



**COPY**

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**LEROY GENE STANLEY,**

**Defendant and Appellant.**

Case No. C063661 /  
S185961

**SUPREME COURT  
FILED**

**MAY 11 2011**

**Frederick K. Ohlrich Clerk**

Appellate District Third, Case No. F09-3110  
Yolo County Superior Court, Case No.  
The Honorable David Rosenberg, Judge

**Deputy**

**RESPONDENT'S ANSWERING BRIEF ON THE MERITS**

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## ISSUE UNDER REVIEW

As appellant asserts (AOB 1), this Court granted review on the following issue:

Did the trial court err in awarding the victim restitution for the costs of repairing her damaged truck, when the estimated cost of the repairs was over [*sic*; nearly] three times the purchase price she paid 18 months earlier?

### PROCEDURAL AND FACTUAL BACKGROUND<sup>1</sup>

Appellant pled no contest to committing felony vandalism (§ 594, subd. (a)(b)(1)) for damaging a vehicle and was sentenced to serve a 16-month term in prison with the amount of direct victim restitution to be determined. (CT 56-59, 61; RT 3-4, 11-12, 14.) The probation report recommended for the victim to be reimbursed for \$2,812.94 based on the auto body shop's estimate of the total repair cost. (CT 65-66.) At sentencing, the parties noted information relevant to the amount of restitution was provided at the preliminary hearing. (RT 9.)

At the preliminary hearing, victim Patricia Short-Lyster testified that about 1½ years earlier her father, a former mechanic, had gone with her to look at a 1975 four-door Dodge Adventurer three-quarter ton pickup; he advised her to buy it. (CT 25, 34, 36, 39-41, 44.) She had paid \$950 cash for the pickup, which she had bought to use to go camping with her family. (CT 41.) As for the offense, she had heard appellant banging on the pickup, which had been in "excellent" physical and running condition prior

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<sup>1</sup> CT and RT refer, respectively, to the 89-page Clerk's and the 22-page Reporter's Transcripts on Appeal; no volume numbers are noted as they are single volumes; all statutory references are to the Penal Code unless otherwise noted; AOB refers to Appellant's Opening Brief on the Merits.

to his vandalism. (CT 32-34, 43-44.) Damage he inflicted included several dents that rippled “all up and down the driver’s side” of the pickup, a few dents in the long wheel base, dents to its right rear passenger door such that it could open only four or five inches, and a broken antenna. (CT 34-37.) The auto body shop estimate for repairing the pickup was \$2,812.94. (CT 38, 47-48; see CT 48-49 [estimate listed the vehicle as a 1975 Dodge D-200].)

The defense argued the amount should be the \$950 that the victim had paid for the vehicle and asserted the restitution amount cannot be more than the vehicle’s worth. (RT 9-10.) The court, presided by the Honorable Paul K. Richardson, judge, disagreed and said it was inclined to order restitution for the full repair amount, however, it set a schedule for the parties to brief the issue and set the matter for a restitution hearing. (CT 60; RT 10-11, 14-17.) The defense submitted points and authorities that argued the court should reduce the recommended restitution from the \$2,812.94 repair cost to the \$950 purchase price, relying upon *People v. Yanez* (1995) 38 Cal.App.4th 1622 (*Yanez*). (CT 73-77.) In contrast, the prosecution filed points and authorities that argued the restitution should be set at the full repair cost of \$2,812.94, relying upon *In re Dina V.* (2007) 151 Cal.App.4th 486 (*Dina V.*), which refused to follow *Yanez*. (CT 79-81.)

At the restitution hearing, the court, presided by the Honorable Timothy L. Fall, judge, noted it had read the briefing and identified the issue as “is it replacement value or repair value, especially if repair is higher than replacement value.” (RT 20-21.) Although the court invited the parties to add further to what they had briefed, neither party had anything to add. (RT 21.) The court then ordered appellant to pay the \$2,812.94 to repair the pickup, stating:

The Court finds that unlike an insurance contract where one contracts under an agreement that the insurance company

can choose replacement value if the repair value is higher than that, this is a matter where someone owns something and has a right to still have it. And if repair exceeds the replacement value, that doesn't mean the person is [*sic*; is not] entitled to have what it was they had been owning all along.

So the restitution amount should be set at what it would take to make the victim whole based on what it is that the victim owned and which was damaged. So apparently that amount was identified as \$2,812.94. That's the repair estimate. That is the amount of restitution ordered then.

Now, on the other hand, the victim is only entitled to as much as becomes -- as takes care of -- makes the victim whole. I'll ask the People to notify the victim that the restitution amount has been ordered. ... [¶] But of course, if it costs less, if it ends up costing less to repair the car [*sic*; truck], then restitution will be reduced appropriately. ...

(RT 21-22.)

On December 10, 2009, appellant filed a timely notice of appeal. (CT 86.) On May 17, 2010, the California Court of Appeal, Third Appellate District directed the parties to address the following issue:

Was it proper to award restitution in the amount of the vehicle repair bill, when that bill exceeded the cost of the vehicle?  
(Compare *In re Dina V.* (2007) 151 Cal.App.4th 486 with *People v. Yanez* (1995) 38 Cal.App.4th 1622.)

On May 26, 2010, and June 8, 2010, respectively, appellant and the People filed supplemental letter briefs. On August 3, 2010, the court of appeal affirmed the trial court's restitution order in a decision certified for partial publication. (*People v. Stanley* (2010) 187 Cal.App.4th 120 (*Stanley*), review granted Nov. 10, 2010, S185961, thereby superseding its publication).

## ARGUMENT

### **I. TO SAFEGUARD A CRIME VICTIM'S STATE CONSTITUTIONAL RIGHT TO BE MADE WHOLE FOR CRIME LOSSES, A TRIAL COURT MUST RETAIN BROAD DISCRETION TO CHOOSE BETWEEN MARKET VALUE AND FEASIBLE REPAIR COST WHEN AWARDING RESTITUTION FOR DAMAGED PROPERTY, EVEN WHEN REPAIR COST WELL EXCEEDS MARKET VALUE; NO ABUSE OF DISCRETION OCCURRED HERE**

As noted (AOB 1), the issue before this Court is:

Did the trial court err in awarding the victim restitution for the costs of repairing her damaged truck, when the estimated cost of the repairs was over [*sic*; nearly] three times the purchase price she paid 18 months earlier?

The short answer is “No.” To safeguard a crime victim’s state constitutional right to be made whole for crime losses, a trial court must retain broad discretion to choose between market value and feasible repair cost when awarding restitution for damaged property even when repair cost well exceeds market value, such as in the instant case. Making the victim whole, rehabilitating the adult offender, and deterring future criminal behavior are laudable objectives that warrant the retention of such discretion. Here, as will be explained *post*, the trial court did not abuse its discretion in awarding the victim repair costs.

#### **A. Standard of Review**

A restitution order is reviewed for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663 (*Giordano*); *People v. Mearns* (2002) 97 Cal.App.4th 493, 498 (*Mearns*)). “A trial court’s determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion.” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382 (*Akins*)). “No abuse of ... discretion occurs as long as the determination of economic loss is reasonable, producing a nonarbitrary result.” (*Giordano, supra*, 42 Cal.4th at p. 665.) Further, a restitution award comes clothed in a

presumption of correctness. (*Id.* at p. 666.) “The order must be affirmed if there is a factual and rational basis for the amount.” (*Akins, supra*, 128 Cal.App.4th at p. 1382; see also, e.g., *People v. Carbajal* (1995) 10 Cal.4th 1114, 1125 (*Carbajal*); *People v. Rubics* (2006) 136 Cal.App.4th 452, 462; *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.)

## **B. Applicable Law**

Crime victims have a state constitutional right to restitution for losses resulting from criminal acts against them. (Cal. Const., art. I, § 28, subd. (b).)<sup>2</sup> That constitutional right is implemented through section 1202.4.<sup>3</sup>

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<sup>2</sup> California Constitution article I section 28, which was added as a result of the 1982 adoption of Proposition 8, also known as the “Victims’ Bill of Rights” (*People v. Anderson* (2010) 50 Cal.4th 19, 27), provides in pertinent part:

(b) In order to preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to the following rights: ... [¶] (13) To restitution. (A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. [¶] (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(Cal. Const., art. I, § 28.)

<sup>3</sup> Section 1202.4 reads in 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 ... in an amount established by court order, based on the amount of loss claimed by the victim ... or any other showing to the court. ... The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. ... [¶] ... [¶]

(continued...)

(See *Giordano, supra*, 42 Cal.4th at pp. 652-653, 656.) “A victim’s restitution right is to be broadly and liberally construed.” (*Mearns, supra*, 97 Cal.App.4th at p. 500; accord, *People v. Baker* (2005) 126 Cal.App.4th 463, 467.)

Restitution “has been judicially defined to mean ‘reimbursement to the victims of crime for *actual loss* flowing from the charged offense or from related misconduct.’” (*People v. Vournazos* (1988) 198 Cal.App.3d 948, 954, italics added, criticized on different grounds in *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543, *In re S.S.* (1995) 37 Cal.App.4th 543, 546 and *People v. Foster* (1993) 14 Cal.App.4th 939, 946-948.) “Although restitution has an element of deterrence [citation], the primary purpose of victim restitution is to provide monetary compensation to an individual injured by crime.” (*People v. Harvest* (2000) 84 Cal.App.4th 641, 648.) “Restitution to the victim is mandatory, although the court retains discretion as to the amount.” (*Akins, supra*, 128 Cal.App.4th at p. 1382.)

There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. [Citation.]

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(...continued)

(3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim ... for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited to, all of the following:

(A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.

(*Carbajal, supra*, 10 Cal.4th at p. 1121.)

There is a conflict in the law as to whether a crime victim can recover the cost of repairing damaged property if that cost is higher than the item's replacement value. (Cf. *Dina V., supra*, 151 Cal.App.4th at p. 486 with *Yanez, supra*, 38 Cal.App.4th at p. 1622.) *Yanez* held the trial court abused its discretion in ordering an adult defendant, who bought a car he knew was stolen and then modified it, to pay \$7,302.18 restitution to cover repairs by the victim<sup>4</sup> where that amount exceeded the \$4,100 "high Blue Book price" of the car. (*Id.*, 38 Cal.App.4th at p. 1625.) In contrast, *Dina V.* held the juvenile court did not abuse its discretion in ordering the minor, who admitted taking a vehicle without the owner's permission, to pay the victim restitution in the amount of \$4,419.72, which represented the cost of repairing the vehicle, even though the replacement value of the vehicle was only \$3,000. (*Id.*, 151 Cal.App.4th at p. 488.)<sup>5</sup>

The *Yanez* court relied upon civil law tort principles to hold that restitution should be limited to *the lesser of* (1) the difference between the market value of the property before the commission of the offense and the market value afterwards; or (2) the reasonable cost of repairing the damaged property to the condition it was in prior to being damaged. (*Id.*, 38 Cal.App.4th at pp. 1626-1627.) The court reasoned

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<sup>4</sup> The victim had sought \$8,018.11 in restitution. (*Yanez, supra*, 38 Cal.App.4th at p. 1625.)

<sup>5</sup> In *Yanez*, the restitution was ordered under former section 1203.04, subdivision (d)(1), enacted in 1988, which was repealed in 1995 and replaced by section 1202.4, subdivision (f)(3)(A) addressing the same subject matter. (Stats. 1995, ch. 313, § 5, p. 1755.) It defined the value of stolen or damaged property exactly as does Welfare and Institutions Code section 730.6, subdivision (h)(1), which was the section the restitution was ordered under in *Dina V.* (*Dina V., supra*, 151 Cal.App.4th at p. 489, fn. 2.)

restitution is not designed to lead to recovery of damages above and beyond those which would be recoverable under civil law. ... If the civil measure of damages results in full compensation, the measure applied to determine the degree of restitution during probation should not result in a greater award.

(*Id.* at p. 1627.) Because the market value at the time the car was stolen had not been determined, however, the court reversed the restitution order and remanded the matter for a determination of its replacement value. (*Id.* at p. 1628.)

*Dina V.* noted *Yanez's* holding, but observed:

Judges have broad discretion in fixing the amount of restitution, and “the court may use 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.” (*In re Brittany L.*, *supra*, 99 Cal.App.4th at pp. 1391-1392, fn. omitted.) As the court concluded in *Brittany L.*, “[W]hile the amount of restitution cannot be arbitrary or capricious, “there is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. ...” [Citation.]” (*Id.* at p. 1391.)

(*Dina V.*, *supra*, 151 Cal.App.4th at pp. 488-489.) The *Dina V.* court also found:

To limit the amount of restitution to the replacement cost, because that would be the manner of determining damages in a civil case, is neither required nor logical. [P]utting such a limit on restitution requires that the victim find a similar vehicle, in similar precrime condition, for sale for the replacement value determined by the court, at the victim’s time and expense. Such an onus should not be placed upon the victim. Limiting the amount of restitution to the replacement cost would not make the victim whole.[Fn. omitted.]

(*Id.* at p. 489.)

Recently, the *Yanez* and *Dina V.* conflict was analyzed in *In re Alexander A.* (2011) 192 Cal.App.4th 847 (*Alexander A.*), which concerned

restitution under Welfare and Institutions Code section 730.6 in a juvenile delinquency case. (*Alexander A.*, *supra*, 192 Cal.App.4th at p. 850.) After defacing a three-wall school mural, Alexander and his companion spray-painted graffiti on the victim's 1992 Accord car, painted its rims and license plate, destroyed the windshield, broke its right rearview mirror, kicked out its front signal lights, dented its hood and roof and damaged its left side, rendering it undrivable. (*Id.* at pp. 851, 858.) The victim submitted an estimate of \$8,219.18 to repair the car, which Kelley Blue Book had listed a dealer's price of about \$5,300 for one in excellent condition, and non-dealer prices of mid-\$3,000 and between \$1,800 and \$1,900 for ones in good and poor conditions, respectively. (*Id.* at p. 851.) In contrast, Alexander presented evidence showing a dealer's price of \$4,200 for one in excellent condition and a non-dealer price of \$2,605 for one in good condition, as well an Internet bulletin board listing of \$1,795. (*Ibid.*) After the prosecutor said the victim wanted to keep the car, the juvenile court ordered Alexander to pay restitution of \$8,219.18. (*Ibid.*)

*Alexander A.* held that applying a strict civil standard to restitution for stolen or damaged property unduly limits the juvenile court's discretion to determine the amount of restitution. (*Id.*, 192 Cal.App.4th at pp. 855-856.) It also held restitution was not limited to the replacement value of the victim's vehicle. (*Id.* at p. 856.) It further held that where other goals of the juvenile justice scheme had been met, the court could consider the impact of its restitution order on the victim in selecting the measure of restitution. (*Id.* at p. 857.) It found that by choosing repair over replacement the juvenile court was not intending to reimburse the victim for noneconomic injury, but rather was "acknowledg[ing] the practicalities involved in cleaning up after a crime spree." (*Ibid.*) As the court observed:

In some cases in which the costs of repair exceed the value of a replacement vehicle, it may be more convenient for the victim to

visit a dealer and purchase another car. *In other cases, as here, the victim may prefer to repair his or her damaged car, despite its age.*

(*Id.*, italics added.)

Additionally, *Alexander A.* found that the juvenile court, by ordering a higher restitution amount than the replacement value of the car, did not seek to punish the defendant, but rather sought to appease the victim who wanted to repair the car. (*Id.*, 192 Cal.App.4th at p. 858.) Given the extent of vandalism, the juvenile court reasonably concluded “ordering Alexander to repair the car served a rehabilitative purpose” as “repairing the vehicle would help Alexander understand there were consequences for his actions.”

(*Ibid.*) As the court observed:

The trial court did not order restitution for impermissible noneconomic damages; it ordered Alexander to pay for the costs of repairing the extensive and deliberate damage he caused to the victim's car. “Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” (*Carbajal, supra*, 10 Cal.4th at p. 1124, quoting *Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10.)

There may be some point at which the costs to repair stolen or damaged property so exceed its value that a restitution order for repair costs may no longer be rational in that it results in a windfall to the victim or does not serve a rehabilitative purpose. (*People v. Kelly* (2010) 189 Cal.App.4th 73, 77 [a restitution order is intended to compensate actual loss and is not intended to provide a windfall to the victim]; *People v. Fortune* (2005) 129 Cal.App.4th 790, 794-795 [restitution is not intended to provide the victim with a windfall].)

Here, in view of the expenses the victim would incur to purchase a similar car in similar precrime condition, and pay taxes and license fees, we are not persuaded the damage award was unjustifiably high in comparison to the value of the vandalized car. Accordingly, we conclude that the trial court did not abuse its discretion when it ordered Alexander to pay the

higher repair costs rather than the lower replacement value of the vehicle.

(*Id.*, parallel citations omitted.)

**C. To Safeguard a Crime Victim's State Constitutional Right to Be Made Whole for Crime Losses, a Trial Court Must Retain Broad Discretion to Choose between Market Value and Feasible Repair Cost When Awarding Restitution for Damaged Property, Even When Repair Cost Well Exceeds Market Value**

Appellant submits it is instructive that, under long-established civil tort law, a tort-feasor's financial liability for damaging personal property beyond repair is the item's replacement value. (AOB 4.) *Yanez* likewise relied upon civil law tort principles to hold restitution should be limited to *the lesser of* (1) the difference between the property's market value before commission of the offense and afterwards; or (2) the reasonable cost of repairing the damaged property to its pre-damaged condition. (*Id.*, 38 Cal.App.4th at pp. 1626-1627.) Yet,

[t]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. [Citation.]

(*Carbajal, supra*, 10 Cal.4th at p. 1121; accord *Dina V., supra*, 151 Cal.App.4th at p. 489.) As the *Dina V.* court observed:

To limit the amount of restitution to the replacement cost, because that would be the manner of determining damages in a civil case, is neither required nor logical. [P]utting such a limit on restitution requires that the victim find a similar vehicle, in similar precrime condition, for sale for the replacement value determined by the court, at the victim's time and expense. Such an onus should not be placed upon the victim. Limiting the amount of restitution to the replacement cost would not make the victim whole.[Fn. omitted.]

(*Id.* at p. 489.)<sup>6</sup>

While not mentioning its state constitutional underpinnings (Cal. Const., art. I, § 28), appellant acknowledges that section 1202.4, subdivision (f) recognizes the actual cost of repair is an appropriate measure of restitution (AOB 6) and that it does not require restitution be limited to the lower amount of fair market replacement or reasonable repair, only that the victim be made whole (AOB 8). He asserts, the question is “when does the cost of repair become unreasonable in relation to the replacement cost?” That question is best left to the discretion of the trial court, which should take into account the objectives of making the victim whole, rehabilitating the offender, and deterring future criminal behavior.

Public policy supports requiring a vandal to pay restitution to repair damaged property when repair is possible. Repairing the item allows a crime victim to keep what she owns, rather than forcing her to go out and search for a comparable replacement which could take a further toll on her in both time and expense. (See *Dina V.*, *supra*, 151 Cal.App.4th at p. 489.) Allowing the victim to keep her property serves to make her whole because it avoids her having to incur the double loss of having her property damaged and then parting with her property, i.e., emotional scars that could otherwise result if she had a sentimental attachment to the property and was forced to part with it (e.g., a family heirloom). It also holds the defendant fully accountable for his actions by requiring that he pay to repair the specific damage he had inflicted. It further serves a deterrent effect because a vandal would be held accountable to pay for repairs that could exceed the

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<sup>6</sup> *Dina V.* acknowledged the difference between the results under the two methods of determining the amount of restitution, i.e., repair cost versus replacement value, was considerably less in its case than in *Yanez*, but still disagreed with *Yanez*'s holding. (*Dina V.*, *supra*, 151 Cal.App.4th at p. 489, fn. 3.)

value of the item they damage, such that the vandal would be deterred from inflicting severe damage.

Nonetheless, appellant asserts:

it should not be the case that destroying property beyond repair works to the financial advantage of a criminal defendant rather than his injuring it, but leaving it in a fixable state.

(AOB 5.) While one can posit a situation where a defendant who partially damages an item would pay more to repair it than another defendant who destroys the same type item would pay to replace it, the message sent to those defendants and to deter potential offenders is the same: you are liable for damages you inflict, period – if you damage something, you will be expected to fix it; if it's not fixable, then you will be expected to replace it.

Relying upon a civil law case of *Smith v. Hill* (1965) 237 Cal.App.2d 374, 388, which measures the damage for wrongful injury to personal property as the difference between its market value immediately before and after injury or the reasonable cost of repair if less than depreciation value (AOB 8), and relying upon how a tax guide and the IRS consider when a vehicle reaches full cumulative depreciation, i.e., when the amount claimed over the years equals its original cost (AOB 9), appellant sets forth the following syllogism:

if reasonable repairs cannot exceed depreciation, and  
depreciation cannot exceed the purchase cost to the victim, then  
an amount equal to the cost of the item is ostensibly an upper  
limit on the reasonable cost of repair.

(AOB 9). Yet, civil law principles in tort cases and depreciation for tax purposes do not take into account the broad construction that judges must accord the state's constitutionally mandated Victims' Bill of Rights (Cal. Const., art. I, § 28) and its implementing statutes. (See *Giordano, supra*, 42 Cal.4th at p. 655; *People v. Phu* (2009) 179 Cal.App.4th 280, 283; *People v. Lyon* (1996) 49 Cal.App.4th 1521, 1525.) Additionally, where repairs

exceed the original cost of the item such as in the instant case, appellant's syllogism misses the goal of making the victim whole because the victim would be put in the undesirable position of paying additional, non-reimbursable out-of-pocket expenses to have the item repaired.

Appellant acknowledges that criminal restitution is not bound by civil law limits such that he concedes reasonable cost of repair may be more than the original cost of the damaged asset, however, he argues it should not be much more. (AOB 9.) For support he relies on a *proposed* model criminal jury instruction from Florida, which provides:

Any damage to Jane Doe's automobile. The measure of such damage is the reasonable cost of repair, if it was *practicable* to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair. You shall also take into consideration any loss Jane Doe sustained for towing or storage charges and by being deprived of the use of her automobile during the period reasonably required for its repair.

(AOB 9-10, quoting *In re Standard Jury Instructions in Criminal Cases - Report No. 2010-01* (Fla. 2010) \_ SO.3d \_,2010 WL 4117070, \*30, italics added.) Yet, the term "practical to repair" is vague – practical from an economic standpoint, from a time-value standpoint, from an aesthetic standpoint, from a doable standpoint, etc. Thus, the model jury instruction is not helpful.

Appellant asserts Kansas criminal courts have developed a formula where the appropriate amount of restitution is the amount required to reimburse the victim for the actual loss – if damaged property can be restored to its previous undamaged condition, restitution is the reasonable cost of repairs plus the reasonable amount necessary to compensate for loss of use – however, restitution that exceeds fair market value constitutes an abuse of discretion. (AOB 10-11, citing *State v. Hunziker* (Kan. 2002) 274 Kan. 655, 663-664 [56 P.3d 202]; *State v. Baxter* (Kan.App. 2005) 34

Kan.App.2d 364, 366 [118 P.3d 1291]; *State v. Casto* (Kan.App. 1996) 22 Kan.App.2d 152, 154 [912 P.2d 772].) Yet, Colorado has recognized “restitution can include repair costs *even if those costs exceed the damaged object's value.*” (*People v. Smith* (Colo. Ct. App. 2007) 181 P.3d 324, 327 [2007 Colo. App. LEXIS 1746], italics added [noting sentencing statute requires “full restitution” and restitution is defined to mean “any pecuniary loss suffered by a victim” thus, repair costs should be included in restitution amount ordered].) Wisconsin law likewise allows restitution for repair costs that exceed market value:

Nowhere does the statute limit repair or replacement costs to the fair market value of the property at the time it was stolen ...; that is but one choice available to the sentencing court in its discretion

(*State v. Kennedy* (Ct. App. 1994) 190 Wis.2d 252, 261 [528 N.W.2d 9; 1994 Wisc. App. LEXIS 1547]; *id.* at pp. 261-262 [“Placing a limit on repair costs equal to the fair market value of the item repaired eliminates the trial court's discretion to consider unique facts”].) Minnesota law similarly holds “restitution does not require a strict netting of the costs against benefits received.” (*State v. Thole* (Minn. Ct. App. 2000) 614 N.W.2d 231, 236 [2000 Minn. App. LEXIS 710], citing *State v. O'Brien* (Minn. App. 1990) 459 N.W.2d 131, 134 [1990 Minn. App. LEXIS 803].)

Appellant also cites a Texas decision that reversed a cost-of-repair restitution order regarding a vandalized car because in Texas restitution does not include cost of repair; instead it includes the value of the property on the date of damage or sentencing less the value of any part of the property returned on its return date. (AOB 10-11, citing *Miller v. State* (Tex. App. Feb. 23, 2011) \_\_ S.W.3d \_\_, 2011 WL 653034 at \*3.) Yet, California law expressly allows for full restitution for the actual cost of repair when repair is possible. Specifically, section 1202.4 provides in pertinent part:

[T]he court shall order *full restitution* unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. ... [¶] ... [¶]

(3) To the extent possible, the restitution order ... shall be of a *dollar amount that is sufficient to fully reimburse* the victim ... for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following:

(A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, *or the actual cost of repairing the property when repair is possible.*

(Italics added.) California law controls here.

In sum, to safeguard a crime victim's state constitutional right to be made whole for crime losses, a trial court must retain broad discretion to choose between market value and feasible repair cost when awarding restitution for damaged property even when repair cost well exceeds market value. Making the victim whole, rehabilitating the adult offender, and deterring future criminal behavior are laudable objectives that warrant the retention of such discretion.

**D. The Trial Court Did Not Abuse Its Discretion in Awarding the Victim Repair Costs**

Here the superior court found:

[T]his is a matter where someone owns something and has a right to still have it. And if repair exceeds the replacement value, that doesn't mean the person is [*sic*; is not] entitled to have what it was they had been owning all along. [¶] So the restitution amount should be set at what it would take to make the victim whole based on what it is that the victim owned and which was damaged. So apparently that amount was identified as \$2,812.94. That's the repair estimate. That is the amount of restitution ordered then.

(RT 21.) The court's ruling is sound.

The court did not abuse its discretion in ordering appellant to pay \$2,812.94 as the cost of repairing the victim's vehicle because its determination of the economic loss was reasonable and nonarbitrary. (See *Giordano, supra*, 42 Cal.4th at p. 665.) There indeed was a factual and rational basis for that amount because appellant had severely damaged the vehicle in that he had inflicted several dents that rippled "all up and down the driver's side" of the pickup, a few dents in the long wheel base, dents to its right rear passenger door such that it could open only four or five inches, and broke its antenna. (CT 34-37.) The auto body shop estimate for repairing the pickup was \$2,812.94. (CT 38, 47-48.)

Nonetheless, appellant relies on *People v. Chappelone* (2010) 183 Cal.App.4th 1159 (*Chappelone*), which he asserts identified the borders of appropriate victim restitution. (AOB 6.) *Chappelone* observed:

A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall. [Citations.] While the court need not order restitution in the precise amount of loss, it "must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious." [Citations.]

(*Id.*, 183 Cal.App.3d at p. 1172.) *Chappelone* involved determining restitution owed by husband and wife defendants for their theft of a large quantity of retail merchandise from the wife's employer, Target, where the merchandise consisted of items that were already damaged, were missing parts, or were un-sellable clearance items, the bulk of which was recovered. (*Id.* at pp. 1163-1171.) The court reversed the trial court's restitution award that was based on the last retail price of the merchandise because that improperly awarded Target a windfall on multiple levels – (1) the last retail price was not reflective of value because the bulk of goods was unsellable damaged or clearance items (*id.* at pp. 1173-1177); (2) awarding retail price, as opposed to wholesale cost, awarded profit despite any indication

of profit loss (*id.* at pp. 1178-1180); and (3) awarding retail price *and* allowing Target to retain the recovered goods for disposal were at odds with one another (*id.* at pp. 1180-1182).

Appellant notes *Chappelone* held that the trial court's award "clearly resulted in a merchandise value that was highly inflated over the actual value of the merchandise to Target." (AOB 7, quoting *Chappelone, supra*, 183 Cal.App.3d at p. 1175.) He submits:

where, as here, restitution is based on the cost of repair but results in a monetary award set at three times the value of the damaged merchandise that restitution is "highly inflated over the actual value" of the item and should not be allowed."

(AOB 7.) Yet, the instant case is distinguishable from *Chappelone*, where the windfall to the victim abounded. Here, the fact that the repairs will cost about three times the victim's purchase price does not mean she will receive a windfall. Instead, it means she will have her truck back in the same condition it was before appellant vandalized it. This comports with the spirit of the Victims' Bill of Rights (Cal. Const., art. I, § 28) and the text of its implementing legislation. Indeed the trial court expressly avoided any windfall, ordering:

[T]he victim is only entitled to as much as becomes -- as takes care of -- makes the victim whole. I'll ask the People to notify the victim that the restitution amount has been ordered. ...  
[¶] *But of course, if it costs less, if it ends up costing less to repair the car [sic; truck], then restitution will be reduced appropriately. ...*

(RT 21-22, italics added.)

Appellant also compares the "surcharge" difference in percentage of repair cost to replacement cost between the instant case and those in other cases. He contends the instant case has a surcharge of 300 percent, whereas *Dina V.* and *Alexander A.* involved surcharges of 47 and 57 percent, respectively. (AOB 11-12.) He argues:

the cost of repair must remain close to the cost of replacement while allowing for a reasonable surcharge of perhaps ten or fifteen percent for the inconvenience to the victim.

(AOB 13.) Respondent disagrees. Such a rigid formula would eliminate the trial court's discretion to consider unique facts of each case and would not necessarily make the victim whole for the loss she suffered. Further, the actual difference in dollar amounts in the instant case of \$1,862.92 (\$2,812.94 - \$950) was a little more than the \$1,419.72 (\$4,419.72 - \$3,000) in *Dina V.* and much less than the \$2,919.19 (\$8219.19 - \$5,300) in *Alexander A.*, which further establishes the arbitrariness of such a formula.

Additionally, merely because the victim paid \$950 cash for her pickup 1½ years earlier (CT 41) does not mean it was not worth more. The record lacks information on the circumstances surrounding the victim's purchase of the pickup, e.g., the seller may have dropped its price because she paid in cash. Further, the victim's father, a former mechanic, had advised her to buy the truck (CT 41), from which one can rationally infer it was a good bargain at \$950.

Appellant also states he "recognizes that a surcharge or cost of inconvenience is not necessarily related to the cost of replacement." He argues "Theoretically, replacing a \$100,000 luxury car would be no costlier than replacing the \$950 1975 Ford Adventurer here." (AOB 13.) Yet, as a matter of common sense, it would be hard to find a 1975 Dodge Adventurer in "excellent" condition for \$ 950, if for no other reason than there are not very many of them on the road. The longer it would take the victim to find one, the greater her loss-of-use damages would be. (See *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995.) Further, even if the victim was lucky enough to find one, there likely would be additional costs associated with shipping or transporting the vehicle to her locale.

Moreover, here repair was possible as evidenced by the repair estimate from the body shop. (CT 38, 47-48.) Thus, the court was obligated to order restitution for the value of “the actual cost of repairing the property.” (§ 1202.4, subd. (f)(3)(A).) That statutory authority establishes the court did not abuse its discretion in making its order in that regard.

Furthermore, the situation here involved an adult, as appellant was age 23. (CT 62.) *Yanez* also involved an adult defendant, whereas *Dina V.* and *Alexander A.* involved minor defendants. *Dina V.* noted that distinction and observed:

The juvenile court here specifically found that ordering the restitution in the “amount of damage” would be more rehabilitative for the minor. As the court noted in *In re Brian N.* (2004) 120 Cal.App.4th 591, 594, overruled on other grounds in *People v. Martinez* (2005) 36 Cal.4th 384, 386, “The juvenile court is vested with discretion to order restitution in a manner that will further the legislative objectives of making the victim whole, rehabilitating the minor, and deterring future delinquent behavior.” To the extent *Yanez* is inconsistent with this opinion, however, we respectfully disagree with its conclusion.

(*Dina V.*, *supra*, 151 Cal.App.4th at p. 489, fn. 3.) *Alexander A.* similarly observed:

While *Yanez* addressed the goal to fully reimburse the victim for all determined economic losses incurred as a result of the minor's conduct, it did not fully consider the role restitution plays in rehabilitating the minor and deterring future criminal offenses. [Citations.]

(*Alexander A.*, *supra*, 192 Cal.App.4th at p. 856.) Significantly, appellant was “remanded to the custody of the sheriff’s department for transportation and delivery to the California Department of Corrections and *Rehabilitation.*” (RT 19, italics added.) Just as with a minor, ordering restitution in the amount of damage would serve the rehabilitative aspect of his sentence. Indeed, “[r]estitution is an effective rehabilitative penalty

because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” (*Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10; accord *Carbajal, supra*, 10 Cal.4th at p. 1124; *Alexander A., supra*, 192 Cal.App.4th at p. 858.)

To recap, making the victim whole, rehabilitating the adult offender, and deterring future criminal behavior are laudable objectives. In light of those objectives and the statutory and state constitutional authority supporting full restitution, the court did not abuse its discretion in ordering appellant to pay restitution in the amount of the cost of the repair estimate. (See *Giordano, supra*, 42 Cal.4th at p. 665.) Because there is a factual and rational basis for that amount, the restitution order must be affirmed. (*Akins, supra*, 128 Cal.App.4th at p. 1382.)

Accordingly, based on the foregoing, the trial court did not abuse its discretion in awarding appellant to pay the full repair cost even though that was just under three times the purchase price the victim paid about 18 months earlier. Hence, appellant’s claim must be rejected.

## CONCLUSION

Accordingly, based on the foregoing, the judgments of the superior court and the court of appeal should be affirmed.

Dated: May 9, 2011

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 6,319 words.

Dated: May 9, 2011

KAMALA D. HARRIS  
Attorney General of California

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

Case Name: *People v. Stanley*

No.: **C063661 / S185961**

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 May 9, 2011, I served the attached **RESPONDENT'S ANSWERING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 May 9, 2011, at Sacramento, California.

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Signature