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No. S276303

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

SCOTLANE MCCUNE,
Defendant and Appellant.

First Appellate District, Division Five, Case No. A163579
Napa County Superior Court, Case No. CR183930
The Honorable Mark S. Boessenecker, Judge

ANSWER BRIEF ON THE MERITS

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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

Crime victims have both a constitutional and a statutory right to receive full restitution for their losses. (Cal. Const., art. I, § 28, subd. (b)(13); Pen. Code, § 1202.4, subds. (a)(1), (f).)[1] In those cases where the amount of restitution cannot be ascertained at the time of sentencing, sections 1202.4 and 1202.46 operate in conjunction to extend a trial court's jurisdiction to determine the amount of victim restitution. (§§ 1202.4, subd. (f), 1202.46.) Section 1202.4 states that "[i]f the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court," which "shall order full restitution." (§ 1202.4, subd. (f).) Section 1202.46 provides that, in such a case, "the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined." (§ 1202.46.)

Appellant Scotlane McCune argues that these provisions extending jurisdiction to determine the amount of restitution do

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

not apply in probation cases. He relies in particular on section 1203.3, which states that a trial court "has the authority at any time during the term of probation to revoke, modify, or change" a probation order. (§ 1203.3, subd. (a).) Subdivision (b)(5) of that statute more specifically states that a trial court is not prohibited from "modifying the dollar amount of a restitution order . . . at any time during the term of probation." (§ 1203.3, subd. (b)(5).) Appellant contends that these provisions operate—at least by implication—to restrict a court's authority by requiring it to fix a probation amount during, and not after, a probation term.

But section 1203.3 governs a different scenario from the one addressed by sections 1202.4 and 1202.46. When a court has imposed restitution in a probation case, and has been able to determine the amount of the victim's losses, then section 1203.3 operates to preclude alteration of that amount after the probationary term has ended. Or, if the court fails to impose restitution altogether as a condition of probation, it would lack the authority to impose restitution after the termination of probation. Sections 1202.4 and 1202.46, on the other hand, apply in any case—regardless of disposition—where a court imposes restitution at the time of sentencing but cannot ascertain the amount. In that situation, a court is permitted to fix the restitution amount at such time as the losses can be determined, even if that occurs after probation (or service of a custodial sentence) has ended. Although the language of section 1202.46 refers to this as "imposing or modifying" restitution, it is clear when read in conjunction with section 1202.4 that in doing so the

court is simply fulfilling the terms of the restitution order previously imposed at the time of sentencing.

Appellant does not appear to contest that a restitution calculation under section 1202.46 may be made even after a prison term has been completed. But he offers no persuasive explanation for why probation should be treated differently. Nothing in the statutory text, the legislative history, or the decisional authority addressing the probation statutes provides any support for such an interpretation. Indeed, the constitutional mandate for full restitution focuses on restoring losses incurred by victims of crime. In light of that goal, there is no sound reason why the approach to imposing and calculating restitution should depend on the particular disposition of a criminal case in the way appellant contends.

Thus, in any case where a court has ordered restitution at the time of sentencing and the record indicates that the amount cannot be determined at that time, the court retains jurisdiction under sections 1202.4 and 1202.46 to fix the amount at such time as the losses can be determined. Such jurisdiction continues, in a probation case like appellant's, even after the probation term has ended.

STATEMENT OF THE CASE

A. Appellant's crime, plea, and placement on probation

Around 9:55 p.m. on June 10, 2017, a California Highway Patrol Officer responded to the scene of a traffic collision where

he found a car crashed head-on into a tree. (5RT 204-205.)[2] The car appeared to be totaled, and a person who appeared to have been a passenger in the car was lying on the ground being treated by medical personnel. (5RT 205, 206.)

At the hospital later that night, the passenger told the officer that appellant, his friend, "accelerated the vehicle at a high rate of speed, lost control, and collided into the tree." (5RT 209-210.) The passenger said the vehicle started smoking and appellant helped him out of the vehicle before fleeing the scene. (5RT 210.) The passenger suffered a severely broken hip and other injuries. (5RT 210-212.)

The officer also spoke to appellant at the hospital. (5RT 212-213.) Appellant admitted he was the driver, confirmed the passenger's story about how the accident happened, and stated that he fled after helping the passenger out of the car. (5RT 213.) Appellant, who did not have a driver's license, admitted to the officer that he knew what he did was wrong. (5RT 213-214.) He said that he fled the scene because he was scared and in shock. (5RT 215.)

Appellant was charged in a criminal complaint with felony hit and run with injury (Veh. Code, § 20001, subd. (a)), misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)), and an infraction for driving without evidence of financial responsibility (Veh. Code, § 16028, subd. (a)). (CT 7-9.)

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[2] Because this case involves a no-contest plea, the facts are taken from the preliminary hearing transcript.

After the preliminary hearing, the trial court declined to reduce appellant's hit-and-run charge from a felony to a misdemeanor. (5RT 221-222.) The court stated:

> I'm concerned about restitution in this matter, and that's an issue, a big issue in my mind. And Mr. McCune's conduct on this date to me is somewhat aggravated in that he caused this accident. Yes, he did take the passenger out of the vehicle, but that's all he did. And certainly didn't comply with Vehicle Code Section 20003 and wait for a police officer or an ambulance to make sure that [the passenger] would be transported—properly transported to [] the hospital to take care of his injuries, which was part of his obligation under 20003.

(5RT 221-222.) Thereafter, an information issued charging appellant with felony hit and run with injury (Veh. Code, § 20001, subd. (a); count 1), and misdemeanor driving without a license (Veh. Code, § 12500, subd. (a); count 2). (CT 26-27.)

Pursuant to a negotiated disposition, appellant pleaded no contest to the hit-and-run charge, stipulating to a factual basis for the plea based on the evidence presented at the preliminary hearing, and the trial court granted the prosecution's motion to dismiss the charge of driving without a license. (12RT 855-857; CT 40-42.) Paragraph three of the plea form signed by appellant stated, "I understand that I may be ordered to pay restitution to the victim(s), if any. I may request a hearing." (CT 41.) Paragraph four discussed the specific terms of his plea, including: "Plea to ct one; NISP, 5 years formal probation. Probation can terminate after 3 years if restitution has been paid in full . . . full victim restitution/Dismiss count two." (CT 41.)

The trial court suspended imposition of sentence and placed appellant on five years' formal probation under the terms and conditions recommended by the probation department. (13RT 909; CT 60-64.) One of the terms required appellant to "[p]ay restitution to [the passenger] and/or the California Victim Compensation & Government Claims Board in an amount to be determined by the Probation Officer and the Court." (CT 63.) The specific amount of victim restitution was unknown at the time of sentencing because the passenger was still receiving medical bills. (CT 69, 108.) Appellant agreed to comply with all terms of probation. (13RT 909-910.)

The probation department submitted two restitution investigation reports to the trial court during appellant's probation term. The first report mistakenly indicated that the victim had not requested restitution. (CT 84.) The second report, submitted a few months later, indicated the initial report was "submitted in error." (CT 85.) The new report stated, "Upon further review, the victim . . . had submitted restitution bills to the District Attorney's office in April 2018, totaling $30,166.23 for medical services provided to him." (CT 85.) The report then stated, "The amount of restitution owed to [the passenger], a victim or person otherwise entitled to restitution in this matter, is $30,166.23; pertaining to the following losses: medical services provided." (CT 85.)

B. Intervening legislation, termination of probation, and restitution hearing

Effective January 1, 2021, while appellant was still on probation, the Legislature enacted Assembly Bill No. 1950 (2019-

2020 Reg. Sess.), Stats. 2020, ch. 328 (A.B. 1950), which amended section 1203.1, subdivision (a), to reduce the maximum felony probation term to two years subject to certain exceptions not relevant here. (Stats. 2020, ch. 328, §§ 1, 2.) By this time, appellant had been on probation for over two years of his five-year term. (13RT 905 [sentencing on June 13, 2018].)

On January 14, 2021, the probation department, in conjunction with the district attorney's office, filed a petition and order pursuant to A.B. 1950 recommending that probation be terminated for more than 50 probationers, including appellant, whose maximum probation terms were reduced as a result of A.B. 1950. (CT 133–135.) The petition stated that "[i]f restitution is outstanding in any matter, a CR-110 form has been completed and submitted on behalf of the victim." (CT 133.) The trial court granted the petition and terminated probation as to the named probationers under the condition that "[i]n all cases being terminated from probation supervision pursuant to AB 1950, the defendant will continue to be required to pay all outstanding victim restitution balances as well as fines and fees ordered by the Court to GC Services after termination of their probation supervision." (CT 135.)

Just over a week after probation was terminated, the district attorney filed a request to place the matter on calendar for a restitution hearing. (CT 86.) At the hearing, the parties were ordered to brief whether restitution could still be ordered after probation was terminated. (14RT 916-919.)

In its brief, the prosecution argued that appellant implicitly consented to the probation department determining the amount of restitution when he signed his plea agreement, and that the probation department's December 30, 2020, report setting the restitution amount constituted a valid, enforceable restitution order under section 1203.1k. (CT 89-95.) In the alternative, the prosecution argued that under the plain language of sections 1202.4 and 1202.46, the trial court retained jurisdiction to fix the restitution amount after probation terminated. (CT 95-100.) The prosecution also appealed to the inequities that would result if the victim were denied restitution through no fault of his own. (CT 100-101.)

In response, appellant's brief argued that the terms of probation required that the court, not the probation department, determine the restitution amount, and that the probation investigation report did not constitute a court order. (CT 123.) Appellant further argued that the court did not set the probation amount before appellant's probation expired and that it lost jurisdiction to determine that amount upon expiration of probation. (CT 123.)

The parties reiterated their arguments at a subsequent hearing, and the trial court ruled that it had jurisdiction to determine the amount of restitution in appellant's case under both of the prosecution's arguments, commenting in part, "I don't think the Legislature ever intended to have someone who is already on probation who needs to pay restitution to just sort of all of a sudden get a windfall and not have to be responsible for

it." (18RT 1117-1131.) After several continuances, the parties stipulated to a total of $21,365.94 in victim restitution. (22RT 1354-1355.) Defense counsel restated his objection to the court's continuing jurisdiction over restitution after appellant's probation was terminated. (22RT 1355-1356.)

C. The Court of Appeal's decision

Appellant timely appealed, challenging the trial court's determination that it retained jurisdiction to fix the amount of victim restitution after probation had been terminated. (Opn. 1.) The Court of Appeal affirmed, agreeing with the trial court that it retained jurisdiction to determine the amount of victim restitution under sections 1202.4 and 1202.46, irrespective of appellant's probation status. (Opn. 1.)

The Court of Appeal observed: "Because the amount of restitution was uncertain at the time of sentencing, the trial court followed the procedure in section 1202.4: it ordered restitution in an amount to be determined by the court, and it set the restitution later when the amount could be ascertained. (§ 1202.4, subd. (f).)" (Opn. 5.) The Court of Appeal further reasoned that "[i]t is immaterial that the court set the amount after McCune's probation had been cut short by a change in law," as "[s]ection 1202.46 expressly preserves the court's jurisdiction to follow the process in section 1202.4, which serves the constitutional mandate to ensure full victim restitution." (Opn. 5.)

The Court of Appeal went on to reject appellant's argument that section 1203.3 conflicts with section 1202.4 and 1202.46 by

requiring that a court determine the amount of restitution during the probation period. (Opn. 5-8.) The Court explained:

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

(Opn. 7.) The court reasoned that this interpretation of the statutes "gives meaning to the language in section 1202.46 granting a court 'jurisdiction' to set restitution," "serves the constitutional mandate that crime victims shall be awarded full restitution," and avoids a conflict with *People v. Bufford* (2007) 146 Cal.App.4th 966, "which adopts a similarly straightforward interpretation of the statute in a non-probation case." (Opn. 7.)

ARGUMENT

SECTIONS 1202.4 AND 1202.46 EXTEND A TRIAL COURT'S JURISDICTION TO FIX THE AMOUNT OF VICTIM RESTITUTION "UNTIL SUCH TIME AS THE LOSSES MAY BE DETERMINED," REGARDLESS OF WHETHER PROBATION HAS TERMINATED

Termination of appellant's probation after the passage of A.B. 1950 did not deprive the trial court of jurisdiction to determine the amount of victim restitution ordered at sentencing

pursuant to sections 1202.4 and 1202.46. Because the trial court ordered that restitution be paid, but deferred calculation of the amount at the time of sentencing, section 1202.46 extended the trial court's jurisdiction to fix the amount "until such time as the losses may be determined." There is no statutory or other restriction that terminated the court's jurisdiction when appellant's probationary period ended. This interpretation accords with the plain language of the relevant statutory provisions governing restitution, fulfills California's constitutional and statutory mandates that crime victims receive full restitution for economic losses suffered as a result of a crime, and gives victims an equal opportunity to receive full restitution no matter whether the defendant was placed on probation or sentenced to prison.

A. Principles of statutory construction

"'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) To properly ascertain the Legislature's intent, a reviewing court "must first look at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400.) "If there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and courts "need not resort to legislative history to determine the statute's true meaning." (*Id.* at pp. 400-401.)

To the extent the statutory text is ambiguous, a reviewing court may look to extrinsic interpretive aids, including the ostensible objectives to be achieved and the legislative history. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.) Ultimately, a court should adopt "the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Ibid.*, internal quotation marks and citations omitted.)

With respect to restitution statutes specifically, this Court has long noted that, to properly fulfill the intent of the People, such statutes are to be broadly and liberally construed. (See *People v. Stanley* (2012) 54 Cal.4th 734, 737 ["'In keeping with the [voters'] "unequivocal intention" that victim restitution be made, statutory provisions implementing the constitutional directive have been broadly and liberally construed'"].)

B. The California Constitution and implementing legislation unambiguously require that crime victims receive full restitution for economic losses suffered as a result of a crime

"In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights." (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) "Proposition 8 established the right of crime victims to receive restitution directly 'from the persons convicted of the crimes for losses they suffer.'" (*Ibid.*, quoting Cal. Const., art. I, § 28, former subd. (b).) "The initiative added article I, section 28, subdivision (b) to the California Constitution: 'It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of

the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.'" (*Ibid.*)

Proposition 8 marked a significant change in the law, which until that time had provided that a trial court's decision to impose victim restitution as a condition of probation was discretionary in nature. (*Giordano*, *supra*, 42 Cal.4th at p. 652.) But the constitutional amendment was not self-executing and it required the Legislature to adopt implementing legislation during the calendar year following its adoption. (Cal. Const., art. I, § 28, former subd. (b).) In accord with this constitutional mandate, the Legislature enacted several statutory provisions governing different aspects of victim restitution. (See *Giordano*, at pp. 652-653 [discussing development of restitution legislation].)

By the mid-1990's, the Legislature had consolidated much of its piecemeal restitution scheme into section 1202.4, deleting or repealing those sections that were subsumed therein. (*Giordano*, *supra*, 42 Cal.4th at p. 653.) "The 1994 amendments to Penal Code section 1202.4 were enacted 'to expand the ability of the victims to receive restitution, both directly and from the restitution fund.'" (*Ibid.*, quoting Assem. Com. on Public Safety, analysis of Assem. Bill No. 3169 (1993-1994 Reg. Sess.) as amended Apr. 4, 1994, p. 2.) The Legislature also expanded the trial court's jurisdiction for purposes of imposing and modifying

victim restitution when it cannot be determined at sentencing by adding section 1202.46 to the Penal Code effective January 1, 2000. (Stats. 1999, ch. 888, § 3.)

In 2008, California voters passed Proposition 9, the Victims' Bill of Rights Act of 2008 (Marsy's Law), which "substantially amended article I, section 28 of the California Constitution" to "make clear that a crime 'victim' is entitled, among other things, '[t]o restitution' (Cal. Const., art. I, § 28, subd. (b)(13))." (*People v. Runyan* (2012) 54 Cal.4th 849, 858-859.) Proposition 9 removed the exception that allowed trial courts to impose less than full restitution for "compelling and extraordinary reasons," and rewrote section 28 of the Constitution to include 17 specific and expansive victim rights, including restitution. (See *People v. Pierce* (2015) 234 Cal.App.4th 1334, 1338, fn. 2; *Slaieh v. Superior Court of Riverside County* (2022) 77 Cal.App.5th 266, 272; Cal. Const., art. I, § 28, subd. (b)(13).)

In accordance with the constitutional mandate, section 1202.4 as currently written requires that full restitution be ordered in every case where a victim suffers an economic loss resulting from a crime, regardless of whether probation is granted. (§ 1202.4; *Giordano*, *supra*, 42 Cal.4th at p. 653.) Subdivision (a)(1) unambiguously declares, "It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." (§ 1202.4, subd. (a)(1).) To implement this goal, section 1202.4 directs a trial court to order a defendant to pay "[r]estitution to the victim

or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment." (*Id.* at subd. (a)(3)(B).) Subdivision (f) of that section provides:

> [I]n 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. . . . *The court shall order full restitution.*

(§ 1202.4, subd. (f), italics added.) "To the extent possible, the restitution order shall be prepared by the sentencing court." (*Id.* at subd. (f)(3).)

Section 1202.4 further states that "[i]f the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court." (§ 1202.4, subd. (f).) And section 1202.46 specifies, "Notwithstanding Section 1170, when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court *shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined*." (§ 1202.46, italics added.)

A trial court generally may not "stray from the statutory mandate of 'full restitution.'" (*Pierce*, *supra*, 234 Cal.App.4th at p. 1338, quoting § 1202.4, subd. (f).) Rather, "if there is a victim and that victim has suffered economic loss as a result of the defendant's conduct, the court *must* order restitution to be paid to

the victim." (*People v. Valdez* (1994) 24 Cal.App.4th 1194, 1202; see *People v. Bernal* (2002) 101 Cal.App.4th 155, 165 ["Section 1202.4 requires 'full restitution.' An order providing less is . . . invalid"].) "The victims' right to restitution is a constitutional one" that "cannot be bargained away or limited by" the parties. (*Pierce*, at pp. 1337-1338; see *Valdez*, at p. 1202-1203 [victim restitution cannot be waived by the prosecution and is not subject to negotiation between the prosecution and defense].)

C. Sections 1202.4 and 1202.46 fulfill California's constitutional requirement of full restitution by granting trial courts continuing jurisdiction as needed to determine the restitution amount, even after probation expires

Sections 1202.4 and 1202.46 manifest a legislative intent to extend a trial court's jurisdiction as needed to ascertain and set the amount of victim restitution, regardless of a defendant's probation status. This accords with California's constitutional mandate that crime victims receive full restitution for losses suffered as a result of crime.

Appellant does not dispute that section 1202.46 in general operates to continue a trial court's jurisdiction as needed to determine and set a restitution amount. He contends, however, that, in contrast to cases where a defendant was sentenced to prison, section 1202.46 does not apply to probation cases at all. Not only does the statutory language belie this interpretation, but there is no indication that the Legislature contemplated that two different rules would apply depending on whether the defendant received probation or a prison term.

In fact, the restitution statutes in their current form were designed to implement the constitutional mandate that crime victims receive full restitution from the defendant for their economic losses, "regardless of the sentence or disposition imposed." (Cal. Const., art. I, § 28, subd. (b)(13).) It is not the defendant's sentence but the victim's economic loss that animates the constitutional and statutory scheme. As long as victim restitution was ordered at the time of sentencing but could not then be calculated, the trial court retains jurisdiction to set the amount whenever it can be ascertained.

1. The plain language of sections 1202.4 and 1202.46 extend a trial court's jurisdiction to set the amount of restitution "until such time as the losses may be determined," regardless of the disposition of a case

When it enacted section 1202.4, the Legislature stated its intent that a victim who suffers an economic loss as a result of a crime shall receive "full restitution" from a defendant convicted of that crime. (§ 1202.4, subds. (a), (f).) The Legislature anticipated, however, that in some cases the amount of full restitution will not be ascertainable at the time of sentencing, or even for months or years afterwards. (See, e.g., *Giordano*, *supra*, 42 Cal.4th at pp. 657-658 ["Many, if not all, of the categories of loss compensable as direct restitution include losses that are incurred after the occurrence of the crime, and which may continue to be incurred for a substantial period of time following a restitution hearing," including "weeks, months, or possibly years"], citing § 1202.4, subd. (f)(3).)

Accordingly, and to fulfill its constitutional obligation to provide full restitution to crime victims, the Legislature enacted two separate statutory provisions that, taken together, manifest its intent that the trial court retains jurisdiction as needed to properly determine a victim's amount of loss—even where, as here, the probation term has already expired. Section 1202.4, subdivision (f), provides that "[i]f the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court." (§ 1202.4, subd. (f).) And section 1202.46 directs that in such cases, "the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution *until such time as the losses may be determined*." (§ 1202.46, italics added.)

Operating together, sections 1202.4 and 1202.46 mean what they say—all crime victims are entitled to full restitution, and if the amount of loss cannot be ascertained at the time of sentencing, the trial court retains jurisdiction to set the amount after it can be determined, irrespective of the defendant's probation status. (Opn. 5; *People v. Zuniga* (2022) 79 Cal.App.5th 870, 876.) Although the language of section 1202.46 refers to this as "imposing or modifying" restitution, it is clear when reading the provisions together that they simply authorize a court to fulfill the terms of a restitution order previously imposed at the time of sentencing by fixing the amount of restitution. This interpretation accords with California's constitutional mandate for full restitution for crime victims. (See *Giordano*, *supra*, 42

Cal.4th at p. 658 ["'[n]othing in the language of the Constitution suggests an intent to limit the right to restitution for financial losses occurring within a particular time frame, or restitution to expenses incurred before sentencing'"].)

Appellant nonetheless contends that section 1202.46's introductory clause—"Notwithstanding section 1170"—means that the section applies only to cases in which a term of imprisonment is imposed under section 1170. (OBM 42.) This is particularly so, appellant argues, because when the Legislature amended section 1202.46 in 2016, it could have, but did not, modify that introductory clause to reference not just section 1170, but section 1203.3 as well. (OBM 41-42.)[3]

Appellant's argument fails to persuade, as it overlooks material distinctions between former section 1170 and section 1203.3. Specifically, section 1202.46's reference to section 1170 was necessary because, at the time section 1202.46 was enacted, section 1170, subdivision (d), ended a court's jurisdiction to vacate or modify a sentence once 120 days had passed from the date of sentencing. The same limitation is now stated in section 1172.1, subdivision (a). (See *People v. Loper* (2015) 60 Cal.4th

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[3] As will be explained, *post*, appellant misreads the cases he primarily relies on to support his contrary interpretation of section 1203.3. Significantly, appellant does not contend that any changes made to the language of section 1203.3 between section 1202.46's enactment in 2000 and amendment in 2016 would have required the additional "notwithstanding section 1203.3" language he claims is necessary for section 1202.46 to apply in probation cases.

1155, 1165 [under former section 1170, subdivision (d), "the trial court loses jurisdiction to resentence on its own motion after 120 days has elapsed"].)

Section 1203.3, in contrast, contains no provision comparable to former section 1170's termination of jurisdiction to alter a sentence after 120 days. Appellant argues that section 1203.3 operates similarly to restrict a trial court's authority to set a restitution amount in probation cases after the term of probation has ended because it specifies that a trial court has the authority and jurisdiction to revoke, modify, or change a probation order at any time during the term of probation. (§ 1203.3, subd. (a); OBM 22-26, 40-44.) But the argument does not withstand scrutiny.

As it relates to restitution, section 1203.3 provides that "[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. 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." (§ 1203.3, subd. (b)(4).) Section 1203.3 further provides, "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." (§ 1203.3, subd. (b)(5).)

This Court has often observed that it does "not construe statutes in isolation, but rather read[s] every statute 'with

reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (*People v. Pieters* (1991) 52 Cal.3d 894, 899; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible"].) As the Court of Appeal below correctly stated, "There is no disharmony between sections 1203.3, 1202.4, and 1202.46." (Opn. 7.)

Section 1202.4 specifically addresses the situation presented in this case, requiring that "[i]f the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court." (§ 1202.4, subd. (f).) Not only does section 1202.4 apply to both probation and non-probation cases (see *Giordano*, *supra*, 42 Cal.4th at p. 653 [section 1202.4 requires restitution "in every case, without respect to whether probation is granted"]), but section 1202.46, which likewise applies to circumstances where the restitution amount cannot be ascertained, explicitly references section 1202.4. (See § 1202.46 [court retains jurisdiction "where the economic losses of a victim cannot be ascertained at the time of sentencing *pursuant to subdivision (f) of Section 1202.4*," italics added].)

Section 1203.3, on the other hand, addresses the court's jurisdiction to "revoke, modify, or change" an order of probation that was already made. (§ 1203.3, subds. (a), (b)(4), (b)(5);

Opn. 7.) The language of the statute contains no express post-probation limitation on a court's authority, but by implication it may be read to mean that "a trial court loses jurisdiction to revoke or modify a probation order after the probationary period has expired." (*Zuniga*, *supra*, 79 Cal.App.5th at p. 876, citing *In re Griffin* (1967) 67 Cal.2d 343, 346.) Even so construed, section 1203.3, subdivision (b)(5) applies, by its plain language, only to the *modification* of the dollar amount of a restitution order. (§ 1203.3, subd. (b)(5).) "Modify" is commonly understood to mean "change," "alter," or "amend." (See Merriam-Webster Dict. Online, <https://www.merriam-webster.com/dictionary/modify> [as of Apr. 3, 2023]; see also Dictionary.com, <https://www.dictionary.com/browse/modify> [as of Apr. 3, 2023].) Section 1203.3, subdivision (b)(5) therefore does not address the more specific circumstance governed by section 1202.4 where the amount of economic loss is not ascertainable at the time of sentencing.

Indeed, appellant's argument that section 1203.3 necessarily displaces section 1202.46 in all cases in which restitution is imposed as a probation condition overlooks that section 1203.3's applicability is premised on there being an ascertainable restitution amount at the time of sentencing in the first place. Section 1203.3, subdivision (b)(4) provides that "[t]he court may modify the time and manner of the term of probation *for purposes of measuring the timely payment of restitution obligations*"; subdivision (b)(5) states that "[t]his 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." (§ 1203.3, subds. (b)(4), (b)(5), emphases added.) The phrases "measuring the timely payment of restitution obligations" and "modifying the dollar amount of a restitution order" necessarily presuppose the existence of a determinable restitution amount to begin with. Hence, when the trial court imposes a restitution order at sentencing with a fixed restitution amount, section 1203.3 applies to govern the trial court's continuing authority to modify the restitution terms.

But when the restitution amount is not ascertainable at the time of sentencing, and the trial court's restitution order consequently does not include any such amount but provides, instead, that "the amount shall be determined at the direction of the court" (§ 1202.4, subd. (f)), a predicate fact necessary for section 1203.3 to apply—that there is a determinable restitution amount to begin with—is absent. In those circumstances, it is section 1202.4, subdivision (f) and section 1202.46 that apply, not section 1203.3.

As the court below correctly stated, section 1202.4 "grants additional authority to address the specific situation in which 'the amount of loss cannot be ascertained at the time of sentencing,' and it mandates that the restitution order 'shall include a provision that the amount shall be determined at the direction of the court.'" (Opn. 7, quoting § 1202.4, subd. (f).) "When a court follows this process, section 1202.46 grants the court jurisdiction 'for purposes of imposing or modifying restitution until such time

as the losses may be determined' (§ 1202.46), even if that occurs after probation has ended." (Opn. 7.)

Reviewing courts "must give the statute a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*People v. Budwiser* (2006) 140 Cal.App.4th 105, 109, citing *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.) The reasonable and commonsense interpretation of the plain statutory language is that section 1202.46 applies not only to non-probation cases, but extends to probation cases as well. Under that statute, a court that has ordered restitution at the time of sentencing, but was unable to determine the amount of losses at that time, retains jurisdiction to fix the amount of restitution "until such time as the losses may be determined," even if that occurs after the expiration of the probation term.

2. The Legislature intended to extend the trial court's jurisdiction to set the amount of restitution ordered but not ascertainable at sentencing even in probation cases

Although there is no textual ambiguity to sections 1202.4 and 1202.46, the legislative intent and policy concerns that motivated California's restitution scheme further demonstrate that the trial court retains jurisdiction to set the amount of victim restitution imposed at sentencing until such losses may be determined, no matter the disposition of the case. Appellant's argument to the contrary conflicts not only with section 1202.46's

purpose, but California's broad constitutional requirement of full restitution for crime victims.

Section 1202.46 was enacted in 1999 as part of Senate Bill No. 1126 (1999-2000 Reg. Sess.) Stats. 1999, ch. 888 (S.B. 1126). In enacting S.B. 1126, the Legislature specifically noted that "[t]he bill . . . 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." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of S.B. 1126 (1999-2000 Reg. Sess.) as amended Sept. 2, 1999.)

In its analysis of S.B. 1126, moreover, the Department of General Services noted that crime victims oftentimes suffer losses as a result of crime that cannot be readily ascertained but "accrue over a long period of time." (Dept. General Services, analysis of S.B. 1126 (1999-2000 Reg. Sess.) as amended June 16, 1999, p. 3.) Owing to perceived jurisdictional limits on a trial court's ability to impose delayed restitution, however, such victims had to "resort to civil suits to recover their crime-related losses from offenders," which infringe[d] on their right to receive restitution under the criminal justice system as guaranteed by the California Constitution." (*Id*. at p. 2.) S.B. 1126 was intended to remedy this situation by "clarify[ing] that the courts maintain the explicit jurisdiction" necessary to impose restitution at such time when the restitution amount becomes ascertainable. (*Id*. at p. 3.)

When the Legislature amended sections 1202.4 and 1202.46 in 2016, to remove certain statutory provisions that had allowed the trial court to impose less than full restitution, it stated that "this measure is declaratory of existing law . . . requir[ing] that '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.'" (Stats. 2016, ch. 37, § 5, italics added.) The Legislature also stated that allowing "less than full restitution in situations where a victim suffers a loss . . . is inconsistent with the constitutional requirement," and that the changes made therein were intended to bring California statutory law into conformity with the constitutional mandate of full restitution for crime victims. (Stats. 2016, ch. 37, § 5.)

Continuing jurisdiction over a person subject to a restitution order "for purposes of imposing or modifying restitution until "such time as the losses may be determined" (§ 1202.46) directly furthers this constitutional mandate. On the other hand, an interpretation that section 1202.46 does not apply to probationers—consequently allowing less than full restitution where, as here, the full measure of a victim's economic loss was not ascertainable within the statutory probation term—would conflict with this established mandate to impose full restitution for all economic losses suffered as a result of a crime, "regardless of the sentence or disposition imposed." (Cal. Const., art. I, § 28, subd. (b)(13)(B).)

Contrary to appellant's argument (OBM 36-38), the fact that section 1202.46 was enacted as part of S.B. 1126 does not indicate

an intent to exclude probationers from its reach.[4] S.B. 1126 made permanent a pilot program that allowed initial court appearances and arraignments of defendants in prison custody throughout the state to be held by videoconference. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of S.B. 1126 (1999-2000 Reg. Sess.) as amended Sept. 2, 1999.) The bill did not focus on restitution specifically, as appellant suggests, but on videoconference appearances generally. (*Ibid.*) The portion of the bill that allowed restitution hearings to be held by videoconference (contained in section 977.2) was simply an expansion of the initial pilot program. (*Ibid.*)

There is some indication in the legislative history of S.B. 1126 that one motivation for the enactment of section 1202.46 was to increase the scope of restitution by permitting it to be determined and collected during the time an inmate is in prison custody. (See Dept. General Services, analysis of Sen. Bill No. 1126 (1999-2000 Reg. Sess.) as amended June 16, 1999, p. 2 ["[t]his provision would clarify that a court retains jurisdiction over offenders' restitution orders when they are sent to CDC facilities to serve their sentence"].) But the same legislative

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[4] Appellant states that the California Department of Corrections and Rehabilitation (CDCR) sponsored S.B. 1126, implying that the sponsorship is significant to interpretation of the bill. (OBM 36.) While the provisions of the bill relating to video arraignment were sponsored by the CDCR, the restitution portions of the bill were sponsored by the Board of Control, now known as the California Victim Compensation Board. (Dept. of Corrections, Enrolled Bill Rep. on S.B. 1126 (1999-2000 Reg. Sess.) Sept. 15, 1999, p. 1.)

history also indicates a primary and more general focus on making victims whole. (See *id.* at p. 3 [acknowledging many victims incur losses from a crime that cannot be totaled until long after sentencing and "accrue over a long period of time"]).[5] In any event, as noted, the later 2016 amendments to sections 1202.4 and 1202.46 make clear that the provisions are intended to apply in all criminal cases regardless of the sentence or disposition imposed. That unequivocal legislative statement resolves any earlier ambiguity about the scope of section 1202.46. (See *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961 [if conflicting statutes cannot be reconciled, later enactments supersede earlier ones].)

A contrary inference about legislative intent would also make little sense because it would result in disparate treatment of post-probation and post-prison cases under existing law. In *Bufford*, *supra*, 146 Cal.App.4th 966, the First District Court of Appeal analyzed the statutory language at issue here in the context of a victim restitution amount determined after a defendant was released from prison. The Court of Appeal held that where a trial court had imposed a victim restitution order at

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[5] This legislative history also suggests that the focus on prison inmates may have arisen at least in part from judicial interpretation of then-section 1170 as limiting courts' jurisdiction over restitution after 120 days from a prison commitment. (See Dept. General Services, analysis of S.B. 1126 (1999-2000 Reg. Sess.) as amended June 16, 1999, p. 2.) The cases appellant relies on for his interpretation of section 1203.3—though his reliance on them is misplaced, as explained *post*—were decided well after the bill was passed.

sentencing, but deferred determining the amount under section 1202.4, subdivision (f), it retained jurisdiction under section 1202.46 to determine the amount of restitution even after the defendant had fully served her prison term. (*Id.* at pp. 969-972.) The Court of Appeal concluded that under the plain language of section 1202.4, subdivision (f), "if the 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 may prevent fixing the amount of restitution." (*Id.* at p. 971.) The Court of Appeal explained that section 1202.4 must be interpreted broadly to avoid frustrating the clear language of article I, section 28 of the California Constitution. (*Ibid.*)

Appellant does not dispute the result in *Bufford* and instead distinguishes it on the basis that the case did not concern probation. (OBM 38-39.) But he offers no reason why the Legislature would have intended to exempt probationers from their constitutional obligation to pay restitution for economic losses caused by their criminal conduct—and, more importantly, why it would have intended to potentially deprive crime victims of their right to full restitution—merely because the defendant was placed on probation instead of being sentenced to prison. A crime victim has no control over the disposition of a criminal case and is in the same position for purposes of restitution regardless of whether the court ultimately imposes probation or a custodial sentence. Indeed, it would make little sense to exempt probationers in particular from their obligation to pay full

restitution. Probation is an act of clemency, with a primarily rehabilitative purpose. (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) Presumably, those who have been placed on probation will be better situated than those sentenced to prison to pay restitution for losses caused by their criminal conduct.

Again, California's constitutional requirement of full restitution applies "regardless of the sentence or disposition imposed." (Cal. Const., art. I, § 28, subd. (b)(13)(B).) In accordance with this mandate, this Court has held that the Legislature intended for section 1202.4 to apply in both probation and non-probation cases. (*Giordano*, *supra*, 42 Cal.4th at p. 653.) The constitutional mandate would be thwarted if trial courts did not retain jurisdiction to set the restitution amount until such time as the amount could be accurately determined, regardless of whether the defendant remained on probation by the time the amount could be determined. As the Court of Appeal held in *Zuniga*, "A contrary result would defeat the victim's right to restitution and 'frustrate the clear language of [California Constitution,] article I, section 28.'" (*Zuniga*, *supra*, 79 Cal.App.5th at p. 876, quoting *Bufford*, *supra*, 146 Cal.App.4th at p. 971.) And as the Court of Appeal below recognized, nothing indicates that the Legislature "intended to make it harder for victims in probation cases to receive full restitution." (Opn. 7.)

Indeed, the circumstances in this case, and others affected by the intervening legislation shortening probation terms, only highlight that the Legislature's understanding of sections 1202.4 and 1202.46 must be that those provisions apply in probation

cases. "[T]he Legislature 'is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted.'" (*People v. Frahs* (2020) 9 Cal.5th 618, 634.) The Legislature gave no hint when it enacted A.B. 1950 that it expected either expedited restitution proceedings in the large volume of cases in which probation terms would suddenly be shortened or that restitution would simply be unavailable in such cases.[6] A result depriving many crime victims of restitution that had been ordered but not calculated, and to which they are constitutionally and statutorily entitled, cannot be what the Legislature envisioned.

D. Appellant's additional arguments are unpersuasive

Appellant offers several additional arguments as to why sections 1202.4 and 1202.46 do not operate to extend a trial court's jurisdiction to determine the amount of restitution in probation cases. These arguments are unpersuasive.

1. Appellant's reliance on *Griffin* and *Chavez* is misplaced

Appellant contends that this Court's decision in *Griffin*, *supra*, 67 Cal.2d 343 supports his argument that section 1203.3 prevents application of section 1202.46 in probation cases. (OBM 23-26.) His reliance on *Griffin* is misplaced. In *Griffin*, this

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[6] As the People have conceded in other cases before this Court, the provisions of A.B. 1950 that shorten probation terms apply to those serving probation at the time the bill was passed, pursuant to the rule of *In re Estrada* (1965) 63 Cal.2d 740. (See *People v. Prudholme*, No. S271057; *People v. Faial*, No. S273840.)

Court held that the defendant was estopped from arguing that the trial court exceeded its jurisdiction when it revoked his term of probation after probation had expired because "[b]y seeking a continuance to a time beyond the end of the probationary term petitioner asked the court to do in a manner that was in excess of jurisdiction what it could have done properly by immediately revoking probation." (*Griffin*, at pp. 348-349.) Thus, the holding in *Griffin* pertained only to the estoppel argument, not the jurisdictional effect of section 1203.3. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 915 [decision is not authority for everything said in the opinion but only for the points actually involved and actually decided].)

Moreover, in the portion of *Griffin* cited by appellant, this Court simply restated what section 1203.3 provides—that a trial court has the authority to revoke or modify probation only during the period of probation. (See *Griffin*, *supra*, 67 Cal.2d at p. 346.) There is no dispute that is what section 1203.3 provides. But a court's act of setting the amount of restitution already ordered is not governed by section 1203.3, but by section 1202.46, which was enacted over 30 years after *Griffin* was decided. Section 1203.3 would only govern where a party seeks to modify the amount of restitution after it has already been set. It makes sense that the statute operates in this way because if the restitution amount has already been set, then the case necessarily is not governed by section 1202.46, which is designed for circumstances where the amount cannot initially be determined.

Appellant's reliance on *People v. Chavez* (2018) 4 Cal.5th 771 is similarly misplaced. In *Chavez*, this Court held that "a trial court exceeds the authority conferred by section 1385 when it dismisses an action after the probation period expires." (*Id.* at p. 777.) The decision in *Chavez* primarily concerned the question of when a trial court's ability to pronounce judgment ends in a probation case. (*Id.* at pp. 782-784.) Significantly, *Chavez* did not involve any statute such as sections 1202.4 or 1202.46 that operate to extend the trial court's jurisdiction over a probationer in specific circumstances. Instead, *Chavez* dealt only with section 1385, which "by its own terms, allows a trial court to dismiss a criminal action but no more." (*Id.* at p. 787.) Because section 1385 did not itself confer extended jurisdiction on the trial court, this Court, following the general principle that the trial court loses jurisdiction over the probationer once probation has expired, held that "a court may not exercise its dismissal power under [section 1385] after probation has terminated." (*Id.* at p. 788.) Here, in contrast, sections 1202.4 and 1202.46 vest extended jurisdiction in the trial court until such time as the amount of the victim's economic loss can be ascertained.

2. ***Hilton* and *Waters* addressed situations governed by section 1203.3, not sections 1202.4 and 1202.46**

Appellant relies heavily on *Hilton v. Superior Court* (2014) 239 Cal.App.4th 766 and *People v. Waters* (2015) 241 Cal.App.4th 822 to support his position. (OBM 26-44.) Both cases are readily distinguishable from this case; indeed, the contrast supports the People's argument that sections 1202.4 and 1202.46 extend the

trial court's jurisdiction to set a restitution amount that cannot be determined at the time of sentence regardless of whether probation has terminated.

In *Hilton*, the defendant pleaded no contest to driving under the influence and unlawful use of a license after he struck a pedestrian with his vehicle. (*Hilton*, *supra*, 239 Cal.App.4th at p. 769.) The trial court placed Hilton on probation for three years and ordered victim restitution as a condition of probation with the amount to be determined at a restitution hearing. (*Ibid.*) The court subsequently ordered Hilton to pay $3,215 in victim restitution pursuant to the parties' stipulation, and Hilton filed proof of payment of the restitution order. (*Ibid.*) Hilton's probation term expired two years later by operation of law. (*Id.* at p. 770.) Nearly twenty months after Hilton's probation expired, the victim asked the trial court to increase the restitution amount by $886,000, to include attorneys' fees and costs incurred during his intervening civil action and other expenses. (*Ibid.*) The trial court ruled that it had jurisdiction to modify the restitution amount in response to the victim's motion. (*Ibid.*) But the Court of Appeal reversed, holding that the victim was effectively seeking an order modifying the terms of Hilton's probation, which had already expired, in violation of section 1203.3, subdivision (a). (*Id.* at pp. 771-777.)

In *Waters*, the defendant pleaded no contest to a charge of grand theft. (*Waters*, *supra*, 241 Cal.App.4th at p. 825.) At sentencing, the trial court placed Waters on three years' probation, but did not order her to pay any victim restitution.

(*Ibid.*) Waters's probation terminated in May 2011. (*Ibid.*) Over three years later, the trial court imposed a victim restitution requirement for the first time and set the amount at $20,800. (*Id.* at p. 826.) The Court of Appeal concluded that by imposing a new victim restitution requirement more than two years after Waters's probation terminated, the trial court had modified the terms of its original probation order after probation had expired, in violation of section 1203.3, subdivision (a). (*Id.* at pp. 829-831.)

Neither *Hilton* nor *Waters* involved the situation in this case, governed by section 1202.4, subdivision (f), where the court's initial order included a provision that the restitution amount would be determined at the direction of the court and the court fixed the amount for the first time after probation expired. Instead, they concerned two situations that are governed by section 1203.3, not section 1202.46. They are therefore inapposite. (See *Zuniga*, *supra*, 79 Cal.App.5th at p. 877.) The Court of Appeal in *Hilton* recognized the distinction between the two statutes when it observed that "losses not only might have been determined but were in fact determined" by the trial court before the defendant's probation term expired. (*Hilton*, *supra*, 239 Cal.App.4th at p. 782.) Similarly, the Court of Appeal in *Waters* recognized the distinction between a court ordering a defendant to pay restitution at sentencing and leaving the amount of restitution open to determination, distinguishing *Bufford* by noting that the trial court there "expressly ordered the defendant to pay restitution at sentencing. The issue on appeal was whether the trial court could reserve jurisdiction to set the

amount of restitution." (*Waters*, 241 Cal.App.4th at p. 831, fn. 5, citation omitted.)

The issue presented in this case is instead identical to that presented in *Zuniga*. Following a hit-and-run, the defendant in *Zuniga* agreed as part of a plea deal to pay full victim restitution and was placed on probation. (*Zuniga*, *supra*, 79 Cal.App.5th at pp. 871-872.) Because the victim's losses were not clear at the time of sentencing, the trial court imposed a probation condition that Zuniga would pay restitution in an amount to be determined later. (*Ibid.*) As here, Zuniga's probation was terminated early when A.B. 1950 reduced most felony probation terms to two years. (*Id.* at p. 874.) Several months after Zuniga's probation expired, the court held a hearing to determine the restitution amount over Zuniga's objection that the court no longer had jurisdiction. (*Ibid.*) The Court of Appeal affirmed the restitution award, explaining that the trial court had simply followed the process established by section 1202.4 and that it retained jurisdiction under section 1202.46 to set the amount of restitution notwithstanding that Zuniga's probation had since expired. (*Id.* at pp. 875-876.)

The Court of Appeal in *Zuniga* held that "payment of victim restitution in an amount to be determined later was already a condition of the original probation order, and the court merely fixed the amount once it could be determined after Zuniga's probation expired." (*Zuniga*, *supra*, 79 Cal.App.5th at p. 877.) "Because the original probation order itself contemplated that the restitution amount would be determined later, the court did not

modify the order or impose any new condition by setting the amount once it could be determined by the probation officer." (*Ibid.*) To the contrary, "the trial court was merely carrying out the terms of the original probation order," and did not "'revoke, modify, or change' the original probation order within the meaning of section 1203.3." (*Ibid.*)

Appellant further contends that when the Legislature in 2016 amended section 1202.46 (to remove the exception that full restitution need not be imposed upon "a finding of compelling and extraordinary reasons") it did not abrogate *Hilton* and *Waters*, and by negative implication it therefore approved his understanding of those cases. (OBM 41-42.) This analytical leap bypasses the fact that neither *Hilton* nor *Waters* was a section 1202.46 case, as in *Hilton* restitution was determined and paid before probation expired and in *Waters* no restitution order was imposed at the time of sentencing. Thus, there was no reason for the Legislature to consider *Hilton* or *Waters* when it amended section 1202.46.

For the same reason, appellant's reliance on two failed assembly bills that proposed further amending section 1202.46 to abrogate *Hilton* and *Waters* is also irrelevant. (OBM 43-46.) As this Court has "often observed, 'Unpassed bills, as evidences of legislative intent, have little value.'" (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 746; see also *Mendoza*, *supra*, 23 Cal.4th at p. 921.) The reason for this rule is apparent. "A Legislature's intent as to failed legislation sheds little light on a subsequent Legislature's intent regarding enacted legislation."

(*Pacific Fertility Cases* (2022) 78 Cal.App.5th 568, 584.) As this Court has observed, "the Legislature's failure to enact a proposed statutory amendment may indicate many things other than approval of a statute's judicial construction, including the pressure of other business, political considerations, or a tendency to trust the courts to correct its own errors." (*Mendoza*, at p. 921.) The Legislature might simply have concluded that the amendment was "unnecessary because the law already so provided." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 28.) And in any event, shortly thereafter the Legislature made clear in amending sections 1202.4 and 1202.46 that "'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.'" (Stats. 2016, ch. 37, § 5.)

3. The legislative history of A.B. 1950 does not support appellant's interpretation of the restitution statutes

Appellant contends that aspects of the legislative history behind A.B. 1950 show the Legislature's intent to approve of *Hilton* and *Waters* and its understanding that restitution calculation under section 1202.46 would be unavailable after the termination of probation. (OBM 44-49.) This argument is unpersuasive.

When the Legislature, through A.B. 1950, amended section 1203.1 to reduce the maximum terms of probation, it made no change to subdivision (a)(3), which requires the court to "provide for restitution in proper cases" and states that any "restitution order shall be fully enforceable as a civil judgment forthwith and

in accordance with Section 1202.4 of the Penal Code." The Legislature also left intact subdivision (b) of section 1203.1, which requires the court to "consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund" and explains how disbursements to the victim should be made in those cases.

In addition to leaving the restitution references in section 1203.1 intact, A.B. 1950 did not make any changes to sections 1202.4 or 1202.46, or otherwise alter the statutory scheme that extends a trial court's jurisdiction to determine the amount of restitution. (Legis. Counsel's Dig., A.B. 1950 (2019-2020 Reg. Sess.) Stats. 2020, Summary Dig.; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. 4 [summary digests of Legislative Counsel are properly considered by an appellate court without the need for judicial notice because the digests are published].) The Legislature is deemed to be aware of existing laws in effect at the time legislation is enacted. (*Frahs*, *supra*, 9 Cal.5th at p. 634.) And it should be inferred "that the Legislature did not intend to interfere with a crime victim's right to restitution under preexisting law when it shortened the maximum term of felony [and misdemeanor] probation." (*Zuniga*, *supra*, 79 Cal.App.5th at p. 878.)

As the Court of Appeal in *Zuniga* correctly determined, "there is no indication in the language or legislative history of Assembly Bill No. 1950 that the Legislature intended to cut off a victim's right to restitution in cases where the trial court had already ordered it as a condition of probation and reserved the

amount for future determination under section 1202.4, subdivision (f), but had not yet determined the amount when the defendant's probation was shortened and terminated early as a result of the new legislation." (*Zuniga*, *supra*, 79 Cal.App.5th at p. 878.) To the contrary, as explained above, it would be especially surprising if the Legislature understood the existing statutory scheme to mean that jurisdiction to calculate a restitution amount ends with the termination of probation and yet made no provision for, or even mention of, the large number of cases like this one in which restitution might be thwarted because of the sudden shortening of probation terms. Accordingly, the legislative history of A.B. 1950 does not suggest an interpretation other than what the plain language of sections 1202.4 and 1202.46 indicate.

Further, the legislative history of A.B. 1950 does not suggest that the bill was meant to address *Hilton* or *Waters*, much less in the way appellant contends. While legislative analysis of the bill acknowledged that existing law provided for restitution in proper cases and that courts were required to consider whether restitution should be included as a condition of probation, it said nothing about *when* a trial court may determine the amount of restitution. (Assem. Com. on Public Safety, Analysis of A.B. 1950 (2019-2020 Reg. Sess.) as amended May 6, 2020; Assem. Com. on Appropriations, Analysis of A.B. 1950 (2019-2020 Reg. Sess.) as amended May 21, 2020; Assem. Floor Analysis, 3d reading analysis of A.B. 1950 (2019-2020 Reg. Sess.) as amended May 21, 2020; Assem. Floor Analysis, 3d reading analysis of A.B. 1950

(2019-2020 Reg. Sess.) as amended June 10, 2020; Sen. Com. on Public Safety, Analysis of A.B. 1950 (2019-2020 Reg. Sess.) version June 10, 2020; Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of A.B. 1950 (2019-2020 Reg. Sess.) as amended June 10, 2020.)

The California District Attorneys Association's (CDAA) commentary on the bill also did not discuss the limitations of *when* the amount of restitution may be determined. (Assem. Floor Analysis, 3d reading analysis of A.B. 1950 (2019-2020 Reg. Sess.) as amended June 10, 2020, p. 2.) Instead, the CDAA expressed a concern, among others, that victims might not receive the full amount of restitution ordered by the court if probation terms were shortened. (*Ibid.*) Thus, contrary to appellant's argument, to the extent restitution was addressed in the legislative history of A.B. 1950, it related only to a crime victim's ability to collect restitution already ordered and had nothing to do with the court's jurisdiction to set a restitution amount.

4. Appellant's arguments about prompt government action, possible civil remedies, and potential prejudice to defendants conflict with the constitutional and statutory requirement of full restitution

Appellant contends that crime victims will receive full restitution under his interpretation of the restitution statutes so long as law enforcement acts promptly. (OBM 49-53.) A victim's right to restitution, however, stands independent of law enforcement action or inaction. That is, if the right to victim restitution "is a constitutional one" that "cannot be bargained

away or limited by" the parties (*Pierce*, *supra*, 234 Cal.App.4th at pp. 1337-1338; see *Valdez*, *supra*, 24 Cal.App.4th at pp. 1202-1203), it necessarily is a right that likewise cannot be waived, forfeited, or otherwise lost due to a perceived action or inaction by prosecutorial or investigative agencies.

More fundamentally, the very purpose of sections 1202.4 and 1202.46 is to preserve jurisdiction until such time as a victim's losses are able to be determined. As this Court has recognized, "[m]any, if not all, of the categories of loss compensable as direct restitution include losses that are incurred after the occurrence of the crime, and which may continue to be incurred for a substantial period of time following a restitution hearing." (*Giordano*, *supra*, 42 Cal.4th at pp. 657-658 [victim's economic losses such as lost wages "may continue to be incurred" for "weeks, months, or possibly years"]; see also OBM 50 ["some victims would not be able to account for all losses prior to the expiration of probation"].) A victim's losses resulting from a defendant's criminal conduct may not even materialize, and at the very least may not be fully calculable, before probation ends. This is entirely out of the control of law enforcement no matter how promptly they might seek a calculation. Appellant's insistence that law enforcement simply act promptly is not reconcilable with the statutory purpose and goal.[7]

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[7] Appellant's assertion that prosecutors and probation could have acted sufficiently quickly in all probation cases like his that were affected by A.B. 1950 is also unrealistic. As appellant notes, three months passed between the date A.B. 1950 was approved (continued…)

Appellant also points to a victim's ability to seek civil remedies outside the restitution process as an alternative in cases where the amount of loss is not determined before probation expires. (OBM 52.) But restitution in a criminal case is, in motivation and design, quite different from any civil remedy. For example, "[t]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121, citation omitted.) And as the Court of Appeal in *Bufford* correctly observed, civil litigation with its attendant

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(…continued)

and the date it took effect. (OBM 49-51.) But as the legislative history of A.B. 1950 reveals, "California's adult supervised probation population is around 548,000—the largest of any state in the nation, more than twice the size of the state's prison population, almost four times larger than its jail population and about six times larger than its parole population." (Assem. Com. on Public Safety, Analysis of A.B. 1950 (2019-2020 Reg. Sess.) as amended May 6, 2020, p. 3.) Appellant does not explain how the district attorneys and probation departments throughout the state could handle a review of over 500,000 probation cases in less than three months, let alone manage to calendar and resolve those cases requiring action, while continuing to handle their normal duties. Preclusion of post-probation restitution calculation under section 1202.46 in these circumstances would result in an extraordinary windfall for some, if not many, probationers. Again, there is no indication that the Legislature intended such a windfall.

burdens would be a poor substitute for constitutionally required criminal restitution:

> When, as here, a trial court has ordered the defendant to make restitution but has not fixed the amount, there is no incentive for the victim to prosecute a civil action. Nor should a victim in such circumstances be put to the trouble and expense of seeking redress through civil litigation with the accompanying uncertainty of recovery in light of possible defenses such as expiration of the statute of limitations. Were we to agree with the defendant's argument on this point we would be substituting the uncertain prospect of a civil remedy for the victim's constitutional 'right to restitution.' We decline to do so.

(*Bufford*, *supra*, 146 Cal.App.4th at p. 971.)

Nor is appellant correct that post-probation restitution calculation is likely to prejudice criminal defendants in a manner that outweighs the constitutional requirement of full restitution and that would support his interpretation of the statutory scheme. Appellant at times in his brief disparages an interpretation of the restitution statutes that would confer "everlasting jurisdiction" (OBM 13, 35), and he raises the specter that a court could make a restitution calculation decades after the expiration of a probation term (OBM 51). But again, he does not appear to dispute *Bufford*'s holding that such extended jurisdiction would exist in non-probation cases. It is not apparent why restitution calculation under section 1202.46 would be required to ensure full restitution after service of a prison term, as in *Bufford*, but not after completion of probation.

In any event, it appears unlikely that decades would pass before "such time as the losses may be determined." Section

1202.46 has been in effect since 2000, and only three published decisions address a trial court's setting of the amount of restitution after a prison or probation term expired—*Bufford*, *Zuniga*, and the Court of Appeal's decision below. In the case of such a lengthy passage of time between ordering restitution and setting the amount, however, due process questions could arise. (See *Bufford*, *supra*, 146 Cal.App.4th at pp. 971-972.) But at least in this case, in which the question of restitution was promptly addressed after the premature termination of probation, no such scenario is presented, and appellant does not contend otherwise.

Here, the court ordered restitution at the time of appellant's sentencing, but deferred setting the amount of restitution because it was unknown at that time. (13RT 909; CT 63, 69, 108.) Appellant had notice of, and agreed to comply with, all terms of probation, including the order that he pay victim restitution. (13RT 909-910.) Indeed, he agreed to pay full restitution as part of his plea bargain. (CT 40-42.) Appellant was again reminded of the restitution obligation at the time probation was terminated because of A.B. 1950. (CT 133, 135.) And the prosecution initiated restitution proceedings about a week after that. (CT 86.)

The Court of Appeal below properly rejected the argument that post-probation calculation of restitution would be unfair under these circumstances. (Opn. 7-8.) And the Court of Appeal in *Bufford* rejected a similar argument, concluding that due process was not implicated where "[t]he trial court ordered victim

restitution at the time of sentencing, and followed the statutory procedure that permits determination of the amount of loss at a later hearing." (*Bufford*, *supra*, 146 Cal.App.4th at pp. 971-972.) The court observed there: "The People properly moved to determine the amount of restitution payable pursuant to the mandatory statutory framework, as soon as possible following dismissal of related charges, in light of defendant's demand for a hearing and her refusal to testify, and there has been no finding of compelling and extraordinary reasons to depart from the statutory framework." (*Id.* at p. 972.) In cases like these, as in the vast majority of cases where restitution is imposed with an amount to be determined later, post-probation or post-prison-term calculation is plainly appropriate to fulfill the constitutional mandate of full restitution without prejudice to the defendant.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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April 3, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 11,698 words.

ROB BONTA
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/S/ AMANDA LLOYD
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April 3, 2023

DECLARATION OF ELECTRONIC SERVICE
AND SERVICE BY U.S. MAIL

Case Name: **People v. McCune** No.: **S276303**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 3, 2023, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 3, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Napa County Superior Court
1111 Third Street
Napa, CA 94559

First Appellate District -
Division Five
Court of Appeal of the State of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 3, 2023, at San Diego, California.

Almeatra W. Morrison	*Almeatra W. Morrison*
Declarant	Signature

SD2022802820
83889583.docx

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/3/2023 by Karissa Castro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S276303**
Lower Court Case Number: **A163579**

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4/3/2023

Date

/s/Almeatra Morrison

Signature

Lloyd, Amanda (239682)

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