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.**	**S276303** First District Court of Appeal No. A163579 Napa County Superior Court No. CR183930

OPENING BRIEF ON THE MERITS

On Review from the Decision of the Court of Appeal,
First Appellate District, Division Five

Appeal from the Judgment of the Superior Court of the State of California for Napa County,
Honorable Mark S. Boessenecker, Judge

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ISSUE PRESENTED

Did the trial court exceed its jurisdiction by setting the amount of victim restitution after terminating defendant's probation pursuant to Assembly Bill No. 1950 (Stats. 2020, ch. 328)?

INTRODUCTION

Probation is "qualitatively different from such traditional forms of punishment as fines or imprisonment" because probation is "an act of clemency in lieu of punishment" and "its primary purpose is rehabilitative in nature [citation]." (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) "A grant of probation is *intended* to afford the defendant an opportunity to demonstrate over the prescribed probationary term that his or her conduct has reformed to the degree that punishment for the offense may be

mitigated or waived." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439, emphasis in original, superseded by statute on other grounds, as stated by *People v. Park* (2013) 56 Cal.4th 782, 789, fn. 4.) Successful completion of probation is a means for a person to achieve "reinstatement to his former status in society" without the stigma of prior criminality haunting him for the rest of his life. (*Stephens v. Toomey* (1959) 51 Cal.2d 864, 871.) Consistent with this purpose, it is only "[d]uring the probationary period" that "the court retains jurisdiction over the defendant [citation], and at any time during that period the court may, subject to statutory restrictions, modify the order suspending imposition or execution of sentence [citation]." (*Howard*, *supra*, 16 Cal.4th at p. 1092; accord *Feyrer*, *supra*, 48 Cal.4th 426, 440 ["the probation statutes confer upon the trial court jurisdiction and authority over a defendant during the term of probation"].) An understanding of the foregoing aims of California's probation statutes and the strict jurisdictional limitations implemented to further these legislative goals is critical to answering the question of whether a trial court has the authority to set the amount of victim restitution after probation has expired. These considerations unerringly point to an absence of such authority.

Appellant Scotlane McCune was sentenced in June 2018 to five years of probation after pleading no contest to felony hit and run involving the injury of his passenger. One of the probation terms required payment of victim restitution in an amount to be determined at a later date. Halfway through his probationary period, the Legislature enacted Assembly Bill No. 1950 (AB

1950), which amended Penal Code[1] section 1203.1, subdivision (a), so that a felony probation term such as his could not exceed two years. (Stats. 2020, ch. 238.) As a result, McCune's probation automatically terminated on January 1, 2021 without the court setting an amount of victim restitution.

On May 3, 2021, following a hearing, the trial court determined it had jurisdiction to set an amount of victim restitution. McCune was subsequently ordered to pay $21,365.94 in victim restitution.

The Legislature has mandated that courts order full victim restitution for economic losses related to the defendant's criminal conduct. (§ 1202.4, subd. (f).) If those losses cannot be ascertained at sentencing, the amount of restitution shall be determined later at the direction of the court. (*Ibid*.)

Section 1203.3 confers authority to the court to revoke, modify, or change a probationer's sentence, but specifies that the authority exists only during the term of probation. (§ 1203.3, subd. (a).) It further allows the court to modify a restitution order pursuant to section 1202.4, subdivision (f) "during the term of the probation." (§ 1203.3, subd. (b)(5).) Read together, these statutes direct that a restitution order may not be modified when a defendant is no longer on probation. Two cases, *Hilton v. Superior Court* (2014) 239 Cal.App.4th 766 and *People v. Waters* (2015) 241 Cal.App.4th 822, support this interpretation.

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

The Court of Appeal below rejected *Hilton*'s and *Waters*'s interpretations of the statutory framework and instead found that section 1202.46—which allows the court to "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"—was not limited by section 1203.3's restriction on the court's authority to modify probation solely before it expires. The Court of Appeal erroneously upheld the trial court's finding that it retained jurisdiction to set an amount of restitution beyond the termination of McCune's probation. Additionally, in *People v. Zuniga*, Division One of the Fourth District Court of Appeal recently and wrongly concluded that a trial court retains jurisdiction under a similar set of facts, finding section 1202.46 controlling and disregarding the statutory analysis of *Hilton* and *Waters*. (*People v. Zuniga* (2022) 79 Cal.App.5th 870, 876.)

The holdings of *Hilton* and *Waters* are compelled by the statutory schemes for restitution and probation. Section 1202.46 does not extend a court's jurisdiction over a person who is no longer on probation. Reading section 1202.46 in conjunction with section 1170 demands an interpretation that section 1202.46 is, in fact, 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.) To hold otherwise would grant courts everlasting jurisdiction over former probationers to impose additional restitution in perpetuity.

This Court should find that the trial court's order setting an amount of restitution was an act in excess of its jurisdiction and reverse the judgment of the Court of Appeal.

STATEMENT OF THE CASE

On November 15, 2017, the Napa County District Attorney filed a felony information charging McCune in count one with felony hit and run involving injury of another person (Veh. Code, § 20001(a)) and in count two with a misdemeanor violation of driving without a valid license (Veh. Code, § 12500(a)). (CT[2] 26-27.)

On May 15, 2018, pursuant to a negotiated disposition, McCune pleaded no contest to felony hit and run involving injury of another person (Veh. Code, § 20001, subd. (a)) and the prosecution dismissed the misdemeanor count. (CT 38-42; 12 RT 856-857.) On June 13, 2018, the trial court suspended imposition

[2] Citations made to the clerk's transcript on appeal will be abbreviated "CT" and citations made to the reporter's transcript on appeal will be abbreviated "RT".

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 December 31, 2020, the probation department filed a restitution investigation report, indicating that the victim had submitted a restitution claim in the amount of $30,166.23 for medical bills to the district attorney's office in April 2018. (CT 60, 85.) The following day, January 1, 2021, AB 1950 went into effect. With exceptions not relevant to this case, the new law amended section 1203.1, subdivision (a) to reduce the maximum felony probation term to two years.

On January 13, 2021, the probation department, in concurrence with the district attorney's office, filed a petition and order pursuant to AB 1950 to terminate McCune's probation. (CT 133-135.) The next day, the trial court signed the petition terminating McCune's probation pursuant to AB 1950. (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.) On May 3, 2021, following briefing by both parties and a hearing, the trial court found that it had jurisdiction to set an amount of victim restitution. (CT 131; 18 RT 1131.)

On September 24, 2021, the trial court ordered McCune to pay $21,365.94 in victim restitution after the parties reached an agreement and stipulated to that amount, 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. (CT 138; 22 RT 1355-1356.)

McCune timely appealed from the restitution order on September 24, 2021. (CT 139.) On July 25, 2022, Division Five of the First District Court of Appeal issued a published opinion affirming the judgment. (*People v. McCune* (2022) 81 Cal.App.5th 648.)

On October 26, 2022, this Court granted McCune's petition for review.

STATEMENT OF FACTS

I. THE INCIDENT

The following facts pertaining to the incident are taken from the preliminary hearing held on November 9, 2017.

On June 10, 2017, at approximately 9:55 p.m., California Highway Patrol officer Riley Sullivan was dispatched to Imola Avenue and Parrish Road in Napa County in response to a traffic collision. (5 RT 203-204.) Upon arrival, he saw a red Mustang sedan had crashed head on into a tree and the front end of the car had been totaled. (5 RT 205-206.) The passenger, Miguel Villa, was outside of the car being helped by several people. (5 RT 205.) Mr. Villa told Officer Sullivan that the driver—a white male, approximately 30 years old, who was a stranger with whom he hitched a ride—had fled the scene. (5 RT 206-27.)

Officer Sullivan spoke with Miguel Calderon, who arrived on the scene after Sullivan. (5 RT 207.) Calderon told Sullivan he was the registered owner of the Mustang but the Mustang's driver was his cousin, McCune, and that he and McCune had

switched cars for the day. (5 RT 207-208.) Calderon gave Sullivan McCune's information and address. (5 RT 208.)

Sullivan went to McCune's address but he was not there. (5 RT 209.) He visited Villa at the hospital to check on his injuries later that evening. (5 RT 209.) Villa admitted that he actually did know the driver and that it was his friend, McCune. (5 RT 209.) Villa told Sullivan that when they were driving, McCune accelerated at a high rate of speed and lost control of the car, colliding with the tree. (5 RT 210.) The car started smoking and McCune helped Villa get out of the car before fleeing the scene. (5 RT 210.)

While at the hospital, Sullivan spoke with McCune, who was sitting in one of the hospital beds with an ice pack on his hand. (5 RT 213.) McCune admitted to being the driver of the Mustang and relayed the same version of events as Villa. (5 RT 213.) He ran from the scene because he was scared and in shock. (5 RT 215.) He said he knew what he did was wrong and stated that he did not have a California driver's license. (5 RT 214, 216.)

II. THE PLEA AND SENTENCING PROCEEDINGS

Prior to sentencing, the probation department sent a letter to Villa on May 22, 2018, requesting documentation for restitution claim purposes. (CT 84.) On May 31, 2018, a probation officer spoke with Villa on the phone, who stated he was seeking restitution, but he was unsure of the specific amount because he was still receiving medical bills. (CT 108.) Probation sent a second letter to Villa on June 13, 2018, the same day of sentencing. (CT 84.) Villa did not respond to that letter. (CT 84.)

At McCune's sentencing hearing, the court placed him on formal probation for a five-year period under the terms and conditions listed in the probation report. (CT 60; 13 RT 909.) One of those terms, number 18, read as follows:

> 18. Pay restitution to Miguel Villa and/or the California Victim Compensation & Government Claims Board in an amount to be determined by the Probation Officer and the Court, plus interest at 10% per year from the date of sentencing, in a manner to be determined by the California Service Bureau and the Court.

(CT 63.)

On July 31, 2020, the probation department filed a restitution investigation report indicating that restitution was not an issue because Villa 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. (CT 85.) In fact, Villa 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 before probation spoke to Villa and sent the first letter requesting documentation. (CT 60, 85.)

At the restitution hearing held after McCune's probation had been terminated, the prosecution stated that probation had emailed Villa twice prior to sentencing asking for a restitution amount, to which Villa replied he was unable to determine an amount. (18 RT 1126.) The prosecution was not sure whether

Villa 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 determined that it 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.)

ARGUMENT

I. THE TRIAL COURT ACTED IN EXCESS OF ITS JURISDICTION WHEN IT SET AN AMOUNT OF RESTITUTION AFTER McCUNE'S PROBATION TERMINATED PURSUANT TO AB 1950.

A. Proposition 8 and the Subsequent Victim Restitution Framework.

In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights, which added article I, section 28, to the California Constitution. (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) That provision provided 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"].) However, when the voters considered Proposition 8, "[t]he ballot arguments for and against the measure scarcely mentioned restitution.'" (*People v. Birkett* (1999) 21 Cal.4th 226, 244.)

Article I, section 28, subdivision (b), 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 response, in 1995, the Legislature amended section 1202.4 "to create a uniform restitutionary scheme for all adult

offenders." (*Birkett, supra*, 21 Cal.4th at p. 248, fn. 21.) Thus, today, most of the provisions of the criminal victim restitution scheme are located in section 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. (l)[3] ["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 1202.4 does not expressly grant trial courts the power to impose restitution in probation cases other than as a condition of probation, and subdivision (l) suggests that victim restitution in the context of a probation sentence may only be ordered as a condition of probation. (*Waters, supra,* 241 Cal.App.4th at p. 830.)

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[3] Effective January 1, 2022, Assembly Bill No. 177 amended section 1202.4 to, in relevant part, renumber subdivisions such that former section 1202.4, subdivision (m), is now subdivision (l).

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).) The same statute mandates that a court consider restitution in all cases: "The court shall consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund." (§ 1203.1, subd. (b).)

In turn, section 1203.3, subdivision (b)(3), limits the court's authority to revoke or modify probation to the probationary period. 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); accord *People v. White* (1982) 133 Cal.App.3d 677, 682 ["An order revoking probation must be made within the period of time circumscribed in the order of probation. Otherwise, the probationary period terminates automatically on the last day"].)

Section 1203.3, subdivision (b)(4) provides, in relevant part: "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*." (Italics added.) Specific to restitution, section 1203.3, subdivision (b)(5) provides that "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 the probation*." (Italics added.)

B. The Statutory Provisions Indicate that the Legislature Intended to Restrict the Trial Court's Jurisdiction to Impose Restitution to the Probationary Period.

Although article I, section 28 of the California Constitution provided a "broad constitutional mandate" that restitution be imposed in every case where a crime victim suffers loss, there were aspects of that mandate that were left open to interpretation by the Legislature. (See *Giordano, supra,* 42 Cal.4th at pp. 649, 655 [finding that the scope of losses, which was left undefined by Proposition 8, extended to the future economic losses incurred by the deceased victim's surviving spouse as a result of the victim's death].) The trial court's jurisdictional limits to set a restitution amount was one such aspect that was left unaddressed by article I, section 28, subdivision (b).

To determine the scope of the trial court's jurisdiction to impose restitution, this Court must "look to the statutes the Legislature has enacted to implement this constitutional provision." (*Giordano, supra,* 42 Cal.4th at p. 655.) "[I]t is well settled that when the Legislature is charged with implementing an unclear constitutional provision, the Legislature's interpretation of the measure deserves great deference." (*Birkett, supra,* 21 Cal.4th at p. 244.) "When the Legislature has 'adopted a plausible interpretation of the constitutional provision,' we

defer to its determination." (*Giordano, supra*, 42 Cal.4th at p. 656, quoting *Birkett, supra,* 21 Cal.4th at p. 244.)

The statutory scheme for restitution makes clear that where probation is granted, the Legislature has determined that a court retains authority to impose or modify an order of restitution, but only during the probationary period. (§ 1203.3, subds. (a), (b)(5).) Once a probationary term has expired, section 1203.3 plainly indicates that the trial court loses that authority. Although section 1203.3, subdivision (a), has been amended since McCune committed his underlying offense, the version of the statute in effect then and the version currently in effect both provide, 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; see also Stats. 2012, ch. 43 (S.B. 1023), § 31, eff. June 27, 2012 [amending the statute to apply to "mandatory supervision" imposed under Realignment].)

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).) It is well settled that "the statute itself furnishes the measure of the power which may thus be exercised . . . ." (*In re Griffin* (1967) 67 Cal.2d 343, 346.)

In *Griffin*, 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 long-held 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.)

This long-held view reaffirmed by *Griffin* originated in *People v. O'Donnell* (1918) 37 Cal.App. 192, 196-197. In *O'Donnell*, this Court examined former section 1203, subdivision 4, which read, in relevant part:

> The court shall have power at any time *during the term of probation* to revoke or modify its order of suspension of imposition or execution of sentence. It may, at any time, when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held shall warrant it, terminate the period of probation and discharge the person so held, and in all cases, 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, be by the court discharged.

(*O'Donnell, supra,* 37 Cal.App. at p. 196, italics added, quoting former § 1203, subd. (4).)

O'Donnell explained that when the Legislature wrote former section 1203 and specified that probation may be revoked

or modified *during the term of probation* and opted not to include a provision allowing the same after the term of probation, then "the necessary implication is that it was not the legislative intention to confer upon the court the right to exercise that power after the time at which the period of probation has expired." (*O'Donnell, supra,* 37 Cal.App. at p. 197.) Section 1203.3, subdivision (a) contains almost identical language in relevant part, and thus the reasoning of *O'Donnell* remains applicable.

Griffin and *O'Donnell* endure and have been reaffirmed by this Court. For example, in *People v. Chavez*, this Court addressed whether trial courts have the authority to dismiss actions pursuant to section 1385 when probation has already successful terminated. (*People v. Chavez* (2018) 4 Cal.5th 771, 779.) In determining that "the trial court's authority to render judgment ends with the expiration of probation," this Court provided a framework within which to determine whether a court had exceeded its jurisdiction conferred by statute. (*Id.* at pp. 777, 780.)

Chavez looked to the statute in question, section 1385, and noted that nothing in the language of section 1385 suggested that the court could take the action in question after a judgment was final. (*Id.* at p. 781.) For successful probationers whose term has ended, a court loses its authority to grant relief under section 1385 when it is no longer able to impose final judgment, i.e., when probation ends. (*Id.* at p. 784.)

Relying on *Griffin* and *O'Donnell*, inter alia, this Court in *Chavez* 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 pp. 782-783, citing, inter alia, *Griffin*, *supra*, 67 Cal.2d at p. 346 and *O'Donnell, supra,* 37 Cal.App. at p. 197.)

In relying on *O'Donnell*, *Chavez* placed particular emphasis on *O'Donnell*'s use of the phrase "during the term of probation." (*Chavez, supra,* 4 Cal.5th at p. 783, quoting *O'Donnell, supra,* 37 Cal.App. at p. 197.) Addressing section 1203.3 specifically, *Chavez* noted that probation terminates automatically on the last day and discharge from probation is mandatory barring special circumstances. (*Chavez, supra,* 4 Cal.5th at p. 783, citing inter alia, *White, supra,* 133 Cal.App.3d at pp. 682-683 and *People v. Smith* (1970) 12 Cal.App.3d 621, 625.)

C. *Hilton* and *Waters* Properly Applied the Reasoning of *O'Donnell* and *Griffin*.

O'Donnell and 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 the court's jurisdiction. Not only

did this Court affirm the reasoning of those cases in *Chavez,* but the courts of appeal in *Hilton, supra*, 239 Cal.App.4th 766 and *Waters, supra*, 241 Cal.App.4th 822 also correctly applied *Griffin* in holding that a trial court lacks jurisdiction to order or modify restitution after the expiration of probation. (*Hilton, supra,* 239 Cal.App.4th at p. 769; *Waters*, *supra*, 241 Cal.App.4th at p. 826.)

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.

i. *Hilton v. Superior Court*

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.*) In that case, the defendant resolved his case pursuant to a negotiated disposition and was placed on probation for three years, with restitution ordered, as determined at a future restitution hearing. (*Ibid.*) At a subsequent restitution hearing, the court ordered restitution pursuant to a stipulated amount. (*Ibid.*) After probation had expired by operation of law, the victim sought additional restitution. (*Id.* at p. 770.) 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. (*Ibid.*)

Relying on *Griffin*, its progeny, and statutory interpretation, *Hilton* 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.)

Importantly, *Hilton* examined the legislative history of section 1203.3, noting that the Legislature was presumably aware of *Griffin* and the former versions of the statute when it amended section 1203.3 to add subdivision (b)(4) in 1995 by adding, "[t]he 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*." (*Hilton, supra,* 239 Cal.App.4th at p. 775, quoting § 1203.3, subd. (b)(4), italics original to opinion.)

The Legislature was also aware of the history when it added subdivision (b)(5) in 2000, which included the phrase "during the term of probation." (*Hilton, supra,* 239 Cal.App.4th at p. 775, citing § 1203.3, subd. (b)(5).) *Hilton* underscored the well-established view that it should be presumed that every word and phrase used in a statute has meaning and useful function, and "a construction rendering some words in the statute useless or redundant is to be avoided." (*Hilton, supra,* 239 Cal.App.4th at p.

775, citing *People v. Contreras* (1997) 55 Cal.App.4th 760, 764.) "We agree with Hilton that to construe section 1203.3, subdivisions (b)(4) and (5) as applying after a defendant's probationary term has expired would render the phrase 'while on probation' in subdivision (b)(4) and the phrase 'during the term of the probation' in subdivision (b)(5) surplusage." (*Hilton, supra,* 239 Cal.App.4th at p. 776.)

Furthermore, *Hilton* noted that this Court in *Griffin* had "approvingly cited appellate cases that construed the section as precluding modification *after* the probation period had expired." (*Hilton, supra,* 239 Cal.App.4th at p. 776, citing *Griffin, supra*, 67 Cal.2d at p. 346.) Accordingly, *Hilton* concluded section 1203.3, "subdivisions (b)(4) and (5) is consistent with a legislative intent that a trial court loses jurisdiction to modify restitution once a probationary term has expired." (*Hilton, supra,* 239 Cal.App.4th at p. 776.)

Hilton decisively rejected the People's argument that the trial court retained jurisdiction to impose victim restitution under section 1202.46, pointing out that "Section 1202.46 does not expressly state a trial court retains the jurisdiction therein specified even after a defendant's probationary term has expired." (*Hilton, supra,* 239 Cal.App.4th at p. 781.) The court noted that "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." (*Id.* at pp. 781-782.)

ii. *People v. Waters*

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 defendant successfully completed a three-year grant of probation and, more than two years later, petitioned the court for relief pursuant to section 1203.4. (*Id.* at p. 825.) At that point, the probation department realized that restitution had not been ordered, even though the victim had previously filed a victim impact statement requesting restitution. (*Ibid.*) The trial court eventually held a hearing and ordered victim restitution. (*Id.* at p. 826.) After examining *Griffin*, *Hilton*, and *People v. Ford*[4] (2015) 61 Cal.4th 282, as well as the statutory scheme, the court of appeal agreed with *Hilton*'s reasoning 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.)

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[4] This Court left open in *Ford* the question it has now granted review to decide. (See *Ford, supra,* 61 Cal.4th at p. 284 ["We need not decide whether a trial court retains jurisdiction to modify the amount of restitution once a defendant's term of probation has expired"].)

Importantly, *Waters* agreed with *Hilton*'s view that "to construe section 1203.3 as applying after a defendant's probationary term would render the phrases 'while on probation' and 'during the term of probation' surplusage." (*Waters, supra,* 241 Cal.App.4th at p. 830, citing *Hilton, supra,* 239 Cal.App.4th at pp. 775-776.)

> Moreover, when the Legislature enacted subdivision (b)(4) of section 1203.3 in 1995 and subdivision (b)(5) in 2000, it is presumed to have been aware of the Supreme Court's earlier decision in *Griffin, supra,* 67 Cal.2d at page 346, 62 Cal.Rptr. 1, 431 P.2d 625, which holds 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.'" As the Legislature framed the language of section 1203.3 in a manner similar to that of *Griffin,* we presume it intended to convey the same meaning.

(*Waters, supra,* 241 Cal.App.4th at p. 830, footnotes omitted.)

Waters agreed with *Hilton* that section 1202.46 "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.)

iii. *People v. Zuniga*

Recently, in *Zuniga, supra,* 79 Cal.App.5th at p. 872, Division One of the Fourth District Court of Appeal found that *Waters* and *Hilton* were distinguishable from its circumstances

and that the trial court did not exceed its jurisdiction by imposing $313,518.74 in restitution after probation had expired. 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. (*Id.* at p. 877.) However, *Zuniga* did not cite any authority for this proposition that adding a six-figure debt to the defendant's probation order was not considered a modification to the probation order, nor did the Court of Appeal below use this

approach. As discussed below, section 1202.46 is inapposite because it does not apply to probation cases.

iv. The Court of Appeal's Reasoning Ignores the Legislative Intent Behind Sections 1203.3 and 1202.4.

The Court of Appeal's decision below directly contradicts *O'Donnell*'s reasoning that the Legislature intended to preclude a trial court from ordering a modification of sentence once probation had terminated. (*O'Donnell, supra,* 37 Cal.App. at p. 197.) The court rejected *Hilton*'s and *Waters*'s interpretation of sections 1203.3, 1202.4, and 1202.46, and disagreed with their finding that the court could only set the amount of restitution during the probationary period. (*McCune, supra*, 81 Cal.App.5th at pp. 654-655.) Ignoring the legislative analysis conducted by both *Hilton* and *Waters*, the court instead reasoned that section 1203.3 allowed for modification of probation conditions during probation and that sections 1202.4 and 1202.46 allowed for imposition or modification of restitution after the probation term ends. (*McCune, supra,* 81 Cal.App.4th at p. 655.) The court bluntly stated, "[t]he statutes simply mean what they say. There is no conflict to resolve." (*Ibid.*)

This vast oversimplification of the statutory framework fails to address *Hilton*'s and *Waters*'s interpretation of *Griffin* and the issue of phrase surplusage. It ignores the legislative history of section 1203.3, the statute's time limitation on restitution orders under section 1202.4, subd. (f) (see § 1203.3, subd. (b)(5)), and treats section 1202.46 as a trump card over sections 1203.3

and 1202.4 to extend the court's jurisdiction over restitution matters indefinitely without statutory or precedential support. It also fails to recognize that restitution in a probation case can only be imposed as a condition of probation (§ 1202.4, subd. (l); *Waters, supra,* 241 Cal.App.4th at p. 830), and that conditions of probation cannot be imposed or modified after probation has been terminated (§ 1203.3, subd. (b)(3)). When the Legislature stated that the probation order may only be modified or revoked *during the term of probation*, this Court has held that "the necessary implication is that it was the legislative intention not to confer upon the court the right to exercise that power after the time at which the period of probation has expired." (*Chavez, supra*, 4 Cal.5th at p. 782; see *Griffin, supra,* 67 Cal.2d at p. 346 ["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"]; *Hilton, supra,* 239 Cal.App.4th at p. 777 ["[O]nce the probationary term expired, no trial court in this case had authority or jurisdiction over [the defendant]"]; *Waters, supra,* 241 Cal.App.4th at p. 829 ["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"]; *People v. Lewis* (1992) 7 Cal.App.4th 1949, 1954 ["[T]he trial court has the power over the defendant at all times during the *term* of probation *until* the defendant is discharged from probation . . . ."]; *White, supra,* 133 Cal.App.3d at p. 683 ["If no order of modification or revocation is

made before the end of the period of probation delineated in the original or any subsequent probation grant, the court has no authority or jurisdiction over the defendant"].)

D. Section 1202.46 Does Not Extend the Trial Court's Jurisdiction to Set Restitution Beyond the Term of Probation.

One central component of *Zuniga* and the Court of Appeal's opinion below is the erroneous viewpoint that section 1202.46 applies to both probation and non-probation cases and allows for everlasting jurisdiction to impose restitution following the termination of probation. (*McCune, supra*, 81 Cal.App.5th at p. 653; *Zuniga, supra,* 79 Cal.App.5th at p. 876.) As acknowledged by the Court of Appeal below*, Zuniga* failed to address that *Hilton* and *Waters* "preclude[d] the result in *Zuniga* because, under their interpretation, section 1202.46 does *not* extend a court's jurisdiction beyond a probationary period." (*McCune, supra*, 81 Cal.App.5th at p. 654.) However, the Court of Appeal below chose its own approach that directly conflicted with rather than distinguished *Hilton* and *Waters*, finding that section 1202.46 conferred jurisdiction to modify restitution even after probation has ended. (*McCune, supra,* 81 Cal.App.5th at pp. 654-655.) To the contrary, section 1202.46 only applies to cases where the defendant has been sentenced to a term of confinement in state prison. Moreover, even if it does apply to probation cases, the language of section 1203.3 and the timing of 1202.46's passage limits application of section 1202.46 to the confines of the probationary term.

i. Section 1202.46 Does Not Apply to Probation Cases.

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.

The statute was added to the Penal Code in 1999 by Senate Bill No. 1126 (SB 1126). (Stats. 1999, ch. 888, § 3.) The bill's sponsor was the California Department of Corrections and Rehabilitation (CDCR)[5]. (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1126 (1999-2000 Reg. Sess.) as amended June 16, 1999.) The bill's explanation of existing law centered on the CDCR's pilot program for electronic appearances, a collaboration between the State Board of Control (later renamed the Victim Compensation and Government Claims Board) and trial courts regarding amending restitution orders. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1126 (1999-2000 Reg. Sess.) as amended September 2, 1999.) The bill

[5] When SB 1126 was proposed, the CDCR was called the California Department of Corrections. This brief uses the current name of the department.

"would specify that these provisions shall not be construed to prohibit an individual or district attorney's office from independently pursuing the imposition or amendment of a restitution order that may result in a hearing, regardless of whether the victim has received assistance. The bill further would require the court to 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 when the economic losses of a victim cannot be ascertained at the time of sentencing." (*Ibid.*) The bill analysis also discussed how funds would be appropriated to the CDCR for prison construction. (*Ibid.*)

The bill analysis by the Assembly Committee on Public Safety made clear that the provisions of the bill centered around the issues of restitution as it related to CDCR inmates. (See Assem. Com. on Pub. Saf., Analysis of Sen. Bill No. 1126 (1999-2000 Reg. Sess.) as amended June 16, 1999.) The author intended for SB 1126 to, among other things, allow for hearings to impose or amend a prison inmate's restitution order through the CDCR's audio-video teleconference equipment used for arraignments. (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1126 (1999-2000 Reg. Sess.) as amended June 16, 1999.) In the comments section of the Assembly Committee on Public Safety's bill analysis, a list of benefits to audio-video conference of restitution hearings was provided by the CDCR. (*Ibid.*) Two such benefits were that the bill "[e]nhances a victim's ability to amend his or her offender's restitution order to reflect actual crime-

related losses, regardless of whether the offender is incarcerated in a distant state prison" and it also "[a]llows courts to establish the amount of a restitution order and allows CDCR to collect upon that order." (*Ibid.*) The CDCR also hailed that the audio video teleconferencing system would reduce the costs of holding restitution hearings. (*Ibid.*)

The legislative history reveals that section 1202.46 was born from the CDCR's desire to streamline not only their audio-video arraignment program, but also their ability to collect restitution funds from state prisoners. SB 1126 provided courts the ability to impose or modify restitution while prisoners were incarcerated and saved the CDCR from having to transport them across the state for restitution hearings. The bill's legislative history makes no mention of probationers. Contrary to the Court of Appeal's assertion in its opinion below, there is no indication that the Legislature intended that section 1202.46 to apply in both probation and non-probation cases. (See *McCune, supra*, 81 Cal.App.5th at p. 655.) The Court of Appeal cites to *People v. Bufford* (2007) 146 Cal.App.4th 966, for the proposition that restitution may be modified at any time, even after probation terminates. *Bufford*, however, does not aid the Court of Appeal's analysis.

In *Bufford, supra,* 146 Cal.App.4th at p. 968, Division Three of the First District Court of Appeal reversed the trial court's order denying the prosecution's motion to set the amount of victim restitution. In that case, the trial court imposed a prison term and restitution order, stating the amount would be

determined by a later court order. (*Id.* at p. 968.) The restitution hearing was repeatedly continued until it finally occurred after the defendant had finished serving her prison term. (*Id.* at p. 969.) The court of appeal, relying on section 1202.46, held that "if the trial court cannot determine the amount of restitution at the time of sentencing, there is no limitation upon when the court must next set a restitution hearing, nor is there a limitation on the permissible reasons that prevent fixing the amount of restitution." (*Id.* at p. 971.) However, the court noted that "Section 1203.3 does not apply in this case, because defendant was not placed on probation." (*Id.* at p. 970, fn. 4.)

Hilton and *Waters* recognized that *Bufford* and its interpretation of section 1202.46 does not apply to probation cases: "*Bufford* was not a probation case. In *Bufford*, the trial court *imposed a prison sentence* and a restitution order. . . ." (*Hilton, supra,* 239 Cal.App.4th at p. 782; accord *Waters, supra,* 241 Cal.App.4th at p. 831, fn. 5.)

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 § 1172.1, subd. (a).) 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.

ii. Even If Section 1202.46 Applies to Probation Cases, Section 1203.3 Limits Its Application to the Term of Probation.

The legislative history of section 1202.46 makes clear that the Legislature intended the statute to apply to CDCR inmates, not probationers. However, even if this Court were to disagree, section 1203.3 places a time limit on the court's ability under section 1202.46 to set an amount of restitution. That limit is the date that probation terminates.

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.) Section 1202.46 must be read in unison with section 1203.3, subdivision (b)(5), which expressly limits the court's jurisdiction to "any time during the term of probation."

Hilton and *Waters* did not argue that section 1202.46 only applied to non-probation cases. Rather, they attempted to harmonize that provision with section 1203.3 and section 1202.4.

(See *Hilton, supra*, 239 Cal.App.4th at pp. 781-782; *Waters, supra,* 241 Cal.App.4th at pp. 830-831.)

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, ch. 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." The Legislature could have easily begun section 1202.46 with, "Notwithstanding sections 1170 and 1203.3," but it did not, and this omission should be construed as an intentional act. (See, e.g., *Moore, 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"].) This Court should therefore presume the Legislature to have acquiesced to *Hilton*'s and *Waters*'s interpretation of section 1202.46.

The Court of Appeal below found that, contrary to *Hilton* and *Waters*, "section 1202.46 controls the result here" and that "there is no basis to distinguish non-probationary cases such as *Bufford*; [sections 1202.4 and 1202.46] apply to both probation and non-probation cases." (*McCune, supra,* 81 Cal.App.5th at p. 653.) 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 p. 842 ["When the Legislature meant to criminalize a violation of the Commission's authority, it knew how to do so in unmistakable language"]; *Moore, 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.

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.

E. The Legislature Approved of *Hilton* and *Waters* When It Drafted AB 1950.

Just as the Legislature was presumably aware of *Griffin* at the time it enacted subdivisions (b)(4) and (b)(5) of section 1203.3, so too was it aware of *Hilton* and *Waters* when it drafted and passed AB 1950. In enacting new laws, it must be presumed that "the Legislature was aware of existing related laws and intended to maintain a consistent body of rules." (*People v. Superior Court (Zamudio*) (2000) 23 Cal.4th 183, 199.)

Previously, in 2016, the Legislature considered and rejected AB 2477, which was introduced for the sole purpose of abrogating the holdings of *Hilton* and *Waters*. (Assem. Bill No. 2477 (2015-2016 Reg. Sess.) as introduced Feb. 19, 2016.) AB 2477 explained:

> Existing law requires a court to impose a separate and additional restitution fine in each case in which a person is convicted of a crime. If the economic losses of a victim cannot be ascertained at the time of sentencing, existing law requires a court to 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. Two state appellate court decisions have held that under state law a court acts in excess of its jurisdiction by ordering restitution or modifying a restitution order after the explanation [sic] of a defendant's probation. [¶] This bill would expressly abrogate the holdings in those decisions by requiring the court to retain jurisdiction over a defendant for purposes of imposing or modifying restitution at any time.

(*Ibid.*)

The Assembly Committee on Public Safety bill analysis of AB 2477 noted that the bill "states legislative intent to abrogate the holdings in Hilton v. Superior Court (2014) 239 Cal.App.4th 766, and People v. Waters (2015) 241 Cal.App.4th 822." (Assem. Com. on Public Safety, Cal. Com. Rep. on Assem. Bill No. 2477 (2015-2016 Reg. Sess.) March 28, 2016, p. A.) The author argued that the decisions in *Hilton* and *Waters* were "problematic" because they held that the courts did not have jurisdiction to impose restitution after the probationary period expired:

> [T]he initial court hearing and restitution hearing are totally separate from one another. Often times restitution hearings can be delayed due to extraneous circumstances. Generally restitution is not granted at the initial hearing because the court still does not have the exact figure that must be paid because some costs may be ongoing or not yet determined, such as medical bills.

(Assem. Com. on Public Safety, Cal. Com. Rep. on Assem. Bill No. 2477 (2015-2016 Reg. Sess.) March 28, 2016, p. C.)

The proposed bill would amend section 1202.46 to refer not only to section 1170, but also to sections 1202.4, 1203.3, "or any other law, and regardless of the type of sentence imposed or suspended . . . ." (Assem. Bill No. 2477 (2015-2016 Reg. Sess.) as introduced Feb. 19, 2016.)

AB 2477 was unable to survive past the first committee, failing to pass the first vote in the Assembly Committee on Public Safety for referral to the Committee on Appropriations. (Com. vote, Assem. Com. on Public Safety (Mar. 29, 2016) <http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_2451-2500/ab_2477_vote_20160329_000001_asm_comm.html> [as of Dec. 30, 2022].) After a motion for reconsideration was granted, it failed upon the second and last vote. (Com. vote, Assem. Com. on Public Safety (Apr. 20, 2016) <http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_2451-2500/ab_2477_vote_20160420_000001_asm_comm.html> [as of Dec. 30, 2022].) However, as noted above, section 1202.46 was amended in 2016 by Assembly Bill 2295 to require that courts order no less than full restitution. (§ 1202.46; Stats. 2016, ch. 37 (A.B. 2295), § 4, eff. Jan. 1, 2017.) The rest of the provision remained unchanged.

When AB 1950 was introduced four years later, the Assembly Committee on Public Safety analysis included the

California District Attorneys Association's (CDAA) opposition, which stated in part,

> Limiting probation hurts crime victims. A major part of rehabilitation is making amends through the payment of restitution, which is a constitutional right. In cases where a probationer owes thousands of dollars in restitution, in some cases millions of dollars, it is vital that probation be long enough in order to increase the likelihood that a crime victim is paid in full.

(Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) as amended May 26, 2020.)

The analysis also mentioned prior failed bills, including AB 2477, signaling that the Legislature was aware of the previous attempts to abrogate *Hilton* and *Waters*. (See Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) as amended May 26, 2020.) The CDAA's opposition noting restitution concerns was reiterated in the Assembly Committee on Appropriations analysis (Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) May 31, 2020) and during the Assembly's Third Reading analyses (Assem. 3d reading analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) as amended May 21, 2020; Assem. 3d reading analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) as amended June 10, 2020). The Legislature's repudiation of AB 2477 and the bill's attempt to abrogate *Hilton* and *Waters* signals that the Legislature validated those decisions and their interpretations of sections 1202.4, 1202.46, and 1203.3. Additionally, AB 2477's author's comment regarding undetermined restitution amounts

and the CDAA's arguments regarding AB 1950's potential effect on victim restitution signals that the Legislature was aware that the reduced probation terms may affect the court's ability to set restitution in certain cases where probation is terminated.

As this Court noted, "It is our task to construe, not to amend the statute. 'In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted.' [Citation.]" (*Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) "We must assume that the legislature knew how to create an exception if it wished to do so . . . . [Citation.]" (*Ibid.*)

Here, the Legislature's explicit acknowledgment of AB 2477 in considering AB 1950 solidifies that the Legislature agreed with *Hilton* and *Waters* that the court's ability to impose or modify victim restitution ends when probation terminates. Knowing that AB 1950 would truncate the probationary term of many active probationers, the Legislature still declined to carve out an exception to allow courts to retain jurisdiction beyond the probationary period for the purpose of imposing or modifying victim restitution. Rather, the Legislature opted to carve out other exceptions to AB 1950's two-year probation limit by declining to extend the reduced probation term to those probationers either convicted of committing certain theft-related felonies or crimes that include specific probation lengths within their provisions. (§ 1203.1, subd. (l)(1)-(2).)

The Legislature's decision to refrain from dictating any special restrictions or terms for probationers whose restitution obligations were not yet set indicates that it intended for those probationers to be emancipated from the court's jurisdiction once probation terminated

F. Crime Victims Will Not Be Precluded from Receiving Full Restitution.

Underlying the opinions in *Zuniga* and *McCune* is the concern that crime victims would be precluded from receiving full restitution, as mandated by section 1202.4, subdivision (f), if trial courts were unable to set an amount of restitution following the termination of probation. (See *McCune, supra,* 81 Cal.App.4th at pp. 653, 655; *Zuniga, supra,* 79 Cal.App.5th at p. 878.) However, given prompt action by prosecutorial offices, probation departments, and the courts, crime victims would still have access to full restitution provided claims were timely submitted.

AB 1950 was introduced and first read on January 17, 2020. (Assem. J. No. 136 (2019-2020 Reg. Sess.).) As early as May 18, 2020, the Assembly Committee on Public Safety published its analysis. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) as amended May 26, 2020.) The analysis noted the support and opposition of numerous groups; amongst those opposed were the CDAA, Chief Probation Officers of California, and State Coalition of Probation Organizations. (*Ibid.*) On August 27, 2020, it was enrolled and presented to the Governor. (Assem. J. No. 216 (2019-2020 Reg. Sess.).) It was approved by the Governor and chaptered by the Secretary of

State on September 30, 2020 and went into effect on January 1, 2021. (Stats. 2020, ch. 328.)

The timeline of this legislation demonstrates that district attorney and probation officer organizations—and thereby their members—were on notice for months of the pending changes. At the very least, there were three full months between the chaptering of the legislation and the date it went into effect, giving the prosecution and probation department time to review cases and seek restitution orders prior to January 1, 2021. Such was the case for all counties in the State of California—not just Napa County—in regards to AB 1950, and would be the case for any future legislation that would have similar effect on the nature or length of a defendant's sentence. The early termination of probation did not instantaneously slam the door shut on any possibility of victims receiving full restitution; rather, barring oversights by the district attorney and probation department (as was the case here), the courts had several months' notice following the chaptering of AB 1950 to order any final amounts of outstanding restitution.

While there is concern that some victims would not be able to account for all losses prior to the expiration of probation, there must be some level of finality that can be relied upon by defendants as well. Two full years of probation beyond the date of sentencing (and even longer from the date of the crime), is ample time for crime victims to submit claims for restitution. In this case, the district attorney's office received Villa's claim for restitution two months prior to sentencing. (RT 60, 85.) In other

cases, the trial court would have had three months following the signing of the legislation to hold a hearing and set amounts of final restitution.

The purpose of restitution under section 1202.4 is not solely victim compensation; rather, restitution orders also serve the state's interest in punishment as well as a rehabilitation purpose of making amends to society. (*People v. Crow* (1993) 6 Cal.4th 952, 957; *People v. Hume* (2011) 196 Cal.App.4th 990, 1000; *Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 443; *People v. Moser* (1996) 50 Cal.App.4th 130, 135.) Allowing the trial courts to reserve restitution to set an amount beyond the termination of probation would tether probationers to the criminal justice system indefinitely, never allowing them to attain full liberty after serving their sentence for fear of being surprised by new unknown financial burdens years later. *Waters* understood that this was an untenable system: "under the Attorney General's view, a trial court that fails to consider victim restitution in the first instance could order a defendant to pay such restitution decades after probation expires. The trial court could even go so far as to order a defendant's estate to pay restitution after learning of the defendant's death. While we are sensitive to concerns about making crime victims whole, there must be some discernible limit to a trial court's power over a defendant after he or she completes his or her sentence." (*Waters, supra,* 241 Cal.App.4th at p. 831.)

The finality of a criminal case and the court's ability to set new amounts of restitution does not preclude crime victims from

seeking alternative avenues of payment for future related expenses. Those victims who do not believe they have been fully compensated by the criminal restitution order, such as those with ongoing medical bills, still retain the ability to seek civil remedies. "An order of restitution pursuant to section 1202.4 does not preclude the crime victim from pursing a separate civil action based on the same facts from which the criminal conviction arose." (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1132; accord *Kerley v. Weber* (2018) 27 Cal.App.5th 1187, 1197 ["a victim has a right to *both* restitution and a separate civil judgment].) "While a restitution order is enforceable "as if [it] were a civil judgment" [citation], it is *not* a civil judgment. A restitution order does not resolve civil liability." (*Vigilant Ins. Co., supra,* 175 Cal.App.4th at pp. 444-445.)

Therefore, a victim may recover any losses not covered by a criminal sentence, while the defendant is protected from duplicative payments. (See § 1202.4, subd. (j) ["Restitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained against the defendant arising out of the crime for which the defendant was convicted"]; *Vigilant Ins. Co., supra,* 175 Cal.App.4th at p. 446 ["any payments made on the civil judgment must be credited against the restitution order, except to the extent that it includes post-judgment interest, pre-judgment interest accruing between the date of the restitution order and the judgment, and costs"]; accord *Hume, supra*, 196 Cal.App.4th at p. 1001.) Thus, precluding courts from having a lifetime hold over former

probationers will not also preclude victims from seeking due compensation.

CONCLUSION

Once a defendant is discharged from probation, he should be emancipated from further court orders modifying his sentence, including those imposing new amounts of restitution. "[T]o hold otherwise would subject a defendant placed on probation to a lifetime restitution obligation and there would be no end to the restitution orders trial courts could impose on such a defendant." (*Hilton, supra,* 239 Cal.App.4th at p. 769.)

For the reasons set forth above, this Court should reverse the Court of Appeal's holding that the court retained jurisdiction to determine and award victim restitution after probation had terminated.

DATED: December 30, 2022

Respectfully submitted,

By:

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Pursuant to rule 8.520(c)(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 11,097, excluding tables. This brief therefore complies with the rule which limits a computer-generated brief to 14,000 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: 12/30/2022

By:

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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:

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STATE OF CALIFORNIA
Supreme Court of California

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