

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

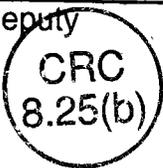
LUIS M.,) No. S207314
)
Petitioner,) 2d Dist. No.
) B238460
v.)
) (LASC No.
THE SUPERIOR COURT OF THE STATE OF) MJ20593)
CALIFORNIA FOR THE COUNTY OF)
LOS ANGELES,)
)
Respondent.)
)
PEOPLE OF THE STATE OF CALIFORNIA,)
)
Real Party in Interest.)
)

SUPREME COURT
FILED

JUL - 1 2013

Frank A. McGuire Clerk

Deputy



Original Proceedings
 From the Superior Court of Los Angeles
 The Honorable Benny Osorio, Judge

REAL PARTY'S REPLY BRIEF

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INTRODUCTION

Real Party, the People of the State of California (hereafter the People) has presented the following issue for review: where a large city is the victim of graffiti vandalism and where that city is tasked with the removal of thousands of acts of graffiti from city property each year, making it nearly impossible and highly impractical to assess the exact cost to remove each individual act of graffiti, may the city create a cost model for the average cost per unit of measure for the removal, cleanup, or repair of graffiti and may that cost model serve as a rational basis for calculating restitution? Petitioner Luis M. (hereafter Petitioner) contends in his Answer Brief that the use of a cost model is reasonable but only “as long as the costs included are attributable to a defendant’s conduct.” This argument is, however, without merit because a requirement that each and every cost included in the model be attributable to a defendant’s conduct completely defeats the purpose and efficiency of relying upon an average cost model. By definition, a “model” is a standard or example

for imitation or comparison. (www.Dictionary.com<URL> [as of June 27, 2013].) Petitioner is trying to change the meaning of an average cost model, leaving it without any real utility or substance. Furthermore, because graffiti vandalism in the form of painting, writing, drawing, and tagging is a class of crime where it is difficult to segregate and isolate the remediation costs to cities in each individual matter, perpetrators must reasonably share the burden of those costs through the calculation of restitution based upon a reasonable cost estimate rather than based upon actual costs. The People therefore continue to urge this Court to reverse the decision of the Court of Appeal and to determine that an average cost model may serve as a rational basis for calculating restitution under such circumstances as presented in this case.

ARGUMENT

I

THE USE OF AN AVERAGE COST MODEL IS A REASONABLE, COST-EFFICIENT MEANS OF ESTIMATING RESTITUTION GIVEN THE VOLUMINOUS NUMBER OF GRAFFITI ABATEMENTS CONDUCTED YEARLY BY LARGE CITIES, AND A REQUIREMENT THAT EACH AND EVERY ELEMENT INCLUDED IN THE COST MODEL BE SPECIFICALLY ATTRIBUTABLE TO A PARTICULAR DEFENDANT'S CONDUCT WOULD DEFEAT THE PURPOSE AND COST-EFFICIENCY OF USING AN AVERAGE COST MODEL

Graffiti vandalism is a crime which continues to grow at a distressing rate in cities throughout this State. As a result, California cities,

in our already seriously economically burdened, cash-strapped State, are required to spend massive sums of money abating the prodigious product of graffiti vandals who chose to engage in this foolish and senseless crime. For example, in this case, pursuant to the Brief filed by the Amicus Curiae City of Lancaster (hereafter the City), during the period from 2006 to 2011, it handled *thousands* of graffiti abatements and expended *millions* of dollars to do so:

In recent years, graffiti vandalism has become an enormous problem in the City of Lancaster (“City”). From 2006 to 2011, the number of graffiti incidents per year skyrocketed from 3,200 to over 26,000. (Exhibit A.) Since 2008, the City has spent an estimated \$38 million responding to over 90,000 incidents.

(Amicus Curiae Brief of the City of Lancaster, p. 2.)

In the instances where graffiti vandals are actually captured and brought to justice, cities are legal entities which are entitled to collect restitution for their losses. (Welfare and Institutions Code² section 730.6) Restitution is a constitutional right in this State. (Cal. Const., art. I, section 28, subd. (b).) It is also a statutory mandate. (Section 730.6, subs. (a)(1) and (a)(2)(B); Penal Code section 1202.4.) Yet, due to the sheer high number of cases amassed by graffiti vandals, it is a difficult task for cities to track the actual costs of abatement for each individual incident. Since 2006, for example, how much did it cost the City to abate incident number 27 or number 23,462? What were its labor costs for incident 412? How much administrative time went into incident 9,327? What type of equipment was used to remediate incident 13,945? What types of materials were used to clean the electrical boxes scarred by Petitioner in this case and how much of those materials were necessary to clean up the damages caused by Petitioner?

2. All further statutory references are to Welfare and Institutions Code, unless otherwise indicated.

If paint was used to repair the damage caused by Petitioner, each painter on the crew would have to log his actual time to paint over Petitioner's nine acts of graffiti and most likely photograph it. Or, were the boxes or at least their scarred components actually replaced? Due to the difficulties and impracticalities of tracking the actual costs of graffiti abatement in each individual circumstance, the City employs a cost model based upon its average cost on an annual basis of removing, cleaning, and repairing incidents of graffiti to calculate restitution. Given the burdens and impracticalities associated with tracking the actual costs of remediation in the thousands upon thousands of graffiti cases handled by the City, an average cost model is a logical, rational, and necessary mode of calculating restitution. (See *In re Anthony M.* 156 Cal.App.4th 1010, 1017, italics added [When ordering restitution under section 730.6, the juvenile court "may used *any rational method* of fixing the amount of restitution, provided it is reasonably calculated to make the victim whole, and provided it is consistent with the purpose of rehabilitation."].)

Petitioner begins his Answer Brief with a concession that the use of a cost model is reasonable. (Petitioner's Answer Brief, p. 3) However, he adds the following qualification to that statement: "as long as the costs included are attributable to a defendant's conduct." The qualification is disingenuous because the requirement that a city provide specific information regarding which components of a cost model are impacted in each individual case is the functional equivalent of requiring the city to track its actual costs in each case. That is, when a defendant argues that the cost model includes the cost of maintaining spray equipment, but sprayers were not utilized *in his case*, and it includes the cost of paint, but no one painted anything *in his case*, and it includes the cost of running the graffiti abatement program, but he does not know what, if any, efforts were

made by the program *in his case*, and when a city is required to respond to such arguments, the utility of relying upon a cost model is utterly co-opted. The purpose of using a cost model is to provide a *reasonable estimate* of the city's costs in a reasonable, cost-efficient manner. Causing a city to spend extra time and money (for additional employees, for supervisors, for training, for computer database maintenance, and the like) to prove up whether each cost included in the cost model is directly attributable to a defendant in each and every graffiti incident effectively eviscerates the efficiency of the cost model.

Obviously, a cost model should not include components that are really unrelated to graffiti abatement (e.g., a city cannot include the costs of building a library or offering after school programs, even in communities with high incidences of graffiti and gang activity) or otherwise unreasonable or illegal (e.g., the labor costs of law enforcement agencies *in the course and scope of their ordinary duties*, such as the costs of a defendant's arrest), and the People seek this Court's guidance as to what components are acceptable. However, once such components are established, it is illogical to permit a defendant to require a city to prove up whether each cost included in the cost model is directly attributable to the defendant. To do so would be the same thing as requiring the city to prove its actual costs and evaporate the utility of relying upon a cost model.

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II

BECAUSE GRAFFITI VANDALISM IN THE FORM OF PAINTING, WRITING, DRAWING, AND TAGGING IS A CLASS OF CRIME WHERE IT IS DIFFICULT TO SEGREGATE AND ISOLATE THE REMEDIATION COSTS TO CITIES CAUSED IN EACH INDIVIDUAL MATTER, PERPETRATORS MUST REASONABLY SHARE THE BURDEN OF THOSE COSTS THROUGH PAYING RESTITUTION BASED ON A COST ESTIMATE RATHER THAN BASED UPON ACTUAL COSTS

Graffiti vandalism, at least in the form of painting, writing, drawing, and tagging is a unique class of crime where, mainly due to its volume, it is difficult to segregate and isolate the costs to repair damaged property in each individual case. Clearly though, the total costs to repair property damaged by graffiti can be a massive burden for California cities: for example, in the City, a *38 million dollar* loss over a six year period is a colossal sum of money no matter how one looks at it; consider how many parks could have been built, employee salaries paid, streets fixed, libraries or after-school programs maintained. Therefore, a cost model simply requires that perpetrators who chose to write on walls, to spray paint on signs, to mark up electrical boxes, to share the burden of their misconduct with other perpetrators who engage in similar misconduct and to share it with the impacted City, which actually bears the most weight for the repair of its damaged property. Certainly, a cost model in a graffiti matter cannot require a defendant to pay for something unrelated to graffiti abatement or for anything unreasonable or illegal, but to the extent that sprayer equipment is included in a cost model although not utilized to remove property damages in every, single case, that is a burden that a perpetrator must share due to the

volume and unique nature of the misconduct. It is a small price to pay for choosing to engage in this type of conduct. It is a small price in proportion to the city's yearly abatement expenses.

Petitioner states in his Answer Brief that a court would never award restitution to a victim for repainting a sidewalk when the sole damage caused by a defendant was the repair of a window. Clearly however, window repair is not the subject matter of this case. Certainly, if a vandal broke a window, the City could and would provide a receipt for the cost of its replacement. The People speculate, however, that the City did not repair 96,000 cases of broken window vandalism from 2006 to 2011. The subject here is segregating and isolating the costs to repair damaged property in each individual case when the vandalism is voluminous and in the form of painting, writing, drawing, and tagging. A cost model simply requires a perpetrator to reasonably share the burden of this type of misconduct with like perpetrators.

III

PETITIONER UNFAIRLY TRIVIALIZES THE ENORMITY OF THE PROBLEM OF CALCULATING RESTITUTION IN GRAFFITI CASES AS WELL AS THE IMPACT OF THE COURT OF APPEAL'S RULING IN THIS MATTER

Petitioner states in his Answer Brief that the People have proffered a "parade of horrors" if this Court were to affirm the opinion by the Court of Appeal in this matter. (Petitioner's Answer Brief, p. 7.) However, in this case, the truth is *actually horrible*. There is nothing trivial about tracking actual expenses in thousands of graffiti abatement cases. Employees, who are hired by any city to clean, remove, or repair graffiti, are unlikely to be equipped to make a reliable record of their efforts. Therefore,

if cost models are prohibited and actual cost records become necessary, a city would be required to hire other employees, supervisors with training in this regard, to keep track of the size and location of the graffiti, how long it took to remove it, what work was done to remove it, whether a sprayer, sandblaster, high water pressure or other equipment was used, how much/what kind of solvent was used to remove it, or paint to cover it. A city would also have to hire employees to create a computer database to preserve that information, as well as employees responsible for inputting the information into the database and for maintaining the database and to make it searchable if the perpetrator is apprehended. According to the City's Amicus Brief, the additional time and money to prove up actual costs "may very well cause the City to abandon any efforts to seek restitution at all." Indeed, it would be imprudent for the City to seek to collect restitution if its collection efforts far exceeded the restitution it could recoup. Furthermore, criminal deterrence would be undermined if defendants (or minors and their parents) were not required to pay for their misconduct. What the People have presented is not a parade of horrors; it is the inevitable consequence of this decision: graffiti vandals will evade having to pay restitution when a large city is the victim.

Petitioner also states that "the People have mischaracterized the decision and have a rather dramatic interpretation of potential consequences." (Petitioner's Answer Brief, p. 7.) Indeed, the Court of Appeal failed to make a clear statement regarding whether or not a city may rely upon a cost model. The People reiterate the Court of Appeal's holding and reasoning:

Here, the estimate was based on an average of all costs of graffiti cleanup, with no consideration of *any individualized facts*, such as the type of graffiti Luis placed on public property and the extent of the efforts necessary to remove it....[§] In sum, the City's restitution model cannot provide the basis for calculating a restitution award, in that it includes sums which

are not economic losses by the direct victim of Luis's graffiti vandalism, and the sums included for cleanup do not reflect the *actual cost* of graffiti cleanup.

(Slip Opn, pp. 7-8, italics added.) The People interpret this to mean that a city may only obtain a restitution order after proving the actual costs incurred to remediate each and every graffiti incident. Again, this would have a devastating effect on a city's ability to collect restitution in graffiti cases, despite the fact that victim restitution is both constitutionally and statutorily mandated. Because the ruling is subject to this interpretation, the People seek this Court's reversal of the ruling.

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CONCLUSION

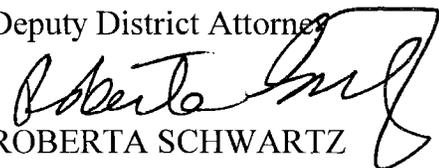
Accordingly, the People urge this Court to reverse the decision of the Court of Appeal and determine that an average cost model may serve as a logical, rational, and necessary basis for calculating restitution in graffiti cases where a large city is the crime victim, even if it rejects any of the particular components of the City's average cost model.

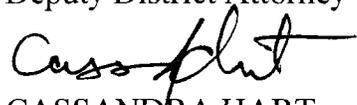
Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed Petition for Review contains approximately 3,104 words including footnotes, which is less than the 4,200 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

A handwritten signature in black ink, appearing to read "Cassandra Hart", is written over a horizontal line. The signature is fluid and cursive.

CASSANDRA HART
Deputy District Attorney

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple, Suite 540, Los Angeles, California 90012-3266. On the date of execution hereof I served (“**REAL PARTY’S REPLY BRIEF**”) the attached document by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

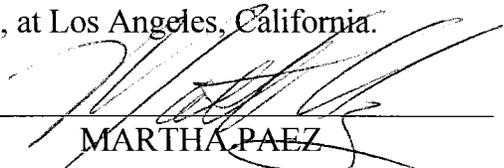
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