

No. BR053255

In the Superior Court of California, County of Los Angeles
Appellate Division

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant and Respondent,

DEMETRIUS CRUMP, et al.,
Victims and Appellants.

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Appellate Division

APPELLANTS' APPLICATION FOR
CERTIFICATION

Appeal From Judgment Of Conviction And Order Denying Restitution
Los Angeles County Superior Court, Case No. 6SC00433
Honorable Alan S. Rosenfield

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I.

INTRODUCTION

This case involves thousands of victims of the largest natural gas leak in the country—the Aliso Canyon/Porter Ranch gas leak—who suffered serious losses arising out of Defendant Southern California Gas Company’s criminal conduct in releasing toxic substances into the air and failing to give notice of the release for days. In contravention of its prosecutorial responsibilities, the Los Angeles County District Attorney structured a plea agreement with the Gas Company to avoid an order of direct restitution to the Victims/Appellants. The trial court accepted the plea agreement without the Victims’ input and later allowed the District Attorney’s plan to succeed by denying the Victims *any restitution* for the Gas Company’s crime. In affirming the trial court’s order, this Court’s Opinion addresses several novel issues in the criminal law arena, some of which involve conflicting precedent, and all of which are critically important to the rights of crime victims statewide.

The Victims thus request that based on the significant, precedential issues addressed in this appeal, to settle important questions of law, and to secure uniformity of decision, that this Court certify the Opinion in this case for transfer to the Court of Appeal. (California Rules of Court, Rule 8.1005.) The *four* novel issues for which the Victims request certification involve fundamental rights of crime victims: (1) whether a crime victim has a constitutional right to appeal an adverse restitution order, (2) whether an entity can plead guilty to failing to give notice of its criminal conduct with no restitution liability for losses caused by that underlying

criminal conduct, (3) whether the transactionally-related rule applies to all adverse sentencing consequences except restitution, and (4) whether the strict standard of causation the Court applied here comports with crime victims' well-settled and broad right to restitution.

Each of these issues, standing alone, is entitled to certification for further review. Taken together, they present a novel body of criminal law in an area with little and at times conflicting prior guidance. And the stakes could not be higher. As the government racks up millions of dollars in settlements with little to none allocated to those actually harmed by this massive gas leak, the rights of the Victims of the Gas Company's crimes, which the government agencies are supposed to protect, have been forgotten.

II. ARGUMENT IN FAVOR OF APPLICATION FOR CERTIFICATION

A. A Case May Be Certified By The Appellate Division For Transfer To The Court Of Appeal Upon A Party's Application

Rule 8.1005(a)(1) of the California Rules of Court provides in pertinent part: "The appellate division may certify a case for transfer to the Court of Appeal on its own motion or on a party's application if it determines that transfer is necessary to secure uniformity of decision or to settle an important question of law." This case involves multiple important questions of criminal law, several of which have not been previously addressed, as well as important criminal law issues that require uniform guidance.

B. This Precedential Case Cries Out For Court Of Appeal Review

By any measure, the importance of this case cannot be overstated. It involves thousands of crime victims of the largest natural gas leak in the country and has received extensive news coverage. It has impacted thousands of home and business owners in the area and caused adverse health consequences to countless residents—even death. And most importantly, it involves the rights of crime victims re-victimized by one sworn to protect them—the District Attorney.

The environmental disaster itself was unprecedented. The Gas Company owns a massive natural gas storage field in Aliso Canyon, adjacent to the Porter Ranch residential community. (1 CT 82.) For over 40 years, the Gas Company reported to state officials that the facility was safe and that the well where a leak developed had a subsurface safety valve. (See 1 CT 56, 66, 69-79.) However, the Gas Company knew the mandatory safety valve had failed in the 1970s, been deliberately removed, and never been replaced. (1 CT 82-89.) Unsurprisingly, when the casing in that well failed on October 23, 2015, there was no safety valve, and the largest natural gas blowout in the state’s history began, spewing hydrogen sulfide, methane, mercaptans, and numerous other toxic substances into Porter Ranch’s air space for months. (1 CT 1, 82-89, 110.) For three days, the Gas Company kept this massive blowout a secret, while over 30,000 Porter Ranch residents in their homes, businesses and schools were continually exposed to these toxic gases. (1 CT 1, 82-89, 115-118.) For weeks the Gas Company informed residents the gases were not toxic and were harmless, until reporters broke the news about the levels of toxins. (1 CT 92- 99.)

A few months after the blowout, the District Attorney filed a misdemeanor criminal complaint against the Gas Company alleging four counts. (1 CT 1-3.) The two at issue are Counts 1 and 4, with Count 1 alleging the Gas Company violated Health and Safety Code¹ section §25510, subdivision (a) by failing to timely report the hazardous discharge of these toxins. (1 CT 1.) Count 4 alleged the Gas Company violated section 41700, subdivision (a) by its actual hazardous discharge of these same toxins. (1 CT 3.)

The Victims' restitution losses from the gas leak included cleaning costs, lost livelihood, unreimbursed relocation expenses, costs for health injuries, and damage to, and diminution in the value of, the Victims' property. (1 RT 35-52, 83.) The District Attorney's Office assured the Victims' attorneys no plea agreement would be entered into that did not include full restitution to the Victims for the Gas Company's criminal conduct. (1 CT 45.) Despite these promises, less than one year after the largest natural gas blowout on record, on September 13, 2016, the District Attorney's Office announced in open court it had entered a plea agreement with the Gas Company. (1 CT 45; 1 RT 1-19.) None of the Victims of the Gas Company's criminal conduct were notified or consulted about the terms of the plea agreement in advance. (1 CT 45, 48.) Neither the District Attorney's Office, nor the Department of Probation ever contacted the Victims or their representatives about the terms of the plea agreement or the Victims' right to restitution. (1 RT 82-83.)

¹ All future references to statutes are to the Health and Safety Code unless otherwise designated.

Under the plea agreement, the Gas Company pleaded no contest to one misdemeanor count of failing to immediately notify the California Office of Emergency Services and the L.A. County Fire Department of the leak that began on October 23, 2015 (Count 1). (1 CT 17.) Pursuant to the plea, the Gas Company would be sentenced to fines, response costs, and remediation. (1 CT 17-19.) The other three counts would be dismissed. (1 CT 19.) The plea agreement deliberately omitted direct restitution for any of the Victims' losses. (1 CT 17-20.) The District Attorney's Office also deliberately agreed to make this a no-probation case, knowing a trial court's ability to award restitution would be much more expansive under a probationary sentence, and that a referral to the probation department for a report would trigger inquiry into restitution. (1 CT 17-20; see Pen. Code, §§ 1203, subds. (b)(2)(D), (d), (g) [probation officer's pre-sentence investigation report must include information and recommendations pertaining to victim restitution]; Pen. Code, § 1203.1, subd. (j) [trial courts have broad discretion in granting probation to impose reasonable conditions]; Pen. Code, § 1202.7 [restitution is a valid condition of probation]; *People v. Miller* (1967) 256 Cal.App.2d 348, 354-356 [trial court discretion to award probation includes restitution even when loss not caused by the crime or caused by related conduct not ending in conviction]; *People v. Goulart* (1990) 224 Cal.App.3d 71, 79 [restitution as condition of probation may be based on conduct underlying dismissed counts].)

After the trial court accepted the plea agreement with no Victim representation, the District Attorney and the Gas Company continued to work in concert to oppose the Victims' rights to restitution. (1 RT 1-21, 22-90.) Because the Victims were not properly notified as to the nature of

evidence to be accepted at the sentencing hearing, only a small number of Victims were available to testify on restitution. (1 RT 22-90.) Both the trial court and the Victims’ attorneys acknowledged at the sentencing hearing that the Victims had no notice prior to the hearing whether their restitution evidence would be allowed, much less that this would be the *sole opportunity for thousands of Victims to provide such evidence*. (1 RT 23-25, 34-35, 84-88.) Despite the inadequate notice, the trial court denied the Victims *any* restitution whatsoever and provided no opportunity for the presentation of further evidence. (1 RT 84-88.)

Less than a year after this unprecedented environmental disaster, the District Attorney acted hastily to settle this prosecution for a pittance—presumably to be the first to gain headlines of a “victory.” The settlement agreement entitled the county to just \$250,000 in fines and the Los Angeles County Fire Department’s Health and Hazardous Materials Division to \$246,672.88 for response costs. (2 CT 302-310.) The only other requirements in the plea agreement were for the Gas Company to implement various measures *to which it was already obligated*, such as to prevent gas leaks. (2 CT 302-310.)

In contrast to the insufficient monetary penalties with which the District Attorney gifted the Gas Company, on the same day this Court’s Opinion issued, *two and a half years after this massive environmental disaster*, various state and other government entities entered into a more measured settlement with the Gas Company for \$119.5 million. As the Attorney General stated on August 9, 2018, the settlement “gives you a sense of what happens when something as devastating as the largest natural gas

leak in the history of recorded time occurs.” He also expressly stated that the settlement did not address the Victims’ injuries, “I want to make this clear: This does not resolve another crucial component that resulted from this incident and that is the personal harm and injury and damages that Angelenos suffered from this leak.”²

Lost in the shuffle of the government agencies’ settlements, however, are the *Victims* of the Gas Company’s crimes. Although they are constitutionally entitled to first priority of payment (Cal. Const., art. 1, § 28, subd. (b)(13)(C), they received nothing from the District Attorney’s small and hurried criminal plea agreement, and nothing from the state and other government entities’ more fulsome settlements. And though the Gas Company and the District Attorney continue to act together to claim the Victims will receive compensation in the civil case, that is demonstrably untrue.

The Gas Company argued in the civil case brought by many of the home and business owners injured by the Porter Ranch gas leak, that business entities may not recover economic damages when they suffer no personal or property injury. (*Southern California Gas Leak Cases* (Supreme Court Case No. S246669, Court of Appeal Case No. B283606, JCCP Case No. 4861). The trial court agreed with the Gas Company, and the Court of Appeal affirmed. However, in light of the importance of the issues involved

² The Attorney General made these comments in an August 9, 2018 *Daily Journal* article about the settlement entitled “State, city settle Porter Ranch case.”

in these cases, the Supreme Court has accepted this issue for review and the matter is pending.

Apparently, the Gas Company and the District Attorney are attempting to prevent the Victims from achieving *any recovery* of their losses, and in particular their broad right to criminal restitution. But the right to restitution “cannot be bargained away or limited, nor can the prosecution waive the victim’s right to receive restitution.” (*People v. Gross* (2015) 238 Cal.App.4th 1313, 1318; see also *People v. Brown* (2007) 147 Cal.App.4th 1213, 1226 (*Brown*).) Not only can the prosecution not bargain away the victim’s rights directly, it cannot do so indirectly as done here by deliberately designing a plea agreement to foreclose restitution: a “sentence without an award of victim restitution is invalid.” (*Brown, supra*, 147 Cal.App.4th at p. 1225.)

III.

THIS COURT SHOULD CERTIFY THE APPEAL ADDRESSING NUMEROUS IMPORTANT CRIMINAL LAW ISSUES TO THE COURT OF APPEAL

A. The Victims’ Constitutional Right To Appeal The Trial Court’s Denial Of Restitution Is Important To Crime Victims Statewide

Whether crime victims have an independent right to appeal a trial court’s denial of their constitutional right to restitution is an issue of great importance to crime victims and has been the subject of conflicting rulings. The California Constitution gives the Victims certain “personally held and enforceable rights,” including to restitution, along with the right to enforce those rights in the appellate courts. (Cal. Const., art. I, § 28, subd.

(b)(10) [to provide information to a probation officer for pre-sentence investigation]; subd. (b)(11) [to receive a pre-sentence report]; subd. (b)(13) [to receive restitution]; subd. (c)(1) [to enforce restitution rights].)

1. Crime Victims' Right To Appeal Adverse Restitution Orders Is Constitutional

Crime victims were given new restitution rights when Section 28 was added to the California Constitution through Proposition 8 by the voters on June 8, 1982, and amended by Proposition 9 (Marsy's Law), by the voters on November 4, 2008. The individual rights Marsy's Law created include: (1) the right to seek and secure restitution, (2) the right to an order of restitution "in every case ... in which a crime victim suffers a loss," and (3) "All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim." (Cal. Const., art. I, § 28, subd. (b)(13).)

Specifically, California Constitution, article 1, section 28, subdivision (b)(13) states in pertinent part: "[T]o preserve and protect a victim's rights to justice and due process, a victim shall be entitled 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."

Crime victims also have the constitutional right to enforce their restitution rights: “A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) [including restitution] in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.” (Cal. Const., art. 1, § 28, subd. (c)(1); see also Cal. Const., art. 1, § 28, subd. (f) [referring to “enumerated rights provided in subdivision (b) [including restitution] that are personally enforceable by victims as provided in subdivision (c)”].)

2. Any Failure On The Legislature’s Part To Adopt A Proper Implementing Statute Cannot Deprive Crime Victims Of Their Constitutional Rights

Penal Code section 1202.4 implements crime victims’ express constitutional right to restitution, with subdivision (f) providing in part: “in 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 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.” Whether the Legislature properly enacted statutory appellate procedures to effectuate the intent of the citizens of California in enacting Marsy’s Law to protect victims’ rights to restitution and to appeal the denial of those rights, the Constitutional provision provides the victims with a personal right to appeal that must be enforced. (See *Byers v. Smith* (1935) 4 Cal.2d 209, 212-215 (*Byers*) [enforcing a constitutional protection where the Legislature had not properly enacted it by statute].)

When the Constitution confers jurisdiction, “the power is conferred [on the Legislature] to adopt such measures and rules as will render the constitutional grant effective and operative, otherwise the [L]egislature might by mere inaction defeat the will of the people expressed in the fundamental law.” (*Byers, supra*, 4 Cal.2d at pp. 213-214.) “[T]he Legislature has not the power, either through direct enactment or indirect device, to destroy or abridge the right of an appeal constitutionally granted.” (*Id.* at p. 214.) Thus, any ministerial failure on the Legislature’s part to amend the criminal statutes to expressly provide an appellate right to victims does not comply with the voters’ intent and cannot prevent the Victims from exercising their constitutional right to appeal. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450-454 (*Dix*) [decided before a victim’s right to appeal an adverse restitution decision was added to the Constitution by Marsy’s Law and distinguishing the restitution rights of crime victims from the District Attorney’s separate right to negotiate criminal pleas].)

3. The Case Law Is Conflicting And Requires Court of Appeal Review For Uniformity

Even before Marsy’s Law amended the Constitution to expressly provide crime victims with the right to appeal, the Court of Appeal recognized that victims had such rights. (*Melissa J. v. Superior Court* (1987) 190 Cal.App.3d 476, 478-479 (*Melissa J.*.) Crime victims are typically not considered parties to a criminal proceeding, but “where the court has issued an order concerning restitution, the victim may assert his or her legitimate rights by the procedures available to parties.” (*Id.* at p. 479.) In *Melissa J.*, the Court of Appeal allowed the crime victim to proceed by petition for writ of mandate, because the victim had no prior notice that an appeal would have

been available. (*Id.* at pp. 478-479.) But, because victims have the right to employ a party's procedures when it comes to restitution, the Court of Appeal recognized that future victims would have standing to appeal. (*Id.* at p. 479.) Since the parties to a criminal appeal have the right to appeal restitution awards, *Melissa J.* establishes that Victims also have appellate rights to appeal the denial of restitution. (See *Dix, supra*, 53 Cal.3d at p. 453 [citing *Melissa J.* with approval].)

Moreover, the Court of Appeal in *People v. Hannon* (2016) 5 Cal.App.5th 94, 105-106 (*Hannon*) recognized that crime victims must have a right *to appeal* the denial of restitution. "If a victim does not have a right to appeal an inadequate restitution award, and the People decline to appeal, then the victim's claims of error may go unheard. Arguably, a victim has a right to appeal under Section 28, subdivision (c)(1), which states that '[a] victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right.'" (*Id.* at p. 107, fn. 7.)

This Court's Opinion and the Appellate Division's Opinion in *People v. Subramanyan* (2016) 246 Cal.App.4th Supp. 1 (*Subramanyan*) conflict with the express language of the Constitution, the Court of Appeal's *Melissa J.* and *Hannon* opinions, and the Supreme Court's clear demarcation between the rights of victims and the rights of prosecutors in *Dix*. The *Subramanyan* Court wrongly concluded: "There is no provision in [the Constitution] that specifically permits a victim to appeal a restitution order. The Penal Code specifically directs that appeals are limited to the People or

the defendant. (Pen. Code, § 1466.) Penal Code section 1202.4 does not authorize an appeal by the victim after a restitution hearing.” (246 Cal.App.4th at p. 7.) The *Subramanyan* Court discounted the constitutional provision authorizing crime victims and their attorneys to personally enforce the victims’ restitution rights in appellate courts. (*Ibid.*) Furthermore, the Court of Appeal in *Hannon* disagreed with this analysis: “*Subramanyan* did not explain how its result was consistent with the language of Section 28, subdivision (c)(1) and did not explain how, consistent with due process, a victim could enforce the right to restitution without the ability to appeal an erroneous restitution award.” (5 Cal.App.5th at p. 107, fn. 7.)

The Opinion spends half of its legal analysis addressing whether the Victims have the right to appeal the denial of their right to direct restitution—highlighting the importance of this issue. The Opinion’s reliance on the Penal Code and the non-controlling and discredited Appellate Division *Subramanyan* decision instead of the binding Court of Appeal decisions in *Melissa J.* and *Hannon* creates a conflict and fails to adequately account for the express constitutional right provided by voters for crime victims to appeal these denials of restitution. (Opinion at 9-14.)

The right to appeal the denial of criminal restitution is an issue of immense importance to crime victims statewide, with an established lack of uniformity in the law. This Court’s allowance of writ review in this case does not correct the fundamental problem. As the Supreme Court held in *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1119, the right to a direct appeal provides relief not available in an extraordinary writ, including a written opinion, oral argument and a right to a decision on the merits.

Therefore, this is the prototypical case for certification for transfer to the Court of Appeal, which can provide precedential guidance on whether victims are entitled to the more expansive, broader rules of an appeal as provided for by the Constitution.

B. Whether Other Criminal Conduct Is Encompassed In A Crime To Which The Defendant Pleaded Guilty Is An Important Issue For Crime Victims Seeking Direct Restitution

Victims have a constitutional and statutory right to restitution for losses they suffer as a result of a defendant's criminal activity. (Cal. Const., art. 1, § 28, subd. (b)(13); Pen. Code, § 1202.4.) The trial court must order restitution for the victim's losses arising out of "the criminal conduct for which the defendant has been convicted." (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1274 (*Walker*)). To determine the conduct for which a defendant stands convicted, courts examine whether the conduct is encompassed in the pleaded-to crime. (*Id.* at pp. 1274-1275.)

The Supreme Court's recent decision in *People v. Martinez*, (2017) 2 Cal.5th 1093, 1103 (*Martinez*), is one of the first in years to address the issue of conduct encompassed within a crime for purposes of restitution. In *Martinez*, the Supreme Court held that a defendant convicted of leaving the scene of an accident that he did not cause could not be ordered to pay restitution to the victim for economic losses caused only by the accident and not by the crime itself. (*Id.* at pp. 1104-1105.) Vehicle Code section 20001, subdivision (a) is a crime that requires no criminal, wrongful, or even negligent conduct in causing the accident by one who flees the scene of a crime. (*Id.* at pp. 1102-1103.) As the Supreme Court held, only when all of

the injury-producing conduct is noncriminal is restitution foreclosed. (*Id.* at pp. 1105-1107.) The application of *Martinez* in general and specifically to this massive environmental crime is an important issue in an area with very little prior precedent.

Unlike the accident in *Martinez*, here the Gas Company's criminal discharge of hazardous materials is criminal conduct encompassed in the Gas Company's criminal failure to timely report that discharge. Section 25510, subdivision (a), the statute under which the Gas Company was charged and to which it pleaded guilty in Count 1, provides liability for failing to give notice of a hazardous discharge: "[T]he handler [including a storer] ... shall, upon discovery, immediately report any release or threatened release of a hazardous material to the [appropriate government agency]." In Count 4, the Gas Company was also charged with the actual hazardous discharge of which it failed to give notice under section 41700, subdivision (a). Section 41700, subdivision (a) provides: "[A] person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property." The Gas Company was charged with violating this statute in Count 4, but it was dismissed.

As relevant here, the elements of section 25510, subdivision (a) are: (1) discovery by a storer of hazardous materials (2) of its release of those hazardous materials into the environment and (3) failing to

immediately report the release to the proper government agencies. The legislative purpose of the statutory scheme is “to protect the public health and safety” and “to prevent or mitigate the damage to the health and safety of persons ... from the release or threatened release of hazardous materials into the workplace and environment” that pose “a significant present or potential hazard to human health and safety.” (§§ 25500, subd. (a), 25501, subds. (c), (l), (m), and (n).) Awarding direct restitution to the victims of such environmental crimes, thus, promotes the legislative purpose to protect health and property.

The Gas Company pleaded guilty to and was convicted of violating failing to give notice of its *release of hazardous contaminants* in Count 1, by failing to report *the same release of hazardous contaminants* into the air that constituted the violation in Count 4. Because the Gas Company’s discharge of methane, methyl mercaptan, butyl mercaptan, benzene and butane into the air was also part of the crime to which the Gas Company pleaded guilty in Count 1 (failure to report its release of methane, methyl mercaptan, butyl mercaptan, benzene and butane), the criminal discharge is also clearly encompassed within Count 1.

The Gas Company was convicted of criminal conduct including the criminal release into the environment of hazardous materials it stored in Aliso Canyon—there can be no failure to notify of a criminal release of hazardous materials by a storer without the release having occurred. Thus, the release of hazardous materials is encompassed in the crime to which the Gas Company pleaded guilty. Accordingly, the Victims are entitled to restitution for their losses arising out of the criminal activity that formed the

basis of the crime for which the Gas Company was convicted. (See, e.g., *Walker, supra*, 231 Cal.App.4th at pp. 1275-1276 [defendant convicted of driving under the influence causing injury properly ordered to pay restitution to all victims of eight-car collision, even those unnamed in the case].)

It is undisputed the Gas Company stored hazardous materials, released them into Porter Ranch and failed to immediately report the release. It is similarly undisputed that the Gas Company's release of these hazardous materials resulted in catastrophic health consequences and property losses to the Victims, including death, massive disruption, temporary relocation, cleaning costs, lost livelihood, damage to property, and diminution of the Victims' property values. The question of whether the criminal conduct of causing a hazardous criminal discharge is encompassed within section 25510, subdivision (a) for failure to give notice of such a discharge is one of first impression. Court of Appeal guidance is necessary. This Court should certify this case of statewide importance for transfer to the Court of Appeal.

C. Whether The Transactionally-Related Test Applies To All Adverse Sentencing Consequences *Except* Restitution Is An Important Issue Needing Further Guidance

Not only are the Victims entitled to restitution because the discharge of hazardous materials was encompassed in the Gas Company's failure to timely report the discharge in the plea for Count 1, the Victims also are entitled to restitution because the discharge itself is transactionally-related criminal conduct for which the Gas Company was charged in dismissed Count 4. That dismissed count for the Gas Company's discharge of hazardous materials is transactionally related to the Gas Company's

failure to timely notify of the discharge. Because restitution is an adverse sentencing consequence, another important issue for which further review is needed is whether the transactionally-related test applies to restitution. It is well-established the transactionally-related test applies to *every* other adverse-sentencing consequence.

A dismissed count is transactionally related to a crime to which a defendant pleaded guilty if “some action of the defendant giving rise to the dismissed count was also involved in the admitted count.” (*People v. Beagle* (2004) 125 Cal.App.4th 415, 421-423 (*Beagle*) [weapons charge not transactionally related to drug charge]; see also *People v. Klaess* (1982) 129 Cal.App.3d 820, 823-824 (*Klaess*) [accessory after the fact transactionally related to crime for which defendant was an accessory]; *People v. Guevara* (1979) 88 Cal.App.3d 86, 92-94 (*Guevara*) [possession of shotgun was involved in kidnapping and thus proper aggravating sentencing factor].)

Since *People v. Harvey* (1979) 25 Cal.3d 754, 758-759 (*Harvey*), case law has uniformly held that a defendant may suffer adverse sentencing consequences for any conduct transactionally related to the conduct for which the defendant has been convicted, even when the transactionally-related count is dismissed.³ If the conduct of the dismissed count is transactionally related to the count to which the defendant pleaded

³ If a defendant pleads guilty to one count and other counts that are not transactionally related are dismissed, a court may not consider the conduct of the dismissed counts in sentencing the defendant, in the absence of a waiver by the defendant at the time of the plea; this is called a *Harvey* waiver. (*Harvey, supra*, 25 Cal.3d at pp. 758-759.) No *Harvey* waiver is required, where, like here, the dismissed count is transactionally related to the charged and pleaded to count.

guilty, adverse sentencing consequences may be based on the dismissed count. (See *Klaess, supra*, 129 Cal.App.3d at pp. 823-824.) The adverse sentencing consequences for transactionally-related conduct can include an aggravated prison term, a consecutive sentence, or an enhanced sentence. (*Harvey, supra*, 25 Cal.3d at pp. 758-759; *Guevara, supra*, 88 Cal.App.3d at pp. 92-94; *Klaess, supra*, 129 Cal.App.3d at pp. 823-824.) The rule also has been applied to probation conditions. (*Beagle, supra*, 125 Cal.App.4th at pp. 420-421 [*Harvey* rule applies to *all* adverse sentencing consequences].)

It is well-established that direct restitution is an adverse sentencing consequence. (See Gas Company's Respondent's Brief 31; *Brown, supra*, 147 Cal.App.4th at pp. 1221-1223 [victim restitution constitutes criminal punishment].) Accordingly, the *Harvey* rule should apply to restitution, as it does to *all* adverse sentencing consequences. (See, e.g., *Beagle, supra*, 125 Cal.App.4th at pp. 420-421.) But this Court held that it did not. (Opinion at 19-21.)

No previous case has suggested that the transactionally-related test does not apply to a restitution adverse-sentencing consequence. (See *Walker, supra*, 231 Cal.App.4th at p. 1274 [referring to *Harvey* in the context of restitution].) The Opinion relies on *Martinez, supra*, 2 Cal.5th at p. 1102 (Opinion at 19-21), but there was only one criminal count in *Martinez* and thus no other dismissed criminal counts that could have been transactionally related. (See also Opinion's citation at p. 20 to *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123 [not involving the *Harvey* rule or the transactionally-related test]; and Opinion's citation at p. 21 to *People v. Jessee* (2013) 222 Cal.App.4th 501, 510 [involving restitution where there were no dismissed

criminal counts].) Under well-settled law, the transactionally-related test applies to *all* adverse sentencing consequences (including restitution), but the Opinion states, “Nothing in the California Constitution or the Penal Code indicates a *dismissed charge* can or must give rise to a restitution award in the nonprobationary context, as the Victims contend.” (Opinion at 21.)

Here, section 41700, subdivision (a) prohibits the discharge of hazardous air contaminants that cause injury, endanger the health and safety of persons, or that tend to cause injury or damage to business or property. The Gas Company was charged with violating this statute in Count 4. In Count 1, the Gas Company pleaded guilty to and was convicted of failing to report *the same release of hazardous contaminants* into the air that constituted the violation in Count 4. The two counts are inextricably intertwined and thus transactionally related. That is because the Gas Company’s conduct giving rise to the dismissed Count 4 (discharge of methane, methyl mercaptan, butyl mercaptan, benzene and butane into the air) was also involved in the count to which the Gas Company pleaded guilty in Count 1 (failure to report its release of methane, methyl mercaptan, butyl mercaptan, benzene and butane).

The Victims are entitled to restitution for their losses incurred from the Gas Company’s delay in reporting the gas leak in Count 1 and the transactionally-related ongoing discharge described in Count 4, because the two crimes involve the same conduct. Without a criminal discharge of hazardous materials, the Gas Company could not have been guilty for failing to give notice of the criminal discharge. The required element in both crimes is the hazardous criminal discharge. Thus, the two crimes were

transactionally related and the trial court should have ordered restitution for all the Victims' losses from both counts regardless of whether one count was imprudently dismissed. (See *Guevara, supra*, 88 Cal.App.3d at pp. 92-94.)

This Court's novel finding on such an important issue of law, that restitution is the only adverse-sentencing consequence not subject to the transactionally-related test, is extremely important to the criminal law field, and those charged and their victims need guidance.

D. The Strict Causation Standard This Court Applied To The Victims' Restitution Claims Is Also An Important Issue Needing Further Guidance By The Courts

This Court's application of a narrow causation standard to the Victims' required showing for criminal restitution is unprecedented and an important issue that needs further review.

1. Restitution Is Mandatory For All Losses Caused By The Defendant's Criminal Conduct

To obtain restitution, a victim's loss must have been caused by the criminal conduct for which the defendant was convicted. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1249.) But as the Supreme Court has previously held, Penal Code section 1202.4, implementing the constitutional right to restitution, is to be broadly and liberally construed. (*Martinez, supra*, 2 Cal.5th at p. 1107.)

A crime victim has the right to be *fully reimbursed* by the defendant for all losses suffered from the criminal conduct underlying the

defendant's conviction. (*Martinez, supra*, 2 Cal.5th at pp. 1100-1101, 1105.) Restitution must be ordered where the defendant's conduct exacerbates or enhances the victim's injuries. (*Id.* at p. 1107.) In determining whether the victim's loss occurred because of the defendant's criminal conduct, tort principles of causation apply. (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1321 (*Holmberg*)). Such loss occurs from a defendant's criminal conduct if that conduct was a substantial factor in causing the victim's loss. (*Id.* at p. 1322.) There can be more than one cause of loss. (*Ibid.*)

A "cause in fact is something that is a substantial factor in bringing about the injury." (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1396 (*Foalima*)). The substantial factor test should not be narrowly applied. (*Id.* at p. 1397.) "The test, put simply, is whether [the victim] would have incurred damages had there been no [crime for which the defendant was convicted]." (*Ibid.*) If the defendant's criminal conduct was a substantial factor and proximate cause of the victim's damages, the victim is entitled to restitution. (*Ibid.*) When the defendant in *Foalima* was convicted of murder but acquitted of arson, the trial court properly awarded restitution for a victim's loss of clothing and household goods burned after the victim died, because the murder was a substantial factor in the destruction of the victim's property. (*Ibid.*)

And in *Holmberg*, for example, restitution was ordered though the defendant was not convicted of the burglary during which the victims' property was stolen, he was convicted only of receiving the victims' stolen property. (195 Cal.App.4th at p. 1322.) The defendant's act of concealing the stolen property was a concurrent cause with the burglary in depriving the

victims of their property's use. (*Ibid.*) Therefore, the defendant was properly ordered to pay restitution for the victims' loss in replacing the stolen property. (*Id.* at pp. 1323-1324.) “[B]y holding on to the equipment, knowing it was stolen, defendant’s conduct was a concurrent cause of the victims’ losses and a substantial factor in causing their damages.” (*Id.* at pp. 1323-1324.)

2. The Gas Company’s Criminal Conduct Was A Substantial Factor In The Victims’ Losses

Here, the Victims are entitled to full restitution for their losses arising from the criminal conduct for which the Gas Company was convicted. The Gas Company’s criminal discharge of hazardous materials was encompassed within the count to which the Gas Company pleaded guilty and the dismissed count was also transactionally related to the same count. (See *Martinez, supra*, 2 Cal.5th at pp. 1102-1103; *Beagle, supra*, 125 Cal.App.4th at pp. 421-423; *Holmberg, supra*, 195 Cal.App.4th at pp. 1321-1322; *Foalima, supra*, 239 Cal.App.4th at p. 1397.) All of the Victims’ losses arose from the Gas Company’s failure to give notice of the hazardous discharge for several days, as well as the actual hazardous discharge transactionally related to and encompassed by the count to which it pleaded guilty.

In addition, even apart from the discharge, failing to report the release of hazardous materials alone was a substantial factor in the losses the Victims suffered. (See *Holmberg, supra*, 195 Cal.App.4th at pp. 1321-1322; *Foalima, supra*, 239 Cal.App.4th at p. 1397.) Had the Gas Company truthfully, accurately and immediately reported the release and nature of these toxic substances, the losses suffered by the Victims could have been

lessened or obviated altogether by their immediate relocation out of the affected area. Like the defendants in *Holmberg* and *Foalima*, the Gas Company is not relieved of its criminal liability for restitution simply because it claims there may have been more than one cause of the Victims' losses, as there is a causal connection between those losses and its failure to immediately report the release of the toxic substances.

However, this Court, while acknowledging that the Victims are entitled to restitution under the Gas Company's guilty plea for Count 1, applied an overly stringent causation standard in contravention of the well-established broad application of criminal restitution rights. (Opinion at 23-25.) This overly-strict standard caused the Court to affirm the trial court's finding that the Victims should receive *no* criminal restitution for Gas Company's pleaded-to crime. (Opinion at 23-25.) Without acknowledging the broad application of criminal restitution, the extremely early phase of this case because of the District Attorney's rush to reach the first (inadequate) settlement, and the fact that several Victims testified about personal and property damage, the Court stated the Victims made "no satisfactory offer of proof to support the claim...." (Opinion at 24.) The Court further imposed a new requirement in contravention of the substantial factor test, that the Victims scientifically separate "*what* damages were specifically attributable to defendant's delay in reporting the leak, as opposed to the leak itself." (Opinion at 24.) That is not the way restitution is supposed to work.

Imposing this strict standard on thousands of *crime victims*, only months after one of the largest environmental disasters in the county, when they were fighting the combined efforts of both the Gas Company and

the District Attorney, has no support in the law. As the Supreme Court has established, Penal Code section 1202.4 is to be broadly and liberally construed. (*Martinez, supra*, 2 Cal.5th at p. 1107.) And as the Constitution requires, “[T]o preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to ... restitution.... (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. 1, § 28, subd. (b)(13)(B).)

As the Victims’ counsel argued at the sentencing hearing, the Victims’ losses began with the Gas Company’s attempt to keep the blowout secret: “I want to be absolutely clear on the record. We are not conceding that there is no restitution for the three days. Presumably the requirement that you report to the regulatory agencies, the release of these substances requires a truthful, an[d] accurate report as to what’s being released. If the Victims of Porter Ranch had known immediately that benzene, fluorocarbons, [etc.] that were ultimately disclosed as being released in those three days, I can tell you that there’s nobody in this courtroom that wouldn’t have packed up their children and left immediately. These are known carcinogens. There is no safe amount. There was hydrogen sulfide that was put onto these homes.” (1 RT 77.) The Victims’ counsel also stated: “During those three days, there’s a consequence.... had they done their duty, had they followed the law, had they reported exactly what they released into the environment, all of this damage would have been prevented because I think the health department would come in and say—they would red tag all those houses. It was that dangerous.” (1 RT 77.)

In addition, both the trial court and the Victims' attorney noted that the trial court and the Victims' attorneys had been unsure how the trial court should proceed with taking evidence on restitution, before the trial court nonetheless proceeded with the only hearing allowing evidence of restitution. (1 RT 34-35.) With no prior notice that Victim witnesses would be allowed to testify, much less prior notice this would be their *only chance* to produce *any evidence* on their restitution rights, only a handful of Victims were available to testify. (1 RT 34-51.) The Victims testified to health effects, injuries, death, extensive un-reimbursed property expenses, and loss of property value. (1 RT 34-51.) In particular, one Victim testified the Gas Company's "irresponsible behavior in not reporting, you can't prepare yourself from harm. It's terrible that there's elementary schools in the area. People are sick.... I get respiratory ailments." (1 RT 50.) Additionally, the Victims' attorney's sworn declaration stated that a 20-year old man who had grown up in Porter Ranch had died of a rare cancer linked to formaldehyde exposure, which likely came from the Gas Company's compressor station. (2 CT 420.) The declaration further stated the Victims had many out-of-pocket costs that had not been reimbursed, including ambulance transport for the man who later died and the costs of cleaning many homes, and attached a bid for home cleaning. (2 CT 420.) The declaration stated it would take the Victims at least a year to procure all cleaning bids. (2 CT 421.)

Had the District Attorney waited to sufficiently assess the impacts to health and property from this enormous environmental disaster, as the State and the City of Los Angeles did, or had the trial court retained jurisdiction to determine the proper amount of restitution, the Victims' harms and injuries would have been even more evident, as is clear from the State

and the City's recent \$119.5 million settlement. In light of the trial court's accepting the hasty plea agreement without the Victims' attorneys being present, and the confusion about whether and what type of restitution hearing to which the Victims would be entitled, the evidence in the record is more than sufficient to meet the *broadly-applied* right to restitution.

The Victims here suffered losses because of the Gas Company's underlying criminal conduct. The Gas Company discharged hazardous materials into the environment and failed to timely report that discharge, as a result of which the Victims suffered significant losses. At a minimum, the Victims are entitled to a fully-noticed opportunity to present evidence on their right to restitution as required by due process and their Constitutional right to criminal restitution.

The Opinion's overly-strict application of the causation standard to Victims' traditionally-broad restitution rights is an important issue, not addressed in this way before, which needs further appellate review.

V.

CONCLUSION

This Court should grant the Victims' Application for Certification because this appeal raises important questions of law and transfer to the Court of Appeal is necessary to determine these important issues, provide guidance to prosecutors, victims and the trial courts, and secure uniformity of decision.

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