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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; SHERRI ANN SMITH, Real Party in Interest.	E041331 (Super.Ct.No. SWF-012388) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. James T. Warren, Judge. Petition denied.

Grover Trask and Rod Pacheco, District Attorneys, and Matt Reilly, Deputy District Attorney, for Petitioner.

No appearance for Respondent.

Neil Auwarter, under appointment by the Court of Appeal, for Real Party in Interest.

In this case, we determine whether there has been reversible error when the trial court refuses to allow the victim and the victims' family to address the court at a *resentencing* undertaken pursuant to Penal Code section 1170, subdivision (d).[1] We conclude that in the circumstances of this case, the People are not entitled to relief and the judgment should stand. Accordingly, we deny the petition.[2]

STATEMENT OF FACTS

We take the facts of the underlying offense from the probation report. A detailed recital is not necessary.

Real party and defendant Sherri Ann Smith, then 42 years of age, with no juvenile or adult involvement with the criminal justice system, had attended the Temecula Balloon Festival with a friend, consuming "large amounts" of food and two glasses of wine. After stopping briefly at her friend's home, she headed east on Highway 74 to the restaurant where her boyfriend worked.[3] Her vehicle collided with a motorcycle driven by Kerry Suglia, on which his wife Sheryl was also riding. Kerry Suglia suffered

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] We initially denied the People's petition summarily without opinion. However, the People sought review in the Supreme Court, and that court transferred the matter back to us with directions to vacate our order and to issue an order to show cause why the relief sought should not be granted. We did so.

[3] Highway 74, or the "Ortega Highway," is an extremely twisting, largely two-lane road winding through the hills.

massive trauma and died at the scene; Mrs. Suglia was critically injured and her left leg eventually had to be amputated.

Smith appeared to be under the influence of alcoholic beverages at the scene and her blood alcohol was tested at .11 percent. She told officers that "The motorcycle was coming at me right in the middle, and bam he ran right into the front of me." There were no other witnesses to the actual crash; however, Mrs. Suglia told a witness who arrived almost immediately after the impact that Smith "came into their lane head-on" and that "there was no way that they could get out of the way of Smith's vehicle."[4]

Smith pleaded guilty to vehicular manslaughter (Pen. Code, § 192, subd. (c)(3)) and driving under the influence with bodily injury (Veh. Code, § 23153, subd. (b)) with a great bodily injury enhancement (Pen. Code, § 12022.7, subd (a)). The terms of the plea bargain provided for a maximum punishment of two years in state prison.

The sentencing memorandum prepared for defendant included literally dozens of letters of support from friends, her employer and coworkers, and family members, including her former husband (a deputy sheriff). All painted a picture of a responsible, hard-working, caring human being. However, at the sentencing hearing, members of the victims' family presented the other side of the coin.

Sheryl Suglia's son, Jeremy Popoff, criticized defendant (who works in a medical office) for not coming to his mother's assistance. He described the drastic alterations to his mother's life due to her injuries—she had been compelled to sell the home she had

shared with her husband so that she could move closer to her children; she also could no longer navigate stairs. Her children's lives had been impacted by the need to provide care for her, and unpaid medical bills were astronomical. He also criticized the two-year "lid" as inadequate.

Kerry Suglia's mother expressed her personal heartbreak and described the victim as a loving "gentle giant" of a man. She described viewing and caressing his body at the mortuary. She told the court that his marriage with Sheryl was devoted and affectionate, and that the couple was "inseparable." She also told the court that since Kerry's death, she had "nothing."

A. Jay Popoff also addressed the court, relating that Kerry Suglia had been an "extremely supportive" stepfather when he had arguably been a "punk kid, pain in the butt." He also described Kerry as a "gentle" person who "gave the best bear hugs."

Finally, Sheryl Suglia described the accident and her struggles to reach her husband as they lay in the roadway. She also listed her injuries, which included a badly impaired arm as well as the loss of a leg, and she suffered from posttraumatic stress syndrome. Her injuries also interfered with her ability to interact and play with her grandchildren. With respect to her husband, Mrs. Suglia repeated that "Everybody loved Kerry" and she reminded the court that their grandchildren would not grow up to know him.

[footnote continued from previous page]

4 The California Highway Patrol officer investigating concluded that Smith's vehicle did cross the centerline.

The family also presented letters and a "memory book" prepared by Kerry's mother.

The trial court, after retiring briefly to consider the information, denied probation due to the serious injuries involved, although it also felt that defendant was "a suitable candidate for probation and would do well on probation." Accordingly, it imposed a two-year prison term.

Shortly thereafter, however, the trial court elected to recall the matter for resentencing, confirming to the prosecutor at a hearing before defendant was transported that he intended to place her on probation. The prosecutor, as was his right, opposed this. "I'd be opposed to that." "I want the Court to know that I am opposed to this." At the next hearing—Smith had still not been transported—the prosecutor insisted that the court explain its reasons; the court said simply that it believed it had made a mistake. The prosecutor opposed bail or O.R. release and insisted that a new probation report be prepared. He also began to argue the question of resentencing on the merits and—despite the court's efforts to assure him that the court knew his position—stated for the record that "I don't think the Court has grounds to resentence her to probation. . . . I'm going to be vociferously arguing that." When the court pointed out that nothing could be determined at that hearing, and that "Mr. Detienne, you've argued this before. You're arguing it now. You're going to argue it again on the 14th," the prosecutor responded that "I think the Court should know my position." At this point, the court reminded him that he had *just stated his position*; the prosecutor then informed the court that the sentencing hearing would be "extensive."

Defendant having finally been transported, the resentencing hearing was originally scheduled for July 14, 2006; the court's references to "media" make clear that the matter had generated a certain amount of public interest. At that time, the court indicated that it did not intend to allow the family members or Mrs. Suglia to address the court unless new information was to be provided to the court. It reminded the prosecutor that the original sentencing hearing had been "very lengthy," that it had reviewed a copy of the transcript, and that the new probation report referred to new interviews with the victim and victims' family. The matter was then adjourned to July 19.

On that date, the court was first obliged to compel the prosecutor to detach from his resentencing brief two letters from persons associated with "Mothers Against Drunk Driving" who, as the court observed, had no standing to participate. The court also required the prosecutor to remove letters from unnamed and undescribed community members.

After defendant's counsel rested, the prosecutor recited the procedural history of the sentencing into the record, and stated that he did not want to "get up here and do this formal impassioned argument . . . . I would like to enter into a dialogue with the Court as to why the Court feels a mistake was made on March 10th [the date of original sentencing]." He proceeded rhetorically, "What happened between March 10th and May 31st [the date of recall] that makes the Court feel that state prison is no longer appropriate? And I would ask the Court for its reasons, because I don't see a mistake."

In response, the court noted its experience of 21 years on the bench and the perhaps "hundreds of thousands of criminal cases" it had handled. It explained that

although it had only once previously recalled a sentence in order to give a defendant probation, it had "literally, prayed about" the case and eventually concluded that it had improperly weighed the factors bearing on probation. It also expressed the view that, considered with other driving deaths involving defendants with higher blood alcohol and worse records, the prosecutor's insistence on prison for Smith was not consistent with past practice, and that the sentence simply was not "a proportionate and equal and fair sentence." It concluded by saying that "[t]he best I can tell you is this is a case that would not go away for me."

The prosecutor then represented that Sheryl Suglia, the Popoff brothers, and Sheryl's sister wished to address the court, along with "two people from Mothers Against Drunk Driving." The court refused to permit the latter to appear at all, and repeated that the family members would only be permitted to make statements that were "not a reiteration of the information," that is, the information presented at the first hearing.

After additional and somewhat contentious proceedings, the prosecutor again asked the court to allow the family to speak, apparently so they could express their outrage over the resentencing, which he described as like a "punch to the gut" or being "kicked to the curb." When the court correctly noted that any such outrage or emotional pain was the court's fault, not defendant's, the prosecutor indicated that, "Perhaps, I didn't emphasize enough on March 10th the severity of this incident. I have four pictures . . . ." He then described the photographs for the record, pointing out blood splashes and Kerry Suglia's "lifeless body." Finally, he suggested that the court should order a

psychiatric study of Smith to determine "what makes her tick." (§ 1203.03.) This was denied.

At this point, the prosecutor made one more effort to have Sheryl Suglia address the court. The court asked again what new information she would present, and the prosecutor represented that she would discuss the impact the court's decision to resentence Smith had on her. After a moment speaking with Mrs. Suglia, the prosecutor added that she wished to remind the court that despite her medical training, Smith had made no effort to assist the victims; this, as the court noted, was already in the record from the original hearing.

By now, proceedings had somewhat deteriorated as far as one can tell from a cold record, with the prosecutor insisting that all factors bearing on probation be fully explored because "apparently, there's some things that weren't said loud enough." At last, however, he reluctantly conceded, "I guess I have nothing further to say." The court then placed defendant on probation on specified terms.

DISCUSSION

The People's position is that the sentencing hearing, and the grant of probation, were void because the victims were deprived of their statutory right to address the court. We disagree, and we also believe that if there *were* any error, it was indisputably harmless. Nothing whatsoever would be served by requiring a third sentencing hearing to be held beyond subjecting everyone involved to additional pain, stress, and grief.

Section 1170, subdivision (d), authorizes a court to recall and vacate a prison sentence "for any reason rationally related to lawful sentencing." (*Dix v. Superior Court*

(1991) 53 Cal.3d 442, 456 (*Dix*).) There is no dispute that the court properly exercised this power.

Section 1191.1, enacted as part of the "Victims' Bill of Rights" in 1982, provides in part that "The victim of any crime . . . or the next of kin of the victim if the victim has died, have the right to attend all sentencing proceedings . . . [¶] . . . and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution. The court . . . shall consider the statements . . . ." Here, there is no dispute that the trial court permitted Mrs. Suglia and other family members to express their views at the *initial* hearing. The question is whether it was obliged to do so at the *resentencing* hearing.

The People rely upon language in *Dix*, *supra*, 53 Cal.3d at page 453, footnote 6, to the effect that "Of course, petitioner [victim] will be entitled under section 1191.1 to receive notice, and to appear and state his views, when [defendant] is resentenced." *Dix* in fact *rejected* the victim's claim that he had *legal standing* to oppose resentencing and the footnote comment is dicta. However, we accept that it is a good statement of the law in general; section 1170, subdivision (d), also provides that the court, after recalling a sentence, shall "resentence the defendant in the same manner as if he or she had not previously been sentenced." It is significant, however, that in *Dix*, the victim—who had been shot in the head by defendant—had not been notified of the original sentencing because the court and parties felt that it was unnecessary where the defendant had pleaded guilty for an agreed maximum term. Thus, when the court recalled the defendant's sentence because the defendant had agreed to cooperate in an unrelated

murder case, the victim had *never* had the opportunity to address the court on the subject of the defendant or the crime. Clearly, in that situation, the victim was entitled to a full opportunity to participate in the resentencing.

As our lengthy recital of the proceedings makes clear, this case was quite different. Mrs. Suglia and the other family members presented their views at great length at the original hearing. Prior to conducting the resentencing, the trial court reviewed the transcript of the original hearing. It elicited from the prosecutor the grudging admission that there was no new information to be presented other than the family's distress caused by the fact that the court had recalled the sentence; and, as the court observed, that was not something that could fairly be blamed on defendant. Key is the statutory provision that the victim or family be permitted to "*reasonably* express" their views. (§ 1191.1; italics added.) Given the recency of the original hearing and the trial court's review of the transcript, it was not "reasonable" that the family be given a *right* to make a renewed demonstration of the family's grief and sufferings. No legitimate purpose would have been substantially served by such a display.

In these circumstances, we do not think it was error for the court to decline to allow the victim and family to address it. However, even if there was error, the authorities compel the conclusion that it must be reviewed under a "harmless error" analysis.

In this respect, the People rely on *Melissa J. v. Superior Court* (1987) 190 Cal.App.3d 476 (*Melissa J.*), but the case is readily distinguishable. In that case, the victim was not notified of a hearing at which the trial court decided to terminate the

defendant's obligation to pay direct restitution to the victim.[5] In a narrow holding, the court held that "as to restitution, the notice and right to appear requirements are mandatory. If the requirements are not satisfied, the victim may challenge a ruling regarding restitution." (*Melissa J.*, *supra*, at p. 478.) Crucial to the decision was the fact that "restitution *rights*" were involved. (*Ibid*., emphasis added.)

Previously, in a case distinguished in *Melissa J.*, the victim-notification requirement of section 1191.1 was expressly held *not* to be jurisdictional in that a failure to notify the victim of the sentencing hearing did not deprive the court of the power to impose a valid sentence. (*People v. Superior Court* (*Thompson*) (1984) 154 Cal.App.3d 319, 322 (*Thompson*).) The court noted that the Legislature had provided neither an enforcement mechanism nor a sanction for the failure to comply with the statute; this remains true.

We are persuaded that *Thompson* is correct. Section 1191.1 provides that the probation officer shall provide "adequate" notice to the victims, and jurisdiction cannot depend upon such a vague and undefined term. We observe that in noting (but not answering) the question of "Whatever special considerations of standing may apply to this limited category of 'victims' rights,'" the Supreme Court in *Dix* cited *Thompson* with a mere "but see" to *Melissa J.* (*Dix*, *supra*, 53 Cal.3d at p. 453.) Any procedural error did not affect the fundamental jurisdiction of the court to render judgment.

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[5] Defendant had been convicted of molesting the victim and as part of his probation had been ordered to pay $400 per month for the victim's psychological counseling.

It remains only to consider the proper standard of review. Aside from jurisdiction, only a few errors are considered "structural" and subject to a rule of automatic reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310 [111 S.Ct. 1246, 113 L.Ed.2d 302], cited in *People v. Flood* (1998) 18 Cal.4th 470, 493.) As the United States Supreme Court explained in *Arizona v. Fulminante*, *supra*, at page 310, a "structural" error is one "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." It is clear that refusing to allow a victim to testify at sentencing cannot be considered such an error. Thus, as no constitutional right is involved (see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]), the proper standard of review must be that of "probable prejudice" or "harmless error." (*People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Under this standard, the conclusion is clear that, even if the trial court *should* have allowed the victim and family members to address it at the resentencing, there is no possibility that the result would have been different. The court had heard extensive statements only a few months previously and it had reviewed the transcript of the original sentencing. Most importantly, the record reflects that it reached the conclusion to grant Smith probation only after weeks of careful thought and reflection. Undoubtedly, this reflection included the tragic effects of the crime, as well as the favorable factors of defendant's history and character.

DISPOSITION

Accordingly, we conclude that our original summary denial of the petition was correct. We do not believe that, in the circumstances of this case, the trial court erred in declining to expend court time on a purely repetitive set of victim and family statements; alternatively, if there was error, it was harmless.

The petition is denied.

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GAUT
Acting P.J.

I concur:

HOLLENHORST
J.

MILLER, J., dissenting.

I respectfully disagree with the majority's two-fold conclusion that victims do not have the right to address a court at a resentencing hearing, and that even if it was error to deny the victims an opportunity to speak, that deprivation was harmless error.

A. It Was Error to Deny Victims a Chance to Express Their Views at Resentencing.

The issue of whether Penal Code[1] section 1191.1 gives crime victims a right to express their views at a resentencing hearing is uniquely a question of law subject to a de novo standard of review. The applicability of a statute to conceded facts is a question of law. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The Victim's Bill of Rights (Proposition 8), passed by voter initiative in 1982, enacted section 1191.1. (*People v. Zikorus* (1983) 150 Cal.App.3d 324, 328-329 (*Zikorus*).) In its current version, section 1191.1 provides:

"The victim of any crime, or the parents or guardians of the victim if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.

"The victim, or up to two of the victim's parents or guardians if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to appear,

personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims, parents or guardians, and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation."

Included within the voter's ballot pamphlet circulated at the time of the initiative was an examination of the proposition by the Legislative Analyst:

"'Under existing law, statements of victims or next of kin are requested for various reports which are submitted to the court. In many cases, parole boards are not required to notify victims or next of kin about hearings. [¶] This measure would require that the victims of any crimes, or the next of kin of the victims if the victims have died, be notified of (1) the sentencing hearing and (2) any parole hearing (if they so request) involving persons sentenced to state prison or the Youth Authority. During the hearings, *the victim*, next of kin, or his or her attorney would *have the right to make statements to the court* or hearing board. In addition, this measure would require the court or hearing board to state whether the convicted person would pose a threat to public safety if he or she were released on probation or parole.'" (*Zikorus*, *supra*, 150 Cal.App.3d at p. 331, italics added.)

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1 All further statutory references will be to the Penal Code unless otherwise indicated.

In *Zikorus*, this court explained the intent behind Proposition 8: "Prior to the enactment of Proposition 8, judges had the power to listen to victims, but had no duty to do so. The clear purpose of Proposition 8, as declared by its title (The Victims' Bill of Rights) was to mandate a previously optional procedure; to *require* the judge to listen to and consider the views of the victim." (*Zikorus*, *supra*, 150 Cal.App.3d at p. 331.) We concluded that "Penal Code section 1191.1 was not intended to change common law and limit information a sentencing court may consider in imposing judgment. *It simply guarantees to the victim a right to be heard and considered*." (*Id*. at p. 332, italics added.)

Four years later, in 1986, the state legislature enacted section 679.02 which established statutory rights for victims, among them, the right to be notified of all sentencing proceedings, the right to appear, to express their views, and to have the court consider their statements. The intent of the legislation was for "all victims . . . of crime [to be] treated with dignity, respect, courtesy, and sensitivity" (§ 679) and their rights be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants."[2]

Whenever a judge exercises his sentencing discretion, consideration of the harm caused by the crime has always been an important factor in sentencing. (*Payne v. Tennessee* (1991) 501 U.S. 808, 821 (*Payne*).) The U.S. Supreme Court noted a rising

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[2] However, victim impact evidence cannot include characterizations or opinions about the crime, the defendant, or the appropriate punishment. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

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tide of legislation wherein Congress and most states had enacted legislation to enable a sentencing authority to consider "'victim impact statement[s]'" to allow victims to describe for sentencing authorities the harm caused by a defendant's crime. (*Id.* at p. 821.) Victim impact statements are designed to show each victim's uniqueness as an individual human being—a state can conclude that a sentencer can have evidence of the specific harm caused by a defendant in order to meaningfully assess his criminal culpability and blameworthiness. (*Id*. at pp. 823, 825.) A state has a legitimate interest in counteracting the mitigating evidence which a defendant is entitled to put into evidence.[3] (*Id.* at p. 825.)

In *Zikorus*, *supra*, we found that the voters enacted section 1191.1 to oblige a judge to hear a victim's views. In contradistinction, I believe *Thompson*[4] incorrectly found the statute's directions were merely directory, and not mandatory.[5] "It would be difficult to conceive of a more absurd result than to adopt a construction which would prevent a victim or next of kin from having a meaningful opportunity to protest a [sentence] that will allow a defendant to escape the punishment which the victim or next

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[footnote continued from previous page]

[3] This is discussed within the context of a capital case.

[4] *People v. Superior Court* (*Thompson*) (1984) 154 Cal.App.3d 319, 321-322. (*Thompson*).

[5] Specifically, *Thompson* discussed the duty to notify victims of the sentencing hearing.

of kin feels is appropriate to the crime." (*People v. Stringham* (1988) 206 Cal.App.3d 184, 197.)

I disagree with the majority opinion finding that the victims only have a right to express their views, without a concomitant remedy to enforce that right. Section 679 provides, "[t]he failure to enumerate in that section a right which is enumerated elsewhere in the law shall not be deemed to diminish the importance *or enforceability* of that right." (Italics added.) Fidelity to our obligation requires us to preserve section 1191.1, "a provision of 'The Victim's Bill of Rights[,]' from becoming a dead letter." (*People v. Stringham*, *supra*, 206 Cal.App.3d at p. 187.)

Not only are victims entitled to voice their views at sentencing, as the majority correctly states, but I believe they should also be allowed to express their views at a resentencing. It is true that the trial judge heard the victims' evidence in aggravation within between 120 to 140 days from the first sentencing. It is also true that he reviewed the sentencing transcript to refresh his memory.

However, the California Supreme Court in *Dix v. Superior Court* (1991) 53 Cal.3d 442, 463 (*Dix*) held that section 1170(d) permits a sentencing court to recall a sentence for any reason which could influence sentencing generally, even if the reason arose after the original commitment. The court may thereafter consider any such reason in deciding upon a new sentence.

In *Dix*, the trial court recalled the sentence at the prosecutor's request in order to give a prison inmate local jail time in exchange for his testimony in a murder for hire prosecution against a drug kingpin. (*Dix*, *supra*, 53 Cal.3d at p. 449.) The victim of the

inmate witness balked at the recall of the inmate's sentence and his release from prison, thus filing a writ to prevent the resentencing and compel the inmate to serve out the original sentence. (*Id.* at p. 450.) The court held that the victim had no standing to challenge a sentencing because victims are not parties to a criminal action and may not intervene with the exercise of a prosecutor's discretion in conducting criminal cases. (*Id.* at pp. 451-452.) It noted the state constitution and statutes accord victims the right to state their views in connection with the disposition and in a footnote stated the victim had the right to be heard at the resentencing. (*Id.* at p. 453, fn. 6.)

The majority opinion distinguishes *Dix* from this case by stating:

"It is significant, however, that in *Dix*, the victim—who had been shot in the head by defendant—had not been notified of the original sentencing because the court and parties felt that it was unnecessary where the defendant had pleaded guilty for an agreed maximum term. Thus, when the court recalled the defendant's sentence because the defendant had agreed to cooperate in an unrelated murder case, the victim had *never* had the opportunity to address the court on the subject of the defendant or the crime. Clearly, in that situation, the victim was entitled to a full opportunity to participate in the resentencing." ((Maj. opn., *ante*, at p. 10.) The majority cites this principle for the proposition that victims are only entitled to speak at one sentencing hearing, not two.

But *Dix* went on to explain that section 1170, subdivision (d) did not preclude the trial court from taking the inmate's cooperation into account when imposing a new sentence and may consider any new fact in consideration for resentencing. (*Dix*, *supra*, 53 Cal.3d at pp. 463, 465.) It stated, "when a case is remanded for resentencing after an

appeal, the defendant is entitled to 'all the normal rights and procedures available at his original sentencing' [Citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed." (*Id*. at p. 460.) Included among defendants' rights is the ability to submit evidence in mitigation. (§ 1204; Cal. Rules of Court, rule 4.423.) The prosecution, too, may also submit evidence in aggravation. (§ 1204; Cal. Rules of Court, rule 4.421.)

Harmonizing sections 1191.1, 697.02, and the aforementioned cases together, it appears that victims should have an opportunity to state their views regarding the crime, the defendant, and restitution at resentencing. The trial court's decision to reduce defendant's sentence approximately 84 percent—from a two-year prison term to being released on probation after four months in prison—caused Ms. Suglia and her extended family and friends to experience emotional distress. The prosecutor's offer of proof was that the victims wanted to describe their outrage over the resentencing, which was like a "punch to the gut" or being "kicked to the curb" and how they felt "disrespected" by the court. This evidence reflected their views concerning the crime (this was a serious crime that did not merit probation) and the person responsible (defendant's conduct was so irresponsibly egregious such that she should remain in prison). This relevant aggravating evidence was not heard in the prior sentencing as it arose afterwards as a result of the trial judge's decision to resentence defendant. Consequently, the victims should be afforded an opportunity to expound their views for a second time at the resentencing. A sentencing court's failure to afford victims their right to speak their piece can be remedied by giving them a forum at a new resentencing hearing. There is no reason to

treat such victim impact evidence differently than other relevant evidence is treated during sentencing. (See *Payne, supra*, 501 U.S. at p. 827.) As defendant was given her due process rights to make any statement regarding her resentencing and a chance to offer mitigating evidence, so should the victim and her family have the same right to make any statements regarding defendant's resentencing, as allowed under sections 1191.1 and 679.02. The opportunity for the victims to offer their views on resentencing should not be limited to newly raised issues, but may also include views the victims previously discussed in the original sentencing.[6]

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[6] However, a trial court always retains its inherent power to limit repetitive questioning and cumulative evidence that has already been presented. (Evid. Code, § 352; *People v. Evers* (1992) 10 Cal.App.4th 588, 599; Witkin, California Evidence, (4th ed. Presentation at Trial, § 68, pp. 99-100).)

A trial court need not allow unnamed and undescribed community members, or advocacy groups such as MADD to speak at a sentencing hearing as these groups have no standing to weigh-in on a trial judge's exercise of his sentencing discretion in a court proceeding as they are not parties to the action. (*Dix, supra*, 53 Cal.3d at p. 450.)

Nor should a trial judge bow to political pressure exerted by the executive branch. The imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions; it is a violation of the separation of powers to abort the judicial process by subjecting a trial judge to the control of the district attorney. (*People v. Thomas* (2005) 35 Cal.4th 635, 641-642.)

Finally, a judge should not succumb to media pressure or allow a vocal segment of society to dictate his sentencing choices—a trial judge "shall be faithful to the law, regardless of partisan interests, public clamor, or fear of criticism," (California Code of Judicial Ethics, Canon (3)(B)(2)) and "shall uphold the integrity and independence of the judiciary." (California Code of Judicial Ethics, Canon (1).)

B. The Trial Court Abused its Discretion in Excluding Relevant Evidence in Resentencing.

The majority opinion states that even if it was error to deny the victims their right to address the trial court at resentencing, it was harmless as there is no possibility that the result would have been different. (Maj. opn., *ante*, at pp. 8, 12.) It is my belief that the *Watson*[7] standard of review inapplicable here, and that the correct standard of review is abuse of discretion.

In *Watson*, the California Supreme Court explained the constitutional amendment adding California Constitution article VI, section 13[8] created a change in the way legal analyses were to be performed by reviewing courts. Formerly, errors in criminal cases were presumed to be prejudicial and judgments of convictions were reversed. (*Watson*, *supra*, 46 Cal.2d at p. 834.) The constitutional amendment created a new concept: reviewing courts were now required to render an opinion whether the error resulted in a "'miscarriage of justice.'" (*Id.* at pp. 834-835.) The court clarified that the controlling consideration was that "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable *to the appealing party* would have been reached in the absence of the error." (*Id.* at p. 836, italics added.)

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[7] *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

[8] Formerly California Constitution, article VI, section 4 1/2.

In this instance, the victims cannot be an appealing party because victims have no standing to challenge a sentence as they are not a party to a criminal action. (*Dix*, *supra*, 53 Cal.3d at p. 450.) Thus it makes no logical sense to say that even if it was error to deny the victims a chance to speak at resentencing, the result would have been the same-that is, the trial judge would have still sentenced defendant to probation. *Watson* can only apply to an appealing party and the Suglia family is not an appealing party. Nor is it applicable to the prosecutor, although he is a party, as he does not hold the unique perspective of a crime victim who herself has suffered the harm resulting from defendant's conduct. And it is not applicable to defendant, as she suffered no prejudice in having her sentence reduced.

Rather, an abuse of discretion standard of review should be applied to determine whether the trial court erred in determining that the victims' testimony was not relevant[9] to resentencing.

California Constitution, art. I, section 28, subdivision (a) provides:[10]

"The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.

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[9] Specifically, the trial court ruled that the victims' testimony was not "pertinent."

[10] Part of the Victim's Bill of Rights passed by the voters in Proposition 8.

"The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also *the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished* so that the public safety is protected and encouraged as a goal of highest importance." (Italics added.)

The mechanism to fulfill victims' expectation that convicted felons are appropriately punished is provided by section 1191.1. It provides victims the right to reasonably express their viewpoints on three matters: (1) their views concerning the crime, (2) the person responsible, and (3) the need for restitution. Any evidence that a victim may give regarding these three factors is relevant in sentencing. A state may conclude that evidence about the victim and about the impact of the crime on the victim's family is relevant to the sentencer's decision as to the type of penalty that should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated. (*Payne*, *supra*, 501 U.S. at p. 827.)

At both the resentencing continuance and the resentencing hearing, the prosecutor made several requests for the trial court to allow Ms. Suglia, and Messrs. Popoff to speak and offer their views. Each time, the trial court asked for an offer of proof of what new information these victims would present; it clarified its ruling that it would only permit new evidence and would bar any information that had already been given in the prior sentencing hearing.

The prosecutor informed the trial court that the victims wanted to discuss the impact they were experiencing as a result of its decision to resentence defendant, their outrage over the resentencing, and defendant's refusal to employ her medical training to assist the victims. The trial court denied their request to speak because it did not think it was pertinent. It stated that any outrage or emotional pain was the court's fault and not defendant's.

It is true that victim impact evidence cannot include characterizations or opinions about the crime, defendant, or the appropriate punishment. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) However, the victims here wanted to express their outrage over the sentence reduction. Although the victims did not testify, a fair reading of the prosecutor's offer of proof would be that the victims wanted to state their position that two years of state prison was a more fitting punishment for the loss of one family member's life and for loss of another member's limb, rather than four months of state prison and release on parole.

This evidence was relevant to section 1191.1 "views of the crime" factor. An abuse of discretion standard of review is applied to a trial court ruling where the admissibility of evidence turns on determining the underlying relevance of the evidence at issue. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) I believe the trial judge abused his discretion when he denied the victims a right to state their position on resentencing defendant to probation, as this evidence was relevant to the crime's impact on the family.

The second item the victims wanted to discuss was defendant's refusal to employ her medical training to assist the victims. This related to the second factor of section 1191.1, which relates to the "person responsible." Again, a fair reading of the prosecutor's offer of proof was that a defendant who had the ability and skills to assist in a medical emergency and failed to do so was perceived by them to be more *blameworthy* than a defendant who had no such skills to offer.[11] The trial court abused its discretion by barring the victims from expressing their views regarding defendant's failure to act as it was highly relevant to section 1191.1's second factor, the victims' viewpoint of the "person responsible."

I would conclude that any time a trial judge completely bars a victim from expressing her viewpoint or cuts off a victim after giving only a partial rendering of her views concerning the crime, the person responsible, or the need for restitution, that judge abuses his discretion. Consequently, I would allow the victims to have a forum to reasonably express their views of these three factors at a resentencing hearing.

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[11] See, e.g., *Payne*, *supra*, 501 U.S. at p. 819. "[T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. 'If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.' [Citation.] The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed."

C. Conclusion.

I would grant the petition for writ of mandate, vacate the sentence, and direct the trial court to set a new resentencing hearing, and allow the victims an opportunity to express their views in a victim impact statement. "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Payne*, *supra*, 501 U.S. at p. 827.)

/s/ MILLER
J.