

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Ct.
	) No. S170778
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. D050432
v.	)
	) Superior Court
ELI J. ANDERSON,	) No. SCE262419
	)
Defendant and Appellant.	)
_____	)

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO

Honorable Allan J. Preckel, Judge

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**APPELLANT'S REPLY BRIEF**

SUPREME COURT  
FILED

*on the merits* SEP 01 2009

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By appointment of the Supreme Court  
with the assistance of Appellate  
Defenders, Inc.

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**APPELLANT’S REPLY BRIEF**

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**ISSUE PRESENTED**

**(California Rules of Court, rule 8.516 (a)(1))**

Appellant Eli J. Anderson was convicted of felony hit and run. 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.)

The issue presented is “did the trial court err in awarding restitution to the hospital that treated the victim of defendant’s hit-and-run-offense?”

## ARGUMENT

### I.

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

##### A. Summary of Appellant’s Argument

The trial court awarded restitution to the hospital that treated the decedent. The decedent was not a “direct victim” of appellant’s criminal conduct, and the award is therefore statutorily improper.

##### B. Respondent’s Argument

Appellant petitioned this court on the narrow issue of whether a hospital can be a “direct victim” for purposes of an award of restitution under the circumstances of this case, pointing out that the published opinion in this case disagreed with the holding of a case out of the Third District Court of Appeal, *People v. Slattery* (2008) 167 Cal.App.4th 1091.

Review was granted on that issue, specifically “did the trial court err in awarding restitution to the hospital that treated the victim of defendant’s hit-and-run-offense?” Appellant’s argument in his opening brief was addressed to that narrow issue. While respondent suggests that “appellant’s argument misses the point” (Respondent’s Brief at p. 15), appellant would respectfully suggest that respondent’s argument misses the point.

Respondent has addressed in detail the broad discretion the trial court has to

impose probation conditions, citing *People v. Lent* (1975) 15 Cal.3d 481. (Respondent's Brief at pp. 5-15.) That isn't the issue before this court; those issues have been decided by this court and there is no difference of opinion among the various courts' of appeal. The issue before this court is much narrower: "did the trial court err in awarding restitution to the hospital that treated the victim of defendant's hit-and-run-offense?"

While respondent states that it will "leave that issue for another day" (Respondent's Brief at p. 12, fn. 6), respondent does address the issue at the end of its brief (Respondent's Brief at pp. 15-18), and appellant will respond appropriately.

Respondent argues that appellant forfeited this issue by failing to raise it in the trial court. (Respondent's Brief at pp. 5-7.) Not so. Appellant's argument is based on a published decision (*People v. Slattery, supra*, 167 Cal.App.4th 1091) dated October 28, 2008, after submission of this case to the court of appeal for decision, and long after the conclusion of the trial. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

Respondent argues that, in any event, *Slattery* was wrongly decided, arguing that the language of Penal Code<sup>1</sup> section 1202.4, subdivision (f) “is broad enough to include both the intended target(s) of a defendant’s crime and those unintentionally – but directly – harmed by it.” (Respondent’s Brief at p. 15, fn. 7.) Respondent is mistaken; the language of the statute is quite specific.

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* (2005) 36 Cal.4th 384, 393, original italics.)

Respondent criticizes appellant’s reliance on *People v. Keller* (1978) 76 Cal.App.3d 827, as this case does not address restitution. (Respondent’s Brief at p. 16.) Appellant does not cite *Keller* for that reason. The express statutory language of Section 1203.1, subdivision (a)(3), governing restitution orders where a defendant is granted probation, specifically

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<sup>1</sup> All further references are to the Penal Code, unless noted.

requires a restitution order to comply with the requirements of section 1202.4. *Keller* holds that section 1203.1 furnishes and limits the measure of authority which the court may thus exercise. (*People v. Keller, supra*, 76 Cal.App.3d 827, 832.) Appellant therefore argues that, contrary to respondent's position (Respondent's Brief at p. 16), the holding in *Slattery* that a hospital cannot be considered a "victim" for purposes of restitution under section 1202.4, subdivision (f) (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1096-1097), should therefore be equally applicable here, regardless of whether a defendant is granted probation or sent to prison.

Respondent also criticizes appellant's reliance on *People v. Birkett* (1999) 21 Cal.4th 226. (Respondent's Brief at pp. 16-17.) Appellant cited *Birkett* only for the proposition that this 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.) While respondent argues that insurance companies and hospitals should be treated differently (Respondent's Brief at p. 18, fn. 9), the holding in *Birkett* was not based on the fact that the insurance companies conduct risk assessments and enter into contracts in which they promise to cover certain losses in exchange for premiums, as respondent argues. The holding is based on the express language of the statute requiring restitution to a "direct" victim. "Direct" was defined as "'straightforward, uninterrupted, [or] immediate' in time, order or succession, or 'proceeding [in logic] from

antecedent to consequent, from cause to effect, etc., uninterrupted,' or generally '[e]ffected or existing without intermediation or intervening agency; immediate.' [Citation.]" (*People v. Birkett, supra*, 21 Cal.4th 226, 232-233, fn. 6.) By this definition the hospital was not a "*direct victim of a crime.*" (§ 1202.4, subd. (k)(2), italics added.) As such, the restitution award is improper.

### CONCLUSION

Appellant was ordered to pay \$31,397.55 in restitution to Sharp Memorial Hospital, for costs of treating the victim in this case. The hospital is not a "victim" of this crime, and the restitution amount should be stricken

Dated: August 26, 2009

Respectfully submitted,

---

Stephen M. Hinkle  
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE**  
**WITH CALIFORNIA RULES OF COURT, RULE 8.360.**

Case Name: People v. ELI J. ANDERSON

Supreme Court No. S170778

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached APPELLANT'S REPLY BRIEF contains 1469 words as calculated by Microsoft Word 2003.

Dated: August 26, 2009

\_\_\_\_\_  
Stephen M. Hinkle

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SUPREME COURT CASE NO. S170778  
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:

**APPELLANT'S REPLY BRIEF**

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:

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Attn: Hon. Allan J. Preckel, Judge

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Vista, California, on August 28, 2009.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on August 28, 2009, at Oceanside, California.

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Stephen Hinkle