

No. A167736

**COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT**

HG, EQ and RG,
Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO
Respondent,

JOSHUA G. GAMOS, et al.,
Real Parties in Interest.

Petition from the Superior Court of the State of California
for the County of San Mateo, Case No. 18-SF-014404
The Honorable Elizabeth K. Lee

**BRIEF OF THE HUMAN TRAFFICKING LEGAL CENTER, ADZ LAW,
LLP, THE CENTER FOR THE HUMAN RIGHTS OF CHILDREN,
FREEDOM NETWORK USA, THE HUMAN TRAFFICKING INSTITUTE,
THE LEGAL AID SOCIETY OF NEW YORK, LOS ANGELES CENTER
FOR LAW AND JUSTICE, THE NATIONAL CRIME VICTIM LAW
INSTITUTE, AND THE THAI COMMUNITY DEVELOPMENT CENTER
AS AMICI CURIAE IN SUPPORT OF PETITIONERS WRIT OF
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INTRODUCTION

Victims have constitutional rights in a criminal prosecution that must be enforced. This case is one of the largest labor trafficking cases ever criminally prosecuted in California. The defendants were convicted at trial for their involvement in a ten-year conspiracy to commit human trafficking and wage theft, among other crimes. The defendants, who all had roles operating or owning a chain of adult residential and child-care facilities, preyed on vulnerable individuals. The defendants used fraud, as well as physical and psychological abuse to cause their victims to work for far-below minimum wage under inhumane conditions. More than one hundred people were victims of the defendants' conspiracy.

This case should have represented a pivotal occasion on which survivors of labor trafficking obtained justice through the criminal legal system. Instead, it has drawn widespread interest, including the attention of the national anti-trafficking movement, because it risks setting a dangerous precedent—one that would significantly curtail and trample human trafficking survivors' rights.

The California Constitution provides 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.” Cal. Const. Art. I, § 28(b)(13)(A). Despite the plain language of the Constitution, the court sought to limit the rights of victims by holding that a victim must be called as a witness at trial to qualify as a crime victim. The court's invention of a testifying requirement

not only has no basis in the law, it is in direct contravention of the law. Moreover, this unfortunate decision runs directly counter to a victim-centered and trauma-informed approach to human trafficking cases.

Because the court’s ruling would significantly limit crime victims’ rights to restitution and would cause unnecessary trauma to survivors of human trafficking and other crimes by tying restitution rights to trial testimony, the court must hear this petition. The Human Trafficking Legal Center, ADZ Law, the Center for the Human Rights of Children, Freedom Network USA, the Human Trafficking Institute, the Legal Aid Society of New York, the National Crime Victim Law Institute and the Thai Community Development Center submit this brief as *amici curiae* in support of the petitioners HG, EQ and RG.

ARGUMENT

I. The Court’s Decision Is Contrary to California Law and Will Cause Harm to Survivors of Human Trafficking

The California Constitution makes clear that victims are entitled to receive restitution “in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” Cal. Const. art. I, § 28(b)(13)(B). Crime victim is defined broadly to include “all persons who suffer losses as a result of criminal activity.” Cal. Const. art. I, § 28(b)(13)(A); *see also Santos v. Brown*, 238 Cal. App. 4th 398, 418 (2015) (“Marsy’s Law clearly demands a broad interpretation of protective victims’ rights.”); *People v. Taylor*, 197 Cal. App. 4th 757, 761, 128 Cal. Rptr. 3d 399, 401 (2011) (“A victim’s restitution right is to be broadly and liberally construed.”) (internal citations and quotation marks omitted).

This broad definition recognizes the importance—both to the victims and to the public—in advocating and protecting crime victims’ rights:

Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California. The enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system fully protecting those rights and ensuring that crime victims are treated with respect and dignity, is a matter of high public importance.

Cal. Const. art. I, § 28(a)(2). The right to restitution is not only expansive. It is also mandatory. California Penal Code Section 1202.4, which implements this Constitutional mandate, specifically provides: “It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime *shall* receive restitution directly from a defendant convicted of that crime.” Cal. Penal Code § 1202.4(a)(1) (emphasis added).

Nevertheless, in this case, the court misapplied the law, narrowing crime victims’ rights through the creation of an unlegislated element of eligibility. Specifically, the court found that “non-testifying victims are not entitled to crime victim restitution.” Mar. 27 Tr. 47; *see also id.* at 45 (“[T]he Court’s ruling [is] that non testifying employees are not entitled to restitution because the Court is finding they’re not crime victims[.]”). This ruling creates a new and unprecedented threshold inquiry for victims seeking restitution. If a defendant proceeds to trial, the victim must now testify at that trial in order to seek restitution at sentencing.

As an initial matter, there is no basis in the law for such a requirement. Nothing in the California Constitution, U.S. Constitution or the penal code suggests that a victim must testify to meet the burden of proof required at a restitution hearing. Nor would such a requirement make any sense. A victim does not even have to testify at trial in order to secure a conviction. The Confrontation Clause provides the defendant with a right to cross examine a witness, but it does not compel the prosecution to call a victim to testify. *See e.g., United States Attorneys' Bulletin, Evidence Considerations in Proving Sex Trafficking Cases Without a Testifying Victim* (Nov. 2017), at 121 (“The Confrontation Clause guarantees every defendant the opportunity for effective cross-examination of any witness at trial. It does not provide an obligation for the United States to call all witnesses against a defendant, including a victim.”). A defendant can be found guilty of committing a crime against a victim without the victim ever testifying at trial. *See e.g., United States v. Deutsch*, No. 18-CR-502 (FB), Verdict Sheet, Doc. 154 (E.D.N.Y. 2023) (jury convicted the defendant at trial for the sexual exploitation and attempted sexual exploitation of minor “Montana,” among other charges, even though she did not testify at the trial). If a defendant can be convicted of a victim-based crime without that victim’s testimony, it simply cannot be that restitution, which has a lower evidentiary standard, compels that same victim’s testimony at trial.

This ruling also shows a complete disregard for the harmful effects that testifying can have on survivors of human trafficking. Testifying at a criminal

trial can retraumatize victims. *See* Wu, et al., *Prosecution at Any Cost? The Impact of Material Witness Warrants in Federal Human Trafficking Cases*, The Human Trafficking Legal Center, 13-14 (2020). “[T]he adversarial structure of criminal prosecutions may be at odds with survivors’ mental health and safety needs; whereas survivors are at a heightened risk for retraumatization in the wake of violence and desire community validation, participating in a criminal prosecution subjects them to public scrutiny and challenges to their credibility.” Love, et al., *Justice in Their Own Words: Perceptions and Experiences of (In)Justice among Human Trafficking Survivors*, Urban Institute (March 2018) (available at https://www.urban.org/sites/default/files/publication/97351/justice_in_their_own_words_0.pdf, p. 2). Survivors of human trafficking, in particular, “may face heightened procedural hardships because of misconceptions regarding their victimization.”¹ *Id.* There can be little doubt that the court’s testimony requirement, which has no basis in the law, will do harm to survivors of human trafficking. This invented requirement does not “ensur[e] that crime victims are treated with respect and dignity,” as promised by California’s

¹ The court’s suggestion that the petitioners improperly attempted to seek civil damages under the guise of criminal restitution is contrary to fact and to law. Criminal restitution and civil damages are distinct remedies and should not be conflated. The court’s comments reveal a fundamental misunderstanding of the law and the role of restitution for trafficking victims. *See* Mar. 27, 2023 Tr. at 37 (“[C]ivil claims for damages, economic damages, are never properly litigated in criminal court.”); *id.* at 40 (“I’ll repeat: The criminal court is not to be used as a vehicle to address civil liability, notwithstanding that this is a big labor trafficking case and there are over 120 other employees who are seeking redress here; they would like their back wages.”).

Constitution. Cal. Const. art. I, § 28(a)(2). This Court must hear the petition and issue a writ of mandate to ensure survivors' constitutional rights and prevent the unnecessary infliction of trauma on survivors.

II. The Court's Decision Infringes on the Crime Victims' Constitutional Rights

The constitutional mandate provides that all victims are entitled to restitution. That right is "personally enforceable" by not only the prosecutor, but also by the victim and the victim's attorney or lawful representative. Cal. Const. art. I, §§ 28(a)(3), (c)(1). The Constitution also recognizes that "California's victims of crime are largely dependent upon the proper functioning of government, upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime." *Id.* at § 28(a)(2). But tying the right to restitution to whether a witness testified at trial further diminishes the limited rights of victims within the criminal legal system. Put simply, the court's ruling places the prosecution in an impossible bind: calling every conceivable witness to the stand, or eviscerating victims' restitution claims by trimming the evidence presented to the jury.²

² Moreover, courts, as the court did in this case, will often put limits on the length of the prosecution's case, thereby, further limiting the ability to preserve victims' rights. Pet. 14 ("As the court explained to the jury: 'The People would very much have liked to call all witnesses on their list but because the Court had imposed that deadline of May 5, [the People] have chosen to present what they've presented up to this time.'").

The prosecution in a criminal case is generally entitled to prove its case to a jury as it sees fit. *See Old Chief v. United States*, 519 U.S. 172, 186, 117 S. Ct. 644, 653 (1997) (recognizing that “the prosecution is entitled to prove its case by evidence of its own choice”). There is no requirement that to establish each element of the crime, the prosecution present testimony from every victim. Thus, it is not surprising, as detailed in the petition, that courts have routinely awarded restitution to non-testifying victims in criminal cases. *See* Pet. 30-31. For example, in *United States v. Mueffelman*, 400 F. Supp. 2d 368 (D. Mass. 2005), the defendant argued that the district court could only order the defendant to pay restitution as to the individuals who were named in the indictment. The district court rejected the defendant’s argument, finding that the court was empowered to order the defendant to pay restitution to victims who, while not named in the indictment, fit within the scheme of conduct alleged and proved. *Id.* at 387.

Had *Mueffelman* gone to trial under the law set by the court in this case, the prosecution would have faced a terrible dilemma: to present the testimony of more than 300 witnesses, or to sacrifice the restitution rights for every victim not called to testify. In the instant case, the defendants were charged with a ten-year conspiracy, which encompassed approximately 120 victims. The prosecutors made strategic decisions regarding which witnesses to call. Their goal was to present the most compelling case to the jury, as efficiently as possible. Notably, the People hoped to present more evidence, including additional witness testimony, but this goal was shattered by the court’s rulings, imposing a firm

deadline for when the People’s case had to be concluded. Pet. 14 (“During the course of trial, the court told the People that they needed to finish their case by May 5. That timeline prevented the People from putting on all [its] witnesses.”). The court cannot force prosecutors to truncate their cases and then arbitrarily strip trafficking victims of their rights because the prosecution was forced to limit witness testimony at trial.

The prosecutors in the instant case zealously advocated for the victims’ rights, but even if the prosecutors had known the court’s ruling in advance, they would have been left in an impossible position. The prosecution could have attempted to call 120 victim-witnesses but that would have been impossible under the court’s deadline and even without that deadline would have resulted in a prohibitively long trial. Moreover, forcing every victim to testify in order to protect their right to restitution would have led to cumulative, or even confusing, testimony. Requiring all 120 witnesses to testify to preserve their restitution rights could also have annoyed the judge and jury, putting a conviction in jeopardy. The prosecution, unaware of this invented new testimony requirement, behaved ethically: presenting the strongest possible case to the jury through the strongest possible witnesses. That strategy has now inadvertently denied victims of any right to restitution and left these victims without recourse to vindicate their rights.³

³ Notably, the instant writ is indicative of the limited recourse available to crime victims. If this Court denies the writ, the petitioners likely do not have any right or ability to bring an appeal. *Crump v. App. Div. of Superior Ct.*, 37 Cal. App. 5th 222, 240 (2019) (“Nothing in Marsy’s Law makes the victim a party to the case, or purports to change Penal Code section 1466. Without party status, there is no

Under the court’s ruling, the victims who were not selected by the prosecution to testify—and who had no right to demand that they be allowed to testify—would have no avenue to seek a remedy. By discarding crime victims’ rights so cavalierly, the court has ensured that victims will be denied restitution for no other reason than the defendants trafficked *too many* people to call as witnesses. This ruling is in direct conflict with 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.” Cal. Const. art. I, § 28(b)(13)(A) (emphasis added). This Court’s review is necessary to correct the court’s invention of law that violates constitutional rights.

III. Survivors of Forced Labor and Human Trafficking Already Face Significant Obstacles in Receiving Restitution

The court’s ruling serves to exacerbate a persistent problem. Survivors of trafficking are frequently denied the restitution they are legally required to receive. Without a right to counsel or the rights of a party to the litigation, crime victims’ rights are most often in the hands of the prosecutors and the courts. Restitution under the federal Trafficking Victims Protection Reauthorization Act (“TVPRA”), as it is under California law, is mandatory. In fact, the language in California Penal Code Section 1202.4 mirrors the language in the TVPRA. *Compare* 18 U.S.C. § 1593(b)(3) (“The term ‘full amount of the victim’s losses’ has the same

basis for a direct appeal”). Rather, the petitioners are, once again, at the whims of the decision of the prosecutor, who must balance a variety of factors in deciding whether or not to appeal a case.

meaning as provided in section 2259(c)(2) and shall in addition include the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.”) *and* Cal. Penal Code § 1202.4(p) (“In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim’s labor as guaranteed under California law, or the actual income derived by the defendant from the victim’s labor or services or any other appropriate means to provide reparations to the victim.”); *see also* Cal. Penal Code § 236.1(g) (“The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(11) of Title 22 of the United States Code.”).

Criminal restitution is mandatory under the TVPRA, but all too often it is simply not ordered. When the TVPRA’s mandatory restitution provision is overlooked, trafficking victims are left empty-handed, deprived of the resources that would enable them to rebuild their lives. Advocates have documented and fought this trend. The Human Trafficking Legal Center has published two in-depth studies of federal criminal human trafficking cases and the frequency with which restitution was awarded in those cases. Collectively, the reports analyzed 510 federal human trafficking cases. The researchers found that restitution was

ordered in just 30 percent of these cases. Levy, *United States Federal Courts Continuing Failure to Order Mandatory Criminal Restitution for Human Trafficking Victims* (2018), at App'x A (available at <https://htlegalcenter.org/wp-content/uploads/2018-Mandatory-Restitution-Report.pdf>).

Recent data (relying on a slightly different methodology) suggests that there has been an increase in restitution orders in federal trafficking cases. But even with the increase, the percentage of defendants ordered to pay restitution remains below fifty percent. In 2021, federal courts failed to order restitution in 63 percent of human trafficking convictions, despite the fact that it was mandatory in those cases. Lane, et al., *2021 Federal Human Trafficking Report*, Human Trafficking Institute (2022) (available at <https://traffickinginstitute.org/wp-content/uploads/2022/09/2021-Federal-Human-Trafficking-Report-WEB-1.pdf>). In federal human trafficking cases prosecuted in California, restitution was ordered against just 18 percent of defendants in cases where there was at least one identified victim. Lane, et al., *2021 California State Report*, Human Trafficking Institute (2022) (available at <https://traffickinginstitute.org/wp-content/uploads/2022/09/2021-State-Summary-CA-PROOF2.pdf>). This case, if allowed to stand, will replicate the state's disappointing record on restitution for trafficking victims.

The failure to order restitution often stems from the victims' lack of legal representation. Moreover, prosecutors routinely fail to seek restitution. But here, the blame for the lack of restitution for these particular victims must be laid

squarely and solely at the feet of the court. This court has violated the law, failing to uphold the basic rights of victims:

This alarming fact may be explained, at least in part, by the false dichotomy between victim advocacy and criminal enforcement. . . . And while the best prosecutors take a victim-centered approach, others, as well as the judges overseeing the criminal cases, are frequently oblivious to their direct legal obligations to victims. The abysmal result is that defendants get to keep what they stole; victims remain penniless; and under-funded public-interest organizations are saddled with the costs of caring for victims.

Vandenberg, *Palermo's Promise: Victims' rights and human trafficking*, 6 Anti-Trafficking Review 138, 139 (2016). The court's ruling has caused grievous harm to victims who have already suffered and strangles the rights of victims in criminal proceedings. Most dangerously, the ruling puts even well-meaning prosecutors in the position of eviscerating a victim's rights to secure a defendant's conviction. This Court must take this case to correct the egregious injustice of the trial court's order.

IV. Civil Damages Are Not a Substitute for Restitution

A civil action is not an alternative to a restitution award. Contrary to the court's insinuation, the petitioners' restitution requests are not equivalent to civil claims. *See* Mar. 27, 2023 Tr. at 37 (“[C]ivil claims for damages, economic damages, are never properly litigated in criminal court.”); *id.* at 40 (“I’ll repeat: The criminal court is not to be used as a vehicle to address civil liability, notwithstanding that this is a big labor trafficking case and there are over 120 other employees who are seeking redress here; they would like their back wages.”). The petitioners were subjected to fraud and abuse by the defendants.

They were forced to work for below minimum wage under inhumane conditions. They are crime victims entitled to criminal restitution, regardless of what other civil claims may also be available.

In the instant case, the People sought the gross value of the victims' labor based on the value of the labor as guaranteed under California law. This request is precisely what is provided for under the law. Victims are entitled to restitution "sufficient to fully reimburse the victim or victims for every determined economic loss." Cal. Penal Code § 1202.4(f)(3); *see also* Cal. Penal Code § 1202.4(f)(3)(D) (specifically providing that victims are entitled to lost wages as part of restitution). A court should base its restitution order on "the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim." *Id.* The petitioners should not be forced to engage in civil litigation simply to obtain the restitution that they have a constitutional right to be awarded in the criminal proceeding.

Sadly, civil litigation is often the only option for survivors of labor trafficking, as governments routinely fail to prosecute labor trafficking cases. *See* U.S. Dep't of State, *Trafficking In Persons Report* 575 (2022) (in fiscal year 2021, the Department of Justice initiated 228 federal human trafficking prosecutions but only seven of those cases predominantly involved labor trafficking). But here, the

state of California did prosecute the case. The victims cooperated with the prosecution. Crime victims should never be forced to engage in civil litigation because of a court's refusal to award mandatory restitution. Many victims would prefer to end their engagement with the legal system after the conclusion of the criminal case. They should be able to do so, without suffering additional detriment, such as the loss of criminal restitution. Victims should not be subjected to the additional trauma and expense of being forced to litigate a civil case. If California intends to be true to the intent and purpose of its Constitution, the trial court's decision must be reversed.

CONCLUSION

For the reasons set forth above, this Court should hear the petition and reverse the court's finding that an individual must testify at trial to be a crime victim as contrary to the law.

Dated: May 10, 2023

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

I, Catherine Sweetser, declare and state as follows:

1. I am an attorney duly licensed to practice law before all courts of the State of California and am Deputy Director of the Promise Institute for Human Rights, and Director of the Human Rights Litigation Clinic at UCLA School of Law, attorneys of record herein for the Human Trafficking Legal Center, ADZ Law, the Center for the Human Rights of Children, Freedom Network USA, the Human Trafficking Institute, the Legal Aid Society of New York, the National Crime Victim Law Institute and the Thai Community Development Center.

2. I make this declaration in support of this Brief of the Human Trafficking Legal Center as Amicus Curiae.

3. I have personal knowledge of the facts set forth in this declaration and if called as a witness, could and would testify competently to them.

4. Pursuant to California Rules of Court, Rule 8.204(c)(1), I hereby make the following certification: The text of this brief consists of 3,658 words as counted by the word-processing program used to generate this brief.

Executed on May 10, 2023, under the laws of the State of California at Los Angeles, California.

/s/ Catherine Sweetser

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PROOF OF SERVICE

I, Carlos Gallegos, declare:

I am employed in the County of Los Angeles, State of California.

My business address is 9415 Culver Boulevard, #115, Culver City, CA 90232. I am over the age of eighteen years and not a party to the action in which this service is made.

On May 10, 2023, I served the document(s) described as

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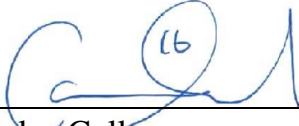
submitted by the Human Trafficking Legal Center, ADZ Law, the Center for the Human Rights of Children, Freedom Network USA, the Human Trafficking Institute, the Legal Aid Society of New York, the National Crime Victim Law Institute and the Thai Community Development Center on the interested parties in this action as follows:

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Carlos Gallegos

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