

**S276303**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

Plaintiff and Respondent,

v.

SCOTLANE McCUNE,

Defendant and Appellant.

S \_\_\_\_\_

First District Court of  
Appeal No. A163579

(Napa County Superior  
Court No. CR183930)

**PETITION FOR REVIEW**

After Decision by the Court of Appeal  
First Appellate District, Division Five  
Filed on July 25, 2022

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**PETITION FOR REVIEW**

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Associate Justices of the California Supreme Court:

Appellant Scotlane McCune petitions this Court for review following the published decision of the Court of Appeal, First Appellate District, Division Five, filed on July 25, 2022, affirming the judgment of the Napa County Superior Court. A copy of the Court of Appeal’s opinion is attached to this petition as Appendix A.

## **ISSUE PRESENTED FOR REVIEW**

1. Whether the Court of Appeal erred in holding that the trial court retained jurisdiction to determine and award victim restitution under Penal Code sections 1202.4 and 1202.46 after it had terminated probation.

## **STATEMENT OF THE CASE AND FACTS**

On May 15, 2018, pursuant to negotiated disposition, McCune pleaded no contest to felony hit and run involving injury to another person (Veh. Code, § 20001, subd. (a)). (CT<sup>1</sup> 38-42; 12 RT 856-857.) The factual basis for the plea was a car accident where McCune lost control of his car, collided with a tree, pulled his injured passenger out of the car, and fled the scene. (5 RT 206, 209-210; 12 RT 856.) On June 13, 2018, the trial court suspended imposition of sentence and placed McCune on formal probation for five years subject to terms and conditions, including 120 days in county jail and that he pay victim restitution in an amount to be determined by the probation officer and the court. (CT 63; 13 RT 908-909.)

On July 31, 2020, the probation department filed a restitution investigation report indicating that restitution was not an issue because the victim did not respond to the two letters from probation. (CT 84.) However, on December 31, 2020, the probation department filed a second restitution investigation report, indicating the first restitution report was filed in error.

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<sup>1</sup> Citations made to the clerk's transcript will be abbreviated "CT" and citations made to the reporter's transcript on appeal will be abbreviated "RT".

(CT 85.) The victim had submitted a restitution claim in the amount of \$30,166.23 for medical bills in April 2018 to the district attorney's office, one month prior to probation to speaking to the victim and sending the two letters requesting documentation and two months prior to sentencing. (CT 60, 85.)

Two weeks later, on January 13, 2021, the probation department, in concurrence with the district attorney's office, filed a petition and order pursuant to Assembly Bill No. 1950 (AB 1950) to terminate McCune's probation. (CT 133-135.) The trial court signed the petition on January 14, 2021, terminating McCune's probation. (CT 135.)

On January 22, 2021, the prosecution filed a request to place the case on calendar to set a restitution hearing. (CT 86-87.) The trial court ordered the parties to prepare briefs addressing whether the trial court had jurisdiction to order restitution after it had already terminated probation. (CT 88; 14 RT 918.)

On May 3, 2021, the trial court held a hearing to determine whether it retained jurisdiction to impose restitution. (CT 131.) The two issues presented were: (1) did the probation department's second restitution investigation report filed on December 31, 2020, constitute an enforceable restitution order, and, (2) even if the restitution investigation report did not constitute an order, did the trial court retain jurisdiction to order restitution after terminating probation. (18 RT 1119-1120, 1131; see CT 89-90.) The prosecution stated that probation had emailed the victim twice prior to sentencing asking for a restitution



amount, to which the victim replied he was unable to determine an amount. (18 RT 1126.) The prosecution was not sure whether the victim sent his restitution claim letter to probation or to the district attorney's office, and the prosecution had no idea where that letter went. (18 RT 1126.)

The trial court acknowledged that the language of probation condition number 18 stated that restitution would be determined by the probation officer and the court. Nevertheless, it determined that under either issue, the trial court had jurisdiction to impose restitution even though probation had been terminated:

And [defense counsel], I understand your argument, I just don't agree that the equities on this particular issue augur in favor of [McCune]. Number one, and I think [the defense is] right when you talk about that the report from probation, but the fact of the matter is, the condition does say, pay restitution in amount to be determined by the probation, by the probation officer and the court. That is the language of the probation condition. But the thing that persuades me the most is the fact that both statutorily and constitutionally, restitution has a real significant position in the criminal law in California. And I think it's different from other probation conditions where I clearly, I think I clearly would be in agreement with [the defense], but not in this particular circumstance. ¶ So whether you look at it from the probation condition argument or the 1202.4, 1203.1, I think the Court does have jurisdiction to determine restitution in this matter.

(18 RT 1131.)

When the defense asked whether the trial court was making a finding in favor of the prosecution on both issues, the trial court replied yes. (18 RT 1131.)

On September 24, 2021, the parties reached an agreement and stipulated to a restitution amount of \$21,365.94, with the understanding that the defense continued to object to and would appeal the trial court's finding that it had jurisdiction to order restitution. (22 RT 1355-1356.)

McCune timely filed his notice of appeal on September 24, 2021. (CT 139.) On July 25, 2022, Division Five of the First District Court of Appeal affirmed the trial court's order. (Appendix A.) McCune did not file a petition for rehearing in the Court of Appeal.

### **WHY REVIEW SHOULD BE GRANTED**

Resolution of the issues presented in this petition is necessary “to secure uniformity of decision” and “to settle an important question of law[.]” (Cal. Rules of Court, rule 8.500(b)(1).) Restitution must be ordered as a condition of probation “[i]n every case in which the defendant is granted probation.” (Pen. Code<sup>2</sup>, § 1202.4, subd. (l).) As a result, the issues of whether a court exceeds its jurisdiction by ordering victim restitution after the termination of probation is an issue with potential to impact every probationer—past, present, and future. It is important for both victims and defendants that this Court clarify the limitations of the court's jurisdiction with respect to

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise noted.

restitution in probation cases. This is important question of law is certain to be reoccurring, and indeed, they already have been. This Court previously considered the issue of “whether a trial court retains jurisdiction to modify the amount of restitution once a defendant’s term of probation has expired” in *People v. Ford* but, on the facts of that case, found estoppel and declined to decide the jurisdictional issue. (*People v. Ford* (2015) 61 Cal.4th 282, 284-285.) More recently, in *People v. Zuniga*, Division One of the Fourth District Court of Appeal concluded that a trial court does retain jurisdiction in such a circumstance. (*People v. Zuniga* (2022) 79 Cal.App.5th 870, 872.)

Although this Court has not answered the jurisdictional question left open by *Ford*, two published decisions have held that a trial court exceeds its jurisdiction when it purports to order restitution after the termination of probation. (*Hilton v. Superior Court* (2014) 239 Cal.App.4th 766, 769 [“we hold a trial court does not have jurisdiction to modify a defendant’s probation to impose restitution after the defendant’s probationary term has expired. Such a modification would be erroneous as an act in excess of the trial court’s jurisdiction”]; *People v. Waters* (2015) 241 Cal.App.4th 822, 826 [concluding that the trial court “acted in excess of its jurisdiction by imposing victim restitution after the expiration of defendant’s probation”].) Since the issuance of these decisions, no other appellate court has disagreed with *Waters* or *Hilton* in any published decision on that jurisdictional issue. However, *Zuniga* distinguished the reasoning in *Hilton* and *Waters* to find that the trial court did not act in excess of its

jurisdiction, erroneously relying on section 1202.46. (*Zuniga, supra*, 79 Cal.App.5th at p. 876.)

The holdings of *Hilton* and *Waters* are compelled by the statutory schemes for restitution and probation. Where restitution is ordered as a condition of probation, the court retains jurisdiction to modify the order of restitution only during the term of probation. (§ 1203.3, subd. (a).) Section 1202.4, which includes most of the provisions of the criminal victim restitution scheme in California, does not expressly grant trial courts power to impose restitution in probation cases other than as a condition of probation. (See § 1202.4.) In turn, under section 1203.3, a court's authorization to modify a condition of probation ceases upon expiration of the term of probation. (§ 1203.3, subd. (b)(5); accord, *Waters, supra*, 241 Cal.App.4th at p. 827.)

Section 1202.46 does not alter this analysis. Reading section 1202.46 in conjunction with section 1170 demands an interpretation that section 1202.46 is inapplicable to cases where a defendant is granted probation. (*Waters, supra*, 241 Cal.App.4th at pp. 830-831; accord, *Hilton, supra*, 239 Cal.App.4th at pp. 781-782.) In the context of probation, the Legislature has made no provision for ordering the tolling of a court's jurisdiction to modify restitution after the expiration of probation. Applying established canons of statutory construction, it should be presumed – as the plain reading of section 1203.3 suggests – that the Legislature therefore intentionally limited a court's authority to modify a term of probation, including restitution, to the probationary period. (See, e.g., *Pacific Gas &*

*Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 842-843; *Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1282.)

This Court should grant review and reverse the judgment.

### **ARGUMENT**

#### **A Trial Court Acts in Excess of Its Jurisdiction When It Orders or Modifies Victim Restitution After a Defendant's Probation Has Terminated.**

The Court of Appeal's conclusion that a trial court retains jurisdiction to determine and award victim restitution after probation has already been terminated is erroneous because it is contrary to statute and case law. A trial court exceeds its jurisdiction when it modifies a condition of probation after probation has terminated, and, in the context of restitution, a court is not authorized to order restitution in a probation case other than as a condition of probation.

##### **A. When a Defendant Is Sentenced to Probation, the Trial Court Must Order Restitution as a Condition of Probation.**

The California Constitution, as amended by the electorate in 1982 via Proposition 8, provides crime victims the right to receive restitution "from the persons convicted of the crimes for losses they suffer." (*People v. Giordano* (2007) 42 Cal.4th 644, 652; see also *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1386; Cal. Const., art. I, § 28, subd. (b)(13)(B) ["Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss"].) The resulting constitutional provision, which

has since been amended, expressly ordered the Legislature to enact statutes to implement a new victim restitution framework. (*In re Brittany L.*, *supra*, 99 Cal.App.4th at p. 1386; *Giordano*, *supra*, 42 Cal.4th at p. 652.) In 1995, the Legislature amended section 1202.4 “to create a uniform restitutionary scheme for all adult offenders.” (*People v. Birkett* (1999) 21 Cal.4th 226, 248, fn. 21.) Thus, today, most of the provisions of the criminal victim restitution scheme are located in section 1202.4. (§ 1202.4.)

Under the framework enacted by the Legislature, restitution must be ordered in all cases where a victim has suffered a loss. (*Giordano*, *supra*, 42 Cal.4th at p. 653; § 1202.4.) This is codified in section 1202.4, subdivision (f), which provides: “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” Moreover, section 1202.4 mandates that “[t]he court shall order full restitution.” (§ 1202.4, subd. (f).)

In cases where probation is granted, restitution must be ordered as a condition of probation. (§ 1202.4, subd. (m) [“In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and order imposed pursuant to this section a condition of probation.”].) Section 1203.1, which vests a court with discretion to impose terms of probation, specifies that “[t]he court shall provide for restitution in proper cases.” (§1203.1, subd. (a)(3).)

In turn, section 1203.3, subdivision (b)(3), limits the court's authority to revoke or modify probation to the term of probation. Section 1203.3, subdivision (b)(3), specifies that "if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be discharged by the court . . . ." (§ 1203.3, subd. (b)(3).)

**B. A Trial Court Lacks Authority to Impose or Modify a Condition of Probation Once the Probationary Term Has Ended.**

Once a probationary term has expired, section 1203.3 and relevant case make clear that the trial court no longer has authority to modify a defendant's restitution obligations. Section 1203.3, subdivision (a) provides, in relevant part: "The court shall have authority at any time *during the term of probation* to revoke, modify, or change its order of suspension of imposition or execution of sentence." (§ 1203.3, subd. (a), emphasis added.) Further, subdivision (b)(5) clarifies that the section does not prohibit the court from modifying a restitution order pursuant to section 1202.4, subdivision (f), "at any time during the term of probation." (§ 1203.3, subd. (b)(5).)

In *In re Griffin* (1967) 67 Cal.2d 343, this Court considered the jurisdictional effect of former section 1203.3 in a habeas corpus proceeding challenging an order revoking probation entered after the defendant's term of probation had expired. In framing the jurisdictional issue, this Court underscored that "section 1203.3 provides that the court shall have authority to

revoke or modify probation ‘at any time during the term of probation.’” (*Griffin, supra*, 67 Cal.2d at p. 346.) Citing this language, this Court endorsed the view that “the court loses jurisdiction or power to make an order revoking or modifying the order suspending the imposition of sentence or the execution thereof and admitting the defendant to probation after the probationary period has expired.’ [Citations.]” (*Ibid.*, fn. omitted.) *Griffin* thus concluded that the order entered after the defendant’s term of probation expired was in “excess of jurisdiction.” (*Id.* at p. 347.)

*Griffin* remains good law and has been reaffirmed by this Court. (See *In re Bakke* (1986) 42 Cal.3d 84, 90, fn. 5 [finding a trial court’s order, issued after expiration of defendant’s probationary term, and purporting to further extend defendant’s probation, was in excess of jurisdiction and void]; *People v. Chavez* (2018) 4 Cal.5th 771, 777 [“Because the trial court’s authority to render judgment ends with the expiration of probation, the court has no power to dismiss under section 1385 once probation is complete.”].) In *Chavez*, this Court explained:

Once probation ends, however, a court’s power is significantly attenuated. Its power to impose a sentence over the defendant ceases entirely – a result embodying the ideal that a court may not dangle the threat of punishment over a former probationer indefinitely. Such a possibility would raise both ‘serious due process concerns’ and fears of nullifying statutory provisions limiting the period of probation. [Citation.] What is more, the court at that point may no longer revoke or modify its order granting probation.



(*Chavez, supra*, 4 Cal.5th at p. 782 citing, inter alia, *Griffin, supra*, 67 Cal.2d at p. 346.)

*Griffin's* progeny and related cases, as well as the statutory scheme for restitution, reinforce that a modification of probation after the expiration of probation constitutes an act in excess of a court's jurisdiction. The First and Second District Courts of Appeal have both relied on *Griffin* in holding that a trial court lacks jurisdiction to order restitution after the expiration of probation. (*Hilton, supra*, 239 Cal.App.4th at p. 769; *Waters, supra*, 241 Cal.App.4th at p. 826.)

In *Hilton*, the Second District Court of Appeal held that a trial court lacks jurisdiction to modify a defendant's probation to impose restitution after probation has expired. (*Hilton, supra*, 239 Cal.App.4th at p. 769.) The court recognized that "to hold otherwise would subject a defendant placed on probation to a lifetime restitution obligation." (*Ibid.*) There, the court ordered restitution pursuant to a stipulated amount. (*Ibid.*) After probation had expired by operation of law, the trial court imposed additional restitution, reasoning that the prior restitution order had been an unauthorized order because it was not full restitution, and that a restitution order could be corrected at any time. (*Id.* at p. 770.)

Relying on *Griffin*, its progeny, and statutory interpretation, the Court of Appeal rejected this reasoning and concluded that the trial court's ruling was erroneous as an act in excess of its jurisdiction. (*Hilton, supra*, 239 Cal.App.4th at pp.

769, 770.) “[O]nce the probationary term expired, *no trial court in this case had authority or jurisdiction over [the defendant.]*” (*Id.* at p. 777, emphasis in original.) The Court also concluded that “[o]nce the trial court granted probation, the jurisdiction the trial court retained and maintained over [the defendant] was exclusively based on the fact he was on probation.” (*Id.* at p. 777.)

Division One of the First District Court of Appeal agreed with the reasoning in *Hilton* and similarly concluded that a trial court acted in excess of its jurisdiction by imposing victim restitution after the expiration of the defendant’s probation. (*Waters, supra*, 241 Cal.App.4th at p. 829.) In that case, the trial court held a restitution hearing after the probationary term had expired and ordered victim restitution. (*Id.* at p. 826.) After examining *Griffin, Ford*, and *Hilton*, as well as the statutory scheme, Division One of this Court agreed with the Second District’s reasoning in *Hilton* and found that the trial court lost jurisdiction over a defendant once the probationary term expired, and that the court had thus acted in excess of its jurisdiction when it ordered victim restitution after the conclusion of probation. (*Id.* at pp. 827-831.) “Section 1203.3 limits the trial court’s authority to modify the conditions of a defendant’s probation, including the defendant’s restitution obligations, to the probationary period.” (*Id.* at p. 829.)

*Hilton* and *Waters* are faithful to section 1203.3, subdivisions (b)(4) and (5), which demonstrate the Legislature’s intent that a trial court loses jurisdiction to impose restitution once a probationary term has expired. Subdivision (b)(4) provides:

“The court may modify the time and manner of the term of probation for purposes of measuring the timely payment of restitution obligations or the good conduct and reform of the defendant *while on probation*.” (§ 1203.3, subd. (b)(4), emphasis added.) Subdivision (b)(5) similarly limits a court’s authority to the probationary term: “This section does not prohibit the court from modifying the dollar amount of a restitution order pursuant to subdivision (f) of section 1202.4 at any time *during the term of probation*.” (§ 1203.3, subd. (b)(5), emphasis added.) To conclude that section 1203.3 authorized a court to modify probation after the expiration of probation would render the phrases “while on probation” and “during the term of probation” surplusage. (*Hilton, supra*, 239 Cal.App.4th at p. 776; see also *Waters, supra*, 241 Cal.App.4th at p. 830.)

Recently, in *Zuniga, supra*, 79 Cal.App.5th 870, Division One of the Fourth District Court of Appeal found that *Waters* and *Hilton* were distinguishable from its circumstances. In *Zuniga*, the court sentenced the defendant to three years of formal probation and one of the conditions was that the defendant pay restitution in amount to be later determined. (*Id.* at p. 873.) The defendant’s probation was terminated after two years pursuant to AB 1950 and the trial court did not order a specific restitution amount until after probation had terminated. (*Ibid.*) The court of appeal held that the trial court did not exceed its jurisdiction by ordering the defendant to pay victim restitution because it retained jurisdiction under section 1202.46 and did not “revoke,

modify, or change” the original probation order within the meaning of section 1203.3, subdivision (a). (*Id.* at p. 874.)

*Zuniga* found that *Waters* was distinguishable because the trial court failed to order victim restitution prior to the expiration of probation, whereas *Hilton* was distinguishable because there the trial court had erroneously increased the amount of a prior restitution award. (*Zuniga, supra*, 79 Cal.App.5th at pp. 876-877.) The *Zuniga* court held that because the trial court was “merely carrying out the terms of the original probation order,” the trial court did not revoke, modify, or change the original probation order and thus did not run afoul of section 1203.3. (*Zuniga, supra*, 79 Cal.App.5th at p. 877.) However, as discussed below, section 1202.46 does not apply to probation cases. Furthermore, as the Court of Appeal in this case notes, under *Zuniga*’s interpretation, section 1202.46 does not extend a court’s jurisdiction beyond the probationary period.

**C. The Court Below Erred in Concluding that the Trial Court Did Not Exceed Its Jurisdiction to Set Restitution After the Expiration of Probation.**

The divergence by *Zuniga* and the Court of Appeal in this case from *Hilton* and *Waters* is contrary to statute and precedent. This Court should grant review and hold, like *Hilton* and *Waters*, that modification of a restitution order after the expiration of probation constitutes an act in excess of the court’s jurisdiction.

The Court of Appeal’s decision in this case did not take into account the driving force behind *Hilton* and *Waters*: this Court’s

decision in *Griffin*. Rather, it simply disagreed with the legislative analysis of *Hilton* and *Waters*, which found that restitution amount may only be fixed during the probation period. The Court of Appeal also disagreed with *Zuniga*'s approach, acknowledging that *Hilton* and *Waters* did not allow for *Zuniga*'s interpretation of the court's jurisdiction beyond the probationary period under section 1202.46.

The Court of Appeal's "straightforward approach" in finding no disharmony between sections 1203.3, 1202.4, and 1202.46 disregards *Griffin* and is contrary to *Hilton* and *Waters*. The decision imputes to section 1202.46 an extension of a trial court's jurisdiction to impose or modify restitution—essentially a tolling provision—where no such language exists. Contrary to the Court of Appeal's assertion, such an interpretation directly contradicts section 1203.3's limitation on a court's jurisdiction to modify probation only during the term of probation.

The Legislature has made no provision for ordering the tolling of a court's jurisdiction to modify restitution after the expiration of probation. If the Legislature had intended that a court retain jurisdiction to order or modify restitution after the expiration of probation, it knew how to provide such an exception in unmistakable language. (See, e.g., *Pacific Gas & Electric Co. v. Public Utilities Com.*, *supra*, 237 Cal.App.4th at pp. 842 ["When the Legislature meant to criminalize a violation of the Commission's authority, it knew how to do so in unmistakable language"]; *Moore v. Hill*, *supra*, 188 Cal.App.4th at p. 1282

[“courts must assume that the Legislature knows how to create an exception if it wishes to do so”].)

For example, in the context of probation revocations, the Legislature has provided a mechanism to toll jurisdiction to adjudicate an alleged violation: “revocation, summary or otherwise, shall serve to toll the running of the probationary period.” (§ 1203.2, subd. (a); see also *People v. Leiva* (2013) 56 Cal.4th 498.) The Legislature created no such exception for restitution orders in the probation context. It should be presumed – as the plain reading of section 1203.3 suggests – that the Legislature therefore intentionally limited the authority to modify a term of probation to the probationary period.

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Furthermore, the Court of Appeal is incorrect that section 1202.46 applies to probation cases and controls the result; section 1202.46 is inapposite where probation is granted. Section 1202.46 provides:

Notwithstanding Section 1170, when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. This section does not prohibit a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine pursuant to Section 1202.4.

(§ 1202.46.)

Reading section 1202.46 in conjunction with section 1170 demands an interpretation that section 1202.46 is inapplicable to cases where a defendant is granted probation. Pursuant to section 1170, when a defendant is sentenced to a non-probationary sentence, the “sentencing court does not have open-ended jurisdiction to modify a sentence; the court’s jurisdiction

expires after 120 days.” (*People v. Willie* (2005) 133 Cal.App.4th 43, 49; see § 1170, subd. (d)(1).) That section 1202.46 begins with the phrase “[n]otwithstanding section 1170” signals that the statute carves out an exception to the limitations on a court’s jurisdiction as proscribed by section 1170. That is, notwithstanding section 1170, section 1202.46 allows a court to retain jurisdiction in non-probationary cases for longer than the 120 days permitted by section 1170, until such time as the losses may be determined.

And though section 1202.46 does not “prohibit a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine pursuant to Section 1202.4,” it also does not grant authority to a court that is not otherwise granted by sections 1202.4 or 1203.3, to modify a restitution order at any time in a probation case. (§ 1202.46, emphasis added.) Section 1202.46 must be read in harmony with section 1203.3, subdivision (b)(5), which expressly limits the court’s jurisdiction to “any time during the term of probation.”

The Court of Appeal in *Waters* agreed that section 1202.46 does not authorize a trial court to modify an order of probation after the probationary period: “The statute’s use of the phrase ‘at any time’ cannot be read in isolation and must be harmonized with the preexisting statutory and case law concerning probation, including section 1203.3, which limits the court’s power to modify probation and restitution after the expiration of the probationary period.” (*Waters, supra*, 241 Cal.App.4th at pp. 830-831; accord,



*Hilton, supra*, 239 Cal.App.4th at pp. 781-782 [“Section 1202.46 too must be harmonized with the preexisting statutory and case law concerning probation, with the result that the section does not authorize a trial court to impose restitution once the defendant’s probationary term has expired”].)

The force of precedent here is enhanced by the Legislature’s amendment of section 1202.46 in 2016, without providing any modification to the statute that would abrogate the court’s holdings in *Hilton* and *Waters*. “The Legislature is presumed to be aware of judicial interpretations of a statute. [Citation.] If the Legislature amends or reenacts a statute without changing the interpretation placed on that statute by the courts, ‘the Legislature is presumed to have been aware of, and acquiesced in, the courts’ construction of that statute. [Citations.]” (*People v. Brown* (2016) 247 Cal.App.4th 1430, 1436, quoting *People v. Ledesma* (1997) 16 Cal.4th 90, 100- 101.) Section 1202.46 was amended in 2016 by Assembly Bill 2295 to make clear that a court did not have authority to order less than full restitution, no longer allowing such an order upon “a finding of compelling and extraordinary reasons.” (§ 1202.46; Stats. 2016, c. 37 (A.B. 2295), § 4, eff. Jan. 1, 2017.) Apart from that modification, the statute remained unchanged. Specifically, the Legislature reenacted the portion of the statute specifying its application “[n]otwithstanding Section 1170.” This Court should therefore presume the Legislature to have acquiesced to the judicial interpretation of section 1202.46 as not applicable to probationary cases.

The Legislature’s awareness of and acquiescence to judicial interpretation of section 1202.46 is especially evident in light of the failure of two assembly bills that proposed modifying section 1202.46 to expressly abrogate the holdings in *Hilton* and *Waters*. (See Assem. Bill No. 2477 (2015-2016 Reg. Sess.) [sought to amend section 1202.46 to read “Notwithstanding sections 1170, 1202.4, and 1203.3, or any other law and regardless of the type of sentence imposed or suspended, the court shall retain jurisdiction over a defendant for purposes of imposing or modifying restitution at any time.”]; Assem. Bill No. 194 (2017-2018 Reg. Sess.) [proposed language that in cases of probation, the court would retain jurisdiction “for purposes of restitution for a period of five years from the date of sentencing, or until the expiration of probation or mandatory supervision, whichever is longer.”]

Thus, where a defendant has been sentenced to probation, section 1202.46 does not authorize a court to retain jurisdiction to order or modify restitution at any time. Here, the trial court acted in excess of its jurisdiction when it ordered additional restitution after the expiration of McCune’s probation. The Court of Appeal below erred in concluding that the trial court did not exceed its jurisdiction by ordering setting the amount of restitution after the expiration of probation.

## CONCLUSION

For the foregoing reasons, appellant Scotlane McCune respectfully asks this Court to grant review and reverse the judgment of the Court of Appeal.

DATED: September 6, 2022

Respectfully submitted,

By:

/s/ KAIYA PIROLO

Kaiya Pirolo

Attorney for Appellant

Scotlane McCune

## CERTIFICATE OF WORD COUNT

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I, Kaiya Pirolo, appointed counsel for Scotlane McCune hereby certify that I prepared the foregoing document on behalf of my client, and that the word count for this brief is 5,258, excluding cover page information, tables, proof of service, signature blocks, and this certificate. This brief therefore complies with the rule which limits a computer-generated brief to 25,500 words. I certify that I prepared this document in Microsoft Word, and that this is the word count Microsoft Word generated for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: 9/6/2022

By:

/s/ KAIYA PIROLO  
Kaiya Pirolo  
Attorney for Appellant

## Appendix A

Court of Appeal Opinion,  
Filed on July 25, 2022

Filed: 07/25/2022

**CERTIFIED FOR PUBLICATION**  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FIRST APPELLATE DISTRICT**  
**DIVISION FIVE**

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTLANE McCUNE,

Defendant and Appellant.

A163579

(Napa County Super. Ct.  
No. CR183930.)

Scotlane McCune appeals from an order awarding victim restitution. He contends the court lost jurisdiction to order restitution when it terminated his probation early following a change to the Penal Code that shortened his probationary term from five years to two. We disagree. The court retained jurisdiction to determine and award victim restitution under Penal Code sections 1202.4 and 1202.46<sup>1</sup> irrespective of McCune's probation status. We therefore affirm.

**BACKGROUND**

McCune crashed his cousin's car into a tree, totaling the car's front end and injuring his passenger. He pled no contest to felony hit and run involving injury (Veh. Code, § 20001, subd. (a)), and the court dismissed a charge of misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)). As part of his plea, McCune agreed to pay restitution to the victim (the passenger).

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<sup>1</sup> Undesignated statutory citations are to the Penal Code.

In June 2018, the court suspended imposition of sentence and placed McCune on five years' probation. McCune was ordered to pay victim restitution in an amount to be determined by the court and probation officer. Two and one-half years later, the probation department filed and served notice that the victim sought \$30,166.23 to recoup medical expenses related to his injuries.

Effective the following day, January 1, 2021, the Legislature enacted Assembly Bill No. 1950 (AB 1950) ((2019-2020 Reg. Sess.), Stats. 2020, ch. 328, § 2). With exceptions not pertinent here, the new law amended section 1203.1, subdivision (a) to reduce the maximum felony probation term to two years. Accordingly, two weeks later the probation department (with the district attorney's concurrence) petitioned to terminate McCune's probation. The petition stated McCune would remain liable for victim restitution. The court granted it the same day.

Just over a week later, the prosecution asked the court to set a restitution hearing. The court requested briefing on whether it retained jurisdiction to determine the amount of restitution after probation terminated. Following argument, it ruled that it did and ordered McCune to pay restitution in the stipulated amount of \$21,365.94.

## DISCUSSION

McCune does not dispute that the trial court had fundamental jurisdiction when it set the restitution: the court retained jurisdiction over the parties and subject matter after McCune's probation expired. (See *People v. Ford* (2015) 61 Cal.4th 282, 287.) The issue is whether the trial court *exceeded* its jurisdiction—that is, whether the court had no statutory authority to set the amount of restitution after his probation expired. (*Ibid.*) This is a question of statutory interpretation, which we review de novo. (*Burke v. California Coastal Com.* (2008) 168 Cal.App.4th 1098, 1106.)

## A.

Proposition 8, adopted by the voters in 1982, marked a sharp change in the state’s policy toward restitution. Formerly, trial courts had discretion to impose victim restitution as a condition of probation. (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*)) Proposition 8 granted crime victims a constitutional right to receive restitution from the convicted person in nearly all cases: “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.” (Cal. Const., art. I, § 28, former subd. (b).) In 2008, voters passed Proposition 9, which removed the exception for “compelling and extraordinary reasons.” (Cal. Const., art. I, § 28, subd. (b)(13); *People v. Pierce* (2015) 234 Cal.App.4th 1334, 1338, fn. 2.)

Consistent with this mandate, the Legislature expanded victims’ access to restitution in the 1990’s by enacting section 1202.4. (*Giordano*, supra, 42 Cal.4th at p. 653.) Section 1202.4 requires restitution in every case, whether or not probation is granted. (*Ibid.*) Subdivision (f) of the statute addresses the particular situation in this case: “[i]f the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution.” (§ 1202.4, subd. (f).)

In that situation—where the court defers setting the amount of restitution until the victim’s loss becomes clear—section 1202.46 extends the court’s jurisdiction to set the amount: “Notwithstanding Section 1170, when the economic losses of a



victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined.” (§ 1202.46.)

Recently, in *People v. Zuniga* (2022) 79 Cal.App.5th 870, petn. for review filed July 15, 2022 (*Zuniga*), our colleagues in the Fourth District considered a case on all fours with our case. Following a hit-and-run, defendant Zuniga agreed to pay full victim restitution in a plea deal and received three years’ probation. (*Id.* at pp. 871-872.) Because the victim’s losses were not yet clear at the time of sentencing, the trial court included a probation condition that Zuniga would pay restitution in an amount to be determined later, as section 1202.4, subdivision (f) prescribes. (*Ibid.*) As in our case, Zuniga’s probation was terminated early, as a result of the new two-year limit in Assembly Bill 1950. (*Id.* at p. 874.) Several months after his probation expired, the court held a restitution hearing and set the amount, despite Zuniga’s objection that the court had lost jurisdiction. (*Ibid.*)

The Court of Appeal affirmed. The court explained that the trial court had simply followed the process, in section 1202.4, for awarding restitution when the amount is initially uncertain. (*Zuniga, supra*, 79 Cal.App.5th at p. 875.) The trial court retained jurisdiction under section 1202.46 to set the amount notwithstanding the fact that Zuniga’s probation had expired. (*Id.* at pp. 875-876.) The court observed that a contrary result would frustrate the clear purpose of the constitutional mandate to award victim restitution. (*Id.* at p. 876; Cal. Const., art. I, § 28.) It also noted that the result is consistent with *People v. Bufford* (2007) 146 Cal.App.4th 966, 970-972 (*Bufford*), a non-probation case, which held that section 1202.46 extends the court’s jurisdiction to set restitution despite the defendant’s

release from prison. (*Zuniga, supra*, at p. 876.) We agree with *Zuniga* on all these points.

As in *Zuniga*, section 1202.46 controls the result here. Because the amount of restitution was uncertain at the time of sentencing, the trial court followed the procedure in section 1202.4: it ordered restitution in an amount to be determined by the court, and it set the restitution later when the amount could be ascertained. (§ 1202.4, subd. (f).) It is immaterial that the court set the amount after McCune’s probation had been cut short by a change in law. Section 1202.46 expressly preserves the court’s jurisdiction to follow the process in section 1202.4, which serves the constitutional mandate to ensure full victim restitution. (§§ 1202.4, subds. (a), (f), 1202.46; Cal. Const., art. I, § 28; *Zuniga, supra*, 79 Cal.App.5th at p. 876; *Bufford, supra*, 146 Cal.App.4th at p. 971.) Moreover, there is no basis to distinguish non-probationary cases such as *Bufford*; the statutes apply to both probation and non-probation cases. (§§ 1202.4, subds. (a), (f), 1202.46.)

## B.

McCune argues that section 1202.46 does not extend a court’s jurisdiction to set restitution after a defendant’s probation expires because the statute is implicitly circumscribed by other statutes that generally authorize a court to revoke, modify, or change probation conditions only during the probationary period. (See, e.g., § 1203.3, subds. (a) [court may revoke, modify, or change a probation order “during the term of probation”], (b)(4) [court may modify terms of probation to ensure timely payment of restitution “while on probation”] and (b)(5) [nothing prohibits court from modifying amount of restitution “during the term of probation”]; *In re Griffin* (1967) 67 Cal.2d 343, 346 [“the statute itself furnishes the measure of the power which may thus be exercised.”].) McCune relies on *Hilton v. Superior Court* (2014) 239 Cal.App.4th 766, 775-776 (*Hilton*) and *People v. Waters*

(2015) 241 Cal.App.4th 822, 829-831 (*Waters*), which support this construction of the statutes.

The *Zuniga* court distinguished *Hilton* and *Waters*. It observed that, in *Waters*, the court ordered restitution for the first time after the defendant's probation had expired, and, in *Hilton*, the court set restitution during the probationary period but later increased the amount after the period had expired. (*Zuniga, supra*, 79 Cal.App.5th at pp. 876-877.) In *Zuniga*, by contrast, the trial court ordered restitution at the time of sentencing and simply fixed the amount when it could be determined, as sections 1202.4 and 1202.46 prescribe. (*Ibid.*) The *Zuniga* court held that this did not "revoke, modify, or change" the original restitution order within the meaning of the general statute governing probation conditions, section 1203.3. Hence, there is no conflict with section 1202.46. In a footnote, the *Waters* court suggests a similar distinction. (*Waters, supra*, 241 Cal.App.4th at p. 831, fn. 5.)

This analysis is somewhat unsatisfying. *Hilton* and *Waters* purported to reconcile a potential conflict between the general probation statute, section 1203.3, and the specific process for deferring fixing the amount of restitution under sections 1202.4 and 1202.46. (*Hilton, supra*, 239 Cal.App.4th at pp. 779-783; *Waters, supra*, 241 Cal.App.4th at pp. 829-831.) They "harmonized" the statutes by holding that the Legislature intended to limit the later statutes so that, like section 1203.3, they allow a court to fix the amount of restitution only during the probationary period. (*Hilton, supra*, at pp. 781-782; *Waters, supra*, at pp. 830-831.) *Hilton* and *Waters* would thus preclude the result in *Zuniga* because, under their interpretation, section 1202.46 does *not* extend a court's jurisdiction beyond the probationary period. Simply distinguishing them leaves the law muddled.

We prefer a more straightforward approach. There is no disharmony between sections 1203.3, 1202.4, and 1202.46. Section 1203.3 grants courts authority and jurisdiction to revoke, modify, or change probation conditions generally, including restitution orders, during the term of probation. (§ 1203.3, subds. (a), (b)(4), (b)(5).) Section 1202.4 grants additional authority to address the specific situation in which “the amount of loss cannot be ascertained at the time of sentencing,” and it mandates that the restitution order “shall include a provision that the amount shall be determined at the direction of the court.” (§ 1202.4, subd. (f).) When a court follows this process, section 1202.46 grants the court jurisdiction “for purposes of imposing or modifying restitution until such time as the losses may be determined” (§ 1202.46), even if that occurs after probation has ended. The statutes simply mean what they say. There is no conflict to resolve.

This approach has several other benefits. First, it gives meaning to the language in section 1202.46 granting a court “jurisdiction” to set restitution, which would be rendered surplusage under *Hilton* and *Waters*. (See *Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, 1197.) Second, it serves the constitutional mandate that crime victims shall be awarded full restitution. (Cal. Const., art. I, § 28, subd. (b)(13)(B); see also, § 1202.4, subd. (f).) Third, it avoids a conflict with *Bufford, supra*, 146 Cal.App.4th 966, which adopts a similarly straightforward interpretation of the statute in a non-probation case. The Legislature intended sections 1202.4 and 1202.46 to apply in both probation and non-probation cases (see *Giordano, supra*, 42 Cal.4th at p. 653), and nothing indicates it intended to make it harder for victims in probation cases to receive full restitution.

Finally, we see no unfairness to defendants like McCune. The *Waters* and *Hilton* courts were apparently concerned that

courts could surprise former defendants by issuing restitution orders out of the blue sky decades after probation ended. (*Waters, supra*, 241 Cal.App.4th at p. 831; *Hilton, supra*, 239 Cal.App.4th at p. 769.) The process in sections 1202.4 and 1202.46 puts a defendant on notice at the sentencing hearing that the court will issue a further restitution order once the victim's loss becomes more certain. Moreover, McCune agreed to pay victim restitution as part of his plea deal. The court set the restitution amount just halfway through his original five-year probationary period, which ordinarily would raise no question about jurisdiction. We see no reason why McCune should receive a windfall simply because his probation was cut short by a change in the law.

#### **DISPOSITION**

The restitution order is affirmed.

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BURNS, J.

We concur:

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JACKSON, P.J.

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WISEMAN, J.\*

A163579

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\* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Napa County Superior Court No. CR183930, Hon. Elia Ortiz.

Kaiya R. Pirolo, under appointment by the First District Appellate Project, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Senior Assistant Attorney General, Melissa Mandel, Supervising Deputy Attorney General, and Teresa Torreblanca, Deputy Attorney General, for Plaintiff and Respondent.

**ATTORNEY'S PROOF OF SERVICE**

(Code Civ. Proc., § 1013a, subd. (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, Kaiya Pirolo, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is kaiya@pirololaw.com and my business address is 1839 Ygnacio Valley Rd, #234, Walnut Creek, CA 94598. On September 6, 2022, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **Petition for Review** on Appeal by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service at Las Lomas Way and San Carlos Dr, Walnut Creek, CA 94598, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 6, 2022, at Walnut Creek, California.

/s/ KAIYA PIROLO   
Kaiya Pirolo  
SBN 280393



STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

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McCune**

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Lower Court Case Number:

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/s/Kaiya Pirolo

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Pirolo, Kaiya (280393)

Last Name, First Name (PNum)

The Law Office of Kaiya Pirolo

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