DATE FILED: April 18, 2023 11:33 AM
FILING ID: 69793A2F88FB3
CASE NUMBER: 2022SC272

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 19CA1308	
Petitioner, ARNOLD R. MARTINEZ, v. Respondent, THE PEOPLE OF THE STATE OF COLORADO.	▲ **COURT USE ONLY** ▲ Case No. 22SC272
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

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The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/John T. Lee

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INTRODUCTION

In this criminal restitution appeal, this Court must decide the proper standard for reviewing a trial court's proximate cause finding after a contested hearing. Roman Martinez, the defendant, asks this Court to disagree with every division of the court of appeals (and all other courts addressing proximate cause in the tort context) and hold for the first time that proximate cause presents a mixed question of law and fact ultimately subject to de novo review. But plain and simple, proximate cause involves core factfinding. Appellate review of a proximate cause *finding* must be limited to clear error, especially when it involves credibility determinations.

Martinez's attempt to unsettle established law is understandable because, under the second issue before this Court, he fails to find any support in the existing record or law for his contention that he did not proximately cause the damage to the victim's car. Under any standard, the trial court and court of appeals reached the right result. Martinez stole a bicycle from the victim's garage in his presence, fled, and then

rode the bicycle into the victim's car after the victim pulled in front of him to get him to stop. As Martinez fully acknowledges, the presence of certain elements put a stop to a finding of an independent intervening cause. The absence of several of those indispensable requirements here—that the defendant did not participate in the alleged intervening act, that the act was not foreseeable, and that the act amounted to gross negligence—foreclose Martinez's argument that the victim's action in trying to stop him from getting away with the bicycle was an independent intervening cause excusing him of liability for the resulting damage.

STATEMENT OF THE CASE AND FACTS

The victim's wife heard a noise in the garage, looked inside, and screamed to her husband that a man was in the garage, stealing their $6,000 bicycle. (CF, p 2.) The victim ran outside, saw Martinez riding away on the bicycle, and jumped in his car to chase after Martinez. (CF, p 2.)

Just a block and a half from the victim's garage, the victim pulled his car parallel to Martinez to try to get him to stop. (TR 5/28/19, pp 9-10.) As Martinez continued to get away with the bicycle, the victim then pulled his car in front of Martinez, again to try and get him to stop. (TR 5/29/19, pp 9-10, 14-15.) Martinez rode the bicycle into the side of the victim's car. (TR 5/29/19, pp 9-10, 14-15; *see also* CF, p 3; Ex. 2 (showing damage to the victim's car above the center of the passenger tire).) Martinez walked away, and a car took him away from the scene. (CF, p 3.)

The People charged Martinez with second-degree burglary, criminal mischief, and violation of bail bond conditions. (CF, pp 30-31.) As part of a plea agreement involving other cases, the People dismissed these charges in this case but reserved the right to request restitution. (Supp. CF, p 1; CF, pp 42-43). The People subsequently requested $2,393.84 in restitution to cover the damage to the victim's car. (CF, pp 45-47, 54.) Martinez objected. (CF, pp 63-65.)

At the restitution hearing, Martinez argued that he was not the proximate cause of the damage to the victim's car because the victim's use of "physical force to recover his property was an intervening cause." (TR 5/28/19, p 8:13-15.) The People submitted victim impact statements, an estimate from the insurer, the police report, and the warrant for Martinez's arrest. (CF, pp 86-115; TR 5/28/19, p 1:17-21.) Consistent with those exhibits, one of the responding officers testified at the hearing that: the victim saw his bicycle being stolen from his garage, he followed Martinez down the street, trying to get Martinez to stop so he could recover the bicycle, he first drove parallel and then pulled his car in front of Martinez, and the event happened about a block and a half from the victim's garage. (TR 5/28/19, pp 9-10.)

The trial court found that the victim's act was not an independent intervening cause. (TR 5/28/19, pp 30-38; CF, p 124.) The court explained that the cases Martinez cited addressing whether a jury instruction on the defense of property should have been given were both inapposite to a restitution issue and factually distinguishable. (CF, pp

123-24; TR 5/28/19, pp 32-36.) Adhering to the proximate cause standard applicable to restitution cases, the court found that the victim's conduct was not an independent intervening cause because (1) it was foreseeable; (2) Martinez was "clearly participating in the event as he was riding [the] bicycle parallel to [the victim's] car while he was in the act of stealing the bicycle," and (3) at most, the victim's action constituted simple negligence and did not rise to the level of gross negligence. (CF, p 124; TR 5/28/19, pp 36-37.) Accordingly, the court granted the restitution request. (CF, p 124.)

A division of the court of appeals affirmed the restitution order, with Judge Jones specially concurring. *People v. Martinez*, 2022 COA 28.[1] As relevant here, the division found that the district court did not abuse its discretion in finding Martinez was the proximate cause for the damage caused to the victim's car. *Id.* at ¶¶21-31. In so doing, the court rejected the defendant's argument that the victim's act of pulling his car

[1] The People cite to a number of cases with *Martinez* in the case name. All short cites referring to *Martinez* refer to the published opinion in this case.

in front of Martinez to get him to stop was an intervening cause because it was foreseeable, not grossly negligent, and Martinez nonetheless participated in that event. *Id.* Judge Jones specially concurred, agreeing with the result but explaining his belief that the proper standard for reviewing the trial court's proximate cause determination was clear error and not an abuse of discretion. *Id.* at ¶¶53-61.

SUMMARY OF THE ARGUMENT

This case calls for this Court to clarify the appropriate standard for appellate review of a trial court's proximate cause determination in a restitution proceeding. Martinez asks for unprecedented de novo review of the fact finder's ultimate determination. But of the dozens of appellate judges to have considered this question, not one has adopted this framework. Rightly so.

Holding the line between trial and appellate court functions is crucial to maintaining a well-functioning judicial system. Instead of unsettling it as Martinez urges, this Court should follow the court of appeals' lead. This Court should hold that although trial courts retain

broad discretion over the terms and conditions of a restitution order, where a defendant challenges the trial court's finding that the defendant was the proximate cause of the victim's losses, appellate review of that factual finding, which often rests on credibility determinations, is ultimately for clear error.

Applying that standard (or under any other standard), this Court should hold that the district court correctly found there was not an independent intervening cause relieving Martinez of responsibility for the damage he proximately caused to the victim's car. The victim's act of trying to stop Martinez from getting away with the bicycle was not an intervening cause for three reasons.

First, an intervening cause is an independent cause in which the defendant does not participate. Here, Martinez's theft of the bicycle in the victim's presence, subsequent flight, and refusal to stop all set into motion the victim's act of pulling his car in front of Martinez. And, as Martinez rode the bicycle into the victim's car, he directly participated in the alleged intervening cause on that ground as well.

Second, an alleged intervening cause does not exempt a defendant from liability if it was foreseeable. Martinez stole the bicycle in the victim's presence and refused to stop when the victim drove parallel to him. It was foreseeable and foreseen that the victim would take additional efforts to halt Martinez from getting away with the bicycle.

Third, simple negligence is never an intervening cause—an intervening cause requires an act of gross negligence. At worst, the victim's act of pulling his car in front of Martinez to try and get him to stop was simple negligence. Martinez's argument to the contrary rests on facts not in the record.

STANDARDS OF REVIEW

On the first issue, the People agree that the determination of the proper standard of review is a legal question reviewed de novo. *See Howard-Walker v. People*, 2019 CO 69, ¶22. The People also agree with Martinez that preservation on this issue is immaterial as "this issue arose with the division's creation of a published split of authority…." O.B. at 7; *Martinez*, ¶¶14, ¶¶53-61 (two judges applying abuse of

discretion, and one judge believing clear error is the correct standard of review).

On the second issue, the proper standard of review for a trial court's proximate cause determination generally comes under the umbrella of abuse of discretion because "a sentencing court has broad discretion to determine the terms and conditions of a restitution order." *People v. Roddy*, 2021 CO 74, ¶23. But where the party challenging restitution attacks the court's proximate cause *finding*, clear error review applies. Martinez preserved his challenge to the trial court's proximate cause finding. (CF, pp 45-47, 54; TR 5/28/19, p 8:13-15.)

ARGUMENT

I. A trial court has broad discretion over restitution terms and conditions, and review of a court's proximate cause determination for restitution purposes depends on the error asserted, with the ultimate finding of proximate cause reviewed for clear error.

Fully consistent with the well-established precedents of appellate review and the restitution statute, this Court should hold that, although trial courts have broad discretion over the terms and

conditions of a restitution order, appellate review of a trial court's proximate cause determination turns on the error asserted. Where, as here, a defendant challenges a district court's ultimate finding of proximate cause, review of that finding should be for clear error.

A. The applicable standard of appellate review is determined by the substance of the claimed error.

"Defining and adopting a standard of review is a critical part of the appellate function." *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (Kourlis, J., dissenting). A standard of review has two parts: one that applies to error determination and one that applies to reversal determination if the appellate court finds error. *Maestas v. People*, 2019 CO 45, ¶20 (Samour, J., concurring); *cf. Hagos v. People*, 2012 CO 63, ¶9 (articulating the standards of reversal). At issue here is the former—the error-determining standard.

Three main standards of review guide an appellate court in discerning whether error occurred: de novo; abuse of discretion; and clear error. *E.g.*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

De novo review is the least deferential, invoked when the appellate court is in the same position as the trial court to analyze the question at hand. *See, e.g.*, *People v. Taylor*, 2018 CO 35, ¶7. "De novo means 'anew; afresh; a second time.'" *Valdez*, 966 P.2d at 598 (Kourlis, J., dissenting) (quoting *Black's Law Dictionary* 392 (5th ed. 1979)). De novo review applies to questions of law, *People v. Justice*, 2023 CO 9, ¶22; to questions of statutory interpretation, *Johnson v. People*, 2023 CO 7, ¶15; and to an objective review of the contents of the record in conjunction with the other rules of review that apply in sufficiency of the evidence claims, *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010).

Abuse of discretion review affords deference to the trial court's decision, so long as it is within acceptable bounds. *Liebnow ex rel. Liebnow v. Boston Enters. Inc.*, 2013 CO 8, ¶14. "An abuse of discretion occurs when the trial court's ruling is manifestly arbitrary, unreasonable, unfair, or based on an erroneous understanding of the law." *People v. Madrid*, 2023 CO 12, ¶57 n.5. Determining whether a court abused its discretion often requires examining a subsidiary legal

or factual question that may require applying another standard of review. *See, e.g.*, *id.* at ¶37.

The clear error standard provides the most deference to the trial courts. Generally, a court's factual findings are clearly erroneous only when they have no support in the record. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383-84 (Colo. 1994); *People v. Thomas*, 853 P.2d 1147, 1149 (Colo. 1993); *see also* C.R.C.P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); Crim. P. 57(b) (noting "the court … shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists"); *Maine v. Taylor*, 477 U.S. 131, 145 (1986) ("[T]he 'clearly erroneous' standard of review long has been applied to nonguilt findings of fact by district courts in criminal cases.").

Clear error review flows from two principles. First, it recognizes principles of judicial economy—"if appellate courts were forced to take a fine-toothed comb to the factual disputes in each case, the appellate

docket would [] suffer a major backlog." *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶18. Second, it appreciates respective institutional competence. *Id.* at ¶19. While "appellate tribunals don't (and, indeed, can't) make findings of fact," trial courts are well-suited to the task. *Id.*

In deciding what standard of review applies, substance controls over form. *See People in Int. of B.H.*, 2021 CO 39, ¶29 n.3 ("[T]he principle of party presentation 'does not prevent a court from properly characterizing an issue that has been improperly characterized by a party.'" (quoting *Lucero v. People*, 2017 CO 49, ¶26)). A reviewing court looks at whether the decision was factual, discretionary, or legal in nature. *See Valdez*, 966 P.2d at 598 (Kourlis, J., dissenting). Although "the distinction between law and fact isn't always a bright one, fact questions 'usually call for proof' and legal questions 'usually call for argument.'" *Carousel Farms*, ¶20 (quoting Clarence Morris, *Law and Fact*, 55 Harv. L. Rev. 1303, 1304 (1942)).

B. Martinez's challenge to the court's ultimate finding of proximate cause is not a sufficiency claim.

Martinez's argument for a de novo standard fails at the outset because he inaccurately characterizes what he wants this Court to review. Martinez frames the issue as a sufficiency of the evidence claim. Although this Court has never explicitly applied the *Bennett*[2] test to review of restitution awards, there is no sound reason not to do so.[3] The problem, however, is that Martinez isn't challenging the sufficiency of the evidence. He does not accept the evidence in the light most favorable to the prosecution or give the prosecution the benefit of every fairly drawn favorable inference. *See Clark*, 232 P.3d at 1291-92; *People v. Barbre*, 2018 COA 123, ¶25. Instead, he asks this Court to review de

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[2] *People v. Bennett*, 515 P.2d 466 (Colo. 1973).

[3] Of course, there will be some key differences in reviewing whether the evidence is of sufficient quantity and quality to support a restitution award. Restitution is a sentencing proceeding, where the burden of persuasion may differ and where the Colorado Rules of Evidence do not apply. *People v. Vasseur*, 2016 COA 107, ¶20; *see* § 18-1.3-603(2), C.R.S. (2022); *see also People in Int. of A.V.*, 2018 COA 138M, ¶24 ("[T]he prosecution is not required to prove restitution by the same quality of evidence required in a trial on the merits of the case.").

novo the trial court's resolution of disputed facts—its ultimate *finding*—deferring only to "findings of historic facts." O.B. at 6. Martinez, therefore, is challenging the ultimate determination by the fact finder, not merely whether the prosecution produced evidence establishing a prima facie case.[4] And these two challenges are distinct, calling for different standards of review.

"When a defendant challenges the sufficiency of the evidence [to support a conviction], [they are] asserting that the prosecution has not proven every fact necessary to establish the crime at issue…." *McCoy v. People*, 2019 CO 44, ¶20. So, the appellate court reviews "the record de novo to determine whether the evidence before the jury was sufficient in both quantity and quality to sustain the defendant's conviction." *Clark*, 232 P.3d at 1291.

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[4] Martinez is also not challenging the adequacy of the court's findings, another related but distinct issue that would be reviewed de novo. *See People v. Tomaske*, 2022 COA 52, ¶38; *People v. Shifrin*, 2014 COA 14, ¶90.

A sufficiency challenge, however, does not review the ultimate determination of guilt. *See id.*; *People v. Garcia*, 2022 COA 83, ¶16 ("[W]hat we review de novo is not the ultimate conclusion of guilt by the fact finder but, rather, whether the prosecution put forward sufficient evidence to 'meet its burden of proof with respect to each element of the crime charged.'" (quoting *Martinez v. People*, 2015 CO 16, ¶22)). Accordingly, this Court has repeatedly reiterated that an appellate court "'may not serve as a thirteenth juror' by considering whether [it] 'might have reached a different conclusion than the jury.' Nor may [it] invade the jury's province by second-guessing any findings that are supported by the evidence." *Thomas v. People*, 2021 CO 84, ¶10 (quoting *People v. Vidauri*, 2021 CO 25, ¶33). "These limitations make it clear that [an appellate court's] review is not truly de novo, or '*anew*.'" *Garcia*, ¶16 n.4. Sufficiency measures whether the prosecution has met its burden of production, not whether the trier of fact reached the correct result. *Id.*

Several divisions of the court of appeals have used the *Bennett* test to review sufficiency challenges to restitution awards. *People v. Moss*, 2022 COA 92, ¶9; *People v. Dyson*, 2021 COA 57, ¶15; *People v. Rice*, 2020 COA 143, ¶22, *overruled on other grounds by People v. Weeks*, 2021 CO 75; *People v. Jaeb*, 2018 COA 179, ¶48; *Barbre*, ¶25; *People v. Ortiz*, 2016 COA 58, ¶26. But in doing so, these courts faithfully apply *Bennett*; they do not use it as a subterfuge to review the district court's proximate cause *finding* de novo as Martinez asks. Instead, what the court reviews "de novo" is the *record* to determine whether the evidence would support proof by a preponderance of the evidence that defendant caused the loss. *Barbre*, ¶25. Not one division has adopted Martinez's proposed standard: deferring only to the court's findings of historical fact but deciding de novo whether the evidence established proximate cause.[5]

[5] Martinez argues that the division in *People v. Reyes*, 166 P.3d 301 (Colo. App. 2007), "seemed to review the proximate cause issue without deference." O.B. at 24. But it did not. Like *Cumhuriyet v. People*, 615 P.2d 724, 726 (Colo. 1980), the division reversed because the evidence was insufficient to prove proximate cause. *Reyes*, 166 P.3d at 304 (noting "the

The difference between sufficiency claims and challenges to the ultimate finding of proximate cause explain any deviation of the division here from how others have approached the question. Although Martinez cited the standard of review for sufficiency claims, he did not present his challenge as one. He disputed the court's finding. *See, e.g.,* COA O.B. at 4 ("This Court should vacate the restitution order because Mr. Martinez did not proximately cause this loss."). Because the standard of review turns on the claimed error, accounting for substance over form, the court of appeals correctly analyzed the challenge as one to the ultimate finding of proximate cause, not to the quantity and quality of the evidence supporting that determination. *See Martinez*, ¶14; *see also id.* at ¶¶60-61 (J. Jones, J., concurring).

The division here is not an outlier. Because issue framing matters, where divisions do review the ultimate finding, they routinely address the issue through the abuse of discretion framework, with any

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lack of evidence" of an ongoing and specific threat by defendant to justify the ordered restitution, there the cost of newly installed locks).

subsidiary standard of review applied. *See People v. Perez*, 2017 COA 52M, ¶12 (applying abuse of discretion framework but finding no error where the court's finding of proximate cause was supported by sufficient record evidence); *see also People in Int. of D.I.*, 2015 COA 136, ¶8; *People v. Sieck*, 2014 COA 23, ¶5; *People v. Henson*, 2013 COA 36, ¶9; *People v. Rivera*, 250 P.3d 1272, 1274-75 (Colo. App. 2010); *Reyes*, 166 P.3d at 302.[6] To adopt Martinez's standard, this Court would have to overrule those and many other restitution cases from the court of appeals.

C. The existence of proximate cause is a question of fact.

Having properly identified the issue as whether the trial court correctly determined the existence of proximate cause, the analysis turns to the nature of that question. Martinez calls for this Court to treat it as a mixed question of law and fact. O.B. at 13. To the extent

[6] Some divisions have harmonized these standards. *See A.V.*, ¶¶31-35; *People v. Stone*, 2020 COA 24, ¶48; *Martinez*, 2015 COA 37, ¶40; *Ortiz*, ¶26.

this simply recognizes that appellate courts review a court's resolution of the law de novo and its factual findings for clear error, it would be unremarkable. A reviewing court could certainly correct a proximate cause finding premised on the wrong law, for example. *See Cowen v. People*, 2018 CO 96, ¶2. But Martinez goes further. He seeks "de novo" review not of the law the court applied, but of its ultimate factual finding applying that law to the historical facts of this case. Such a framework markedly departs from this Court's proximate cause precedent.

Martinez's entire appellate challenge depends on importing some tort concepts into the restitution context. *See* O.B. at 7-10. Yet, tort law obviates his premise. It is black letter law that proximate cause is a question of fact reserved to the fact finder. *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶30; *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶33 n.5. The reason is pragmatic. "Foreseeability is the touchstone of proximate cause." *Build It and They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 306 (Colo. 2011) (internal quotations omitted).

Thus, finding proximate cause depends "in part on the common sense consideration of the risks created by various conditions and circumstances, and in part on the policy consideration of whether a defendant's responsibility should extent to the results in question." *Id.* at 611; *accord Wagner*, ¶66 (Hart, J., dissenting in part) ("[P]roximate cause is ultimately a question based in policy judgments and common sense: Given the circumstances, is it fair to hold the defendant responsible for the results of his conduct?").

Proximate cause thus requires the fact finder to not only resolve historical fact disputes, but also to draw on its own common sense and judgment regarding those facts. *See Calkins v. Albi*, 431 P.2d 17, 20 (Colo. 1967) ("The jury is the judge of the force and effect of the evidence as it pertains to the issues of fact, one of which is the issue of proximate cause.").

Against this backdrop, treating the existence of proximate cause as a mixed question ultimately reviewed de novo is legally unsupported. Martinez cites no case where a court has treated the question of

proximate cause as a mixed question of law and fact in the way he suggests.

"To be sure, our case law makes clear that sometimes, albeit infrequently, proximate cause is a matter of law for the court, because the intervening act is so independent and so extraordinary that the plaintiff's injuries are clearly the result of the intervening act and not fairly attributable to the defendant's original negligence." *Deines v. Atlas Energy Servs., LLC*, 2021 COA 24, ¶17. But because the proximate cause decision is so fact-bound, this Court has long held that proximate cause transforms into a legal matter only upon meeting two conditions. *See, e.g.*, *Louthan v. Peet*, 179 P. 135, 136 (Colo. 1919). Only where (1) "facts are undisputed and [2] reasonable minds could draw but one inference from them" does causation become a question of law for the court. *Gibbons v. Ludlow*, 2013 CO 49, ¶13 (quotations omitted); *accord Pioneer Const. Co. v. Richardson*, 490 P.2d 71, 74 (Colo. 1971); *Yockey Trucking Co. v. Handy*, 262 P.2d 930, 933 (Colo. 1953). The absence of dispute for the fact finder to resolve is a prerequisite to an

appellate court treating proximate cause as a question of law. *Gibbons*, ¶13. Indeed, when proximate cause is a legal question, there will usually be no findings of historical fact made—because the facts are undisputed, and there are therefore no competing inferences to be drawn from them.[7] *See id.*

Because proximate cause becomes a matter of law only when there are no material factual disputes and no competing inferences to be drawn from the evidence, Martinez never explains how it will present on appeal as a mixed question of law and fact. The question should either be factual, or it will be legal. The presence of factual questions negates the ability for an appellate court to decide the issue as a matter of law. *See Wagner*, ¶¶31, 36.

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[7] Martinez misunderstands *Radetsky v. Leonard*, 358 P.2d 1014 (Colo. 1961), as supporting the proposition that this Court has resolved proximate cause as a legal matter "[e]ven where the parties disputed historical facts." O.B. at 12. But *Radetsky* addressed proximate cause as a matter of law precisely because no party disputed the *legally significant* facts. 358 P.2d at 1016.

Contrasting classic situations where the ultimate resolution of a mixed question of law and fact is reviewed de novo hinders rather than helps Martinez's plea to impose that framework onto review of a proximate cause finding. *See People v. Matheny*, 46 P.3d 453, 459-60 (Colo. 2002) (custody determination includes a legal conclusion); *Maphis v. City of Boulder*, 2022 CO 10, ¶15 (governmental immunity reviewed de novo because the question "is one of statutory interpretation"); *People v. V.K.L.*, 2022 CO 35, ¶20 (ICWA's active efforts requirement is reviewed de novo because it involves interpretation of ICWA); *Application for Water Rights*, 2013 CO 41, ¶48 (reviewing ultimate finding de novo because it involves interpretation of the statute).[8] In

[8] Martinez also cites cases that cannot fairly be characterized as actually applying mixed question review. *LeHouillier v. Gallegos*, 2019 CO 8, ¶¶4, 51 (remanding for new trial after concluding evidence to meet plaintiff's burden was insufficient); *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1092 (Colo. 2011); *id.* at 1094 n.16 (recognizing the level of punitive damages is not a question of fact); *Jagow v. E-470 Pub. Hwy Auth.*, 49 P.3d 1151, 1158 (Colo. 2002) (reviewing record to determine whether evidence supported the award for damages).

each case, the issue clearly presents underlying factual findings to inform an ultimate question of law.[9]

None of these situations are analogous to resolving proximate cause for restitution purposes. Whether a defendant proximately caused the victim's losses is not an ultimate legal conclusion or a question of statutory interpretation for the court. It asks the fact finder to resolve conflicting testimony, draw inferences, and use their common sense to decide whether the victim's losses were reasonably foreseeable. *See Ekberg v. Greene*, 588 P.2d 375, 377 (Colo. 1978) (issues of proximate cause do not rest "on mechanistic rules of law" but instead on the fact finder's "determination of what is reasonable in each factual setting"). Because a finding of proximate cause requires weighing evidence and

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[9] Even though this Court has, in dicta, remarked that causation presents a mixed question of law and fact, *e.g.*, *People in Int. of S.N.*, 2014 CO 64, ¶22 n.6, it has maintained that the ultimate resolution of that "mixed" question is a question of fact reserved for the fact finder, *Handy*, 262 P.2d at 933 ("[T]he question of proximate cause … ordinarily is considered to be a question of fact for the jury or other trier of facts, or, as it is sometimes stated, it is a mixed question of law and fact *for the jury*." (quoting 65 C.J.S., Negligence, § 265, p 1183) (emphasis added)).

making a judgment call, applying abuse of discretion and clear error review is the correct approach.

Martinez's final policy plea that proximate cause should transform into a legal question on appeal argues that such an approach is necessary to ensure consistency in the law. Sure, this Court has employed similar reasoning to err on the side of reviewing "ultimate findings" where constitutional rights are at stake and the ultimate finding could be fairly characterized as legal. *See Matheny*, 46 P.3d at 461-62. But a proximate cause finding for restitution purposes does not implicate a defendant's constitutional rights. § 18-1.3-602(3)(a); *Cumhuriyet*, 615 P.2d at 725. And, under the weight of precedent, proximate cause can't be fairly characterized as a question of law. *Ekberg*, 588 P.2d at 377.

Merely because an issue may involve applying legal principles does not open the door to de novo review. Otherwise, every application of law to fact would be so reviewed. But it is not. *See, e.g.*, *People v. Martinez*, 74 P.3d 316, 322 (Colo. 2003) (applying abuse of discretion

standard to trial court's admission of expert testimony despite the requirement that courts apply the legal framework announced in *Shreck*); *St. James v. People*, 948 P.2d 1028, 1031 (Colo. 1997) (review of a trial court's determination on breach of a plea agreement is clear error). Where the ultimate determination is factual, review is for clear error. C.R.C.P. 52(a); Crim. P. 57(b); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (rejecting mixed question review or de novo review of "the ultimate finding" where the issue was purely factual, there a finding of intentional discrimination, noting Rule 52(a) "does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts").

The risk of disparate outcomes is also overblown. Martinez cites no support for the idea that Colorado is experiencing "disparate" outcomes on proximate cause. *See* O.B. at 18. Even so, any "inconsistency" in outcomes is not the boogeyman Martinez claims. It is the natural consequence of relying on different fact finders with diverse viewpoints to resolve inherently factual questions based on the unique

evidence presented in each case. *See Wagner*, ¶¶38-39; *Ekberg*, 388 P.2d at 377. This Court should trust fact finders to do their jobs.

Finally, to the extent doubts linger over who should ultimately decide whether Martinez proximately caused the victim's loss, the General Assembly has resolved it. The restitution statute reserves the determination of restitution to the trial court. § 18-1.3-603(1), C.R.S. (2022); *see also Weeks*, ¶34 (noting "subsection (1)(b) is all about the court's obligation"). That includes the court's finding that defendant was the proximate cause of the victim's loss. *See id.*; § 18-1.3-602(3)(a), C.R.S. (2022). It is the trial court whom the prosecution must convince, not the appellate court. To this end, the General Assembly has not directed the trial court to make findings of historical fact regarding its rationale for proximate cause so the appellate court can review them and decide the issue anew. *See* § 18-1.3-603, C.R.S. (2022). The absence of such direction reinforces that the General Assembly did not intend for the appellate court to substitute its judgment for that of the trial court on this point.

D. The correct appellate standard is that a court abuses its discretion in finding a defendant was the proximate cause of a victim's loss if its proximate cause finding is clearly erroneous.

As this case illustrates, Colorado courts have not always been precise or intentional when reciting the standard of review of a trial court's restitution order. *See Martinez*, ¶53 (J. Jones, J., specially concurring). And, as Judge Jones recognized in his special concurrence, a trial court's restitution award is not entirely discretionary in the sense of being optional. *See id.* at ¶¶58-59. But the abuse of discretion standard is not limited to entirely discretionary decisions. And whether viewed through the overarching umbrella of abuse of discretion or the more precise lens of clear error as a subsidiary question, the result in this case is the same: review of the trial court's *finding* of proximate cause is a factual issue that should be upheld because it is supported by the record.

Granted, labeling something an "abuse of discretion" often just begs the question: how shall an appellate court determine whether

abuse occurred? Returning to the framework discussed in Section I.A., the answer turns on the error asserted. A court can abuse its discretion if its decision is arbitrary, unreasonable, or unfair (e.g., if it makes findings unsupported by the record). Or it can abuse its discretion if it bases the exercise of that discretion on the wrong law (e.g., if it misinterprets its statutory authority).

When a party asserts the trial court wrongly found the existence of proximate cause, the party is arguing that the court improperly resolved or weighed the facts before it to reach an incorrect determination of what was reasonably foreseeable. That is a challenge to the court's fact-finding function, calling for clear error review of that issue. If the court did not clearly err, then it also did not abuse its discretion on that basis.

In sum, determining the proper standard of review turns on answering the right question: what decision is the defendant asking the appellate court to review? And where, as here, that decision is one reserved to the trial court alone, the reviewing court should afford it

proper deference. As stated in *Roddy*, ¶23, this Court should hold that although trial courts have broad discretion in fashioning the terms and conditions of a restitution order, appellate courts review a challenge to the court's proximate cause finding for clear error.

II. Martinez's criminal conduct proximately caused the damage to the victim's car, and the victim's effort to stop Martinez's flight was not an independent intervening cause.

Martinez devotes much of his brief on this issue to arguing facts and policy issues not presented here. Those contentions are inapposite and wrong. But equally important, Martinez's brief ignores that review of a district court's proximate cause finding is for clear error. In any event, under any standard, the court of appeals correctly held that the record amply supports the district court's proximate cause finding because there was no independent intervening cause.

A. The trial court applied the correct analytical framework.

Colorado courts construe the restitution statute liberally to make victims whole. *See, e.g.*, *Roberts v. People*, 130 P.3d 1005, 1009 (Colo. 2006). The reason: the General Assembly's express declaration that the

restitution statute "shall be liberally construed." § 18-1.3-601(2), C.R.S. (2022). The General Assembly has directed that criminal offenders pay restitution because crime victims "endure undue suffering and hardship," "[p]ersons found guilty of causing such suffering and hardship should be under a moral and legal obligation to make full restitution to those harmed by their misconduct," and "payment of restitution by criminal offenders to their victims is a mechanism for the rehabilitation of offenders." *Id.* at (1)(a)-(c). "Restitution" is "any pecuniary loss suffered by a victim" that was "proximately caused by an offender's conduct" and "can be reasonably calculated and recompensed in money." § 18-1.3-602(3)(a).

Although this Court has yet to expressly address the contours of proximate cause in the context of restitution cases, that concept as used in criminal and tort law establishes certain guideposts. Indeed, "[t]he concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances." *Proline v. United States*, 572 U.S. 434, 444-45 (2014) (citing 1 W. LaFave, Substantive

Criminal Law § 6.4(c), p. 471 (2d ed. 2003)). "Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Id.* at 475 (citing 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, p. 493 (2005)). But because proximate cause "defies easy summary," it is "a flexible concept...." *Id.*

In the restitution context, "proximate cause" is any "cause which its natural and probable sequence produced the claimed injury." *People in Interest of D.S.L.,* 134 P.3d 522, 527 (Colo. App. 2006) (citations omitted); *accord, e.g.*, *People v. Leonard*, 167 P.3d 178, 181 (Colo. App. 2007). A "requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Proline*, 572 U.S. at 445. Accordingly, while some "tort concepts such as comparative negligence or comparative fault will not relieve or reduce a restitution obligation," an independent

intervening cause is relevant in determining whether a defendant proximately caused a victim's losses. *Sieck*, ¶8.

Like the division here, all divisions of the court of appeals to reach the issue have held that three elements must be satisfied to establish an independent intervening cause. *Martinez*, ¶¶16-17; *Sieck*, ¶8; *People v. Clay*, 74 P.3d 473, 475 (Colo. App. 2003); *see also Auman v. People*, 109 P.3d 647, 662 (Colo. 2005) (applying same factors in criminal law context). First, the independent intervening act must destroy the causal connection between the defendant's act and the victim's injury, thereby becoming the cause in fact of the victim's injury.[10] *Martinez*, ¶16. Second, the defendant must not participate in the intervening cause. *Id.* at ¶17. And third, the intervening cause must not have been reasonably foreseeable. *Id.* "Simple negligence is foreseeable and does not constitute an independent intervening cause; gross negligence is not

[10] While the divisions have not labeled this requirement, by its terms, it is essentially importing the "but for" element from criminal cases. *See, e.g.*, *Auman*, 109 P.3d at 662 (identifying the "but for" as one of the three elements of proximate cause).

foreseeable and thus may serve as an independent intervening cause." *Id.*

Martinez does not appear to challenge this framework. Nor does he challenge the persuasive relevance of tort and criminal cases in addressing proximate cause in the restitution context. *See, e.g.* O.B. at 27-39 (relying on criminal and civil proximate cause cases).

Instead, Martinez argues that, though he rode the stolen bicycle into the victim's car and caused the damage as he attempted to get away, he did not participate in causing the damage. O.B. at 36. He also contends that the victim's attempt to stop him from getting away with the bicycle was not foreseeable. And he contends that the actions taken by the victim rose to the level of gross negligence.

In so arguing, Martinez highlights the problem with applying de novo review to an inherently factual question. Far from deferring to the court's findings, even on historic facts, Martinez discards them, substituting his own version of the facts and inferences drawn from

them. Affording the district court proper deference, his argument fails on all three fronts.

B. Martinez inextricably participated in the alleged intervening act.

This Court should reject Martinez's proximate cause claim on the threshold ground that he is unable to meet the prefatory condition for an independent intervening cause—it is "one in which the accused does not participate." O.B. at 36 (acknowledging that element and quoting *People v. Stewart*, 55 P.3d 107, 121 (Colo. 2002)). As one court has explained, "an intervening act does not break the chain of causation if it is a normal response to the situation created by the original wrongful act." *Wallace v. Owens-Illinois, Inc.*, 389 S.E.2d 155, 157 (S.C. Ct. App. 1989). Instead, "the general rule is that one who does a wrongful act is answerable for all consequences that may ensue in the normal course of events." *Id.* Therefore, "an intervening event, even if a cause of the harm, does not operate to exempt a defendant from liability if the intervening event was put into operation by the defendant's negligent

acts." *Gallimore v. Commonwealth*, 436 S.E.2d 421, 425 (Va. 1993) (applying proximate cause in tort context).

In *Stewart*, this Court rejected the supposition that even a grossly negligent act by a victim was an independent intervening act when it was part of the chain of events caused by the defendant. 55 P.3d at 121. There, Stewart veered his vehicle toward a pedestrian and brushed against him. *Id.* at 112. An argument ensued, Stewart aggressively drove back and forth, and the pedestrian landed on the vehicle's hood. *Id.* The victim rolled off, and the vehicle ran over and killed him. *Id.* According to Stewart, the victim had jumped on his hood and then jumped off. *Id.* This Court held that Stewart was not entitled to an affirmative defense of intervening cause because, even if the victim's conduct was "grossly negligent," it "would not constitute a 'break' in the causal chain launched by Stewart's misconduct." *Id.* at 121. Because the victim's leap came after Stewart brushed him with his car and their ensuing altercation, "this is not a case in which the defendant fairly can be characterized as a non-participant." *Id.*

Martinez's participation in the alleged intervening event at issue here was even more direct. As the district court found, with record support, Martinez "clearly participated." (TR 05/28/19, p 37:13-20.) Martinez took the bicycle in the victim's presence. The victim followed Martinez in his car, got parallel to Martinez, and tried to get him to stop. Despite those attempts, Martinez continued to try and escape with the bicycle. The victim then pulled in front of Martinez; Martinez then rode the bicycle into the victim's car. Given those facts, Martinez directly participated in the event on two related fronts. First, Martinez participated in the collision by triggering the chain of events, he stole the bicycle in the victim's presence, fled with it, and then "refus[ed] to stop." *Martinez*, ¶30; *see also Stewart*, 55 P.3d at 121. Second, Martinez directly participated in the collision because he rode the bicycle into the car during his attempt to get away with the bicycle. *See People v. Reynolds*, 252 P.3d 1128, 1131 (Colo. App. 2010) (holding that defendant was not entitled to an intervening cause instruction when he argued that his conduct so angered the other driver that the other

driver intentionally collided with his car because, among other problems, defendant was a participant in the final collision).

Martinez's attempt to argue he was not a participant is divorced from the law. Although Martinez argues that his theft of the bicycle could not be considered in the chain of events because the theft was completed, the restitution statute requires a court to compensate a victim for any pecuniary losses proximately caused by an offender's conduct. § 18-1.3-603(2)(b).[11] Damages sustained by flight from a crime are directly and proximately caused by the crime. *See, e.g.*, *United States v. Wells*, 873 F.3d 1241, 1264-69 (10th Cir. 2017) (holding that an intervening causes may still be directly related to the offense conduct for purposes of proximate causation "well after the conclusion" of that offense conduct); *see also United States v. Donaby,* 349 F.3d 1046, 1053

[11] While tort cases are persuasive in the restitution context, restitution should be construed more liberally, and the outer limits of tort law should not apply to bar restitution. *Proline*, 572 U.S. at 453-54 ("Legal fictions developed in the law of torts cannot be imported into criminal restitution and applied to their utmost limits without due consideration of these differences.").

(7th Cir. 2003) ("The district court could properly conclude that robbing the bank directly and proximately led to the high-speed chase and the property damage that ensued"); *United States v. Washington*, 434 F.3d 1265, 1268-70 (11th Cir. 2006) (damages stemming from flight from robbery are directly and proximately caused by a robbery); *United States v. Reichow,* 416 F.3d 802, 805 (8th Cir. 2005) (flight is part of the robbery for restitution purposes); *United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 928 (9th Cir. 2001) (collecting cases providing that a defendant is responsible for restitution damages at least one step removed from the offense conduct itself); *cf. State v. Patterson*, 384 P.3d 92, 95-96 (Mont. 2016) (holding victim's lost wages, incurred because he took time off work pursuing and recovering the stolen property, were recoverable as restitution).[12] Under this authority, Martinez should not

[12] The one case Martinez cites—*Snyder v. Colorado Springs & C.C.D. Ry. Co.*, 85 P. 686 (Colo. 1906)—provides little support for his argument. Although the Court discussed intervening cause, it did so in the context of addressing duty; the case did not address whether a defendant was liable under the restitution statute given his participation in the chain of events leading to a victim's losses. *See id.* at 687.

be allowed to escape reimbursing the victim for damages his criminal conduct proximately caused.

C. The victim's attempt to stop Martinez from getting away with the bicycle was not just foreseeable, it was foreseen.

A defendant may not claim an independent intervening cause when the circumstances show he expected the alleged intervening act. *Sieck*, ¶8; *Clay*, 74 P.3d at 475; *accord* O.B. at 27. Determining whether an act was foreseeable "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48 (Colo. 1987).

The centerpiece of Martinez's argument that the victim's action constituted an independent intervening cause—a post hoc assertion of intentionality based on his claim that the victim "elevate[d] recovery of his property over Mr. Martinez's safety"—lacks any record support. *See* O.B. at 30. As the court of appeals stated, the record is "devoid of evidence" that the victim chose to "elevate his property's recovery over

Mr. Martinez's safety." *Martinez*, ¶23. Beyond that, the trial court also found that the victim "was pulling his vehicle in front of Defendant anticipating Defendant would stop and thus cease his theft of the bicycle." (CF, p 138.) Thus, even under Martinez's mixed standard, this Court must accept the trial court's finding of historical fact that the victim did *not* intend to crash his car into Martinez and the victim's own $6,000 bicycle. Indeed, all of the evidence indicated the victim wanted *to protect* his property by having Martinez *stop* and return it.

Given the actual facts in this case, it was not clearly erroneous (or error under any standard) for the trial court to find it foreseeable that the victim would take action to stop Martinez from getting away with the bicycle. As the court of appeals explained, if it was foreseeable that the victim would pursue him (which Martinez concedes), "it was also foreseeable that, upon reaching Martinez, the victim would take steps to recover his bicycle, such as attempting to force Martinez to stop." *Martinez*, ¶24. The victim's alleged intervening act was not just foreseeable, it was foreseen. *See Jupin v. Kask*, 849 N.E.2d 829, 837

(Mass. 2006) (holding defendant could not claim intervening cause when record indicated she foresaw alleged intervening event); *see also United States v. Wilfong*, 551 F.3d 1182, 1187 (10th Cir. 2008) (when defendant issued a bomb threat to a building, he could not claim that decision to evacuate the building resulting in restitution for lost work time was not foreseen).

Moreover, "[s]imply because something has not yet happened does not mean that its happening is not foreseeable." *Lannon*, 744 P.2d at 48. An event "is reasonably foreseeable if it is a probable consequence of the defendant's wrongful act or is a normal response to the stimulus of the situation created thereby." *Buckley v. Bell*, 703 P.2d 1089, 1092 (Wyo. 1985); *see also Virginia Elec. & Power Co. v. Winesett*, 303 S.E.2d 868, 874 (Va. 1983) (stating that, to hold that an act was not an intervening cause, "reasonable foreseeability is sufficient; clairvoyance is not required").

At a minimum, the victim putting his car in front of Martinez in an effort to get him to stop was reasonably foreseeable. *See Stewart*, 55

P.3d at 121 (an intervening act must not be foreseeable); *see also, e.g.*, *State v. Corbus*, 249 P.3d 398, 403-04 (Id. 2011) (given defendant's dangerous driving, passenger's decision to jump out of car was foreseeable); *State v. Hiett*, 115 P.3d 274, 275-77 (Wash. 2005) (where juveniles took a vehicle without permission but were not the driver, they were responsible for the damage caused by the driver because it was foreseeable that "a person guilty of taking a motor vehicle would steal personal property in the vehicle, attempt to elude the police, or cause an accident"); *Delawder v. Commonwealth,* 196 S.E.2d 913, 915 (Va. 1973) (holding that in a motor vehicle race, the possibility of one driver losing control and causing damage was foreseeable).

D. The victim's effort to stop Martinez did not rise to the level of gross negligence.

The last indispensable requirement for finding an independent intervening act was also absent—there was no gross negligence by the victim. As this Court has made clear, simple negligence on the part of the victim "is not, as a matter of law, an independent intervening cause." *People v. Garner*, 781 P.2d 87, 90 (Colo. 1989) (internal citations

omitted). As both courts below correctly found, the victim's conduct was, if anything, simple negligence.

Quite apart from citing any cases directly supporting his contention that pulling a car in a bicycle's path to get the rider to stop treks past simple negligence to gross negligence, Martinez instead appears to argue that the victim's conduct was grossly negligent because he intended to damage his car. *See* O.B.. at 30-31 (citing *Hamill v. Cheley Colo. Camps., Inc.*, 262 P.3d 945 (Colo App. 2011), *Jaeb*, and *United States v. Speakman*, 594 F.3d 1165 (10th Cir. 2010), and suggesting that, unlike those cases, there was gross negligence here because the victim intended to cause the damage done to his car). The record squarely refutes Martinez's claim. The victim did not intentionally hit Martinez—he did not hit him at all. And the record does not support that the victim intended Martinez to hit his car with

his bicycle—he pulled his car in front of Martinez in an effort to get Martinez to stop.[13]

While Martinez has not identified any Colorado law holding that a potential traffic violation constitutes gross negligence, numerous cases have rejected such arguments. In *People v. Marquez*, 107 P.3d 993, 996-97 (Colo. App. 2004), for example, the division held that the victim's crossing of a centerline before a collision was only simple negligence and could not serve as an independent intervening cause. Likewise, in *People v. Dubois*, 216 P.3d 27, 28 (Colo. App. 2007), *aff'd*, 211 P.3d 41 (Colo. 2009), the division held that a deputy's decision to drive at a reckless speed was simple negligence and not an intervening cause. And several divisions have found that a victim's failure to wear a seatbelt—despite an affirmative duty to do so—is simple negligence and not gross

[13] For this reason, Martinez also errs in deriding the lower courts for placing too much emphasis on the victim's subjective intent. O.B. at 32. What matters here is that the victim did not crash his car into Martinez and the victim tried to get Martinez to stop. Contrary to Martinez's assertion, the lower court correctly looked at the evidence presented, and it determined that the victim's effort to get Martinez *to stop* was not (objectively or subjectively) grossly negligent.

negligence. *See Sieck*, ¶10; *People v. Smoots*, 2013 COA 152, ¶10; *People v. Lopez*, 97 P.3d 277, 282 (Colo. App. 2004)), *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 5.

Switching tacks, Martinez also attempts to argue that the victim's conduct was not foreseeable because it "exceeded the law's limits." O.B. at 33 (citing *People v. Oslund*, 2012 COA 62, 292 P.3d 1025, and *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986)). Martinez asserts that the defense of property statute "regulates people's real-world use of force, and because [the victim] exceeded the statute, his unlawful actions were not foreseeable." O.B. at 34.

Martinez's argument fails at its premise. Depending on the circumstances, a criminal act can be foreseeable and is therefore not an independent intervening cause. *See, e.g.*, *Wagner*, ¶38 (recognizing that jury could conclude extreme act of violence–which would violate a number of criminal laws–was foreseeable). As the second restatement of torts provides, even in the context of a third party's criminal act, liability is not excused if defendant "at the time of his negligent conduct

realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." Restatement (Second) of Torts § 448 (1965); *see Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 Conn. L. Rev. 1189, 1231 (2000) (concluding that under the Restatement, "one may be liable for conduct that creates a foreseeable risk of an intervening criminal attack"). Any conduct in this case by the victim in contravention of the law was foreseeable and proximately linked and prompted by Martinez's criminal conduct.

Beyond that, Martinez's argument is disconnected from this case. As the court of appeals explained, those cases are distinguishable as they concerned the very different legal issue of whether defendants charged with crimes were entitled to claim the defense of property instruction to justify their use of physical force.[14] *Martinez*, ¶26.

[14] Indeed, to the extent Martinez's argument suggests that he completed the theft and that the defense of property defense would therefore not apply to the victim because it only applies to actions taken to prevent a

Moreover, any reliance on those cases is even more attenuated as the victim here *did not use* physical force. He put his car in front of Martinez to stop him—Martinez rode the bicycle into the car. In addition, those cases are factually distinguishable. Unlike those cases where the force was used after the theft, the victim's acts occurred during a "theft in progress." *Martinez*, ¶29. Under the circumstances here, it was foreseeable that the victim would try and stop Martinez from getting away with the bicycle.

E. There is no other availing basis for this Court to overrule the courts of appeals or the trial court.

Unable to find an answer in the issue granted, Martinez suggests that the victim in this case did not meet the restitution statute's definition of "victim" because he committed a "crime arising from the same conduct, criminal episode, or plan." O.B. at 31 (citing § 18-1.3-

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theft, that contention runs headlong into the citizen's arrest statute. *See* § 16-3-201, C.R.S. (2022). Martinez does not argue, nor would the record support, that the victim's conduct was grossly negligent taking into account the citizen's arrest statute.

602(4)(b), C.R.S. (2022)). That argument was neither presented below nor in the petition for certiorari. *See Jagged Peak Energy Inc. v. Oklahoma Police Pension & Ret. Sys.*, 2022 CO 54, ¶63 (holding issue not presented in the petition for writ of certiorari was not properly before this Court). C.A.R. 53(a)(1) limits this Court's consideration only to the issue set forth and the "subsidiary issue[s] clearly comprised therein." Martinez's claim that restitution should not be awarded in this case because the victim does not fit within the statutory definition for "victim" is an independent challenge outside the scope of the question granted.

Regardless, Martinez's observation does nothing to help his position. There is no finding that the victim committed a crime. And while Martinez lists such crimes as second-degree assault and vehicular assault, the victim neither hit Martinez with his car nor is there any basis to find that he intended to injure Martinez. In any event, in asserting that the victim was not a victim because he committed a crime "arising" from Martinez's criminal act, Martinez only highlights

that the victim's act was not an independent intervening cause because Martinez was a direct participant in that chain of events caused by his theft of the bicycle.

Finally, Martinez wrongly asks this Court to decide this case based on the policy concern that affirming the restitution award would somehow "make less safe the parties to these thefts, others on the road, and the public." O.B. at 32. Martinez contends that awarding restitution in this case would encourage future crime victims to engage in similar attempts to recover their property. According to Martinez, "Bicycle thefts are commonly committed by children." *Id.* In his view, therefore, because children often steal bicycles, awarding restitution in this case may result in juveniles getting injured. *See id.*

This issue is not remotely involved here as there were no children involved. The People are also unaware of any law supporting the notions that this Court decides cases not involving juveniles based on assumptions that juveniles will commit crimes or that this Court's decisions should not discourage juveniles from committing crimes. More

fundamentally, the People are unaware of any cases applying those notions when interpreting a statute focused on making crime victims whole.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the restitution order and hold that appellate courts should review a challenge to the trial court's finding of proximate cause for clear error.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **MEREDITH K. ROSE,** via Colorado Courts E-filing System (CCES) on April 18, 2023.

/s/ Paul Schumaker