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March 9, 2012

Frederick K. Ohlrich
Clerk of the Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

SUPREME COURT
FILED

MAR 12 2012

Frederick K. Ohlrich Clerk
Deputy

RE: *People v. Paul Dean Runyan*
Supreme Court of the State of California, Case No. S187804

Dear Clerk of the Court:

This supplemental reply letter brief responds to appellant's supplemental brief ("ASB") addressing the two issues set forth in the Court's February 22, 2012, request for further briefing. As explained below, the restitution assessed in this case was properly awarded to the victim, Mr. Bengé's estate, for the economic losses that were proximately caused by appellant's criminal conduct resulting in Mr. Bengé's death.

I. MR. BENGE'S ESTATE IS A VICTIM ENTITLED TO RESTITUTION UNDER BOTH THE CALIFORNIA CONSTITUTION AND PENAL CODE SECTION 1202.4

In the second question posed by this Court in its supplemental briefing order, the Court asked whether Penal Code¹ section 1202.4 requires, or permits, restitution for direct and personal losses "ostensibly incurred by the victim *at or after the time of the victim's death, and as a consequence of the victim's death?*" It appears appellant has interpreted this question as whether the victim-estate is a victim entitled to restitution under section 1202.4. (See ASB 1-5.) As detailed in Respondent's Brief on the Merits, Mr. Bengé's estate qualified as a victim entitled to restitution under the expanded definition of "victim" approved by the People in Marsy's Law. (Cal. Const., art. I, § 28, subd. (e) [specifically including as a victim for purposes of restitution "a lawful representative of a crime victim who is deceased"].) Moreover, as the legal equivalent of the deceased, Mr. Bengé's estate was substituted for the victim within the meaning of section 1202.4, subdivisions (a) and (f), the moment Mr. Bengé died. Accordingly, Mr.

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

Benge's estate was properly awarded restitution for the economic losses it incurred as a result of appellant's criminal conduct resulting in Mr. Benge's death.

Appellant contends that the Legislature "so obviously contemplated the issue of including a victim's estate" within the criminal restitution scheme and intentionally placed estates in the same category as corporations to preclude restitution to an estate in cases where a defendant's criminal conduct results in the actual crime victim's death. (ASB 4.) He is mistaken. There is no indication that the Legislature intended that a homicide victim's estate would be precluded from recovering restitution for the economic losses incurred as a result of the criminal act just because the act was committed before the estate came into existence. Instead, section 1202.4, subdivision (k)(2), was added by the Legislature to ensure that legal and governmental entities against which a crime was committed can recover restitution for any economic losses incurred as a result of that crime. For example, that provision would allow an estate to recover restitution when an executor embezzles money from the estate. To that end, subdivision (k)(2) implicitly contemplates that the victim-entity was already in existence at the time of the crime. In this case, in contrast, it was appellant's criminal conduct resulting in Mr. Benge's death that caused the estate to come into being. As such, Mr. Benge's estate became the "victim" the moment Mr. Benge died.

II. THE ECONOMIC LOSSES INCURRED BY THE VICTIM-ESTATE WERE PROXIMATELY CAUSED BY APPELLANT'S CRIMINAL CONDUCT

Appellant argues that, with the exception of the \$45 in funeral costs, the restitution assessed was erroneous because the amounts were speculative and were not proximately caused by his criminal conduct.² (ASB 6-9.) Respondent submits that the restitution amounts awarded to the victim-estate were supported by the People's Points and Authorities in Support of Restitution to the Estate of Donald Benge³ ("People's Memorandum") and Art Olson's representations to the trial court. Moreover, all of the economic losses were proximately caused by appellant's criminal conduct. Thus, the trial court properly ordered appellant to pay \$446,486 in restitution to the victim-estate.

² Because appellant concedes that the \$45 in funeral costs was an economic loss proximately caused by his criminal conduct (ASB 9), respondent will not discuss that category of restitution.

³ On March 5, 2012, respondent filed a Motion to Augment the record with the People's Memorandum. Further, respondent notes that the August 5, 2009, transcript of the restitution hearing is contained in the second volume of the reporter's transcript. (2RT 601-618; see ASB 5 [appellant's request to augment the record with the transcript of the August 5, 2009, restitution hearing].)

A. The Restitution Amounts Were Supported By The People's Restitution Memorandum and Art Olson's Statements

“A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered.” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542; see *People v. Giordano* (2007) 42 Cal.4th 644, 663.) In reviewing the sufficiency of the evidence to support a restitution award, “[t]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court’s findings. [Citations.]” (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045, internal quotation marks omitted.) Further, “[t]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt.” [Citation.]” (*People v. Gemelli, supra*, 161 Cal.App.4th at p. 1542.)

The word “loss” within the meaning of section 1202.4 “““must be broadly and liberally construed to uphold the voters’ intent.” [Citation.] Because the statute uses the language ‘including, but not limited to’ these enumerated losses, a trial court may compensate a victim for any economic loss which is proved to be the direct result of the defendant’s criminal behavior, even if not specifically enumerated in the statute.” [Citation.] [Citation.]” (*People v. Moore* (2009) 177 Cal.App.4th 1229, 1232.) ““The only limitation the Legislature placed on victim restitution is that the loss must be an “economic loss incurred as the result of the defendant’s criminal conduct.” [Citations.] [Citation.]” (*Id.*, footnote omitted; see *People v. Giordano, supra*, 42 Cal.4th at p. 656.)

As noted by the trial court at the restitution hearing in this case (2RT 615), “a prima facie case for restitution is made by the People based in part on a victim’s testimony on, or other claim or statement of, the amount of his or her economic loss.” (*People v. Millard* (2009) 175 Cal.App.4th 7, 26, citing *People v. Prosser* (2007) 157 Cal.App.4th 682, 690-691 and *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048; see also § 1202.4, subd. (f), emphasis added [“the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, *based on the amount of loss claimed by the victim or victims* or any other showing to the court”]; *People v. Gemelli, supra*, 161 Cal.App.4th at p. 1543.) “Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. [Citation.]” (*People v. Gemelli, supra*, at p. 1543.)

Once the trial court in this case found that Mr. Bengé's estate qualified as a victim entitled to restitution under the California Constitution, it relied on the statement of the amount of the economic losses the victim-estate incurred as reflected in the People's Memorandum. (See 2RT 611, 613-616; see also People's Memorandum [containing breakdown of restitution amounts and supporting documents].) Indeed, the People's Memorandum contained documents reflecting the appraised wholesale and retail values of Mr. Bengé's coin collection, the appraised value of Mr. Bengé's fencing equipment, the appraised value of items from Mr. Bengé's residence, and the actual amount that each of those items sold for. (See People's Memorandum at Attachments.) Additionally, the People's Memorandum contained a letter from David Rawson detailing what he did as the "de facto executor" (see 2RT 612), a breakdown of the costs associated with Art Olson's traveling, and his representing Mr. Bengé and the victim-estate at the sentencing and restitution hearings, and a breakdown of the funeral expenses and expenses incurred in administering Mr. Bengé's estate. (See People's Memorandum at Attachments.)

Moreover, as noted by the trial court in response to appellant's argument that the amounts were "conclusory and speculative," Art Olson's statements at the sentencing hearing provided additional evidence supporting the restitution amounts. (See 2RT 613-614; see also 2RT 303-307.) Finally, appellant did not provide any evidence disputing the amount of losses claimed by the victim-estate. (See *People v. Gemelli, supra*, 161 Cal.App.4th at p. 1543.) Thus, he failed to meet his burden of disproving the victim-estate's losses. (See *ibid.*) Accordingly, the trial court did not abuse its discretion in awarding restitution to the victim-estate in the undisputed amounts reflected in, and supported by, the People's Memorandum.

B. The Economic Losses for Which the Victim-Estate Was Awarded Restitution Were Proximately Caused By Appellant's Criminal Conduct Resulting in Mr. Bengé's Death

Tort principles of causation apply to victim restitution claims in criminal cases. (*People v. Jones* (2010) 187 Cal.App.4th 418, 424-427 (*Jones*)). As explained by the *Jones* court, there "are two aspects of causation . . . cause in fact (also called direct or actual causation), and proximate cause." (*Id.* at p. 424.) The court continued: "[a]n act is a cause in fact if it is a necessary antecedent of an event" and "proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.'" (*Id.* at p. 425.)

“California courts have adopted the ‘substantial factor’ test in analyzing proximate cause. [Citation.]” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1321-1322.) “‘The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.’ [Citation.]” (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79.) “Thus, ‘a force which plays only an “infinitesimal” or “theoretical” part in bringing about injury, damage, or loss is not a substantial factor’ [citation], but a very minor force that does cause harm is a substantial factor [citation]. This rule honors the principle of comparative fault.” (*Ibid*; see also *People v. Holmberg, supra*, 195 Cal.App.4th at p. 1321-1322 [applying substantial factor test to criminal restitution].)

Here, the net \$229,721 loss to Mr. Bengé’s coin business was proximately caused by appellant’s criminal conduct resulting in Mr. Bengé’s death. Indeed, Art Olson explained that Mr. Bengé’s business was more valuable because of his knowledge and expertise within the field, and as a result of Mr. Bengé’s death “the value of his multimillion-dollar business was reduced to the wholesale value of his coins.” (2RT 305.) Thus, appellant’s conduct resulting in Mr. Bengé’s death reduced the value of the coin business below that which it would have been worth had Mr. Bengé not been killed. Similarly, the victim-estate was forced to sell Mr. Bengé’s fencing equipment and items from his residence because he died. It was only because of appellant’s drunk driving and subsequent car crash that Mr. Bengé died. Thus, appellant’s criminal conduct was a substantial factor triggering the victim-estate’s need to sell Mr. Bengé’s personal property.

Further, appellant’s criminal conduct was the proximate cause of the \$36,000 economic loss to the victim-estate to the extent it paid David Rawson for his services in gathering the necessary paperwork and acting as the “de facto executor” immediately after Mr. Bengé died and until the Trust Company could take over. (See generally § 1202.4, subd. (f)(3)(H) [economic losses include “[a]ctual and reasonable attorney’s fees and other costs of collection accrued by a private entity on behalf of the victim”].) Indeed, David Rawson would not have had to spend any time acting as the “de facto executor” if appellant had not killed Mr. Bengé. Likewise, Art Olson would not have had to travel to the sentencing and restitution hearings to speak on behalf of Mr. Bengé, present the itemized list of economic losses incurred by the victim-estate, and to urge the trial court to order restitution if appellant had not killed Mr. Bengé. (See *People v. Moore, supra*, 177 Cal.App.4th at p. 1233 [defendant is not relieved from the responsibility of compensating victim for attending court proceedings related to criminal conduct simply because victim chose to attend]; *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1509-1510 [affirming restitution to parents of murder victim for

economic losses associated with attending trial].) Finally, appellant's criminal conduct was a substantial factor bringing about the victim-estate's \$148,645 in probate costs. Indeed, it was only because of appellant's criminal conduct resulting in Mr. Bengé's death that his estate had to be probated.⁴

In sum, appellant's criminal conduct proximately caused all of the economic losses incurred by the victim-estate in this case. Accordingly, respondent respectfully requests that this Court affirm the restitution order.

Sincerely,

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⁴ Respondent does not address appellant's argument in regards to "Biblical Calculations" (ASB 8) because it does not appear any such restitution was incorporated into the amounts assessed against appellant. (See 2RT 616-617.)

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Paul D. Runyan**

No.: **S187804**

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.

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On March 9, 2012, I served the attached **RESPONDENT'S SUPPLEMENTAL REPLY LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

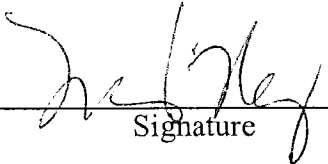
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 9, 2012, at Los Angeles, California.

Lisa P. Ng
Declarant



Signature