

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

No. S 212940

Plaintiff and Respondent,

Court of Appeal Case No.
A135733

v.

Sonoma County
Superior Court

WILLIAM J. FORD,

Case No. SCR-530837

Defendant and Appellant.

Appeal from the First District Court of Appeal
Division Three

BRIEF ON THE MERITS

Jane Gaskell, CSB #271387
Law Offices of Andrian & Gallenson
1100 Mendocino Avenue
Santa Rosa, California 95401
Telephone: (707) 527-9381
Facsimile: (707) 526-9051

Attorneys for Defendant/Appellant
WILLIAM J. FORD

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Attorneys for Defendant/Appellant
WILLIAM J. FORD

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BRIEF ON THE MERITS

QUESTION PRESENTED

Does Penal Code section 1202.46 grant the trial court never-ending jurisdiction to modify restitution even after the expiration of probation, and despite the express language of Penal Code section 1203.3, which authorizes modification of the conditions of probation only during the probationary term?

NECESSITY FOR REVIEW

A grant of review and resolution of this issue by this court was necessary to settle an important question of law, involving the rights of probationers who successfully complete probation and the First District Court of Appeal's application of Penal Code section 1202.46, which, until this opinion issued, had not been applied in a case where the defendant was granted probation rather than sent to state prison. (All further references are to the Penal Code, unless otherwise stated.)

SUMMARY OF ARGUMENT

At the time of Mr. Ford's sentencing, the trial court ordered victim restitution in an amount in excess of \$12,000 and granted Mr. Ford probation. By operation of law, payment of all restitution fines and orders become conditions of probation pursuant to section 1202.4(m). Thereafter, modification of the restitution order is authorized under section 1203.3 (b)(5), which allows modification at any time during the term of probation. Consequently, when a victim requests additional restitution, a modification of probation is sought through the trial court. Here, the Sonoma County Probation Department contacted Mr. Ford and attempted to modify his probation. After multiple delays, primarily due to the victim's failure to

furnish appropriate accounting records, the court failed to modify the restitution amount prior to the expiration of Mr. Ford's probation.

The People argued that the original sentence, which contained both a restitution fine and a restitution amount payable directly to the victim, was invalid. Secondly, the People argued that section 1202.46 provides authority for a trial court to impose an additional restitution order at any time, regardless of the expiration of probation. Mr. Ford disagreed, and argued that the plain language of section 1203.3 brings the trial court's jurisdiction to modify probation to an end when the probationary term expires. The trial court determined that it still had jurisdiction to act and issued an additional restitution order after probation had terminated.

Mr. Ford contends that after termination of his probation, any act by the court not supported by either statute or decisional authority is an act in excess of jurisdiction, which is therefore invalid. Mr. Ford did not consent to the court's act of ordering an additional restitution amount. Rather, at the first opportunity, through defense counsel, Mr. Ford challenged the court's jurisdiction and has refrained from engaging in any further litigation of this issue before the trial court.

After argument was heard in Division Three of the First District of the Court of Appeal, the appellate court concurred with the trial court and held that section 1202.46 authorizes the order of additional restitution after the

termination of probation. In light of the unanimous opinion, no Petition for Rehearing was filed.

STATEMENT OF THE CASE

Procedural History

Mr. Ford was involved in a motor vehicle accident resulting in injury on February 2, 2008. He failed to stop his vehicle at the scene of the accident or to provide the identification and vehicle registration information required by law. On August 21, 2008, defendant William J. Ford entered a plea of no contest to one felony violation of Vehicle Code Section 20001(a). On October 9, 2008, imposition of sentence was suspended and Mr. Ford was granted formal probation with standard terms for 36 months. Restitution was imposed in the amount of Twelve Thousand Four Hundred Sixty-Five Dollars and Eighty-Eight Cents (**\$12,465.88**) for victim's medical expenses. Further restitution was reserved.

On January 29, 2010, Ms. Jennings, the pedestrian who was injured in the accident, filed a civil complaint in Sonoma County Superior Court (SCV-246720).

On May 7, 2010, in a letter to the appellant, the Sonoma County Probation Department informed Mr. Ford that he was required to pay restitution in the amount of Two Hundred Eleven Thousand Dollars (**\$211,000**), or Thirteen Thousand One Hundred Eighty-Seven Dollars and

Fifty Cents (**\$13,187.50**) per month. In response, Mr. Ford exercised his statutory right to a hearing on this proposed modification of his probation terms.

The hearing date was initially set September 24, 2010. Thereafter, the hearing date was re-set six times between October 2010 and April 2011. After April 1, 2011, the court and counsel met a further five times before once again re-setting the date of the hearing for August 26, 2011. However, on August 19, 2011, this date was again vacated and the People stipulated that Mr. Ford had requested a timely Restitution Hearing. After further court appearances, the hearing date was re-set for October 5, 2011, four days before Mr. Ford's probation was due to expire. Prior to October 5, 2011, the Probation Department, in the form of an Order Modifying Probation, recommended the aforementioned modification of the conditions of Mr. Ford's probation to the trial court. The proposed Order also contained a specific request that formal probation be extended for 24 months "in order to allow him to pay the ordered restitution." A copy of the letter and proposed Order were attached as an Exhibit to the Appellant's Opening Brief in the Court of Appeal (hereinafter "AOB Exhibit _") as Exhibit A.

At the time set for hearing on October 5, 2011, Mr. Ford stipulated to an extension of his probation. However, the court only extended probation until November 2, 2011. On October 26, 2011, Mr. Ford once again agreed to

a further extension of his probation by another 30 days. On November 2, 2011, all parties settled on extending Mr. Ford's probation until March 30, 2012.

The restitution hearing began on January 27, 2012, and in response to rebuttal, Ms. Jennings was ordered to provide further documents to defense counsel. The hearing was continued until March 1, 2012, at which time the People undertook further direct examination of Ms. Jennings. However, when a subpoenaed defense witness, Officer E. Rhodes of the Santa Rosa Police Department, failed to appear on this second date, the hearing was continued until March 8, 2012. Once again, despite defense counsel's efforts, on March 8, 2012, the witness failed to appear. As a result, Judge DeMeo issued an Order to Show Cause to Officer Rhodes. This Order was vacated the following day after Officer Rhodes appeared before the court in chambers. The hearing was re-set for March 27, 2012.

On March 27, 2012, the hearing was once again continued, this time due to the unavailability of the Deputy District Attorney assigned to the case. A Stipulation and Order to this effect were attached as AOB Exhibit B. The hearing date was re-set for April 6, 2012. No further request or orders regarding probation were forthcoming from either the trial court or the Deputy District Attorney. As previously ordered by the trial court in early November, Mr. Ford's probation terminated on March 30, 2012.

On April 6, 2012, defense counsel made a special appearance on behalf of the Appellant solely to contest the trial court's continuing jurisdiction to enter any order relating to Mr. Ford and his now-terminated probation. During the April 6, 2012 court appearance, the Deputy District Attorney agreed that Mr. Ford's probation had not been extended and consequently had terminated, as indicated on the court docket, a copy of which is attached as AOB Exhibit C. The court asked both parties to brief the issue and set a further hearing date of May 17, 2012.

Both parties filed timely briefs and the hearing took place, as scheduled, on May 17, 2012. The Appellant, who had been present for the multitudinous previous hearings, was not present. The Court concluded it had jurisdiction over the matter and ordered restitution in the amount of Two Hundred Seventy-Five Thousand Seventeen Dollars (**\$275, 017**).

Defense counsel requested an opportunity to research the available options for the Appellant. Although a briefing schedule and further hearing date were initially set, no further proceedings took place in the trial court. On June 15, 2012, the Appellant filed a timely Notice of Appeal.

Statement of Facts

The underlying criminal charges in this case stem from an accident that occurred on February 2, 2008. In light of the guilty plea entered by Mr. Ford, a brief summary of the facts, as stated in the original traffic collision report

authored by Officer Eric Rhodes of the California Highway Patrol, is provided for background information only.

At approximately 8:00 p.m., Ms. Elaine Jennings, accompanied by her dog, began crossing B Street in Santa Rosa, California. As it was raining heavily, Ms. Jennings decided to cross the street without using a crosswalk. Although she saw Mr. Ford's vehicle approaching, she continued crossing the street, mistakenly believing he had seen her. The car struck both Ms. Jennings and her dog. Ms. Jennings' left leg was broken in multiple places. She also sprained her left shoulder, chipped a tooth, and suffered several bruises and abrasions.

Mr. Ford, whose license was suspended, was stopped by a patrol car on 7th Street, just east of Orchard Street. In his statement to the officer on scene, Mr. Ford explained he had seen a dog fly up onto his hood but after he stopped at a subsequent traffic light started to realize the damage appeared to be too substantial to have been caused by a dog. He added he was looking for an opportunity to turn around when he was stopped. Although the investigating officer concluded Ms. Jennings caused the collision by crossing between two controlled intersections outside of a crosswalk in violation of Vehicle Code section 21955, he also recommended that Mr. Ford be charged with felony "hit and run", a violation of Vehicle Code section 20001(a) and a

misdemeanor violation of driving on a suspended license pursuant to Vehicle Code section 14601.1 (a).

Mr. Ford entered a plea of no contest on August 21, 2008 and was subsequently sentenced to formal probation for 36 months. Multiple conditions of probation were imposed, including a six-month county jail sentence. The Court also ordered Victim restitution of Twelve Thousand Four Hundred Sixty-Five Dollars and Eighty-Eight Cents (**\$12,465.88**) for medical expenses.

In May 2010, approximately nineteen months after the sentencing, Mr. Ford's probation officer began the process of modifying the probation conditions by asking Mr. Ford to pay an additional Two Hundred Eleven Thousand Dollars (**\$211,000**) as restitution for losses Ms. Jennings claims were suffered by her small business enterprise during 2008 and 2009 as a result of her injuries. During the partially completed hearing process, Ms. Jennings testified about various profit and loss calculations and taxation issues. Hence, the final amount of the May 17, 2013 court order was significantly higher (at **\$275, 017**) than the initial figure requested.

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ARGUMENT

I.

WHERE A GENERAL STATUTE IS INCONSISTENT WITH A SPECIFIC STATUTE, THE LATTER CONTROLS.

When asked to interpret the language of a statute, the role of the court is “to determine the Legislature’s intent so as to effectuate the law’s purpose.” (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) The starting point is the plain language of the statute, and the words should be given their ordinary and usual meaning. (*People v. Cornett* (2012) 53 Cal. 4th 1261, 1265.) “The plain meaning controls if there is no ambiguity in the statutory language.” (*Ibid.*) It is a widely accepted principle that where a general statute standing alone includes the same matter as a specific statute, therefore creating a potential conflict, the special statute will be considered as an exception to the general statute “whether it was passed before or after such general enactment.” (*People v. Gilbert* (1969) 1 Cal. 3d 475, 479.) Indeed, this principle is so well-settled that it is embodied in the California Code of Civil Procedure:

In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible; and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.
(Cal. Code of Civ. Proc. § 1859.)

This canon of construction is equally applicable in the context of criminal law. As has been stated by this Court in the past, “[t]he fact that the Legislature has

enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply. Indeed, in most instances, an overlap of provisions is determinative of the issue of legislative intent and ‘requires us to give effect to the special provision alone in the face of the dual applicability of the general provision . . . and the special provision. . . .’” (*People v. Jenkins* (1980) 28 Cal. 3d 494, 505-506, citing *People v. Gilbert, supra*, 1 Cal.3d at p. 481.)

Most recently, in an analogous situation in 2011, the instant Court applied this principle to competing statutes in *People v. Murphy, supra*, 52 Cal. 4th 81. The construction doctrine asserted in *Murphy* is commonly referred to as the *Williamson* rule. (*Id.* at p. 86.) This rule mandates that if a general statute includes the same illegal conduct as a special statute, the court infers that the Legislature intended the conduct to be prosecuted exclusively under the special statute. This resulted in a comparison of Vehicle Code section 10501, a statute prohibiting the filing of a false vehicle theft, and Penal Code section 115, which prohibits the offering of a false or forged record for filing with a public office. (*Id.* at p. 94-95.) After analyzing the language of the statutes and the legislative intent, the court concluded the Legislature “in specifying that [the conduct envisaged in Vehicle Code section 10501] constitutes a misdemeanor, intended to create an exception to the felony punishment specified in the more general statute.” In other words, even though Penal

Code section 115 allows for harsher punishment, the existence of Vehicle Code section 10501 was deemed sufficient evidence that the Legislature intended a less serious outcome for the filing of false vehicle theft reports. The specific statute, not the general, controlled the outcome.

Each statute relevant to Mr. Ford's case is discussed in turn below. Like the competing felony and misdemeanor statutes at issue in *Murphy*, in Mr. Ford's case there is overlap and potential conflict. The language of section 1202.46 contains no limitation with regard to timing and application, and therefore would appear to be a general provision. By contrast, sections 1202.4(m) and 1203.3 (b) (5), are limited to cases in which a grant of probation has been made and to the operation of conditions of probation. As such, these latter two sections are specific and therefore, under the principles declared in *Gilbert* and *Jenkins* must be given effect.

II.

THERE IS NO PRECEDENT TO SUPPORT THE ARGUMENT THAT PENAL CODE SECTION 1202.46 AUTHORIZES THE TRIAL COURT TO MODIFY THE TERMS OF PROBATION AFTER PROBATION HAS TERMINATED.

During oral argument before the court on April 6, 2012, the prosecutor claimed that section 1202.46 granted the court never-ending jurisdiction to modify a restitution order that was a condition of probation at any time, even many years, after probation ended. The First District Court of Appeal also opined that section 1202.46 was unlimited by time and should be applied to

probationers as well as state prisoners, regardless of whether probation had terminated.

A review of the applicable history and case law shows this interpretation is contrary to both the legislative purpose and use of section 1202.46.

A. The Victim's Bill of Rights

Following the passage of Proposition 8 in 1982, the Legislature was required to adopt implementing legislation to enact what was known at the Victim's Bill of Rights. (*People v. Giordano* (2007) 42 Cal. 4th 644, 652-653.) Although the early statutes did not "either requir[e] or authoriz[e] trial courts to order defendants who were convicted of crimes but were not given probation to make restitution to any of the victims of their crimes," it did provide initially for mandatory restitution fines and restitution as a condition of probation. (*Ibid.*) In 1986, the addition of Government Code Section 13967 remedied the problem and provided for victim restitution in probation-denied cases. (*Ibid.*) By the mid-1990s, the state's restitution scheme was consolidated into Penal Code Section 1202.4 and the restitution sections of Government Code Section 13697 were deleted. (*Id.* at p. 653.) As the *Giordano* court noted, the Legislature ultimately enacted, and frequently amended, "a bewildering array" of statutes in response to Proposition 8. (*Id.* at p. 652.)

B. The History of Section 1202.46

In 1999, the Legislature enacted Senate Bill 1126 (SB 1126), the purpose of which was to convert the provisions of a Department of Corrections (DoC) pilot project into permanent legislation. (Legis. Counsel's Dig., Sen. Bill No. 1126 (1999 Reg. Sess.). The DoC had developed a system of allowing inmates to appear in court via audio-video communications rather than personally. (*Ibid.*) Enactment of SB 1126 permanently authorized this program under section 1202.41. Similarly, the preceding legislation had also established a pilot program that enabled the State Board of Control to collaborate with the courts regarding the amendment of restitution orders. (*Ibid.*) This pilot included allowing the State Board of Control to determine if the cost of holding a hearing was justified, even where the hearing had not been waived. (*Ibid.*) The bill therefore also sought to specifically provide that restitution hearings could now be conducted using audio-video communications. In addition, section 1202.41(c) contains the mandate that the other provisions within the bill would not be construed as prohibiting "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." (*Ibid.*) In other words, the bill was focused on dealing with a variety of problems relating to

the ability to ensure defendants were able to appear in court when they were already in the custody of Department of Corrections.

This interpretation of the legislative history is further supported by the California Judges Benchguide 83, which provides guidance on how section 1202.46 allows a restitution order after sentencing when the initial amount of restitution is uncertain. In particular, the following 'judicial tip' explains this section's relationship to the problems of transporting inmates from the prison system:

When the defendant is sentenced to prison, it is highly advisable to address restitution prior to the defendant being transported to the prison. If the defendant is transported to prison with a "to be determined" order, it is highly unlikely that the victim will ever be able to obtain a restitution order unless the defendant waives his or her personal appearance at any future hearing. Counties typically cannot afford to bring a prisoner back to the local area for a restitution hearing. If the total amount of losses cannot be determined prior to the defendant being transported, the court should (1) order the amount that can be determined so that the California Department of Corrections and Rehabilitation (CDCR) can start the collection, (2) include an order in the sentence for the defendant to pay any additional restitution in an amount to be determined by the court, and (3) seek a waiver of the defendant's presence at any future restitution hearings. The court may also seek a stipulation that if restitution falls within a certain range, the defendant will agree to restitution and waive a hearing.

(Cal. Judges Benchguide 83: Restitution (CJER 2013), §83.80, p. 83-57.)

The next provision of SB 1126 ultimately provided the language for section 1202.46, which reads as follows:

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. Nothing in this section shall be construed as prohibiting 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 without a finding of compelling and extraordinary reasons pursuant to Section 1202.4.

(Ibid.)

Section 1202.46 must first be read then in conjunction with section 1170, which is the statute from which the court derives its authority for determinate sentencing. Its provisions provide the court with authority to recall the original sentence and re-sentence the defendant. (§ 1170(d).) However, this authority is limited to a 120-day period after the original sentence. *(Ibid.)* Thereafter, under section 1170, the court has no authority to amend the sentence once 120 days have transpired. Where a defendant has been sentenced to state prison, a restitution order must be made at sentencing. (§ 1170(d).) This means any amendment of restitution where the defendant was committed to state prison can only be achieved by a change to the sentence. Hence, without the authority contained within section 1202.46, the court would lose jurisdiction to re-sentence the defendant after the first 120 days of incarceration.

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C. The Case Law

After an extensive review of available case law, there are only six published cases that discuss section 1202.46. The first five cases are summarized as follows:

1. *People v. Giordano* (2007) 42 Cal. 4th 644, 650-651: The defendant was serving a sentence in state prison. The Court of Appeal affirmed defendant's sentence as modified by the restitution order. It agreed with the trial court's determination that Penal Code section 1202.46 granted the trial court jurisdiction to consider the request for restitution seven months after defendant was sentenced. (*Giordano* at p. 650-651.)
2. *People v. Turrin* (2009) 176 Cal. App. 4th 1200: The defendant was serving a sentence in state prison. The trial court had lost jurisdiction to modify defendant's restitution fines; thus, an order denying defendant's motion to modify restitution fines was not appealable post-judgment order.
3. *People v. Brown* (2007) 147 Cal. App. 4th 1213: The defendant was serving a sentence in state prison. The only reference to 1202.46 relates to the court's authority to imposing a restitution order after the initial sentencing. This case involved withdrawal of plea after the restitution amount was altered from the original agreement.
4. *People v. Zackery* (2007) 147 Cal. App. 4th 380: The defendant was serving a sentence in state prison. The issue is the procedure to be adopted when the court, under the authority of 1202.46, corrects a what is deemed a clerical error at the original sentencing.
5. *People v. Moreno* (2003) 108 Cal. App. 4th 1: The defendant was serving a sentence in state prison. This case stands for the proposition that under 1202.46, a sentence is considered invalid if the court at the initial sentencing had neither ordered restitution nor found "compelling and extraordinary reasons" for ordering less than full restitution.

The sixth and final case is *People v. Bufford* (2007) 146 Cal. App. 4th 966, wherein the Court of Appeal affirmed a trial court's ability to impose restitution after the defendant had completed her state prison sentence. (*Id.* at p. 971-972.) Of particular note is the court's reliance on the procedural history, i.e. that it was the defendant who caused the delay in setting the restitution amount because an appeal was pending and she refused to testify until the outcome of the appeal was affirmed. (*Ibid.*) *Bufford* is the only case that makes any reference to section 1203.3, the statute allowing modification of restitution during the period of probation. At footnote 4, the court notes:

Section 1203.3 does not apply in this case, because defendant was not placed on probation. [...]
(*Bufford* at p. 970, footnote 4.)

As with every other published case in which section 1202.46 is discussed, *Bufford* involves a defendant who was sentenced to state prison. In its opinion, the First District dismisses the importance of this footnote. However, at a minimum, it does serve to emphasize that the *Bufford* defendant was not on probation and the *Bufford* opinion contained no discussion about how the provisions of section 1203.3 might apply outside of the realm of state prison sentences.

Moreover, *Bufford* is distinguishable. Although requested by the prosecutor, no restitution order was actually made. (*Bufford* at p. 971-972.) That is simply not so in Mr. Ford's case. Restitution was ordered at the time

of sentencing. The question presented by Mr. Ford relates to the later modification of restitution, not the original imposition of direct victim restitution.

A review of the origins of the statute and the subsequent case law demonstrates that section 1202.46 was clearly intended to provide the court with authority to act with regard to restitution once the defendant was imprisoned and potentially unable to return for a further hearing. Hence, there is no precedent with which to support the contention in the lower courts that section 1202.46 is applicable to his situation.

III.

MR. FORD'S SENTENCE WAS NEITHER ILLEGAL NOR INVALID.

On a related note, the People also argued in the trial court that the sentence would be illegal or invalid if the court failed to change the amount of restitution. This is not so. Such an assertion is not supported by either statutory language or the case law. Rather, “[w]here the court fails to issue an award altogether . . . the sentence is invalid. [Citation.]” (*People v. Rowland* (1997) 51 Cal. App. 4th 1745, 1751.) And section 1202.46 itself describes a sentence as being invalid “due to the omission of a restitution order or fine.”

Here, nothing was omitted. Both fines and direct victim restitution were ordered. The trial court did as it was obliged to do, and the sentence complied with the requirement of the section 1202.4 (f) that the defendant be ordered to pay victim restitution.

IV.

MR. FORD WAS GRANTED PROBATION AND AS A RESULT OF THE APPLICATION OF SECTION 1202.4(m), THE ORIGINAL RESTITUTION ORDER BECAME A CONDITION OF PROBATION.

There are multiple requirements included in the probation statutes found in section 1203.3 et seq. Of particular import to this case is section 1202.4 (m), which provides:

In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation. Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied.

(Ibid.)

Hence, by operation of law, pursuant to section 1202.4(m), where probation is granted, all restitution orders must become conditions of probation.

At his sentencing on October 9, 2008, Mr. Ford was granted probation. He was also ordered to pay a restitution fine of Four Hundred Forty dollars (\$440) and restitution of Twelve Thousand Four Hundred Sixty-Five Dollars and Eighty-Eight Cents (\$12,465.88) directly to the victim. (See AOB Exhibit C.) Therefore, just as required by section 1202.4 (m), payment of both of these imposed amounts indisputably became conditions of Mr. Ford's probation. The court's intent was clear. Restitution was ordered at the time of sentencing and any further modification was to be carried out through the usual probationary procedures. Further confirmation of this is derived from

the fact that it was the Sonoma County Probation Department who instigated this proceeding by attempting to both modify and extend Mr. Ford's probation, as shown on the Order Modifying Probation. (AOB Exhibit A.)

Thus, as in all cases where probation has been granted, the restitution in Mr. Ford's case was no longer a sentencing issue, but rather it became a condition of probation. All orders made by the trial court were therefore governed by the probationary scheme.

V.

SECTION 1203.3 IS THE SOURCE OF THE COURT'S AUTHORITY TO MODIFY PROBATION: WHEN PROBATION TERMINATES, THE COURT NO LONGER HAS ANY JURISDICTION TO MODIFY THE PREVIOUSLY-IMPOSED CONDITIONS OF PROBATION.

Grants of probation are governed by sections 1203 et seq. Section 1203.3 is most relevant to Mr. Ford's situation and grants the court broad discretion to modify the conditions of probation. As section 1203.3 (a) expressly states, the court has authority *at any time during the term of probation* to revoke, modify, or change its order of suspension of imposition or execution of sentence. Further, modification of restitution is specifically addressed in section 1203.3 (b)(4) & (5), which provides:

(4) 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. The court shall not modify the dollar amount of the restitution obligations due to the good conduct and reform of the defendant, absent compelling and extraordinary reasons, nor shall the court limit the ability of

payees to enforce the obligations in the manner of judgments in civil actions.

(5) Nothing in this section shall be construed to 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*.

(*Ibid.*) (Emphasis added.)

Therefore, it is axiomatic that an order revoking or modifying probation must be made during probation. (*People v. White* (1982) 133 Cal. App. 3d 677, 682-683; *In re Daoud* (1976) 16 Cal. 3d 879, 882; *People v. DePaul* (1982) 137 Cal App 3d 409, 412; see also, *In re Griffin* (1967) 67 Cal.2d 343, 347; *People v. Smith* (1970) 12 Cal.App.3d 621, 625; *People v. Blakeman* (1959) 170 Cal App 2d 596; *People v. Blume* (1960) 183 Cal App 2d 474.) Where no such order is made, “the probationary period terminates automatically on the last day. [Citations.] 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. [Citation.]” (*People v. White, supra*, at p. 682-683.)

Furthermore, *In re Daoud, supra*, 16 Cal. 3d 879 also explains once lost, “a court cannot revive lapsed jurisdiction by the simple expedient of issuing an order nunc pro tunc. [Citation.]” (*Id.* at p. 882.) And, failure to act within the term of probation is judicial, not clerical error, hence “it is well settled

that judicial error cannot be corrected once jurisdiction has expired. [Citations omitted.]” (*Ibid.*)

Hence, while he was on probation, the court had jurisdiction over Mr. Ford, and was statutorily empowered to modify the conditions of his probation. However, the authority provided by section 1203.3 came to an end on March 30, 2012, when Mr. Ford’s probation terminated automatically, at which point the court lost the jurisdiction to make further orders relating to this case. As stated in *In re Daoud*, this was judicial not clerical error, and therefore the court cannot issue an order nunc pro tunc to overcome the lapse in jurisdiction.

Moreover, as stated in the Declaration of Chris P. Andrian (AOB Exhibit D), the continuing and lengthy delays in this case were primarily the result of the People’s inability to provide promised documents relating to Ms. Jennings’ business finances. Indeed, the court refused to set a hearing between April 2011 and August 2011 due to the lack of documentation. Meanwhile, Mr. Ford made himself available at numerous court dates, abided by the court’s orders, and continued through his probationary period without incident. As stipulated to by the People, when the end of his probation was looming, Mr. Ford made a timely request for the hearing to be set prior to the original probation termination date.

Thus, Mr. Ford was no longer subject to probation and therefore the trial court had no mechanism through which to make valid orders modifying any previously imposed terms and conditions of probation.

VI.

THE TRIAL COURT'S IMPOSITION OF A MODIFIED RESTITUTION ORDER AFTER THE TERMINATION OF PROBATION WAS AN ACT IN EXCESS OF JURISDICTION TO WHICH MR. FORD DID NOT CONSENT.

A. While the court did not lack fundamental jurisdiction, the court acted in excess of its power.

“A lack of jurisdiction in its fundamental or strict sense results in ‘an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’ [Citation.] (*People v. Lara* (2010) 48 Cal.4th 216, 224–225.) As case law explains, “[n]either the probation statutes nor the cases applying them support a holding that expiration of the probationary period terminates the court’s jurisdiction of the subject matter.” (*In re Bakke* (1986) 42 Cal. 3d 84, 89.) Indeed, probation statutes themselves contemplate that such fundamental jurisdiction continues, for they provide for the court’s determination of certain matters after the end of the probationary term. (*Ibid.*)

However, while a court “may have jurisdiction in the strict sense”, it may “nevertheless lack ‘jurisdiction’ (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.]” (*People v. Lara, supra*, 48 Cal.4th

at p. 225.) When a court acts outside the bounds of its power, it is said to have acted in excess of jurisdiction. (*Ibid.*)

Mr. Ford does not argue that the trial court lacked fundamental jurisdiction over the subject matter. Rather, while the court does have certain enumerated powers, which enable it to act after probation expires, perhaps the most commonly used being the power to expunge convictions, there is simply no statutory authority which allows a trial court to modify a condition of probation after termination. The durability of section 1203.3 is discussed above: It is the source of the court's authority for modifying probation and ends when probation is complete. Of course there can be no doubt the Legislature intended to ensure victims of criminal behavior receive appropriate restitution. However, the current penalogical scheme embodied within section 1202.4 et seq. more than adequately allows for this both at the imposition of sentence and through the subsequent probationary procedures. The court here seeks to expand its reach without support from either statutory or decisional authority.

B. Mr. Ford did not consent to the court's act in excess of jurisdiction and should not be estopped from raising the issue on appeal.

It is well settled that when a court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. (*City of Los Angeles v. Cole* (1946) 28 Cal.2d 509, 515;

Guardianship of Di Carlo (1935) 3 Cal.2d 225, 228-229; *People v. Patrich* (1897) 118 Cal. 332, 333; *Hoshour v. County of Contra Costa* (1962) 203 Cal.App.2d 602, 605; *Phillips v. Beilsten* (1958) 164 Cal.App.2d 450, 457.) Hence, in contrast to fundamental jurisdiction, where a court's order is in excess of jurisdiction "is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time." (*People v. Lara, supra*, at p. 225.) However, a defendant will be excused from the necessity of a timely objection if such an objection would be futile. (*People v. Hill* (1998) 17 Cal. 4th 800, 820; *People v. Arias* (1996) 13 Cal. 4th 92, 159; *People v. Noguera* (1992) 4 Cal. 4th 599, 638; *People v. DeFrance* (2008) 167 Cal. App. 4th 486, 501.) In addition, a defendant will not be estopped from raising an issue on appeal if the issue calls into question "the functioning of the courts and in some instances on other considerations of public policy." (*City of Los Angeles v. Cole, supra*, at p. 515.)

Here, Mr. Ford was present and ready to continue the hearing scheduled on March 27, 2012. However, prior to entering the courtroom, the Deputy District Attorney informed defense counsel that she was required to return to another courtroom to resume a partially-complete preliminary hearing and would not be able to move forward that afternoon with Mr. Ford's hearing. This issue was not clear from the very brief transcript of the proceedings before Judge DeMeo. Therefore, a Stipulation and Order to

Modify the Record has been attached to this brief. Any objection to the District Attorney's unavailability would have therefore been futile and Mr. Ford should not be estopped from asserting on appeal that the trial court acted in excess of its jurisdiction.

VII.

APPLICATION OF SECTION 1204.46 TO PROBATIONERS WILL DEFEAT THE REHABILITATIVE PURPOSE OF PROBATION, CREATE A WHOLE NEW FIELD OF LITIGATION, AND OVERRIDE THE CONCEPT THAT ALL CLAIMS ARE SUBJECT TO A STATUTE OF LIMITATIONS.

"Probation is not a form of punishment. It is an act of clemency in the discretion of the trial court." (*People v. Morrison* (1980) 109 Cal. App. 3d 378, 383, citing *People v. Phillips* (1977) 76 Cal.App.3d 207, 213.) Further, "the primary purpose of granting probation instead of the imposition of sentence to an incarcerating institution is to help the defendant rehabilitate himself." (*People v. Matranga* (1969) 275 Cal. App. 2d 328, 332.)

As discussed above, the current probation scheme encompasses multiple provisions that deal specifically with restitution orders. Put simply, as part of the grant of probation: any restitution ordered becomes a condition of probation; a restitution condition, like other probation conditions, can be modified during the term of probation; when a probationer is approaching the end of his probationary period, he must file an updated financial disclosure statement in direct contemplation of the continuing obligation to pay (*People v. Holman* (2013) 214 Cal. App. 4th 1438, 1457, citing section

1202.4, subdivision (f)(11).); and once probation is complete, the criminal restitution order can be enforced in the same manner as a civil judgment . (*Id.* at p. 1453 [“any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied.”].) In other words, the Legislature has promulgated multiple specific statutes relating to a probationer’s obligations with regard to restitution and a victim’s rights are already well-protected.

In Mr. Ford’s case, as was required by statute, a restitution order was made at sentencing. Likewise, the amount he was ordered to pay became a condition of his probation. Ms. Jennings exercised the right available to sue him in civil court. And, again as envisaged by the probation statutes, Ms. Jennings was also able to request modification of the criminal restitution order through the Sonoma County Probation Department. Finally, in keeping with section 1214, the restitution amount in place at the end of probation can be converted to a civil judgment. The Legislature has provided adequate protection for the right of victims through the existing provisions.

To now ignore the plain meaning of those specific provisions in favor of a general statute enacted in response to a problem with the transportation of state prison inmates not only violates the usual rules of statutory construction but also potentially opens the flood gates to future litigation for

millions of former, current, and future probationers. The total adult probation population supervised in California in 2007 was roughly 350,000. (Legis. Analyst., *Achieving Better Outcomes for Adult Probation*, May 29, 2009.) Given probation is commonly imposed over a three to five year period, even a conservative estimate would place the number of former probationers in the millions.

In *People v. Jones* (2010) 187 Cal. App. 4th 418, the Third District Court of Appeal recently touched on the question of limitless liability with regard to victim restitution:

In the words of Prosser and Keeton: '[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."' [Citation.] (*Id.* at p. 425.)

The *Jones* case holds that it is reasonable to apply the principles of proximate cause found in tort law to victim restitution, and adds "the law must impose limitations on liability for victim restitution other than simple direct causality or else a defendant will face infinite liability for his or her criminal acts, no matter how remote the consequence." (*People v. Jones, supra*, 187 Cal. App. 4th 418, 425.) In analogous fashion, in 2010 the Second District Court of Appeal also recognized that "[e]ndless litigation, in which nothing was ever finally determined, would be worse than occasional

miscarriages of justice' (*Pico v. Cohn* (1891) 91 Cal. 129, 134; accord, *United States v. Throckmorton* (1878) 98 U.S. 61, 68–69; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11.) (DeLouize, *supra*, 32 Cal.4th at p. 1232.)” (*People v. Nesbitt* (2010) 191 Cal. App. 4th 227, 242.)

Perhaps the most dangerous aspect of the appellate opinion in this case is this potential to introduce a whole new area of litigation into criminal courts up and down the state. Probationers, like every other litigant in the California judicial system, are surely entitled to knowing that their rehabilitation and punishment is complete? As the Second District said:

The concept of finality rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.

(*People v. Nesbitt* (2010) 191 Cal. App. 4th 227, 242.)

With the exception of only the most extreme criminal acts, every potential legal complaint is subject to a statute of limitations. The policy reasons for these statutes are as old as the American legal system itself: “Statutes of limitations have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims. (*Telegraphers v. Ry. Express Agency* (1944) 321 U.S. 342, 348-349; *Shain v. Sresovich* (1894) 104 Cal. 402, 406.)”. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal. 3d 773, 787.)

CONCLUSION

If the First District's opinion is allowed to stand, the rehabilitative purpose of probation will be defeated. Former, current and future probationers will face a lifetime of post-conviction litigation through the criminal justice system. They will be forced to defend claims that grow ever more staler by the year. Opening the door to these types of claims will create a brand new area of litigation, overwhelm the already-overloaded criminal court system, and nullify the very purpose of California's probationary scheme.

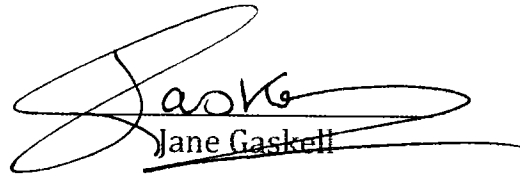
The concept of never-ending authority to impose victim restitution espoused by the trial court and the People flies in the face of logic. The purpose of punishment is fulfilled when a sentence is imposed and served, and when a grant of probation is completed. To allow the re-opening of the question of restitution after the completion of every other aspect of a sentence would subject an otherwise rehabilitated criminal defendant to a lifetime penalty. There is no other aspect of probation that can be re-imposed or amended after probation is complete. For example: jail time cannot be re-imposed; the former probationer cannot be forced to attend educational classes; and the former probationer cannot have his rights under the Fourth Amendment removed or reduced by making him subject to search and seizure terms at the hands of law enforcement. Most importantly, the

Legislature has already provided multiple opportunities for crime victims to request and enforce restitution orders issued by the criminal courts. The First District's opinion reaches into perpetuity and is a step too far.

Mr. Ford respectfully requests that this Court overturn the decision of the First District Court of Appeal and invalidate the restitution order issued by the trial court in this matter.

Dated: January 14, 2013

Respectfully submitted,



Jane Gaskell

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIAM J. FORD,

Defendant and Appellant.

No. S 212940

A 135733

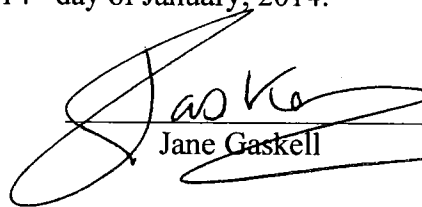
Superior Ct. No. SCR-530837

(Superior Court of Sonoma County)

CERTIFICATE OF WORD COUNT

I, Jane Gaskell, appellate counsel of record for WILLIAM J. FORD in this matter, do hereby certify that according to Microsoft Word, the word processing program used to generate the PETITION FOR REVIEW, the word count of the brief is 7374.

Executed at Santa Rosa, California this 14th day of January, 2014.


Jane Gaskell

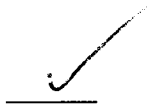
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Law Offices of Andrian & Gallenson, attorneys for Defendant and Appellant William J. Ford, and is a person of such age and discretion to be competent to serve papers. The undersigned certifies that she caused copies of Appellant's **BRIEF ON THE MERITS** and **CERTIFICATE OF WORD COUNT** in the case entitled People v. Ford, Supreme Court No. S212940, to be served on the parties in this action, addressed as follows:

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San Francisco, California 94102-7004

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Supreme Court of California
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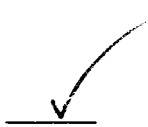
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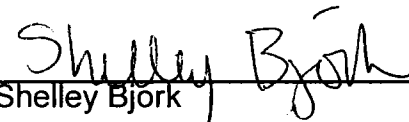
Honorable Bradford Demeo
Sonoma County Superior Court
600 Administration Drive
Santa Rosa, California 95403

Sonoma County District Attorney
Attention: Robin Hammond
Hall of Justice, Room 212-J
600 Administration Drive
Santa Rosa, California 95403



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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 and that this declaration was executed on **January 14, 2014** at Santa Rosa, California.



Shelley Bjork