial court has broad discretion in assessing "whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues, supra,* 8 Cal.4th 1060.) The Court of Appeal stated "[W]hether Milligan was suicidal had little or no relevance to whether the objective evidence in the case supported Anderson's claim he did not know he had hit a person. Moreover, the court did not preclude Anderson from arguing that because of the sudden nature of the accident, he did not know what he had hit. . . Whether Milligan intentionally stepped in front of Anderson's car, or was negligent in crossing the road, was not a relevant issue in the case." (Court of Appeal opinion at pp. 12-13.) This opinion does not, however, reflect the approach that the prosecution took in both trials.

The prosecution spent a considerable amount of time in both trials trying to establish that the victim had crossed five lanes of traffic from the left to the right. (See, for example 3 R.T. pp. 568-571, from the second trial.) With appellant driving on the far right side of the road, this made it more likely that appellant would have seen the victim crossing the road, as

the victim was hit in the right side of the vehicle, and therefore would have crossed directly in front of appellant. The prosecution made this argument in the first trial. (Aug. 14 R.T. p. 4005.)

It was never suggested, and certainly never argued by appellant, that his car was not the car that collided with the victim. The only issue was whether appellant was aware that he had collided with a human being. Therefore the only relevance of the elaborate accident reconstruction conducted by the police and presented by the prosecution was to establish that appellant had knowledge that he had collided with a human being because that person had crossed in front of him.

Therefore it was entirely relevant for the defense to present evidence that the victim had not crossed in front of appellant, making it less likely that appellant had knowledge that he had collided with a human being because the victim entered the roadway from the right side and had contact with the right side of the car. This was the argument that appellant made in his first trial. (Aug. 14 R.T. pp. 4035, 4039.)

With respect to the evidence of the "Fight or Flight" syndrome, the court stated "a reasonable court could also have determined that its probative value was substantially outweighed by the potential it would cause undue prejudice, a confusing of the issues, or a misleading of the jury. As explained, *ante*, the proposed fight or flight syndrome was contrary to Anderson's own trial testimony and version of events. He

admitted that he left the scene after stopping, viewing his car, and determining he had either hit a person or an animal, based upon the blood and damage to his car, and then going back to see if he could determine what he hit. This testimony is inconsistent with a theory, as espoused by Anderson, he was "consumed with the need to get to a place of safety," and his leaving the scene was an automatic response over which he had no control." (Court of Appeal opinion at pp. 13-14.)

During the first trial, Dr. Thomas Streed testified that the "fight or flight syndrome" would have caused a different reaction in appellant then what would otherwise be considered normal, and that appellant would have no control over that reaction, needing to flee from the perceived danger. (Aug. 9 R.T. pp. 1644-1650.) Therefore, appellant's decision to leave the parking garage was not, in the opinion of Dr. Streed, a "reasoned decision," but was instead a decision borne out of panic. Although appellant stated that it was a possibility that he had hit a person, he still believed he had struck an animal, not a human being. (4 R.T. p. 767.) With that panicked mindset, appellant left the parking garage. The evidence was therefore probative. As to its prejudicial impact, the court suggests the evidence would "cause undue prejudice, a confusing of the issues, or a misleading of the jury." (Court of Appeal opinion at p. 13) Petitioner respectfully suggests that the court is not giving the jury enough credit. The evidence going to the "fight or flight" syndrome was merely additional evidence,

although very important to appellant's defense, for the jury to sift through in reaching their decision.

Petitioner is not asking this court to determine that his theory as to what happened is correct. His argument is that his theory was plausible, at least as plausible as that of the prosecution, and as such it was up to the trier of fact to make the determination as to which theory was correct. For these reasons, the trial court's ruling to exclude the evidence on suicide as well as the evidence on the "fight or flight syndrome" was an abuse of discretion requiring reversal of petitioner's conviction.

E. The Constitutional Violations.

Under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, a criminal defendant has an unquestionable right to present relevant exculpatory evidence to the jury. This necessarily includes evidence which calls into doubt the reliability of the evidence on which the state is relying. (*See Davis* v. *Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347].)

Criminal defendants have a constitutional right to "have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690-691 [106 S.Ct. 2142, 90 L.Ed.2d 636].) Where the state interferes with that right, a conviction cannot stand. (*See Davis* v. *Alaska*, *supra,* 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038. 35 L.Ed.2d

297]; and *Washington* v. *Texas* (1967) 388 U.S. 14 [87 S.Ct. 1920, 18 L.Ed.2d 1019].)

The United States Supreme Court has repeatedly indicated that a State may not use its general rules of evidence or procedure to bar material testimony or pertinent cross-examination which is crucial to a criminal defendant's defense. (*See Michigan* v. *Lucas* (1991) 500 U.S. 145 [111 S.Ct. 1743, 114 L.Ed.2d 205] (preclusive effect of statutory "notice of evidence" requirement in rape case); *Taylor* v. *Illinois* (1988) 484 U.S. 400 [108 S.Ct. 646, 98 L.Ed.2d 798] (sanction of preclusion for defense violation of discovery rules); *Rock* v. *Arkansas* (1987) 483 U.S. 44 [107 S.Ct. 2704, 97 L.Ed.2d 37] (exclusion of defendant's testimony under state rule disallowing all hypnotically refreshed evidence) *Green* v. *Georgia* (1979) 442 U.S. 95 [99 S.Ct. 2150, 60 L.Ed.2d 738] (state failure to recognize hearsay exception for declaration against penal interest); *Davis* v. *Alaska*, *supra*, 415 U.S. 308 (denial of cross-examination for bias based on state rule making evidence of juvenile proceedings inadmissible in adult court); *Chambers* v. *Mississippi*, *supra*, 410 U.S. 284 (state rule precluding cross-examination of party's own witness); *Washington* v. *Texas*, *supra*, 388 U.S. 14 (state rule precluding accomplice from testifying for defense); and *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674] (exclusion of evidence of benefits given to prosecution witness as violating confrontation clause).)

Again, petitioner is not asking this court to determine that his theory is correct. His argument is that his theory was plausible, at least as plausible as that of the prosecution, and as such it was up to the trier of fact to make the determination as to which theory was correct. The right of a criminal defendant to present a defense on his behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment. *See Webb* v. *Texas* (1972) 409 U.S. 95, 98 [93 S.Ct. 351, 34 L.Ed.2d 330]; and *Washington* v. *Texas*, *supra*, 388 U.S. at 19. For these reasons, the trial court's ruling to exclude the evidence on suicide as well as the evidence on the "fight or flight syndrome" was an abuse of discretion requiring reversal of petitioner's conviction. This was error under the Fifth, Sixth, and Fourteenth Amendments.

F. This Court Should Grant Review.

The trial court's exercise of its discretion to exclude evidence may be reversed on appeal when a showing is made that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d at p. 316; see also *People v. Rodrigues, supra,* 8 Cal.4th at p. 1124.) Petitioner has shown that a miscarriage of justice occurred, as he was unable to present his theory of what happened during the accident, in contrast to the

prosecution's theory of what happened, and allow the jury, as the finder of fact, to make the decision as to whose theory it accepted.

In addition, reversal is required as petitioner has shown that errors of a constitutional magnitude occurred. In both *Chambers* v. *Mississippi* and *Green* v. *Georgia*, the High Court reversed without harmless error analysis. (*See Chambers* v. *Mississippi*, *supra*, 410 U.S. at 303; and *Green* v. *Georgia*, *supra*, 442 U.S. at 97.) No separate prejudice analysis was necessary, because a finding that the exclusion of evidence violated due process necessarily entailed a finding that the evidence was so critical to the defense that its exclusion deprived the defendant of a fair trial. (*Chambers* v. *Mississippi*, *supra*, 410 U.S. at 303 ["we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial"]; and *Green* v. *Georgia*, *supra*, 442 U.S. at 97 ["the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment"].)

At the very least, reversal is required unless the prosecution demonstrates that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Because respondent was the beneficiary of the error, the burden falls upon it to prove "beyond a reasonable doubt" that the error did not affect the result. Moreover, "beyond a reasonable doubt" is the equivalent of a "subjective state of near certitude." (Cf. *Victor v. Nebraska* (1994) 511

U.S. 1, 15 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Here, respondent cannot carry such a heavy burden. The jury in the first trial, that heard the evidence excluded in the second trial, voted seven to five in favor of acquittal. The jury in the second trial, that did not hear the evidence heard in the first trial, convicted petitioner. It cannot be said beyond a reasonable doubt that the error in excluding the proffered evidence in the second trial did not affect the outcome. This court should therefore grant review.

II.

THE SECOND TRIAL COURT JUDGE IMPERMISSABLY EXCLUDED EVIDENCE FOUND ADMISSABLE BY THE FIRST TRIAL COURT JUDGE, IN VIOLATION OF CALIFORNIA AND FEDERAL LAW

A. Introduction

As noted previously, the prosecution objected to the introduction of evidence on either suicide or the "fight or flight syndrome" in both the first and second trials. In the first trial, the trial court researched the issue and allowed the testimony. Prior to the second trial, a different trial court ruled both evidence of the victim's suicide and evidence of the "fight or flight syndrome" irrelevant, and excluded mention of both. The court ruled that evidence of the victim's mental state was irrelevant to whether or not it was probable that petitioner knew another person was injured in the accident. (1 R.T. pp. 17, 18, 29-30.) Similarly, the evidence as to the "fight or flight

syndrome" was excluded as lacking relevance, materiality, and probative value. (1 R.T. pp. 45-46.)

The ruling of the second trial court judge was error. "It is a fundamental principle of jurisprudence ... that a question of fact or of law distinctly put in issue and directly determined by a[criminal or civil] court of competent jurisdiction cannot afterwards be disputed between the same parties." (*Frank v. Mangum* (1915) 237 U.S. 309, 334 [35 S.Ct. 582, 59 L.Ed. 969] (internal citation omitted).) California also recognizes this application of the law of the case doctrine. The error is a violation of petitioner's due process rights, requiring reversal.

B. The Standard of Review

As this issue presents exclusively a question of law, the appellate court reviews the trial court's ruling de novo. (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1282; *In re Alberto* (2002) 102 Cal.App.4th 421, 426; see *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

C. The Second Trial Court Erred in Ruling Inadmissible Evidence That Had Previously Been Ruled Admissible By the First Trial Court Judge

In a criminal cause, the court generally has the authority to correct its own prejudgment errors. (*People v. Rose* (1996) 46 Cal.App.4th 257, 262-263.) "In criminal cases, there are few limits on a court's power to reconsider interim rulings ...." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1246.)

Different policy considerations, however, are operative if the reconsideration is accomplished by a different judge. Accordingly, the general rule is just the opposite: the power of one judge to vacate an order made by another judge is limited. (*Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588.) This principle is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice. "If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. To affirm the action taken in this case would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts." (*People v. Scofield* (1967) 249 Cal.App.2d 727, 734 [first judge's ruling upholding search warrant was binding on second judge; order granting § 995 motion reversed].)

Despite the overwhelming weight of authority, the Court of Appeal has focused on a single case, a decision by the Second District Court of Appeal, where a change in a ruling by a second judge following a mistrial was upheld on appeal. (Court of Appeal opinion at pp. 11-12.)

In *People v. Riva* (2003) 112 Cal.App.4th 981, the court determined that the first trial judge had made an error:

"Furthermore, for reasons of comity and public policy discussed above, trial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so-mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law. In the present case, after Judge Comparet-Cassani issued her ruling on the *Miranda* motion, the prosecutor asked for an opportunity to argue the motion further after doing more research. The judge replied: "That's fine. I'm more than happy to reverse a ruling if shown it's wrong." As we discuss below, we have found no California case which supports Judge Comparet-Cassani's suppression of the statements Riva made in jail and several cases denying suppression under similar facts. Thus, Judge Garner had a sufficiently persuasive reason for reversing Judge Comparet-Cassani's order with respect to the statements made in jail just as the latter might have been persuaded to reverse her own earlier ruling had the first trial lasted

long enough for the prosecutor to accept her invitation to show her she was wrong." (*People v. Riva, supra,* 112 Cal.App.4th 981, 992-993.)

This ruling is in accord with established California law. 50 years ago, the California Supreme Court stated "It is settled law in California that "a valid order made *ex parte* may be vacated only after a showing of cause for the making of the latter order, that is, that in the making of the original order there was (1) inadvertence, (2) mistake, or (3) fraud." (*Wyoming Pac. Oil Co. v. Preston* (1958) 50 Cal.2d 736, 739.) Here, however, there was no suggestion that the first judge's ruling was wrong. As noted above, in the first trial, the trial court researched the issue of the suicide evidence overnight. She cited eleven different cases she had researched, in addition to the Vehicle Code and the Witkin publications, in ruling that the defense could introduce evidence of suicide as going to the third element of CALCRIM No. 2140. (Aug. 1 R.T. pp. 114-115.) The trial court then held an Evidence Code section 402 hearing in which it heard from Dr. Thomas Streed on the "fight or flight syndrome." At the conclusion of the hearing, the court ruled that the defense could use the evidence as going to appellant's knowledge that he had hit a person. (Aug. 6 R.T. pp. 891-892.)

The second judge disagreed with the ruling. The court ruled that evidence of the victim's mental state was irrelevant to whether or not it was probable that appellant knew another person was injured in the accident. (1 R.T. pp. 17, 18, 29-30.) Similarly, the evidence as to the "fight or flight

syndrome" was excluded as lacking relevance, materiality, and probative value. (1 R.T. pp. 45-46.) "Mere disagreement with the result of the order is not a persuasive reason for reversing it." (*People v. Riva, supra,* 112 Cal.App.4th 981, 992.)

The power of one judge to vacate an order made by another judge is limited. (*Greene v. State Farm Fire & Casualty Co, supra,* 224 Cal.App.3d 1583, 1588.) This principle is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice. "If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. To affirm the action taken in this case would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts." (*People v. Scofield , supra,* 249 Cal.App.2d 727, 734 [first judge's ruling upholding search warrant was binding on second judge; order granting § 995 motion reversed].)

D. Federal Authorities Are In Accord

As previously noted: "It is a fundamental principle of jurisprudence ... that a question of fact or of law distinctly put in issue and directly determined by a[criminal or civil] court of competent jurisdiction cannot

afterwards be disputed between the same parties." (*Frank v. Mangum, supra,* 237 U.S. 309, 334. (internal citation omitted).)

In *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, the 9th Circuit dealt with a case whose legal principles are on point with the instant case. Petitioner's defense to a charge was entrapment. At trial, the court instructed the jury on entrapment. The jury was unable to reach a verdict and the court declared a mistrial. At re-trial, a different judge refused to instruct the jury on entrapment. The 9th circuit held this to be error.

"It is important to remember that at Bradley's first trial, the trial judge found that the evidence presented required that the jury be given an entrapment instruction. The evidence presented at the second trial was *exactly* the same as the first trial, yet the second trial judge refused to give the instruction. As the District Court below observed:

'[B]y refusing to instruct the jury on entrapment, the trial judge essentially left the jury with petitioner's confession to the offense, without ever allowing them to consider petitioner's preclusive defense. By rejecting petitioner's request for an entrapment instruction, the trial court effectively deprived petitioner of his only defense.' This kind of manipulation of the jury is simply not permissible. 'The trial judge is ... barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.' (*United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573 [97 S.Ct. 1349, 51 L.Ed.2d 642.).

Moreover, when one judge determines, as a matter of law and fact, that the evidence requires the giving of an entrapment instruction, and no additional evidence to the contrary is proffered at a subsequent trial, the second judge may not simply ignore the findings of the first. . . This kind of unauthorized second-guessing is impermissibly arbitrary and can amount to a violation of Due Process." (*Bradley v. Duncan, supra,* 315 F.3d 1091, 1097-1098.)

E. This Court Should Grant Review

In determining the appropriate standard of harmful error analysis to apply in this case, it is noted that the beyond-a-reasonable-doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24, applies to prejudicial-error analysis for federal constitutional errors, while the *Watson* standard of reasonable probability that the result would have been more favorable, absent the error (*People v. Watson* (1956) 46 Cal.2d 818, 835-836), applies to prejudicial-error analysis for errors of state law. (*People v. Boyette* (2002) 29 Cal.4th 381, 428.)

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers* v. *Mississippi*, *supra*, 410 U.S. at 294.) As petitioner has shown that the second trial court's ruling was a deprivation of federal due process, the *Chapman* standard should apply. Because respondent was the beneficiary of the error, the burden falls upon it to prove "beyond a reasonable doubt" that the error did not affect the result.

Moreover, "beyond a reasonable doubt" is the equivalent of a "subjective state of near certitude." (Cf. *Victor v. Nebraska, supra,* 511 U.S. 1, 15; *Jackson v. Virginia, supra,* 443 U.S. 307, 315.) Here, respondent cannot carry such a heavy burden. The jury in the first trial, that heard the evidence excluded in the second trial, voted seven to five in favor of acquittal. The jury in the second trial, that did not hear the evidence heard in the first trial, convicted petitioner. It therefore cannot be said beyond a reasonable doubt that the error in excluding the proffered evidence in the second trial did not affect the outcome.

Even under the lesser *Watson* standard, reversal is warranted because it is reasonably probable that petitioner would have received a more favorable verdict if the proffered defense evidence had been admitted. The Supreme Court has also "made clear that a 'probability' in this context does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*.' (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics original, boldface added, citing *People v. Watson, supra,* 46 Cal.2d at p.837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698 [104 S. Ct. 2052, 80 L.Ed.2d 674].) The evidence received in the first trial was the same as that received in the second trial, absent the excluded defense evidence. As the first trial jury voted seven to five in favor of acquitting petitioner, it is reasonably probable that the second trial jury, having heard the excluded evidence,

would have similarly favored petitioner with their verdict. This court should therefore grant review

III.

THE TRIAL COURT IMPERMISSABLY AWARDED RESTITUTION TO A HOSPITAL, AS A HOSPITAL CANNOT BE NAMED A "VICTIM" FOR PURPOSES OF RESTITUTION IN THIS CASE

On April 27, 2007, appellant was ordered to pay $34,092.02 in restitution. (Aug. 1 C.T. p. 2.) Of this amount, $31,397.55 was ordered paid to Sharp Memorial Hospital, for costs of treating the victim. (Aug. 1 C.T. p. 2.)

On October 28, 2008, the Third District Court of Appeal held, in a published case, that a hospital cannot be considered a "victim" for purposes of restitution under Penal Code[4] section 1202.4, subdivision (f). (*People v. Slattery* (2008)167 Cal.App.4th 1091.)

The trial court in *Slattery* ordered restitution to be paid to a hospital under the authority of section 1202.4, subdivision (f). This subdivision provides in relevant part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim ...." (§ 1202.4, subd. (f).) Under the plain language of this statute, then, the court may order restitution only to a "victim." (See *People v. Martinez* (2005) 36 Cal.4th

[4] All further references are to the Penal Code, unless noted

384, 392.)The term "victim," as it relates to any kind of business or governmental entity, is defined in section 1202.4, subdivision (k)(2): "(k) For purposes of this section, 'victim' shall include all of the following: [¶] ... [¶] (2) Any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity *when that entity is a direct victim of a crime.*" (§ 1202.4, subd. (k)(2), italics added.) "Thus, section 1202.4, subdivision (k) permits restitution to a business or governmental entity only when it is a *direct victim* of crime." (*People v. Martinez, supra,* 36 Cal.4th at p. 393, original italics.)

Employing this definition of "direct victim," our Supreme Court has held that insurance companies that reimburse their insureds whose cars were stolen are not direct victims of car theft. (People v. *Birkett* (1999) 21 Cal.4th 226, 245-247.) Similarly, the high court has held that the California Department of Toxic Substance Control is not a direct victim of attempted methamphetamine production in incurring costs cleaning up waste material from the production. (*People v. Martinez, supra,* 36 Cal.4th at pp. 386, 393-394.) And appellate courts have held that a police department is not a direct victim when it incurs economic losses in the course of a criminal investigation. (*People v. Torres* (1997) 59 Cal.App.4th 1, 4-5; *People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077.)

Applying this definition, the Court of Appeal held that a hospital is not a "direct victim." "Defendant's criminal conduct consisted of inflicting injury upon an elder adult. Marshall Hospital is not a "direct victim" because it was not the " 'immediate object[ ]' " of the conduct, nor the entity " ' *against which* the ... crimes had been committed.' " (*People v. Martinez, supra,* 36 Cal.4th at p. 393, quoting *People v. Birkett, supra,* 21 Cal.4th at pp. 233-232, respectively, italics in *Birkett.*) Rather, defendant's mother was the " 'immediate object[ ]' " of the offense. (*People v. Martinez, supra,* 36 Cal.4th at p. 393.) Also, the hospital incurred its economic loss indirectly from defendant's conduct: first, defendant illegally inflicted injuries upon her mother; second, Marshall Hospital treated defendant's mother for the injuries; third, defendant's mother did not pay the hospital bills." (*People v. Slattery, supra,* 167 Cal.App.4th 1091, 1096-1097.)

The court went on to say: "Like the Department of Toxic Substance Control in *Martinez,* Marshall Hospital must recoup its costs through other means. Section 1202.4, subdivision (f) explicitly requires that the immediate victim, defendant's mother, be made whole for her economic losses, including medical expenses, resulting from defendant's criminal conduct. (§ 1202.4, subd. (f) & (f)(3)(B).) Because defendant's mother is deceased, the court must order the restitution to be paid to her estate. Diverting the restitution due to defendant's mother to a third party, such as

Marshall Hospital, violates the statute because it fails to make defendant's mother whole. (*People v. Birkett, supra,* 21 Cal.4th at pp. 245-247.) As the People concede, Marshall Hospital may bring a civil claim against the mother's estate to ensure payment of the debt." (*People v. Slattery, supra,* 167 Cal.App.4th 1091, 1097.)

The identical issue is present in this case. Sharp Memorial Hospital was the entity that treated the decedent's injuries. (1 R.T. pp. 156-157, 167.) As such it is not a "victim," for purposes of restitution under section 1202.4, subdivision (f).

Appellant was granted probation in this case, and the Court of Appeal saw that as a critical distinction: "Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria. Thus, even if in cases where a defendant is sentenced to state prison a hospital is not considered a victim for purposes of restitution, under *Carbajal* and *Lent*, the court properly exercised its discretion to order restitution to the hospital that treated Milligan because he was unable to pay those expenses. Forcing the hospital to bear those expenses, under the facts of this case, would defeat the purposes of the restitution statutes where it was ordered as a condition of probation."(Court of Appeal opinion (modified) at p. 30)

This analysis is at odds with the express statutory language of Section 1203.1, subdivision (a)(3), governing restitution orders where a defendant is granted probation, which specifically requires a restitution order to comply with the requirements of section 1202.4. The holding in *Slattery* should therefore be equally applicable here, regardless of whether a defendant is granted probation or sent to prison.

The court went on to say:

"Further, to the extent *Slattery* intended its holding to be broad enough to include restitution orders where probation is granted, we decline to follow its holding. In reaching its decision, the *Slattery* court relied heavily on *People v. Birkett, supra,* 21 Cal.4th 226 (*Birkett*), in which the California Supreme Court held that a court could not order restitution as a condition of probation to be paid to insurance companies who paid out claims to the defendant's victims whose cars were stolen. (*Id.* at pp. 234-235.)

Here, however, the victim was not an insurance company but the direct provider of emergency medical services to the victim. Insurance companies conduct risk assessments and enter into contracts in which they promise to cover certain losses in exchange for premiums. A hospital, by contrast, when presented with a gravely injured victim, has an obligation to treat the victim regardless of whether the victim has insurance or the costs of care will ever be recoverable. (See *Prospect Medical Group, Inc. v.*

Northridge Emergency Medical Group (Jan. 8, 2009) 2009 WL 36855, *1, *3.) When a hospital suffers this type of economic loss as a result of a defendant's criminal acts it is a *direct* victim." (Court of Appeal opinion (modified) at p. 30.)

This holding is also at odds with established case law. As noted above, employing this definition of "direct victim," our Supreme Court has held that insurance companies that reimburse their insureds whose cars were stolen are not direct victims of car theft. (People v. *Birkett, supra,* 21 Cal.4th 226, 245-247.) Similarly, the high court has held that the California Department of Toxic Substance Control is not a direct victim of attempted methamphetamine production in incurring costs cleaning up waste material from the production. (*People v. Martinez, supra,* 36 Cal.4th at pp. 386, 393-394.) And appellate courts have held that a police department is not a direct victim when it incurs economic losses in the course of a criminal investigation. (*People v. Torres, supra,* 59 Cal.App.4th 1, 4-5; *People v. Ozkan, supra,* 124 Cal.App.4th 1072, 1077.) Lastly the *Slattery* court directly addressed this question in ruling that a hospital was not a "direct victim" for purposes of restitution. Therefore this court should grant review to resolve the conflicting opinions between this Court of Appeal and other Court's of Appeal.

CONCLUSION

For the reasons set forth above, this court should exercise its discretion and grant review.

Dated: February 24, 2009

Respectfully submitted,

Stephen M. Hinkle
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.360.

Case Name: People v. ELI J. ANDERSON

Court of Appeal No. D050432

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached PETITION FOR REVIEW contains 8320 words as calculated by Microsoft Word 2003.

Dated: February 24, 2009

Stephen M. Hinkle

Stephen M. Hinkle
Attorney at Law
3529 Cannon Road, Ste 2B-311
Oceanside, CA 92056

COURT OF APPEAL CASE NO. D050432
SUPERIOR COURT CASE NO. SCE262419

People v. ELI J. ANDERSON

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 3529 Cannon Rd, Suite 2B-311, Oceanside, CA 92056. I served the following document:

PETITION FOR REVIEW

of which a true copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee names hereafter, addressed to each addressee respectively as follows:

Attorney General
110 West "A" St, Suite 1100
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Attn: Laura Furness
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Attn: Marlene Coyne
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Fourth District Court of Appeal
Division 1
750 B St., Ste. 300
San Diego, CA 92101

Clerk of the Court (East County)
Superior Court of San Diego County
250 East Main Street
El Cajon, CA 92020
Attn: Hon. Allan J. Preckel, Judge

Eli J. Anderson
6055 Winfield Ave
La Mesa, CA 91942-3221

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Vista, California, on February 24, 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 24, 2009, at Oceanside, California.

_____
Stephen Hinkle

EXHIBIT A

Filed 12/31/08; pub. & mod. order 1/27/09 (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ELI JORDAN ANDERSON, Defendant and Appellant.	D050432 (Super. Ct. No. SCE262419)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed.

In June 2006 the San Diego County District Attorney charged Eli Jordan Anderson with felony hit and run resulting in death, under Vehicle Code[1] section 20001, subdivisions (a) and (b)(2). In the first trial in October 2006 the jury was unable to reach a verdict, voting seven-to-five in favor of acquitting Anderson, and the court declared a mistrial. In December 2006 a second trial commenced and the jury found Anderson guilty.

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1 All further statutory references are to the Vehicle Code unless otherwise specified.

In February 2007 the court sentenced Anderson to 365 days in county jail, stayed that sentence pending appeal, and gave him five years' probation. The court also ordered Anderson to pay the victim's family $34,092.02 in restitution.

On appeal, Anderson asserts the court committed prejudicial error by (1) excluding evidence the victim was suicidal and expert testimony on "fight or flight" syndrome, which the court had allowed him to present in the first trial; (2) refusing his proposed instructions on constructive knowledge; (3) failing to sua sponte give a unanimity instruction; (4) instructing the jury under CALCRIM No. 2140; (5) refusing to allow him reopen his case following closing arguments; and (6) ordering restitution as a condition of probation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

In July 2005 Anderson, who was 18 years old at the time, was working as a production assistant filming commercials in Los Angeles. On the Fourth of July weekend, he drove home to San Diego County.

On the evening of July 1 he socialized with some friends. He had a video camera with him and documented the evening's events. Although some of his friends were drinking, there was no evidence presented at trial that he drank or took any drugs that evening.

A little after midnight Anderson left his friends and began driving to his girlfriend's house in Lakeside. He drove east on Fletcher Parkway, near the Parkway Plaza shopping mall, in the fourth of five traffic lanes. He observed no other cars on the

road or pedestrians nearby. He reached down to change the radio station on his car stereo and took his eyes off the road for between five and 10 seconds. He heard a bang, followed by his windshield shattering and glass getting in his hair, eyebrows and mouth.

Anderson testified he did not know what happened to cause his windshield to shatter. Based upon recent media accounts of rocks being thrown at cars, he thought an unknown person had thrown a rock through his windshield. Feeling fearful and confused, Anderson called his girlfriend, Jenin. He told her he was going to look at his car, and he pulled into the parking lot at one end of the mall. Anderson recorded on his video camera his inspection of the car and noted there was blood at the top of the windshield and significant damage to his car. He realized he had struck an animal or a person.

According to Anderson, he then drove slowly along the parking lot fronting Fletcher Parkway, looking onto the road to see what he might have collided with. He did not see any evidence of a collision or what he may have hit. He testified he could see through or around hedges separating the parking lot from Fletcher Parkway. However, he admitted he did not drive along the portion of the roadway where the accident occurred, there were places where he could not see through the hedges, and he did not leave his vehicle to take a closer look.

Anderson left the mall, drove onto the freeway and called Jenin to tell her he was driving to her home in Lakeside. Jenin told him it was unsafe to drive with a shattered windshield and to pull off the freeway at a restaurant called Janet's Cafe, which the two frequented.

Anderson's friend, Ian Tanner, showed up at the cafe, followed by Jenin. Anderson and Jenin then drove to her house in Jenin's vehicle.

Gregory Gilbride was driving with two friends down Fletcher Parkway after midnight on the morning of July 2, 2005, when he saw a man lying across the fifth lane of traffic, who he assumed was a "drunken bum."[2] Gilbride pulled into the mall parking lot to render assistance. He testified he needed to walk through the hedges on the edge of the parking lot to see the body.

As Gilbride approached, he saw blood and "a mangled body." The man was grunting and trying to get up, but he could only lift himself a few inches before collapsing again. Gilbride diverted traffic around the victim until police arrived. During that time he did not observe any vehicles driving around the mall parking lot.

Gilbride's 911 call was placed at 12:35 a.m., and police officers arrived within a few minutes. Officers determined the critically injured man was Robert Milligan. Paramedics arrived and they transported Milligan to the hospital, where he subsequently died from his injuries. He had massive head and face injuries as well as chest damage.

Jenin testified that after she and Anderson arrived at her house, she and her brother, Andy Kunz, drove in his truck back to the scene of the accident to learn what had happened. As they approached the scene they were stopped by a police officer. Jenin asked the officer what had happened, and he responded that a pedestrian was hit by a car.

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2 Gilbride was ruled unavailable for the second trial, and his testimony from the first trial was read to the jury.

Jenin asked if it was a male or female. Jenin then told the officer that she "just wanted to know because [she] was looking for [her] mom." They then drove to Janet's Cafe, where she saw the blood on Anderson's shattered windshield.

When Jenin and Kunz returned to their home they reported the news to Anderson. According to Jenin, he appeared "shocked" and stated he wanted to immediately turn himself in. However, Jenin's father suggested he wait until an attorney could be contacted. Anderson's father, Michael Anderson, was also contacted and he arrived a short time later. Anderson never contacted police.

On the evening of July 2, 2005, an anonymous male caller provided police with the first name of the driver who collided with Milligan. The next day, another anonymous caller informed police that the vehicle involved in the incident was located in the parking lot where Janet's Cafe was located. When officers arrived at the scene they found Anderson's car and traced its registration to Anderson's parents. They also discovered Anderson's camcorder in the front passenger seat.

Evidence technician Julie Palos examined the vehicle. She found hair and blood samples imbedded in the windshield. Crime lab technician Michelle Hassler determined the DNA in the blood samples taken from the windshield matched Milligan's DNA.

Detective John Pearsley was the lead investigator on the case. He matched debris from the collision scene to Anderson's car. An examination of the videotape from Anderson's car revealed Anderson was the driver of the vehicle that struck Milligan. Based upon the injuries Milligan suffered to the right side of his body, a prominent scuff mark on the right side of his shoe, and his resting place in the fifth lane of traffic,

Detective Pearsley opined Milligan was running from the median toward the sidewalk when he was struck. He testified that the significant damage to the inside of Milligan's left leg, which reflected the point of impact, could not have happened if Milligan were walking northbound. Detective Pearsley also stated that the scuff mark on the ball of Milligan's right shoe indicated his weight was on his right foot at the time he was struck. He also testified Milligan's resting place in the southern-most lane of traffic indicated he was headed, probably running, in a southerly direction at the time of impact because his forward momentum would continue the same direction after impact.

B. *Defense Case*

Anderson presented the testimony of Dr. Harry Bonnell, a forensic pathologist. Based upon his examination of the evidence, he opined one could not tell from the evidence which way Milligan was moving across the street when Anderson struck him or whether Milligan was walking, running or tripped at the time of impact.

San Diego Police Officer Stephen McDonald testified that on May 27, 2005, there was a series of incidents involving rocks thrown at cars in various locations around San Diego. In one of the incidents, a passenger in a car struck by a rock was fatally injured when the rock came through the windshield. As part of his investigation of the incidents, he notified the press and asked them to appeal to the public for help in locating the assailants.

DISCUSSION

I. *EVIDENTIARY RULINGS*

Anderson asserts that his state and federal constitutional rights were violated when the court excluded (1) evidence that the victim committed suicide, and (2) and expert testimony on "flight or fight" syndrome. We reject this contention.

A. *Background*

1. *First trial*

At the first trial in this matter, Anderson was allowed to present, over the objection of the People, evidence that Milligan may have committed suicide. The court[3] found the evidence relevant to whether Anderson knew he had struck someone. In allowing such evidence, the court stated, "It is a question of fact for the jury to determine whether or not the defendant knew he was in an accident . . . ." The court reached that decision after taking the matter under submission, and cited 11 different cases in support of the ruling. The court found that evidence Milligan might have jumped or flung himself from the right side of Anderson's car, contrary to the People's theory Milligan was merely jaywalking and Anderson must have known he hit a person because he was traveling from the center of the street across Anderson's line of sight, was also relevant to the issue of whether he knew he had hit a person.

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3 The Honorable Christine K. Goldsmith.

The court then held an Evidence Code section 402[4] hearing to determine the admissibility of the expert testimony of Dr. Thomas Streed on fight or flight syndrome. Dr. Streed testified that fight or flight syndrome is a person's response to a perceived threat, when that person acts without thinking. At the conclusion of the hearing, the court ruled that Anderson could present this evidence as relevant to Anderson's "intent, the knowledge element . . . ."

At the trial evidence was received to support Anderson's claim that Milligan committed suicide by jumping in front of his car. A friend of Milligan's, James Ribley, testified that the day before his death, he was very depressed about something and told Ribley "he wanted to kill himself." He also testified concerning Milligan's mental health issues, which included Milligan asking Ribley one time after he was released from San Diego County Mental Health Services (County Mental Health) if Ribley was his father, and on another occasion expressing the belief that Adolph Hitler was his father. In the weeks before his death, Milligan talked to Ribley on 10 to 15 occasions about dying.

Rex Wells, another friend of Milligan's, testified that two days before the incident Milligan told him he "might as well run in front of a car on the freeway." He also told Wells he was searching for his birth mother and that he had to find his German heritage. He testified that on three separate occasions within the two months prior to his death,

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4 Evidence Code section 402, subdivision (b) provides: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests."

Milligan had talked for over an hour about ending his life. When Milligan was with him two days before his death, he observed Milligan take a wooden pallet out of the back of his truck and write something on it. After Milligan's death it was discovered the writing said, "I don't have hopes and dreams . . . plans and schemes and don't have much reason to live." Mental health records indicated Milligan was taken to County Mental Health two to four weeks before his death.

The medical examiner that conducted the autopsy on Milligan concluded his death was likely the result of a suicide. Anderson's pathologist expert, Dr. Bonnell, also opined the victim had committed suicide. He also opined the note left on the pallet in the back of Milligan's truck was a suicide note.

With regard to the fight or flight syndrome expert testimony, Dr. Streed testified that it would have caused Anderson to have no control over his reaction to being struck in the windshield, and he would perceive a need to flee from the perceived danger.

The first trial resulted in a hung jury, the jury voting seven to five in favor of acquittal. The court then declared a mistrial.

2. *Retrial*

At the retrial defense counsel made an offer of proof that this same evidence would be presented on behalf of Anderson in support of his defense that he did not know he had struck a person and did not willfully fail to stop and render aid. However, the court[5] excluded evidence of Milligan's alleged suicidal thoughts and Dr. Streed's

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5 The Honorable Allan J. Preckel

proposed testimony concerning fight or flight syndrome, finding the evidence was irrelevant and inadmissible under Evidence Code section 352. With regard to the evidence Milligan was suicidal, the court stated:

> "It is the court's position and determination that the legal bedrock underlying certain of the court's evidentiary rulings in this case is and should be as follows: [¶] That it matters not whether the decedent, Mr. Robert Milligan, was, in a manner of speaking, Mother Teresa or the devil incarnate; that it matters not what Mr. Robert Milligan's mental state was at the time of or precedent to the collision. That apart from any pre-existing physical trauma, it matters not what Mr. Robert Milligan's physical condition was at the time of or precedent to the collision. [¶] What does matter is the following: [¶] First, was Mr. Robert Milligan a human being? [¶] Second, was he alive prior to being struck by a vehicle on Fletcher Parkway in El Cajon in the early morning hours of July 2nd, 2005? [¶] Third, was that collision a cause of death of Mr. Robert Milligan? [¶] Fourth, was the defendant, Mr. Eli Anderson, the driver of the vehicle that collided with Mr. Robert Milligan? [¶] Fifth, did the defendant stop at the scene of the collision, provide reasonable assistance, and/or identify himself consistent with the requirements of Vehicle Code section 2003? [¶] Sixth, *did the defendant know that he had been involved in an accident that injured another person, or did the defendant know from the nature of the accident that it was probabl*[*e*] *that another person had been injured?*" (Italics added.)

B. *Analysis*

In a criminal trial, the trial court generally has broad authority to reconsider interim rulings and correct its own prejudgment errors. (*In re Alberto* (2002) 102 Cal.App.4th 421, 426.) However, a different rule applies to a second judge's reconsideration of the ruling of a different judge. (*Id.* at p. 427.) "Different policy considerations . . . are operative if the reconsideration is accomplished by a different judge. Accordingly, the general rule is just the opposite: the power of one judge to

vacate an order made by another judge is limited." (*Ibid.*) "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." (*Ibid.*) This rule is intended to promote orderly administration of justice, prevent forum shopping, preserve confidence in the integrity of the courts, and prevent one judge from interfering with a case pending before another judge. (*Ibid.; People v. Riva* (2003) 112 Cal.App.4th 981, 991 (*Riva*).)

If, however, a judgment is reversed on appeal and remanded for a new trial, the rulings on pretrial motions and objections to evidence may be reconsidered. (*Riva, supra,* 112 Cal.App.4th at pp. 991-992.) The Court of Appeal in *Riva* concluded this principle also applied where a mistrial was granted, and the matter subsequently transferred to a different judge. (*Id.* at p. 992.) "In the case of a mistrial the issues remain in flux, the rulings remain interlocutory and the outcome remains undetermined." (*Ibid.*) "We conclude, therefore, pretrial rulings on the admissibility of evidence, like rulings on pleadings, should be reviewable by another judge following a mistrial because they are intermediate, interlocutory rulings subject to revision even after the commencement of trial." (*Ibid.*)

Reconsideration of a prior ruling of another judge following mistrial requires that "the defendant be given notice and an opportunity to be heard." (*Riva, supra,* 112 Cal.App.4th at p. 992.) In addition, "the revised ruling cannot be arbitrary or made without reason." (*Ibid.*) "Furthermore, for reasons of comity and public policy discussed above, trial judges should decline to reverse or modify other trial judges' rulings unless

there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*Id.* at pp. 992-993, fns. omitted.)

1. *Ample evidence supported reconsideration of first trial judge's order*

Because the case was reassigned to a different judge following a mistrial, the court had the power and authority to reconsider the admissibility of the evidence concerning Milligan's alleged suicidal thoughts and the expert testimony concerning fight or flight syndrome. Moreover, Anderson was given notice of the motion to exclude the evidence and ample opportunity to argue the matter. The court considered the proposed evidence and the law applicable to the subject and therefore its ruling cannot be considered "arbitrary or made without reason." (*Riva, supra,* 112 Cal.App.4th at p. 992.)

The court had persuasive reasons for excluding the evidence. Whether Milligan was suicidal had little or no relevance to whether the objective evidence in the case supported Anderson's claim he did not know he had hit a person. Moreover, the court did not preclude Anderson from arguing that because of the sudden nature of the accident, he did not know what he had hit. The evidence had highly charged emotional undertones, potentially raising sympathy for Anderson and painting the victim as a less than

sympathetic character. As to the proposed fight or flight testimony, the court could have reasonably concluded it was not supported by the facts because Anderson stopped, called his girlfriend, videotaped his vehicle, and drove back through the mall parking lot to see what he had hit. The court made a reasonable and well-founded decision to keep the trial grounded in the facts and relevant evidence.

2. *There was no abuse of discretion in excluding the evidence under Evidence Code section 352*

Even if the evidence of Milligan's suicidal thoughts and the expert testimony on fight or flight syndrome had some relevance, the court did not abuse its discretion in determining that its probative value was substantially outweighed by its prejudicial effect.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The "prejudice" referred to in Evidence Code section 352 is that which """uniquely tends to evoke an emotional bias against [a party] as an individual,""" while having only slight probative value. (*People v. Garceau* (1993) 6 Cal.4th 140, 178, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Under this section, "the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on

appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, the evidence of Milligan's suicidal thoughts had little probative value, but had the potential of being highly prejudicial. It had an obvious tendency to evoke an emotional bias against the victim, while at the same time evoking sympathy for Anderson. Whether Milligan intentionally stepped in front of Anderson's car, or was negligent in crossing the road, was not a relevant issue in the case. There was little or no dispute that the crash took Anderson by surprise. The relevant question was, *after* he was surprised, what did he do next, and what could he reasonably believe he had hit? As CALCRIM No. 2140 states, "[t]he driver of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable."

As to the proposed expert testimony on fight or flight syndrome, a reasonable court could also have determined that its probative value was substantially outweighed by the potential it would cause undue prejudice, a confusing of the issues, or a misleading of the jury. As explained, *ante*, the proposed fight or flight syndrome was contrary to Anderson's own trial testimony and version of events. He admitted that he left the scene after stopping, viewing his car, and determining he had either hit a person or an animal, based upon the blood and damage to his car, and then going back to see if he could determine what he hit. This testimony is inconsistent with a theory, as espoused by Anderson, he was "consumed with the need to get to a place of safety," and his leaving

the scene was an automatic response over which he had no control. The proffered evidence did, however, have the potential of arousing sympathy for Anderson, misleading the jury, confusing the issues and serving as a distraction, given Anderson's defense and version of events.

In sum, the court did not abuse its discretion in excluding the proffered evidence under Evidence Code section 352 as Anderson cannot show the court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125.)

II. *REFUSAL OF INSTRUCTION ON CONSTRUCTIVE KNOWLEDGE*

Anderson asserts the court erred when it refused to instruct the jury with a pinpoint instruction on constructive knowledge he had proposed. This contention is unavailing.

A. *Background*

At trial, Anderson requested that the court, in addition to giving an instruction under CALCRIM No. 2140, which sets forth the elements of the crime of felony hit and run resulting in death, give an instruction stating, "Knowledge may be imputed to the driver of a vehicle where the fact of injury is visible and obvious or where the seriousness of the collision would lead a reasonable person to assume that there must have been resulting injuries." However, the court refused the proposed instruction because it duplicated the standard instructions given to the jury, specifically CALCRIM Nos. 2140 and 3406.

Accordingly, the court instructed the jury under CALCRIM No. 2140, which states the knowledge element as, "The defendant knew that he had been involved in an accident that injured another person, or knew from the nature of the accident that it was probable that another person had been injured." The court further instructed the jury on knowledge under CALCRIM No. 3406, as follows:

> "The defendant is not guilty of the crime charged in Count One if he did not have the intent or mental state required to commit the crime, because he *reasonably did not know a fact or reasonably and mistakenly believed a fact.* [¶] If the defendant's conduct would have been lawful under the facts as he *reasonably believed them to be*, he did not commit the charged crime. [¶] If you find that *the defendant did not know that it was probable that he had struck a human being, and if you find that belief was reasonable*, he did not have the specific intent or mental state required for the charged crime. [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for the charged crime, you must find him not guilty." (Italics added.)

B. *Analysis*

Although a defendant generally has a right to a pinpoint instruction on a particular defense theory (*People v. Earp* (1999) 20 Cal.4th 826, 886), "instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) Further, a court may also properly refuse a pinpoint instruction that is an incorrect statement of law (*People v. Gurule* (2002) 28 Cal.4th 557, 659), that is confusing (*People v. Moon* (2005) 37 Cal.4th

1, 30), or that is merely duplicative of other instructions (*People v. Bolden* (2002) 29 Cal.4th 515, 558).

The California Supreme Court has defined the knowledge element of felony hit and run resulting in death as follows, "[C]riminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." (*People v. Holford* (1965) 63 Cal.2d 74, 80, fn. omitted (*Holford*). This definition has not changed since *Holford*, and, as stated, *ante,* CALCRIM No. 2140 accurately and fully describes this element. Indeed, CALCRIM No. 2140 cites *Holford* as authority for the knowledge element. (CALCRIM No. 2140, bench notes).

Nevertheless, Anderson asserts that his requested pinpoint instruction, taken from the case *People v. Carter* (1966) 243 Cal.App.2d 239 (*Carter*), needed to be given to the jury as it "more accurately" reflects the knowledge element and defense theory of the case.

The Court of Appeal's decision in *Carter* did not purport to change or "more accurately" define the constructive knowledge standard stated in *Holford.* Instead, the Court of Appeal used *Holford* to find there was insufficient evidence of constructive knowledge in that case. (*Carter, supra,* 243 Cal.App.2d at p. 241.) *Carter's* discussion of situations that might meet the *Holford* definition, "visible and obvious" injury situations and the "seriousness of the collision," merely constituted illustrations of the *Holford* standard. (*Carter, supra,* at p. 241.) Accordingly, the requested pinpoint instruction was properly refused. Indeed, because there might be situations where the

fact of injury may not be "visible and obvious" and the collision not "serious," but the overall facts of the collision are such that a reasonable person would find it probable that another person had been injured, the requested instruction could in fact be misleading.

III. *UNANIMITY INSTRUCTION*

Anderson contends the court should have instructed the jury sua sponte with a unanimity instruction as to when he knew he had been involved in an injury-causing accident and therefore, when his duty to act arose. We reject this contention.

A defendant's constitutional right to a unanimous jury verdict requires that when the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon or the trial court must sua sponte give a unanimity instruction telling the jurors they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction is designed to eliminate the danger that a defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed. (*Ibid.*)

However, no unanimity instruction is required when the prosecution presents *multiple theories* regarding *one* discrete criminal act or event. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135; *People v. Carlin* (2007) 150 Cal.App.4th 322, 347.) In *Russo*, the California Supreme Court explained the distinction between multiple theories (not requiring a unanimity instruction) and multiple acts (requiring a unanimity instruction): "[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise

role was, the jury need not unanimously agree on the basis or . . . the 'theory' whereby the defendant is guilty. . . ." (*Russo, supra,* at p. 1132.) "The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at pp. 1134-1135.)

Likewise in this case no unanimity instruction was required as to when Anderson's duty arose to stop, render aid and report the accident. The jury was entitled to decide that his duty arose at any time during the time period between when he struck the victim and when he left the scene. There was one discrete act—leaving the scene of the accident with knowledge he was involved in an injury-producing accident—and the jury need not have agreed when, before he left, his knowledge arose.

IV. *INSTRUCTION UNDER CALCRIM NO. 2140*

Anderson asserts the court erred by instructing the jury under CALCRIM No. 2140, without further instructing the jury he had no duty to assist Milligan if others were already providing aid. This contention is unavailing.

CALCRIM No. 2140, which sets forth the elements of felony hit and run, contains an optional, bracketed statement that "[t]he driver is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance."

However, Anderson did not request this amplifying instruction at trial. Accordingly, he has forfeited the right to raise this issue on appeal. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Moreover, even if we were to reach the merits of this issue, we would reject Anderson's claim of error as this proposed instruction is not supported by the evidence in this case. In *People v. Scheer* (1998) 68 Cal.App.4th 1009, the defendant similarly argued on appeal that the trial court erred in failing to amplify the standard CALJIC instruction on the elements of felony hit and run (CALJIC No. 12.70) by adding language similar to the bracketed portion of CALCRIM No. 2140, quoted *ante.* (*Scheer, supra,* 68 Cal.App.4th at pp. 1026-1027.) The Court of Appeal rejected this contention, holding it was unsupported by the evidence: "The undisputed evidence reflects appellant fled the scene within a minute or two after the collision and made no attempt either to exit his car or to ascertain either the condition of the victims or whether any of the bystanders were in

fact rendering the kind of assistance mandated by [the Vehicle Code]. [¶] We hold the driver's duty to render necessary assistance under [the Vehicle Code], at a minimum, requires that the driver first ascertain what assistance, if any, the injured person needs, and then the driver must make a reasonable effort to see that such assistance is provided, whether through himself or third parties. [Citation.] [¶] Obviously, where, as here, the driver flees the scene without inquiring about or otherwise investigating the victims' condition, he has failed to perform the first step. [Citation.] Additionally, the mere presence of bystanders who arguably gathered to aid the victims does not guarantee that the injured person will receive all necessary aid. In some instances, for example, a bystander may be willing, but not physically capable, of removing the victim from the wreck, or a bystander may be willing to call for help but no phone is available yet is not willing to transport the victim to a medical facility. [¶] *In view of the foregoing, we further conclude that appellant was not entitled to an amplifying instruction to the effect that his duty to render necessary assistance was obviated because such assistance was rendered by others. The fortuitous fulfillment of the driver's duty to render reasonable assistance to the injured victim or victims by Good Samaritans cannot operate to exonerate the driver and nullify the fact such duty was breached by the driver. To reach a contrary conclusion would impermissibly immunize the driver from the penal consequences of such breach and encourage scofflaws to violate both the letter and spirit of the law.*" (*Scheer, supra,* 68 Cal.App.4th at pp. 1028-1029, italics added.)

Likewise in this case, Anderson did not stop to check the condition of Milligan or ascertain what, if any, aid he needed. Rather, he left the scene within minutes of the

accident, claiming he did not see Milligan and did not see anyone who had stopped to assist Milligan. It was Anderson's contention he did not even know he had hit a person until his girlfriend and her brother told him. The fortuitous fulfillment of his duty by others, i.e., Gilbride, who arrived at the accident shortly after it occurred and telephoned for assistance, cannot exonerate Anderson and nullify his initial breach.

V. *COURT'S REFUSAL TO REOPEN DEFENSE CASE*

Anderson asserts the court erred in refusing to allow him to reopen his case after closing arguments to allow him to investigate the veracity of Officer Whitman's testimony concerning the density and height of the hedges along Fletcher Parkway and his opinion it would be very difficult for a person to see through them to the roadway from the mall parking lot. We reject this contention.

A. *Background*

Following closing argument, defense counsel requested that he be allowed to reopen his case to investigate the state of the hedges between the mall parking lot and Fletcher Parkway. Counsel indicated that although there were very dense hedges just next to the collision site, Anderson believed there were very few shrubs to the east of the accident site, where he claimed he drove in the mall parking lot after the accident. Counsel stated that he and Anderson each drove out to the scene after closing argument and confirmed that area at present did not have any dense hedging. Counsel requested that they be allowed to investigate the existence and nature of the hedging in place on the night of the accident by sending out an investigator and comparing aerial photographs taken shortly after the accident. The court denied the motion.

B. *Analysis*

A trial court has discretion to order a case reopened to permit the introduction of additional evidence. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.) "In determining whether a trial court has abused its discretion in denying a . . . request to reopen, the reviewing court considers the following factors: '(1) the stage the proceedings had reached when the motion was made; (2) the [requesting party's] diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.' [Citation.]" (*People v. Jones* (2003) 30 Cal.4th 1084, 1110.) If error is found, the court must then assess any prejudicial effect. (*Id.* at pp. 1111, 1117.)

Here, the late stage of the proceedings, the lack of significance of the potential evidence, and the lack of diligence by defense counsel compel the conclusion the court did not err in refusing to let the defense reopen its case. The characteristics of the hedges and shrubbery along Fletcher Parkway were discussed throughout the trial. Several witnesses testified to the existence of the hedges and shrubbery in both the area of the accident and where Anderson alleged he drove. There were multiple photographs admitted into evidence, including defense exhibits, which depicted the area. At all times during the trial, both sides understood the significance of the hedges and shrubbery and its relationship to Anderson's ability to see the road from the mall parking lot. The defense had ample opportunity to explore the state of the hedges and shrubbery both before and during Anderson's defense case. The area had been so thoroughly explored that when Officer Whitman testified in rebuttal, defense counsel did not cross-examine

him. In sum, the court did not err in refusing to let Anderson reopen his defense case after oral arguments.

VI. *RESTITUTION ORDER*

Anderson asserts that the court erred in ordering that, as a condition of probation, he be ordered to pay restitution for expenses related to Milligan's injuries and death. Specifically, he asserts the order was improper because these expenses were not caused by and had no relation to the crime for which he was convicted. This contention is unavailing.

A. *Background*

The trial court, as a condition of probation under Penal Code section 1203.1, ordered Anderson to pay Sharp Memorial Hospital the costs incurred as a result of their treatment of Milligan for his injuries before he died. The court further ordered Anderson to pay Milligan's family's funeral expenses as a condition of probation. The total amount of the restitution order was $34,092.92.

B. *Standard of Review*

Penal Code section 1203.1 gives trial courts broad discretion to impose conditions of probation to foster rehabilitation of the defendant, protect the public and the victim, and ensure that justice is done. (Pen. Code, § 1203.1, subd. (j); *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 319.) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.] Conversely, a

condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), fn. omitted, quoting *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121 (*Carbajal*).)

C. *Analysis*

Anderson asserts that his criminal act was in leaving the scene, and section 20001 does not require a showing that he caused Milligan's injuries, death, and the related funeral expenses. (*People v. Escobar* (1991) 235 Cal.App.3d 1504, 1509 ["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"].) However, the identical argument asserted by Anderson was raised by the defendant in *Carbajal, supra,* 10 Cal.4th 1114, and rejected by the California Supreme Court.

However, in imposing restitution as a condition of probation, "[a] court may also consider [in imposing victim restitution] crimes which were charged but dismissed [citation]; uncharged crimes, the existence of which is readily apparent from the facts elicited at trial [citation]; or even charges of which the defendant was acquitted, if justice requires they be considered. [Citation.]" (*People v. Goulart* (1990) 224 Cal.App.3d 71, 79.) This is because probation is an """act of clemency and grace,""" not a matter of right. (*People v. McGavock* (1999) 69 Cal.App.4th 332, 337.) "[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." (*People v. Miller* (1967) 256 Cal.App.2d 348, 356; see also *In re Osslo* (1958) 51 Cal.2d 371, 377.) Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria. It is not limited to damages specifically caused by the crime of which the defendant was convicted.

In *Carbajal* the high court held that a trial court may order a defendant convicted of hit and run to pay, as a condition of probation, "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.) The court reasoned that the damage the defendant caused to the parked car during the hit and run accident was "reasonably related" to the crime of hit and run. (*Id.* at p. 1123.) As the court in *Carbajal* put it, "[b]y 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.' [Citation.]" (*Id.* at p. 1124.)

The court also concluded that in the probation setting "restitution is also related to the goal of deterring future criminality. By seeking to force the defendant to accept the responsibility he attempted to evade by leaving the scene of the accident without identifying himself, the restitution condition acts both as a deterrent to future attempts to evade his legal and financial duties as a motorist and as a rehabilitative measure tailored to correct the behavior leading to his conviction." (*Carbajal, supra,* 10 Cal.4th at p. 1124.)

Likewise in this case the court did not abuse its discretion in ordering restitution as a condition of probation. Because the jury necessarily found, as an element of the crime of felony hit and run, that Anderson was involved in an accident that resulted in injury or death, the restitution order was reasonably related to the expenses related to Milligan's injuries and death. Further, the order serves the purpose of deterring future criminality. The order forces Anderson to confront, in concrete terms, the harm his actions have caused.

Further, Anderson's reliance on *People v. Scroggins* (1987) 191 Cal.App.3d 502 for the proposition there is a causation element in restitution orders is misplaced. In reaching this conclusion, the *Scroggins* court relied upon *People v. Richards* (1976) 17 Cal.3d 614, 619-620, which narrowly construed a trial court's authority to imposed restitution for damages that were not specifically caused by the defendant's criminal conduct. (*Scroggins, supra,* 191 Cal.App.3d at pp. 506-507.) However, in *Carbajal,* our

high court expressly disapproved this portion of the *Richards* decision. (*Carbajal, supra,* 10 Cal.4th at p. 1126.)

The court did not err in imposing its restitution order.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.

Filed 1/27/09

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ELI JORDAN ANDERSON, Defendants and Appellants.	D050432 (Super. Ct. No. SCE262419) ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING OPINION FOR PUBLICATION NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on December 31, 2008, is modified as follows:

1. At page 28, immediately preceding the paragraph that states, "The court did not err in imposing its restitution order," the following five paragraphs are added:

> Following submission of this matter the Third District Court of Appeal held, in a published opinion, that a hospital that treated a victim injured by a defendant is itself not a "victim" for purposes of restitution under section 1202.4, subdivision (f). (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1096-1097 (*Slattery*).) Based upon this decision, Anderson asserts, in a petition for rehearing, the court erred in ordering him to pay $31,397.55 to Sharp Memorial Hospital for the costs of treating the victim Milligan. Anderson's reliance on *Slattery* is misplaced.

In this case, Anderson was granted probation, whereas in *Slattery* the defendant was sentenced to state prison. That distinction is critical to our analysis.

As discussed, *ante*, probation is an """act of clemency and grace,""" not a matter of right. (*People v. McGavock, supra,* 69 Cal.App.4th at p. 337.) "[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." (*People v. Miller, supra,* 256 Cal.App.2d at p. 356.) Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria. Thus, even if in cases where a defendant is sentenced to state prison a hospital is not considered a victim for purposes of restitution, under *Carbajal* and *Lent*, the court properly exercised its discretion to order restitution to the hospital that treated Milligan because he was unable to pay those expenses. Forcing the hospital to bear those expenses, under the facts of this case, would defeat the purposes of the restitution statutes where it was ordered as a condition of probation.

Further, to the extent *Slattery* intended its holding to be broad enough to include restitution orders where probation is granted, we decline to follow its holding. In reaching its decision, the *Slattery* court relied heavily on *People v. Birkett* (1999) 21 Cal.4th 226 (*Birkett*), in which the California Supreme Court held that a court could not order restitution as a condition of probation to be paid to insurance companies who paid out claims to the defendant's victims whose cars were stolen. (*Id.* at pp. 234-235.)

Here, however, the victim was not an insurance company but the direct provider of emergency medical services to the victim. Insurance companies conduct risk assessments and enter into contracts in which they promise to cover certain losses in exchange for premiums. A hospital, by contrast, when presented with a gravely injured victim, has an obligation to treat the victim regardless of whether the victim has insurance or the costs of care will ever be recoverable. (See *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (Jan. 8, 2009) 2009 WL 36855, *1, *3.) When a hospital suffers this type of economic loss as a result of a defendant's criminal acts it is a *direct* victim.

There is no change in the judgment.

The petition for rehearing is denied.

The opinion in the above-entitled matter filed on December 31, 2008, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

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HUFFMAN, Acting P. J.

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