

# SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and Respondent,

v.

ELI J. ANDERSON,

Defendant and Appellant.

Case No. S170778

SUPREME COURT  
FILED

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Appellate District, Division One Case No. D050432  
San Diego County Superior Court  
Case No. SCE262419  
Honorable Allan J. Preckel, Judge

## RESPONDENT'S ANSWER BRIEF ON THE MERITS

EDMUND G. BROWN JR.  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GARY W. SCHONS  
Senior Assistant Attorney General  
JAMES D. DUTTON  
Supervising Deputy Attorney General  
MELISSA MANDEL  
Deputy Attorney General  
State Bar No. 159141  
110 West A Street, Suite 1100  
San Diego, CA 92101  
P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2211  
Fax: (619) 645-2191  
Email: [Melissa.Mandel@doj.ca.gov](mailto:Melissa.Mandel@doj.ca.gov)  
*Attorneys for Plaintiff and Respondent*

**TABLE OF CONTENTS**

	<b>Page</b>
Issue Presented.....	1
Introduction.....	1
Statement of the Case and Facts .....	1
Argument .....	5
I.    The order requiring appellant to pay restitution to the hospital was not arbitrary or capricious because it complied with Penal Code section 1203.1, and <i>People v. Lent</i> .....	5
A.    Appellant has forfeited his claim that the order requiring him to pay restitution to the hospital was invalid .....	5
B.    The restitution order was not arbitrary or capricious because it complied with Penal Code section 1203.1 and <i>People v. Lent</i> .....	7

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>In re Bushman</i> (1970) 1 Cal.3d 767 .....	10
<i>In re I.M.</i> (2005) 125 Cal.App.4th 1195 .....	11, 12
<i>In re Sheena K.</i> (2007) 40 Cal.4th 875 .....	7
<i>Kelly v. Robinson</i> (1986) 479 U.S. 36 [107 S.Ct. 353, 93 L.Ed.2d 216.] .....	14
<i>People v. Bartell</i> (2009) 170 Cal.App.4th 1258 .....	7
<i>People v. Birkett</i> (1999) 21 Cal.4th 226 .....	16, 17, 18
<i>People v. Carbajal</i> (1995) 10 Cal.4th 1114 .....	passim
<i>People v. Gardineer</i> (2000) 79 Cal.App.4th 148 .....	6, 7
<i>People v. Giordano</i> (2007) 42 Cal.4th 644 .....	8, 9, 10, 11
<i>People v. Keller</i> (1978) 76 Cal.App.3d 827 .....	16
<i>People v. Lai</i> (2006) 138 Cal.App.4th 1227 .....	9
<i>People v. Lent</i> (1975) 15 Cal.3d 481 .....	passim
<i>People v. Martinez</i> (2005) 36 Cal.4th 384 .....	14, 15

<i>People v. Mason</i> (1971) 5 Cal.3d 759 .....	8, 10
<i>People v. O'Neal</i> (2004) 122 Cal.App.4th 817 .....	7
<i>People v. Percelle</i> (2005) 126 Cal.App.4th 164 .....	9
<i>People v. Rubrics</i> (2006) 136 Cal.App.4th 452 .....	8, 11, 13
<i>People v. Slattery</i> (2008) 167 Cal.App.4th 1091 .....	7, 14, 15
<i>People v. Walker</i> (1991) 54 Cal.3d 1013 .....	7
<i>People v. Welch</i> (1993) 5 Cal.4th 228 .....	6, 7
<i>People v. Woods</i> (2008) 161 Cal.App.4th 1045 .....	9, 11, 19

**STATUTES**

Health and Safety Code

§ 11470.1.....	15
§ 11470.2.....	15

Penal Code

§ 1202.4, subd. (k) .....	8
§ 1202.4, subd. (a)(1).....	14
§ 1202.4, subd. (a)(3)(B).....	8
§ 1202.4.....	passim
§ 1203.1.....	5, 7, 16
§ 1203.1, subd. (b).....	10
§ 1203.1, subd. (a)(3).....	15
§ 1203.1, subd. (j).....	10, 11
§ 1203.04, subd. (g).....	11, 14, 17, 18

Vehicle Code

§ 20001, subd. (a).....	1, 4
§ 20001, subd. (b)(2).....	1, 4

**CONSTITUTIONAL PROVISIONS**

Bill of Rights.....	7
---------------------	---

California Constitution

art. I, § 28.....	1, 7, 8, 15
art. I, § 28, subd. (b).....	1, 8

## **ISSUE PRESENTED**

Review was granted to decide the following issue: “Did the trial court err in awarding restitution to the hospital that treated the victim of the defendant’s hit-and-run offense?”

## **INTRODUCTION**

Appellant drove down a San Diego street late at night and fatally struck pedestrian Robert Milligan. Appellant fled the scene, leaving Milligan’s mangled body lying in the roadway. Emergency responders transported Milligan to the trauma center at Sharp Memorial Hospital, where life-saving efforts were made, but Milligan died from his injuries. Those efforts cost Sharp Memorial Hospital \$31,397.55. Neither Milligan’s family members nor his estate were liable for those costs. Appellant was convicted of felony hit and run resulting in death (Veh. Code, §20001, subds. (a) and (b)(2)), and was granted probation. The trial court ordered appellant to pay restitution to Sharp Memorial Hospital as a condition of probation. That order was not arbitrary or capricious. To the contrary, the trial court’s restitution order honored this Court’s directive to broadly construe the constitutional right of crime victims to receive restitution from the persons convicted of the crimes for losses they suffer. (Cal. Const. art. I, § 28, subd. (b).) Because restitution was ordered as a condition of probation, it does not matter whether the hospital was a direct victim, or whether restitution could have been ordered if appellant had been sentenced to state prison.

## **STATEMENT OF THE CASE AND FACTS**

A little after midnight on July 2, 2005, appellant Eli Anderson, then 18 years old, drove his Mitsubishi Mirage from La Mesa towards his girlfriend’s home in Lakeside. It was a clear night, appellant had a straight line of sight and the area was well lit. There was a sidewalk along the right

side of the roadway and a median on the left side of the roadway, with hedges and shrubbery running along the median and between the sidewalk and the Parkway Plaza shopping mall. (1 RT 220-222, 227-234; 2 RT 260-261, 267-268, 278-280, 413, 415, 420, 442-443; 3 RT 572, 577-578, 589; 4 RT 697-699, 741-745; 5 RT 864.)

According to appellant, shortly before 12:30 a.m., he reached down to change the radio station on his car stereo and took his eyes off the road for between five and ten seconds, when he suddenly heard a bang, followed by his windshield shattering and glass fragments showering the inside of his car. Shocked, and not yet knowing what caused his windshield to shatter, appellant cleaned the glass from his mouth, hair, and lap, slowed his speed, and then called his girlfriend Jenin as he pulled into the mall's eastern-most parking lot located in front of Best Buy. The Best Buy parking lot was located approximately four-tenths of a mile from the collision site. (3 RT 533, 4 RT 704.) Before turning into the parking lot, appellant used his rearview and side mirrors to look at the roadway behind him, and saw nothing but an "empty street" and no evidence he hit a human being. (4 RT 699-705, 749, 751, 754-757, 764.)

In his 12:27 a.m. phone call to Jenin, a "stuttering" and "shaky" appellant expressed confusion as to what happened, but told her he was pulling into a parking lot to examine the damage to his vehicle. (3 RT 483, 501.) Based on a series of recent rock-throwing incidents in the central parts of San Diego and La Jolla, appellant initially believed someone had thrown a rock at his car. (4 RT 701.) However, after examining the significant damage to his car and observing blood on the top of his shattered windshield, appellant realized he either hit an animal or a human being. (4 RT 728.) Appellant videotaped his inspection of the car between 12:31 a.m. and 12:32 a.m.. (2 RT 448, 3 RT 555-558, 563-566, 583-586; 4 RT 706, 764-768, 771, 778; 5 RT 866-873, 906.)

Appellant left the mall, drove onto the freeway, and called Jenin to tell her he was driving to her home. Appellant admitted that when he was driving on the freeway, he was frightened by the possibility that he may have hit a human being and left the scene. (4 RT 793.) Appellant agreed with Jenin that he would park at Janet's Café, a restaurant they frequented together, which was about four miles from Parkway Plaza. (3 RT 481-482, 4 RT 712, 5 RT 906-907.) Jenin came to Janet's Café and appellant and Jenin departed together in Jenin's car for her Lakeside home, approximately five miles away. Appellant left his damaged vehicle in the restaurant parking lot. (2 RT 352, 3 RT 483-484, 535, 4 RT 713-714.)

Gregory Gilbride was driving eastbound on Fletcher Parkway when he saw a man later identified as 50 year old Robert Milligan lying across the fifth lane of traffic. Milligan was plainly visible. As Gilbride approached Milligan, he saw blood and a "mangled body." Milligan was grunting and attempting to lift himself up off the pavement but could only lift himself a few inches before collapsing again. Gilbride called 911 and diverted traffic until police arrived. Paramedics arrived and transported the critically injured Milligan to Sharp Memorial Hospital, where he subsequently died from his injuries. (1 RT 136, 3 RT 451-461, 467-477, 479-480, 5 RT 850-851, 860, 862.)

Jenin and her brother returned to the collision scene and learned from a police officer that someone had been hit by a vehicle. They drove to Janet's Café and observed the blood on appellant's shattered windshield. (3 RT 473.) They returned to Jenin's house and reported the news to appellant, who appeared shocked and expressed a desire to turn himself in. (4 RT 715-717.) Appellant, however, never contacted the police. Instead, police discovered his identity on July 3, 2005, after anonymous tips provided police with his first name and the location of the vehicle involved in the collision. (2 RT 291-294, 339-342, 345, 350, 3 RT 526-528.)



The San Diego County District Attorney charged appellant with felony hit and run resulting in death, in violation of Vehicle Code section 20001, subdivisions (a) and (b)(2). (1 CT 1-2.) A mistrial was declared after the first trial resulted in a deadlocked jury. On January 10, 2007, appellant was convicted as charged at a second jury trial. (4 CT 647, 690-691, 694, 722-723.)

On February 28, 2007, the trial court sentenced appellant to 365 days in county jail, stayed pending appeal, and five years' formal probation. (4 CT 725.) On April 27, 2007, the trial court ordered appellant to pay a total of \$34,092.02 in restitution, of which \$31,397.55 was to go to Sharp Memorial Hospital for costs incurred in treating Milligan prior to his death. (1 Augmented CT [ACT] 2, 16 RT 4506-4507.)

In an opinion filed on December 31, 2008, the California Court of Appeal, Fourth Appellate District, Division One, affirmed appellant's conviction, and held that restitution was properly ordered as a condition of appellant's probation. The Court of Appeal subsequently granted appellant's Petition for Rehearing. On January 7, 2009, the Court of Appeal modified its opinion, ordered it published, and affirmed the term of probation requiring appellant to pay restitution to the hospital. The court found the restitution order was proper because it fell within the trial court's broad discretion to impose conditions of probation, and because the hospital was a direct victim of appellant's crime.

This Court granted appellant's Petition for Review on April 29, 2009.

## ARGUMENT

### **I. THE ORDER REQUIRING APPELLANT TO PAY RESTITUTION TO THE HOSPITAL WAS NOT ARBITRARY OR CAPRICIOUS BECAUSE IT COMPLIED WITH PENAL CODE SECTION 1203.1, AND *PEOPLE V. LENT*<sup>1</sup>**

As a term of probation, appellant agreed to pay restitution to the hospital that treated Milligan. In so doing, appellant forfeited his right to challenge that restitution order on appeal. Appellant claims the restitution order was an abuse of discretion because the hospital was not a direct victim within the meaning of Penal Code section 1202.4. (AOB 9-17.) Because restitution was ordered as a condition of appellant's probation, Penal Code section 1202.4 does not apply and the hospital need not qualify as a direct victim. The restitution order was proper because it complied with the requirements for probation conditions. The order was not arbitrary or capricious, as it satisfied the requirements of Penal Code section 1203.1, and *People v. Lent* (1975) 15 Cal.3d 481.

#### **A. Appellant Has Forfeited His Claim That The Order Requiring Him To Pay Restitution To The Hospital Was Invalid**

At a restitution hearing held on April 27, 2007, the People submitted hospital bills resulting from the life-saving efforts made in the trauma department of Sharp Memorial Hospital. The People asserted the hospital was entitled to restitution because the decedent did not have the ability to pay for the medical expenses, the decedent's family members were not liable for the expenses, and therefore the hospital was "going to have to eat those expenses in light of the decedent's lack of financial ability." The

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<sup>1</sup> *People v. Lent* (1975) 15 Cal.3d 481.

prosecutor also sought restitution on behalf of several of Milligan's family members who incurred costs related to his burial.<sup>2</sup> (16 RT 4501-4502.)

Defense counsel acknowledged the trial court's broad discretion in imposing conditions of probation, and objected to the restitution order on the sole basis that the evidence supported the defense theory that Milligan committed suicide. He did not object on the grounds that an order requiring appellant to pay restitution to the hospital was not an appropriate term of probation, or that the hospital was not a victim of his crime. (16 RT 4503, see also 16 RT 4506.) The court ordered appellant to pay \$31,397.55 in restitution to Sharp Memorial Hospital. (Aug. CT 2, 16 RT 4506-4507.)

Because of the trial court's wide discretion in fashioning terms of probation, a defendant who contends a condition of probation is erroneous must raise his claim in the trial court by objection in order to preserve the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 235; *People v. Gardineer* (2000) 79 Cal.App.4th 148, 151-152.)

A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis.

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<sup>2</sup> The prosecutor represented to the court that Milligan's family members were not liable for his medical expenses, and that the decedent (Milligan's estate) was unable to pay. Defense counsel did not dispute this representation, and the prosecutor did not claim Milligan's family members were entitled to restitution for Milligan's medical expenses. (16 RT 4501-4502.)

(*People v. Welch, supra*, 5 Cal.4th at p. 235, citing *People v. Walker* (1991) 54 Cal.3d 1013, 1023; see also *People v. Gardineer, supra*, 79 Cal.App.4th at pp. 151-152; *In re Sheena K.* (2007) 40 Cal.4th 875, 880.)

This rule applies to a defendant's failure to object on the grounds that a probationary restitution order directs restitution to a person who is not a qualified victim. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 820; contrast *People v. Bartell* (2009) 170 Cal.App.4th 1258, 1261, [finding no forfeiture in a state prison case because the defendant claimed the restitution order was unauthorized.]) Had appellant objected to the restitution order, the trial court would have had an opportunity to explain, modify or delete the condition of probation requiring him to pay restitution to Sharp Memorial Hospital. Foreclosing appellate review for appellant's failure to do so will promote the public policy of reducing costly appeals for matters that should have been resolved in the trial court.<sup>3</sup>

**B. The Restitution Order Was Not Arbitrary Or Capricious Because It Complied With Penal Code Section 1203.1 and *People v. Lent***

Proposition 8 created a Victim's Bill of Rights. (Cal. Const., former art. I, § 28.)<sup>4</sup> The People of the State of California declared their

[u]nequivocal intention . . . that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.

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<sup>3</sup> The forfeiture claim was not presented to the Court of Appeal because the issue of whether the hospital was a direct victim was not raised in appellant's opening brief on appeal. Appellant first raised the issue in his petition for rehearing, which asked the court to consider that question in light of the then recently decided case *People v. Slattery* (2008) 167 Cal.App.4th 1091.

<sup>4</sup> Cal. Const. art. I, sec. 28, was amended by Proposition 9 ("Marsy's law") which became effective in November 2008, after appellant's crime.

(Cal. Const., former art. I, § 28, subd. (a.))

The People further provided that

[r]estitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.

(Cal. Const., former art. I, § 28, subd. (b.))

When a defendant is granted probation, a trial court has great latitude in fashioning terms of probation which carry out the voters' clear intent to provide for restitution. Probation is a privilege and not a right. When a defendant accepts probation in exchange for avoiding a prison term, trial courts have "broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety." [Citation.] (*People v. Mason* (1971) 5 Cal.3d 759, 764; see also *People v. Lent, supra*, 15 Cal.3d at p. 486.)

The breadth of this discretion extends to restitution orders. While all restitution orders are reviewed for abuse of discretion, "the scope of a trial court's order is broader when restitution is imposed as a condition of probation." (*People v. Giordano* (2007) 42 Cal.4th 644, 664, fn. 7.) "[C]ourts have far greater leeway in selecting appropriate restitution as a condition of probation" than courts have in a prison case. (*People v. Rubrics* (2006) 136 Cal.App.4th 452, 459.) The sentencing court abuses its discretion in ordering restitution as a condition of probation only when its determination is arbitrary or capricious, or exceeds the bounds of reason. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121, citing *People v. Welch, supra*, 5 Cal.4th at p. 233.)

In every case, the court must order restitution to the victim of the crime. (Pen. Code, § 1202.4, subd. (a)(3)(B).) "Victim" is defined in Penal Code section 1202.4, subdivision (k) as:

- (1) The immediate surviving family of the actual victim.

(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.

(2) Any person who has sustained economic loss as the result of a crime and who satisfies the following conditions:

(A) At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim.

(B) At the time of the crime was living in the household of the victim.

(C) At the time of the crime was a person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to a relationship listed in subparagraph (A).

(D) Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime.

(E) Is the primary caretaker of a minor victim.

(4) Any person who is eligible to receive assistance from the Restitution Fund pursuant to Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code.

In probation cases, the statutory requirement for direct victim restitution is a directive, but not a limitation. Penal Code section 1202.4 does not limit a trial court's discretion in imposing terms of probation that are otherwise proper. (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1050; see also, *People v. Giordano*, *supra*, 42 Cal.4th at p. 664, fn. 7; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1248.) In prison cases, courts must look to the governing statute for guidance, but in the probation context, the court may impose conditions it could not otherwise impose. (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179-180.) Rather,

probation conditions are governed by Penal Code section 1203.1, subdivision (j), which provides, in pertinent part:

The court may impose and require any or all of the above-mentioned terms of imprisonment, fines, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . .

The validity of restitution as a condition of probation turns on the same standards against which other probation conditions are tested. (See *People v. Giordano, supra*, 42 Cal.4th at p. 652, citing Pen. Code, §1203.1, subs. (b) and (j), and *People v. Lent, supra*, 15 Cal.3d at p. 486.) Probation conditions are imposed to foster rehabilitation and promote public safety, and therefore are not to be invalidated by a reviewing court unless 1) they have no relationship to the crime of which the offender was convicted, 2) they relate to conduct which is not itself criminal, and 3) they require or forbid conduct which is not reasonably related to future criminality. (*People v. Lent, supra*, 15 Cal.3d at p. 486.)<sup>5</sup> “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.” (*People v. Giordano, supra*, 42 Cal.4th at p. 664, fn. 7.) Accordingly, *Lent* -- not Penal Code section 1202.4-- defines the boundaries of a trial court’s discretion to impose terms of probation, including terms involving restitution.

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<sup>5</sup> *People v. Lent* overruled *People v. Mason, supra*, 5 Cal.3d 759, and *In re Bushman* (1970) 1 Cal.3d 767, to the extent that the three-factor test for invalidating a condition of probation – set forth below – was stated in the disjunctive rather than the conjunctive. (*People v. Lent, supra*, 15 Cal.3d at p. 486, fn. 1.)

A contrary ruling would undermine this Court's holdings in several cases. For example, in *People v. Carbajal, supra*, 10 Cal.4th 1114, 1122, this Court stated:

[N]othing in Proposition 8 or in [former] Penal Code section 1203.04 purports to limit or abrogate the trial court's discretion, under Penal Code section 1203.1, to order restitution as a condition of probation where the victim's loss was not the result of the crime underlying the defendant's conviction, but where the trial court finds such restitution will serve one of the purposes set out in Penal Code section 1203.1, subdivision (j).

In *People v. Giordano, supra*, 42 Cal.4th at p. 664, fn. 7, this Court acknowledged that a trial court can impose conditions of probations that it could not otherwise impose, so long as the conditions are not invalid under the three *Lent* criteria. And in *Lent* itself, this Court affirmed an order of restitution to a victim of a crime for which the defendant had been acquitted, because of the trial court's broad discretion to impose conditions of probation. (*People v. Lent, supra*, 15 Cal.3d at p. 486.)

Cases applying the foregoing principles illustrate the trial court's broad discretion to impose conditions on probationers is governed by *Lent*, and not restricted by statute. In *People v. Carbajal, supra*, 10 Cal.4th 1114, this 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 which was damaged in the hit and run. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1119.) *Carbajal* relied on the trial court's broad discretion to set probationary terms under Penal Code section 1203.1, subdivision (j), and the language in former Penal Code section 1203.04, subdivision (g), declaring the legislative intent not to abrogate the trial court's broad discretion. (*People v. Woods, supra*, 161 Cal.App.4th at p. 1050; *People v. Rubrics, supra*, 136 Cal.App.4th at pp. 459-460.) This Court applied *Lent* to uphold the restitution order as a condition of probation. Similarly, in *In re I.M. (2005)* 125 Cal.App.4th 1195, the court



upheld an order requiring a juvenile probationer to pay restitution to cover the expenses of the victim's funeral even though the juvenile was convicted of being an accessory after the fact. The order was proper under the trial court's broad power to impose conditions of probation that foster rehabilitation and protect public safety. (*In re I.M.*, *supra*, 125 Cal.App.4th 1195 at pp. 1208-1209.)

The same is true here. The nature of the losses underlying the restitution order to the hospital here are not materially distinguishable from those at issue in *Carbajal*. In both cases, the losses were incurred in an accident from which the defendant fled the scene, and which formed the basis of his hit and run conviction. Accordingly, the only question is whether the result in this case should be different than in *Carbajal* because appellant was ordered to pay the hospital rather than Milligan's estate for economic losses that were otherwise clearly recoverable in restitution. Stated more generally, the issue is whether an otherwise valid probationary restitution order becomes invalid under *Lent* where the recipient receives qualified losses but is arguably not a direct victim as defined in Penal Code section 1202.4.<sup>6</sup>

Probation conditions are not to be invalidated unless they fail all three of the *Lent* criteria. (*People v. Lent*, *supra*, 15 Cal.3d at p. 486.) As to the first prong of *Lent*, the restitution order here directly related to the crime. In *People v. Carbajal*, *supra*, this Court found prong one was satisfied because "[b]y leaving the scene of the accident, the fleeing driver deprives the non-fleeing driver of his or her right to have responsibility for the

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<sup>6</sup> Respondent does not concede that Sharp Memorial Hospital does not qualify as a victim under Penal Code section 1202.4, but leaves that issue for another day, since it contends the trial court's discretion to order restitution as a condition of probation is not limited by the definition of victim in Penal Code section 1202.4.

accident adjudicated in an orderly way according to the rules of law.” (*People v. Carbajal, supra*, 10 Cal.4th at p. 1124.) This analysis applies with equal force here, because the direct relationship discussed in *Carbajal* was the relationship between the crime of hit and run, and the costs associated with that crime. (*Ibid.*) The analysis in *Carbajal* focused on the nature of the losses and not the identity of the person who sustained them. The nature of the losses here are similar to those in *Carbajal* because the hospital incurred economic losses for medical expenses incurred in treating Milligan for injuries sustained in the collision from which appellant fled. Thus, there is a direct relationship between appellant’s crime and the losses underlying the restitution order.

The restitution order also meets the third prong of *Lent* because it is reasonably related to future criminality. In a hit and run crime, it is the running that violates public policy. Appellant’s failure to remain at the scene and accept responsibility for his role in the accident imposed the full costs of the accident on the other parties involved and on the public in general. (*People v. Rubics, supra*, 136 Cal.App.4th at p. 460, citing *People v. Carbajal, supra*, 10 Cal.4th at p. 1124.) This is so because appellant’s flight from the scene disadvantaged the investigation. Appellant’s car was unavailable for immediate inspection. Investigators were forced to proceed without appellant’s contemporaneous description of the circumstances of the accident. Had appellant stayed at the scene and participated in the investigation, he may have disclosed facts which would have revealed additional contributing factors and assisted all interested parties, including the hospital, in pursuing their civil remedies. The extent to which appellant’s participation in the investigation would have led to the discovery of other potential civil defendants from which the hospital might seek to offset its damages is simply unknown.

With respect to the third *Lent* factor, this Court held in *Carbajal* that in the probation setting, restitution was related to the goal of deterring future criminality because it forced the defendant to face the responsibility he attempted to evade when he fled the scene. This Court further held the order served a deterrent and rehabilitative function. (*People v. Carbajal, supra*, 10 Cal.4th at pp. 1124, 1126, quoting *Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10 [107 S.Ct. 353, 93 L.Ed.2d 216.]) The order in this case has the same deterrent and rehabilitative effect as it would if the order were directed to a statutorily designated victim. The restitution order serves a rehabilitative function by forcing appellant to recognize the true impact of his crime.

This analysis holds true even though *Carbajal's* reasoning relied in part on Penal Code section 1203.04, which was repealed in 1995. Referring to subdivision (g) of that section, which stated, “[n]othing in this section shall be construed to limit the authority of the court to grant or deny probation or *provide conditions of probation*” this Court concluded,

In light of this language, we find unconvincing defendant’s claim that the electorate in passing Proposition 8, and the Legislature in enacting section 1203.04, intended to *narrow* the circumstances under which restitution is proper . . .

(*People v. Carbajal, supra*, 10 Cal.4th at p. 1122.)

That claim is equally unconvincing under the legislation in effect at the time of appellant’s crime. In addition to Proposition 8, which set forth the intent of the voters to recognize the rights of crime victims, Penal Code section 1202.4, subdivision (a)(1), makes it clear that

[i]t is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.

Appellant does not even claim the restitution order violates the *Lent* criteria. Rather, he relies on *People v. Slattery* (2008) 167 Cal.App.4th 1091, and *People v. Martinez* (2005) 36 Cal.4th 384, 392, in support of his claim that the hospital was not a victim within the meaning of Penal Code section 1202.4. (AOB 10-17.) Appellant's argument misses the point.

Both *Slattery* and *Martinez* involved defendants who were sentenced to state prison. As set forth above, Penal Code section 1202.4 defines the victims who are entitled to restitution in such cases. Here, the restitution order was authorized by the trial court's broad discretion to impose terms of probation. Penal Code section 1202.4 does not apply.<sup>7</sup>

Appellant also claims the express language of Penal Code section 1203.1, subdivision (a)(3), specifically requires a restitution order to comply with Penal Code section 1202.4. (AOB 14-15.) Not so. Penal Code section 1203.1, subdivision (a)(3), states,

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<sup>7</sup> In any event, *Slattery* was wrongly decided. Appellant relies on *Slattery* for the proposition that one harmed by criminal action may receive restitution under section 1202.4 only if the actor directed his or her actions toward the harmed person or entity. (AOB 12-14.) But neither the Constitution nor the statute purports to limit the class of victims to those who were *intended* targets of the subject crime, or for that matter, to crimes which involve an intent to cause harm. To the contrary, the language "in every case" makes it clear that restitution is required even for crimes where the actor did not "direct" his conduct towards anyone, such as hit and run. (Cal. Const., former art. I, § 28, subd. (b); Pen. Code, § 1202.4, subd. (f).) Further, the phrase, "as a result of," found in both the constitutional provision and the statute, is broad enough to include both the intended target(s) of a defendant's crime and those unintentionally-but directly-harmed by it. (*Ibid.*) Moreover, *Martinez* is distinguishable because the Department of Toxic Substances Control was the designated victim of the court's restitution order, but that department had exclusive rights to both criminal and civil recoveries under a different statute, Health and Safety Code, sections 11470.1 & 11470.2. (*People v. Martinez, supra*, 36 Cal. 4th at p. 394.)

The court shall provide for restitution in proper cases. The restitution order shall be fully enforceable as a civil judgment forthwith and in accordance with Section 1202.4 of the Penal Code.

The separate sentences in that provision contain two separate concepts. The first requires the court to order restitution in proper cases, without limitation. The second sentence refers solely to the enforceability of the restitution order, which is enforceable as a civil judgment and in accordance with Penal Code section 1202.4. The reference to Penal Code section 1202.4 in the sentence pertaining to enforceability of restitution orders does not limit the requirement that the court provide for restitution in appropriate cases.

Appellant's reliance on *People v. Keller* (1978) 76 Cal.App.3d 827, 832 (AOB 10, 15), is also misplaced. In *Keller*, the defendant pled guilty to possessing heroin after his motion to suppress evidence was denied. The heroin was discovered when the defendant's home was searched pursuant to "narcotics conditions" imposed as a condition of his probation in a prior petty theft case. The court found the probation condition was invalid, as it bore no relationship to the defendant's crime of stealing a .49¢ ball point pen, and it was unreasonable because it required the waiver of an important constitutional right in a minor case where there was no evidence of a drug connection to the crime. (*People v. Keller, supra*, 76 Cal.App.3d at pp. 839-840.) *Keller* does not address restitution, and reaffirms that conditions of probation imposed pursuant to Penal Code section 1203.1 must be reasonable and satisfy the *Lent* criteria. As set forth above, the restitution order here meets those requirements.

Finally, this case is not like *People v. Birkett* (1999) 21 Cal.4th 226, as appellant suggests. (AOB 16.) *Birkett* did not hold that only direct victims may receive restitution as a condition of probation. In *Birkett*, following the defendant's guilty plea to auto theft and running a "chop

shop,” he was placed on probation and ordered to pay victim restitution. At the restitution hearing, the trial court determined that the individuals who sustained vehicle losses had been partially reimbursed by insurance. Under the statutory scheme in effect at the time of the defendant’s crime,<sup>8</sup> the trial court determined the insurers were *entitled* to restitution. It ordered restitution to the individuals only for losses that had not been reimbursed by their insurance companies, and ordered restitution to the insurance companies for the amounts they had paid to their respective insureds. (*People v. Birkett, supra*, 21 Cal.4th at p. 230.)

In reversing that order, this Court addressed the “narrow” questions presented under the 1994 statutory scheme; whether those laws gave insurers a *right* to restitution insofar as they had reimbursed their insureds for crime related losses, and if not, whether trial courts had discretion to allocate mandatory probationary restitution awards between insurers and insureds to reflect such reimbursements. (*Id.* at p. 228.) As to the first issue, this Court relied on the plain language of former Penal Code section 1203.04 and its legislative history to reject the argument that the insurance companies were direct victims within the meaning of that statute. (*Id.* at p. 231, 245.) As to the second issue, this Court held the trial court abused its discretion by dividing a single award for the full amount of loss between each immediate victim and his insurer. (*Id.* at p. 245.) That conclusion was based on statutory language making the Legislative intent clear to require probationary offenders to make full restitution for all losses entirely to the individual or entity the offender had directly wronged, regardless of

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<sup>8</sup> Penal Code section 1203.04 was repealed in 1995. A uniform restitution scheme for all adult offenders was created through the amendment of Penal Code section 1202.4 in 1995. Penal Code section 1202.4 has been amended many times since its adoption. (See *People v. Birkett, supra*, 21 Cal. 4th at p. 247, fn. 21.)

the victim's reimbursement from other sources. (*People v. Birkett, supra*, 21 Cal.4th at p. 246.) "Nothing in the constitutional language states or implies that such restitutionary awards may be diverted to satisfy the claims of third parties." (*Id.* at p. 247.)

Neither of the "narrow" concerns addressed by *Birkett* comes into play here. As to the first issue, Respondent does not contend the hospital here had a right to restitution, but that the trial court had discretion to order restitution to the hospital as a term of probation.<sup>9</sup> As to the second issue, the trial court's order of restitution to the hospital did not divert part or all of the full restitutionary amount otherwise due to the immediate victim. Milligan's family members were not liable for the hospital bills, and his estate was unable to pay. They did not incur economic losses related to Milligan's medical bills and did not seek restitution for those expenses. Thus, unlike *Birkett*, the restitution order here did not "incorrectly divert[] portions of this restitutionary award from the immediate victims to their reimbursing insurers, thus leaving the immediate victims with less than

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<sup>9</sup> Because hospitals are different from insurance companies, Respondent does not concede that *Birkett* compels the conclusion that the hospital in this case had no right to restitution. The hospital was not an insurance company but the direct provider of medical services to the deceased victim. Unlike an insurance company which conducts risk assessments and enters contracts in which it promises to cover certain losses in exchange for the benefit of receiving insurance premiums, a hospital trauma center is in the business of saving lives. When a gravely injured victim is taken to a trauma center, the staff at that center have legal, ethical and professional responsibilities to treat that victim irrespective of whether the costs incurred will ultimately be collectible. Their willingness to provide such services is not an implied agreement to assume financial responsibility for those services. When a hospital suffers this type of economic loss because of a defendant's criminal actions, it is not acting pursuant to a contract for which it has received premiums in exchange for assuming economic responsibility.

“full” restitution without regard to private insurers.” (*People v. Birkett, supra*, 21 Cal.4th at p. 247.)

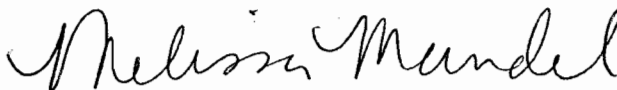
In probation cases, courts ordering restitution may consider dismissed charges, uncharged crimes, or even charges of which the defendant was acquitted, if justice requires they be considered. (*People v. Woods, supra*, 161 Cal.App.4th at p. 1050, quoting *People v. Carbajal, supra*, 10 Cal.4th at pp. 1114, 1121.) It follows that the court’s award of clearly recoverable losses to the party that actually incurred them is not arbitrary or capricious, and did not exceed the bounds of reason.

In sum, appellant had the option of rejecting the privilege of probation if he found the terms too harsh, and could have chosen instead to serve a term in state prison. The order requiring appellant to pay \$31,397.55 to Sharp Memorial Hospital was properly imposed as a condition of probation. The judgment of the Court of Appeal should be affirmed. Alternatively, the order should be modified so that restitution is paid to the estate of Robert Milligan.

Dated: August 14, 2009

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GARY W. SCHONS  
Senior Assistant Attorney General  
JAMES D. DUTTON  
Supervising Deputy Attorney General



MELISSA MANDEL  
Deputy Attorney General  
*Attorneys for Plaintiff and Respondent*

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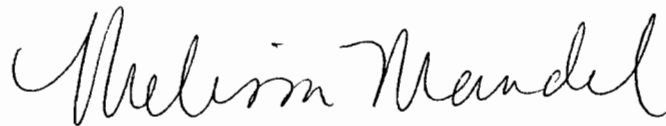


**CERTIFICATE OF COMPLIANCE**

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **5211** words.

Dated: August 14, 2009

EDMUND G. BROWN JR.  
Attorney General of California

A handwritten signature in black ink, reading "Melissa Mandel". The signature is written in a cursive, flowing style.

MELISSA MANDEL  
Deputy Attorney General  
*Attorneys for Plaintiff and Respondent*



**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Eli J. Anderson**

Case No.: **S170778**

I declare:

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

On August 14, 2009, I served the attached

**RESPONDENT'S ANSWER BRIEF ON MERITS**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Stephen M. Hinkle Attorney at Law 3529 Cannon Road, Suite 2B-311 Oceanside, CA 92056 <i>Attorney for Appellant Eli Jordan Anderson</i> (two copies)	Court of Appeal Fourth Appellate District, Division One 750 B Street, Suite 300 San Diego, CA 92101
Hon. Allan J. Preckel San Diego County Superior Court East County Regional Center 250 East Main El Cajon, CA 92020	The Honorable Bonnie M. Dumanis District Attorney San Diego County District Attorney's Office 330 West Broadway, Suite 1320 San Diego, CA 92101
Appellate Defenders, Inc. 555 West Beach Street, Suite 300 San Diego, CA 92101	

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 14, 2009, at San Diego, California.

G. Nolan  
Declarant



Signature

