

**COPY**

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**WILLIAM J. FORD,**

**Defendant and Appellant.**

**SUPREME COURT  
FILED**

Case No. S212940

MAR 14 2014

Frank A. McGuire Clerk

Deputy

First Appellate District, Division Three, Case No. A135733  
Sonoma County Superior Court, Case No. SCR530837  
The Honorable Bradford DeMeo, Judge

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## ISSUE

Whether the trial court had jurisdiction to award restitution to a crime victim after the expiration of the defendant's term of probation?

## INTRODUCTION

Penal Code sections 1202.4 and 1202.46<sup>1</sup> implement the state constitutional right of a victim to an order of restitution "in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers loss." (Cal. Const., art. I, § 28, subd. (b)(13).) The California Constitution and statutes place no temporal limit on the victim's right to such a restitution order. A crime victim is entitled to an order of "full restitution" unless a trial court "finds compelling and extraordinary reasons for not doing so and states them on the record." (§1202.4, subd. (f).)

The trial court acted within its jurisdiction under the California Constitution and the legislative imperative to provide full restitution to a victim of crime by reserving jurisdiction over restitution at the initial sentencing and, later, ordering restitution based on losses determined after the expiration of appellant's term of probation. Appellant is estopped to assert the court acted in excess of its jurisdiction because he failed to object to a continuance of the restitution hearing beyond the date of his probation period. Accordingly, the restitution order was proper and should be affirmed.

## STATEMENT OF THE CASE

### A. Factual Background and Plea Proceeding

On February 8, 2008, appellant severely injured Elaine Jennings in a hit-and-run incident in Santa Rosa. Jennings had been shopping at Macy's

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<sup>1</sup> All subsequent statutory references are to the Penal Code unless otherwise noted.



with her small service dog. She needed to cross the street to get to her car, and tried to cross in the middle of the block because it was raining heavily. In the middle of the road, she paused when she saw appellant's car. His vehicle slowed, and Jennings continued across the street believing that appellant had seen her. But appellant's car struck Jennings and her dog, causing her to roll onto the hood of appellant's car and fall to the ground on her side. (CT 194.)

A Macy's employee saw Jennings pause in the middle of the street as appellant's car slowed. When Jennings continued to cross the road, the car sped up and struck Jennings, causing her to land on the windshield of appellant's car. After hitting Jennings, appellant's car "slowed briefly, accelerated, and then turned right onto a cross street." (CT 194-195.)

A police officer pursued the car, which was "traveling quickly." The officer had "to exceed the speed limit to catch him." (CT 195.) Appellant's car ran a stop sign before the officer stopped it. The car had a large scratch across the hood and significant damage to the windshield. Appellant said he had been in a collision, but was not sure what he had hit. As appellant was placed into the back of a patrol car, an officer heard him say, "I can't believe I hit that lady." (CT 195.) On the way to jail, appellant called his girlfriend to tell her that he was being arrested for hit and run and that he had "clipped a lady." (CT 195.) Appellant said that he had not been drinking, but that he had been smoking marijuana. Appellant's car smelled strongly of marijuana. (CT 195.)

At the police station, appellant said that he had been traveling 25 miles per hour in his car when he struck what he thought was a dog. He "suspected it was a dog because he had looked it right in the eyes." (CT 195.) After he stopped a few blocks further on and assessed the damage to his car, he thought that he might have hit more than a dog. He unsuccessfully tried to flag down a police officer. Before he found a place

to turn the car around to return to the accident scene, he was stopped by the Highway Patrol. (CT 195.) Appellant told the police that it had not occurred to him to call 911 on his cell phone. Asked why he had driven past four intersections and a parking lot where he could have turned around, appellant said the area was unfamiliar, and he had not seen those places as opportunities to turn around. (CT 195-196.)

Jennings was a self-employed caterer whose profession required her to be physically active. Her injuries caused her to lose six months of work, and impacted her business over the course of a year. (CT 198.)

On February 15, 2008, the Sonoma County District Attorney's Office filed a felony complaint charging appellant with leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), and with an enhancement for the infliction of great bodily injury (§ 12022.7, subd. (a)). The complaint further alleged that appellant's driving privilege was suspended at the time of the hit and run offense. (Veh. Code, § 14601.1, subd. (a)). (CT 1.)

On August 21, 2008, appellant pleaded no contest to leaving the scene of an accident in exchange for the dismissal of the other allegations. (CT 15-17.)

#### **B. Restitution Proceedings and Orders**

On October 9, 2008, the trial court placed appellant on probation. (CT 19-20; 1 RT 12-14.) The court ordered that victim restitution be "specifically reserved," and stated that appellant would have 90 days to request a hearing to contest the amount once the award had been determined. (1 RT 14.) Pending a final determination of the full amount, the trial court awarded restitution of \$12,465.88 for Jennings's medical expenses. (CT 129; 1 RT 15.) Defense counsel asked that the issue of restitution be reserved so counsel could review supporting documentation. (1 RT 15.) The court responded that it would "*reserve further order and power to make further orders in that connection.*" (1 RT 16, italics added.)

Appellant accepted probation on the terms and conditions thereof. (1 RT 16.)

On May 7, 2010, the probation department notified appellant that he was ordered to pay \$211,000 in victim restitution. (CT 43.)

On August 12, 2010, the prosecution requested a continuance of a September 24, 2010, restitution hearing because Jennings was unavailable on the latter date. (CT 48.) With the parties' consent, the hearing was continued to October 22, 2010. (CT 51.) The matter later was reset for December 10, 2010. (CT 137.) On December 8, 2010, the prosecution requested a continuance because the assigned attorney would not be available. (CT 56.) Appellant also requested a continuance. (CT 59, 138.) Thereafter, the matter was continued several more times until August 19, 2011. (CT 59-67.) On that date, the parties the restitution hearing postponed because documents supporting the victim restitution claim were still outstanding. (3 RT 103.) The prosecution stipulated that the defense had timely requested a restitution hearing. (3 RT 103.) The prosecutor stated "that there would be no prejudice to dropping this" and that the inquiry could be resumed when the documents were available. (3 RT 103.)

On October 5, 2011, defense counsel stated that appellant's probation was set to expire within a week and that the probation department had requested that appellant's probation be extended for two years. (4 RT 123.) Defense counsel asked the court to "reserve" the issue of extending probation for two years and asked for a "short extension" as the defense was "still waiting for the documentation on the final, final number" on the restitution owed. (4 RT 123.) Defense counsel requested that the matter be "put . . . over for 30 days" and that appellant's probation be extended for 30 days. (4 RT 124.) Counsel explained that "any restitution amount is going to be reduced to a civil judgment anyway," and that appellant had made plans to move to Massachusetts once his probation ended. (4 RT 123.)

Defense counsel said that he simply wanted probation extended for a “reasonable period” to allow him and the prosecutor “to work this out.” (4 RT 124.) Based on that request, the trial court extended probation until November 2, 2011, and scheduled a further restitution hearing for October 26, 2011. (4 RT 125.)

On October 26, 2011, defense counsel stated that she and the prosecutor had agreed to a “short continuance” and wished to conduct the hearing in another week. (4 RT 129.) Noting that there had “been at least 10 appearances” on the case, the court stated that it did not understand why an additional week was required. (4 RT 129.) Defense counsel and appellant agreed that appellant’s probation be extended for an additional 30 days to December 2, 2011. The court set the next hearing for November 2, 2011. (4 RT 131.)

On November 2, 2011, defense counsel appeared for the restitution hearing and stated that he had “all the documentation” he was “going to get.” (4 RT 134.) Defense counsel wanted a hearing set to contest the matter “at the court’s convenience,” to allow the defense to argue whether the victim’s injuries actually were due to appellant’s conduct. Counsel stated that appellant had pleaded guilty only to leaving the scene of an accident, and that the accident itself was “not his fault.” (4 RT 134.) Defense counsel requested that appellant’s probation be extended for the time period to the set hearing date. (4 RT 135.) Based on appellant’s request, the court set the matter for January 27, 2012, and extended appellant’s probation until March 30, 2012. (4 RT 135.) The court set a briefing schedule. Appellant was required to file his memorandum of points and authorities on the issue of fault in the incident by December 16, 2012, and the People’s response was due by January 10, 2012. (4 RT 135.)

On January 27, 2012, the court held the restitution hearing. Defense counsel asserted that the prosecution’s motion on the issue of fault was not

filed until January 24, 2012, that it did not address the issue of comparative negligence, and that the court need not consider the prosecution's motion because it was untimely. (5 RT 184-186.) The prosecutor argued that appellant waived the comparative negligence argument by not asserting it following the assessment of approximately \$12,000 for medical bills. Defense counsel responded that the "court reserved restitution." (5 RT 188.)

The trial court proposed to hold the restitution hearing as scheduled and stated that, if necessary, it would schedule a second hearing on the issue of comparative negligence. When asked if there was any objection to the proposal, defense counsel responded, "No, your honor." (5 RT 190.)

The victim, Elaine Jennings, testified she was self-employed with her husband in a catering business. (5 RT 191.) Before appellant struck her with his car and fled, Jennings worked a minimum of 60 hours per week in the business. (5 RT 193.) According to Jennings, when she entered the street, she saw appellant slowing down and thought he had seen her. However, he struck her with his vehicle. (5 RT 197.) Jennings was in the trauma unit after sustaining multiple fractures to her leg, a broken scapula, and the loss of her front teeth. Jennings was in the hospital for a week and was confined to a wheelchair for approximately two months. (5 RT 198.) She spent the next couple of months on crutches. (5 RT 198-199.) Then Jennings "graduated to a cane." (5 RT 199.) After six months using the cane, Jennings was able to walk without a cane. (5 RT 199.)

Jennings was unable to work for about six months after she was injured and had to use an inheritance "to keep the business afloat." (5 RT 199-200.) Because of residual pain from her multiple leg fractures, Jennings usually had to be off her feet for two days after any catering event. (5 RT 203.) Before appellant hit her with his car, Jennings was an avid hiker. After being struck, she could not walk more than "10 or 15 minutes

without having problems.” (5 RT 204.) During cross-examination, defense counsel asked that further records be produced regarding Jennings’s business losses. (5 RT 211.) The hearing was again continued at defense counsel’s request so that the defense could rebut the \$275,000 restitution amount claimed by the victim, an amount that differed from the previously claimed amount of \$211,000. (5 RT 233-234.)

Based on appellant’s desire for rebuttal, the restitution hearing was scheduled to resume on March 1, 2012. (CT 142.) On that date, Jennings again testified. (CT 142.) At the conclusion of the hearing, appellant stated that he had subpoenaed a witness, Santa Rosa Police Officer Eric Rhodes, but that the officer had not appeared. (CT 142, 168.) At a subsequent appearance on March 8, 2012, Officer Rhodes again did not appear in court and an order to show cause issued. (CT 143.) The matter was continued until March 27, 2012, for a hearing on the order to show cause, and for completion of the restitution hearing. (CT 108, 143.) On March 9, 2012, Officer Rhodes appeared and the order to show cause was vacated. (CT 143.)

On March 27, 2012, the matter was continued until April 6, 2012. (CT 144.) Appellant did not object to the continuance.

On March 30, 2012, appellant’s probation term expired. (CT 144.)

On April 6, 2012, appellant made a limited appearance to contest jurisdiction because his probation term had expired on March 30, 2012. (CT 175-176.) The court ordered the parties to brief the jurisdiction issue and set a hearing date for argument on the matter. (CT 185-186.)

On May 17, 2012, the court awarded restitution in the amount of \$275,017. (CT 172.) The trial court ruled that it had jurisdiction to award restitution, noting that the restitution was not simply a condition of probation, but was a separate order over which the sentencing court had reserved jurisdiction. (RT [5/17/12] 3.) The court found that under the

broad powers set forth in section 1202.4, subdivision (f), the court had the authority to “set or modify probation if it’s been reserved at the time of sentencing.” (RT [5/17/12] 11.) Appellant sought further briefing on the issue of comparative negligence and another hearing was set for June 21, 2012. (CT 172-173.) Further proceedings on comparative negligence were not made part of the record on appeal.

### **C. Decision by the Court of Appeal**

On appeal, appellant contended that the trial court’s restitution order after the termination of his probation exceeded its jurisdiction and was without his consent. On July 17, 2013, the Court of Appeal affirmed the judgment. It held the trial “court’s retention of jurisdiction to determine and award victim restitution was permissible under Penal Code sections 1202.4 and 1202.46 irrespective of the expiration of [appellant’s] probation.” (*People v. Ford* (July 17, 2013, A135733) slip opn. at p. 1.) Rejecting appellant’s argument that section 1203.3, subdivision (b)(5) creates a limitation period on restitution to the term of probation, the court of appeal explained that the statute “is permissive, not restrictive. It takes nothing away from the court’s authority to award restitution under section 1204.4 [*sic*].” (*Id.*, slip opn. at p. 4.)

This Court granted appellant’s petition for review.

### **SUMMARY OF ARGUMENT**

A trial court’s authority to impose and modify an order of victim restitution is separate from its authority over probation conditions. Under article I, section 28, subdivision (b) of the California Constitution and sections 1202.4 and 1202.46, a trial court may order restitution to compensate a crime victim regardless of a defendant’s sentence. Furthermore, a restitution award may be ordered or modified in order to

provide full restitution to crime victims “until such time as the [victim’s] losses may be determined.” (§ 1202.46.)

At sentencing in this case, the trial court had reserved the determination of restitution under section 1202.4, subdivision (f). It retained authority under sections 1202.4 and 1202.46 to make its restitution order of \$275,017. The court was authorized to award restitution in full once that amount was determined regardless of appellant’s probation status. Moreover, appellant is estopped from asserting the court exceeded its jurisdiction because he did not object to the continuance of the restitution proceedings to a date beyond the expiration of his probationary period.

### **ARGUMENT**

#### **I. THE TRIAL COURT RETAINED JURISDICTION TO ORDER VICTIM RESTITUTION AFTER THE EXPIRATION OF APPELLANT’S PROBATION**

Appellant contends that the trial court’s issuance of a restitution order after the expiration of his probation period was an act in excess of the court’s jurisdiction and that he did not consent to the court’s order of full restitution to the victim.

The California Constitution and sections 1202.4 and 1202.46 authorize the imposition and modification of restitution orders to compensate a crime victim regardless of a defendant’s sentence. A crime victim is entitled to an order of full restitution unless a trial court “finds compelling and extraordinary reasons for not doing so and states them on the record.” (§1202.4, subd. (f).)

There are no statutory time restriction on when a crime victim may secure an order of restitution under these provisions. Furthermore, appellant is estopped from claiming the court acted in excess of its jurisdiction because he did not object to a continuance of the restitution proceedings beyond the date of his probation period.



## A. Applicable Law

“In 1982, California voters passed Proposition 8, also known as The Victims’ Bill of Rights. . . . [Citations.] Proposition 8 established the right of crime victims to receive restitution directly ‘from the persons convicted of the crimes for losses they suffer.’” (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) Proposition 8 added article I, section 28, subdivision (b) to the California Constitution. (*Id.* at p. 652) At the time of the offense and the sentencing in this case, that provision read:

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 person in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.

(Cal. Const., art. I, § 28, former subd. (b).) Article I, section 28, former subdivision (b), which is not self-executing, directed the Legislature to adopt implementing legislation. (*People v. Giordano, supra*, 42 Cal.4th at p. 652.)<sup>2</sup>

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<sup>2</sup> On November 4, 2008, the voters enacted Proposition 9 (known popularly as Marsy’s Law), which substantially amended various provisions of the Victims’ Bill of Rights, including those on restitution. (See *People v. Runyan* (2012) 54 Cal.4th 849, 858; *People v. Brunette* (2011) 194 Cal.App.4th 268, 279 fn. 5.) Article I, section 28, subdivision (b), provides now in relevant part:

(b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights:

[¶] . . . [¶]

(13) To restitution.

(continued...)

In 1983, the Legislature enacted section 1203.04, which “require[d] courts to impose restitution as a condition in all cases in which probation is granted.” (*People v. Narron* (1987) 192 Cal.App.3d 724, 732.) In 1995, the Legislature repealed section 1203.04 and incorporated its requirements into section 1202.4. (Stats.1995, ch. 313, §§ 5, 8, pp. 1755-1758, 1762, eff. Aug. 3, 1995.) Section 1202.4 now requires restitution in every case, without respect to whether probation is granted. (*People v. Giordano*, *supra*, 42 Cal.4th at p. 653.) Subject to minor exceptions, section 1202.4, subdivision (f), provides:

in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victims or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record.

In the case of a defendant who is placed on probation, the court “shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation.” (§ 1202.4, subd. (m).)

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(...continued)

- (A) 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 seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.
- (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

In 1999, the Legislature expressly conferred jurisdiction on trial courts to impose and modify economic losses of a victim until such time as those amounts could be ascertained. Section 1202.46 provides:

Notwithstanding Section 1170, when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. 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.

A sentence without an award of victim restitution is invalid. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 164–165; *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751.) A trial court has no discretion over the issuance of the award itself (*People v. Rowland, supra*, 51 Cal.App.4th at pp. 1751–1752), and “really very little discretion” over the amount of the award (*id.* at pp. 1751). “The statute requires the award be set in an amount which will fully reimburse the victim for his or her losses unless there are clear and compelling reasons not to do so.” (*Id.* at p. 1754.) A court’s reasons for awarding less than full restitution must be stated on the record. (§ 1202.4, subd. (f).) Thus, just as a sentence lacking a victim restitution award is invalid, a sentence awarding less than full victim restitution is similarly unauthorized when the court fails to state clear and compelling reasons for its decision. (See *People v. Bernal, supra*, 101 Cal.App.4th at p. 165.)

There is no statutorily imposed time restriction on when a crime victim may seek and secure restitution. In *People v. Bufford* (2007) 146 Cal.App.4th 966, the defendant asserted that the trial court lacked jurisdiction to make a restitution order after she had served her prison

sentence. The appellate court disagreed. It first observed that under section 1202.4, the court was statutorily obligated to impose victim restitution, if any, and 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).)” (*Id.* at p. 970.)

The court in *Bufford* observed that at the time of sentencing in that case, the trial court had reserved the question of victim restitution. That act is specifically authorized by section 1202.4, subdivision (f), under which “[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.” (*People v. Bufford, supra*, 146 Cal.App.4th at p. 971.) “Under a reading of the plain language of section 1202.4, 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.” (*Ibid.*)

**B. The Trial Court Properly Reserved the Determination of Economic Losses at Sentencing**

Appellant contends that under section 1203.3, subdivision (b)(5), invalidates the action of the trial court in making a final order of restitution after his probation term expired. That section states: “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.” (§ 1203.3, subd. (b)(5).) Based on section 1203.3, appellant claims that the trial court could only issue or modify the restitution order during his term of probation. (AOB 21-24.) Appellant misinterprets the statutory scheme.

As in *Bufford*, the trial court specifically reserved the issue of restitution at sentencing. When the court sentenced appellant, it stated that it would “*reserve further order and power to make further orders*” regarding restitution and appellant accepted the grant of probation on those terms. (1 RT 15-16, italics added.)

Under *Bufford* and section 1202.4, the court’s retention of jurisdiction over restitution was proper as it was based on the court’s inability to ascertain the total amount owed in restitution at the time of sentencing. (*People v. Bufford, supra*, 146 Cal.App.4th at p. 971.)

The trial court’s order effectively reserved jurisdiction to determine the amount of restitution at a subsequent time when the victim’s losses could be readily ascertained. Crime victims frequently suffer losses which are not ascertainable at the time of sentencing because the victim is still undergoing medical or psychological treatment or the entire consequences of defendant’s criminal conduct have not yet been fully realized. Since a trial court must impose restitution whenever there has been an economic loss, it does not err in ordering restitution in an as-yet-undetermined amount as a means of retaining jurisdiction over the issue of restitution, so long as it subsequently enters an enforceable order after a hearing or an agreement as to the appropriate amount of restitution.

(*People v. Guardado* (1995) 40 Cal.App.4th 757, 762-763; accord, *People v. Harvest* (2000) 84 Cal.App.4th 641, 651-652 [trial court’s express reservation of jurisdiction over restitution proper where defendant put on notice of reservation and never protested reservation of jurisdiction].)

Nothing in section 1203.3 precluded the trial court from expressly reserving jurisdiction over the amount of restitution until a time when the victim’s actual loss was ascertained. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1337-1338 [trial court is permitted to reserve jurisdiction to modify restitution award]; accord, *People v. Guardado, supra*, 40 Cal.App.4th. at pp. 762-763.) Section 1202.4, subdivision (f), affirmatively grants the court power to order restitution without a time limitation.

Section 1203.3, subdivision (b)(5), is a legislative recognition that the ordinary requirement for a change of circumstances before a probation order can be modified does not apply to a restitution order. Hence, it is permissive. The statute nowhere purports to limit the victim's state constitutional right to restitution after the court reserves jurisdiction to make an award of losses that are yet to be determined. Nor could the statute be so interpreted to condition a victim's right to restitution without placing the statute's constitutionality into doubt.

Significantly, a defendant's sentence is incomplete so long as a final restitution order is reserved and the trial court has not articulated compelling reasons for awarding less than full restitution to the victim. (§ 1202.4, subd. (f) [a court must order "full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record"].) As stated in *People v. Bernal*, *supra*, 101 Cal.App.4th 155, 164-165: "We note that victim restitution is mandated by both the Constitution and section 1202.4, and a sentence imposed without such an award is invalid. (*People v. Rowland*, *supra*, 51 Cal.App.4th at p. 1751.) Section 1202.4 requires 'full restitution.' An order providing less is similarly invalid. [Citation.]" (Accord, *People v. Brown* (2007) 147 Cal.App.4th 1213, 1225-1226 ["just as a sentence lacking a victim restitution award is invalid, a sentence awarding less than full victim restitution is similarly unauthorized when the court fails to state clear and compelling reasons for its decision"].)

Had the trial court not ordered full victim restitution after reserving jurisdiction to make a final order when the losses were determined, its action would be unauthorized because its sentence would be incomplete. This lends further support to the conclusion that the trial court had jurisdiction to issue its order after appellant's probation had ended. It was undisputed that the victim had suffered extensive business losses as a result

of appellant's crime, and that the order reimbursing her only for her medical expenses did not make her whole. Because the medical restitution award represented only a portion of the victim's loss and because the court had reserved jurisdiction to make a final award, any failure by the trial court to terminate jurisdiction by awarding restitution upon the determination of actual loss (or a statement of compelling reasons for not awarding full restitution to the victim) would itself have been unauthorized and correctible at any time. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1044–1045 [affirming the rule that an unauthorized sentence may be corrected at any time]; *People v. Brown, supra*, 147 Cal.App.4th at pp. 1225-1226; *People v. Bernal, supra*, 101 Cal.App.4th at pp. 164-165.)

Appellant distinguishes *Bufford* by arguing that Jennings was provided partial restitution for medical expenses at the initial sentencing whereas the victim in *Bufford* was provided no restitution. In essence, he claims that because the original restitution order, which allowed Jennings's other economic loss to be determined later, was valid, no further changes to the restitution award were authorized. (AOB 18-19.) The argument that the court could validly provide less than full restitution seeks to limit the victim's right to restitution from persons convicted of the crimes causing the losses they suffer. (Cal. Const., art. I, § 28, subd. (b).) The Legislature has directed courts to award "full restitution" to victims absent "compelling and extraordinary reasons for not doing so" (§ 1202.4, subd. (f)).

The validity of the original restitution order, as far as it went, does not alter three basic facts. One, the court had reserved jurisdiction to make a further order of restitution in the amount of losses to be determined as it was entitled to do. Two, the court remained under a duty to make a final restitution award to the victim when the amount of losses were determined absent an appropriate finding that would excuse not fully compensating the victim. Three, the parties were fully aware that the initial \$12,465.88

restitution order was incomplete, because it did not include Jennings's lost profit from her catering business. Thus, the trial court was authorized to reserve the determination of further restitution under sections 1202.4 and 1202.46 and remained under a duty to award full restitution to the victim once the full loss was determined.

**C. Section 1202.4 Requires Courts to Order Full Restitution to Crime Victims Independently of Whether the Restitution Order Is Imposed as a Probation Condition**

Appellant contends that "the restitution in [his] 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." (AOB 21.) At the core of this argument is the incorrect premise that once a restitution order becomes a condition of probation, the trial court's continuing jurisdiction over the final determination of restitution lapses upon the expiration of probation.

The court's reservation of continuing jurisdiction to make a final award of restitution is not itself a condition of probation even if an interim award happens to become such a condition. A "convicted criminal may be required to pay one or more of three types of a restitution": (1) a restitution fine (§ 1202.4, subd. (b)); (2) direct victim restitution (§ 1202.4, subd. (f)); and (3) restitution as a condition of probation (§ 1203.1, subds. (b), (j)); *People v. Lent* (1975) 15 Cal.3d 481, 486-487). (*People v. Giordano, supra*, 42 Cal.4th at pp. 651-652.) The statutory jurisdiction provided for these multiple kinds of restitution is intended to provide full restitution to crime victims in all cases. The jurisdictional predicate subsists apart from an actual award of restitution that may (or may not) be imposed as part of a probationary scheme. Whether or not a defendant is placed on probation, section 1202.4, subdivision (f), requires courts to order full restitution to crime victims.



Likewise, the trial court's final award of restitution for the victim's full loss was not based on its power to impose or modify conditions based on a change of circumstance during the term of probation; rather, it was based on its independent power to order restitution under section 1202.4, subdivision (f). Section 1202.4, subdivision (f), provides for "full restitution" to crime victims unless the trial court finds and states "compelling and extraordinary reasons for not doing so." The court ruled that it had jurisdiction to award restitution, noting that the restitution was not simply a condition of probation, but was a separate order over which the sentencing court had reserved jurisdiction. (RT [5/17/12] 3.) The court found that, under the broad powers set forth in section 1202.4, subdivision (f), it had the authority to "set or modify restitution if it's been reserved at the time of sentencing." (RT [5/17/12] 11.) Based on the independent statutory authority to order restitution, regardless of the sentence imposed, the court acted properly within its jurisdiction by ordering appellant to make Jennings whole for her business losses.

Appellant cites section 1202.4, subdivision (m), to support his contention that "where probation is granted, all restitution orders must become conditions of probation." (AOB 20.) Section 1202.4, subdivision (m), 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." Appellant claims this provision restricts the court's jurisdiction to provide full restitution to crime victims because the restitution order became a probation condition and nothing more. But that provision does not eliminate the court's independent jurisdiction to order or modify restitution after a defendant completes

probation. The plain language of section 1202.4, subdivision (m), imposes no limitation on a court's authority under section 1202.4, subdivision (f), to reserve a restitution determination until the amount of loss can be ascertained. However, we acknowledge that after the filing of appellant's opening brief, the Second District Court of Appeal, Division Three held that a trial court lacks jurisdiction to modify restitution once a defendant's probation term has expired. (*Hilton v. Superior Court* (February 25, 2014, B248654) \_\_\_ Cal.App.3d \_\_\_ [2014 WL 717456] at p. \*1.) *Hilton* was wrongly decided and, in any event, is distinguishable.

In *Hilton*, the defendant pleaded no contest to driving with a blood alcohol content of at least .08 percent and unlawful use of a driver's license. (*Hilton v. Superior Court, supra*, 2014 WL 717456 at p. \*1.) The trial court placed Hilton on probation for three years and ordered him to pay \$3,215 in direct restitution to Fernando Tellez, who defendant struck with his car in the offense. (*Ibid.*) There was no indication that the trial court had reserved the determination of further restitution for a later date. Hilton paid the \$3,215 in restitution as well as a \$3.5 million civil suit settlement to Tellez. (*Ibid.*) On November 28, 2012, over a year and seven month's after Hilton's probation expired, Tellez filed a motion in the superior court seeking more than \$886,000 in additional restitution based on the California Constitution's former article I, section 28, subdivision (b), and section 1202.4, subdivision (f). (*Ibid.*) The trial court ruled that it had jurisdiction to issue the \$866,000 restitution order because the initial \$3,215 award was not full restitution and, thus, was unauthorized. (*Id.* at p. \*2.)

The appellate court in *Hilton* disagreed and found that the trial court lacks jurisdiction to modify restitution once a defendant's probation term has expired. (*Hilton v. Superior Court, supra*, 2014 WL 717456 pp. \*3-\*7.) The court in *Hilton* asserted that under section 1203.3 a court loses jurisdiction to revoke or modify probation terms after the expiration of the

probationary period. (*Id.* at pp. \*3-\*5, citing *In re Griffin* (1967) 67 Cal.2d 343, 346-347.) The *Hilton* court reasoned:

Once the trial court granted probation, the jurisdiction the trial court retained and maintained over Hilton was exclusively based on the fact he was on probation. Tellez [the victim] filed with the trial court a motion for additional restitution. Effectively, therefore, his motion was a motion for an order modifying Hilton's probation to require additional restitution. However, the trial court's jurisdiction over Hilton expired on April 8, 2011, and Tellez filed his motion in November 2012, more than one year and seven months after Hilton's probationary term had expired. On April 3, 2010, the trial court ruled it had jurisdiction to impose additional restitution. That ruling was erroneous.

(*Hilton, supra*, at p. \*7.)

This holding conflates the court's jurisdiction over the modification of conditions of probation during a defendant's probation period based on changed circumstances, with the trial court's continuing and independent jurisdiction to make crime victims whole through restitution awarded in the amount of the loss as determined. A court retains the jurisdiction to award full restitution as authorized under section 1202.4, subdivision (f), to implement the victim's independent constitutional right, regardless of a defendant's current probation status or, for that matter, whether he or she is granted probation at all.

Moreover, *Hilton* is factually distinguishable. The trial court in *Hilton* did not reserve the determination of further restitution at sentencing. In contrast, both parties in this case were aware of the possibility of further litigation regarding Jennings's business losses. (1 RT 15-16.) When the trial court initially sentenced appellant, it stated that it "*reserve[d] further order and power to make further orders*" regarding restitution, and appellant accepted probation on those terms. (1 RT 15-16, italics added.) Under *Bufford* and section 1202.4, the court's retention of jurisdiction over restitution preserved its authority to issue further restitution orders until

Jennings's full loss could be determined. (*People v. Bufford, supra*, 146 Cal.App.4th at p. 971.)

Finally, appellant impliedly consented to further restitution proceedings beyond the date of his probation's expiration (see section I.F. *post*), whereas Hilton did not. The victim in the *Hilton* case filed a motion in the superior court seeking the \$886,000 in additional restitution over a year and seven month's after Hilton's probation had expired. Hilton never agreed to those proceedings. Thus, *Hilton* is inapposite here.

**D. The Plain Language of Section 1202.46 Did Not Limit the Trial Court's Jurisdiction to Order Restitution After Appellant's Probation Terminated**

Section 1202.46 establishes 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" without regard to whether the person was sentenced to prison or granted probation. Appellant contends, however, that section 1202.46 does not apply to probationers. He references the statute's legislative history and notes that the bill's proponent, the California Department of Corrections, discussed the proposed statute in terms of conducting restitution hearings in correctional facilities via video conferencing. Appellant states that section 1202.46 "was focused on dealing with a variety of problems relating to the ability to ensure defendants were able to appear in court [via video conferencing] when they were already in the custody of Department of Corrections." (AOB 14-16.) From this history, and other secondary sources, appellant concludes that section 1202.46's continuing restitution jurisdiction applies only to inmates, not probationers. (AOB 19.)

When construing statutes, a reviewing court must "ascertain the intent of the enacting legislative body" in order to "adopt the construction that best effectuates the purpose of the law." (*People v. Albillar* (2010) 51

Cal.4th 47, 54-55, internal quotation marks omitted.) To that end, the court “first examine[s] the words of the statute, ‘giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent.” (*Id.* at p. 55.) “If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature’s intent is unnecessary.” (*Ibid.*) “Judicial construction of unambiguous statutes is appropriate only when literal interpretation would yield absurd results.” (*Ibid.*) If, however, “the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.” (*People v. King* (2006) 38 Cal.4th 617, 622, internal quotation marks omitted.)

The language of section 1202.46 is clear, and interpreting it according to its plain meaning will not result in absurd consequences. Section 1202.46 bestows trial courts with 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.” It provides continuing jurisdiction to correct a deficient restitution order by stating, “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.” The statute does not distinguish a crime victim’s right to restitution from a defendant who is sentenced to prison as opposed to a defendant who is placed on probation. Indeed, the statute provides the authority to enable all crime victims to obtain restitution unless compelling and extraordinary reasons justify otherwise.

Appellant's resort to legislative history, the determinate sentencing statute (§ 1170), and subsequent cases does not alter the fact that section 1202.46 says nothing reflecting its inapplicability to probation cases. (AOB 19.) "If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*People v. Traylor* (2009) 46 Cal.4th 1205, 1212.) There is no ambiguity in the statute and thus no need to resort to the legislative history or other secondary authority.

Even if there were such ambiguity, appellant's resolution would be contrary to the California Constitution, and the legislative purpose to make *all* victims whole, because it would prevent a court from reserving jurisdiction over restitution in probation cases while not preventing such a reservation in prison cases. As noted by the trial court, it would be anomalous for continuing jurisdiction to be exercised over the restitution obligations of state prisoners while barring continuing jurisdiction over the restitution obligations of probationers. (RT [5/17/12] 10-11 ["It would be somewhat absurd" if the court had "unlimited jurisdiction to award or determine restitution" in a state prison case but preclude such jurisdiction in a probation case since both defendants and crime victims would be treated unequally].) A probationer's crime victim is as much entitled to be made whole as a state prisoner's crime victim. "Restitution shall be ordered from the convicted person in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary." (Cal. Cont., art. I, § 28, former subd. (b).) Consequently, section 1202.46 should be interpreted in a manner to allow the court to reserve continuing jurisdiction to order and modify restitution whether or not the defendant has been granted probation.

Such a construction harmonizes section 1202.46 with still another source of a trial court's jurisdiction to award full restitution after the

defendant's term of probation. Section 1202.4 also provides the broad authority for the imposition or modification of restitution at "the direction of the court." (§ 1202.4, subd. (f).) *Bufford* found that "[u]nder a reading of the plain language of section 1202.4, 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." (*People v. Bufford, supra*, 146 Cal.App.4th at p. 971.)

Consistent with *Bufford*, to read section 1202.4, subdivision (f) so narrowly as to preclude the trial court's jurisdiction to award or modify restitution in the full amount of the losses as may be determined, regardless of whether a defendant is sentenced to prison or granted probation, is to frustrate article I, section 28, subdivision (b) of the California Constitution. (*Ibid.*)

Appellant argues that section 1202.46 is inapplicable because certain probation provisions regarding restitution are specifically applicable to his case and should override the more general restitution statute in section 1202.46. (AOB 10-12.) He states, "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 [ , subdivision] (m) and 1203.3[ , subdivision] (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 . . . must be given effect." (AOB 12.)

The court's authority to order restitution was not bound within the probationary scheme. The general/specific rule of statutory construction to which appellant alludes does not dictate a contrary result.

Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as

creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute.

(*People v. Murphy* (2011) 52 Cal.4th 81, 86, citing *In re Williamson* (1954) 43 Cal.2d 651, 654.) To determine if the doctrine is applicable, courts must decide whether, “(1) . . . each element of the general statute corresponds to an element on the face of the special statute, or (2) . . . it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.” (*People v. Watson* (1981) 30 Cal.3d 290, 295-296.) Under the first test, “a special statute will not preempt a general statute unless all the requirements of the general one are covered in the special.” (*People v. Molina* (1992) 5 Cal.App.4th 221, 226-227, citing *People v. Ruster* (1976) 16 Cal.3d 690.) Under the second test, courts examine the “context in which the statutes are placed.” (*People v. Jenkins* (1980) 28 Cal.3d 494, 502.) “If it appears from the entire context that a violation of the ‘special’ statute will necessarily or commonly result in a violation of the general statute, the *Williamson* rule may apply even though the elements of the general statute are not mirrored on the face of the special statute.” (*Ibid.*) “The rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict.” (*People v. Walker* (2002) 29 Cal.4th 577, 586.)

Appellant’s suggested application of the *Williamson* rule here labels section 1202.46 a general statute and sections 1203.3 and 1202.4, subdivision (m), the more specific statutes. He thereby compares the court’s power to impose and modify restitution to the court’s power to impose probation conditions. However, there is no conflict in these statutes. As explained *ante*, the statutory authority to ensure full restitution to crime victims exists separately from the probationary scheme. That is, whether or not a defendant is placed on probation, section 1202.4 requires courts to order full restitution to crime victims. (§ 1202.4, subs. (a)(3),



(f.) Appellant's attempt to bootstrap his position through a legislative rule of construction cannot overcome his victim's state constitutional and statutory right to an award of restitution in the full amount of the loss as determined.

**E. A Trial Court's Jurisdiction to Issue Restitution Terminates When Full Restitution For A Victim's Losses Has Been Ascertained and Ordered**

Raising the specter of "never-ending authority to impose victim restitution," appellant argues, "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." (AOB 31.) Contrary to this assertion, a trial court's jurisdiction to order and modify restitution is not without an end; it terminates when a defendant makes a victim whole.

Section 1202.4, subdivision (f), provides, "If the amount of [a victim's] 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." Section 1202.46 provides that "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." These statutes reflect that once the court ascertains the amount of the loss and orders full restitution, its jurisdiction under those statutes terminates.

The Legislature intended restitution to "restore the economic status quo" by returning to the victim "funds in which he or she has an ownership interest" following a criminal conviction. (*People v. Giordano, supra*, 42 Cal.4th 644, 658.) However, "a restitution order 'is not . . . intended to provide the victim with a windfall. [Citation.]'" (*People v. Millard* (2009) 175 Cal.App.4th 7, 28.) The victim's economic loss must come "as a result

of the defendant's conduct.” (§ 1202.4, subd. (f).) Victims are entitled to an amount of restitution so as to make them whole, but nothing more, from their actual losses arising out of the defendant’s criminal behavior. (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794-795.) Thus, once the court has determined the full extent of a victim’s losses as a result of a defendant’s criminal behavior and ordered that amount in restitution, a further award of windfall funds in restitution to the victim would be in excess of its statutory jurisdiction in the case.

Here, the trial court’s jurisdiction over restitution effectively terminated when it determined Jennings’s business losses and ordered appellant to pay her that amount in restitution. At that point, the parties did not contemplate new claims of economic losses by Jennings, and the court did not reserve its jurisdiction over such claims if any existed. The court had discharged its duty to provide Jennings with “full restitution” under section 1202.4, subdivision (f) and had no authority to order what would otherwise be a windfall amount of funds as restitution. Appellant’s concern about “never-ending” jurisdiction is, thus, unfounded.

**F. Appellant Is Estopped from Claiming the Court’s Restitution Order Was in Excess of Jurisdiction**

On March 27, 2012, appellant did not object to a continuance of the restitution matter to April 6, 2012, a date after his probation period expired. (CT 144.) Appellant contends he should not be estopped from raising the restitution jurisdictional issue on appeal even though he did not object to the continuance. (AOB 24-27.) We disagree. Appellant is estopped because he agreed to a continuance of the proceedings to a date beyond the expiration of his probation. Moreover, the delay in awarding full restitution was occasioned, in large part, by appellant’s continuing efforts to seek more and more documentation, and by his repeated efforts to reduce the amount owed on the basis of comparative negligence. When a defendant is

partially responsible for a delay in setting restitution, he should not be permitted to assert that delay as a basis for invalidating a final restitution order. Such a result unfairly denies the crime victim full restitution despite no fault of her own.

*People v. Lara* (2010) 48 Cal.4th 216, explained how acts in excess of jurisdiction are subject to principles of estoppel, waiver, or consent.

“When courts use the phrase ‘lack of jurisdiction,’ they are usually referring to one of two different concepts, although, as one court has observed, the distinction between them is ‘hazy.’ (*People v. Mendez* (1991) 234 Cal.App.3d 1773, 1781.)” (*Williams, supra*, 77 Cal.App.4th 436, 447.) 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.’ (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) On the other hand, a court may have jurisdiction in the strict sense but 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.] When a court fails to conduct itself in the manner prescribed, it is said to have acted in excess of jurisdiction.” [Citations.]

The distinction is important because the remedies are different. “[F]undamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court’s jurisdiction in the fundamental sense is null and void” ab initio. (*Williams, supra*, 77 Cal.App.4th at p. 447.) “Therefore, a claim based on a lack of . . . fundamental jurisdiction[] may be raised for the first time on appeal. (*People v. Chadd* (1981) 28 Cal.3d 739, 757.) ‘In contrast, an act 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. [Citations.]’ (*People v. Ruiz* [(1990)] 217 Cal.App.3d [574], 584; *In re Andres G.* (1998) 64 Cal.App.4th 476, 482.)” [Citations.]

(*Id.* at pp. 224-225.) Consistent with these principles, a probationer may be estopped from asserting a lack of nonfundamental jurisdiction:

A probationer may by his conduct, however, consent to the continuance of a proceeding to a time beyond that within which a statute requires the court to act. In an analogous context the Court of Appeal held in *People v. Ham* (1975) 44 Cal.App.3d 288, 294, that when a probationer appeared before the court for a revocation hearing prior to the expiration of the period of probation, and requested a continuance to a date beyond that period, the court retained the power to conduct the hearing and to revoke probation as the probationer was estopped to complain that the period of probation had expired.

This court reached a similar conclusion in *In re Griffin, supra*, 67 Cal.2d 343, where we explained: “Neither 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. The 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. [¶] When . . . the 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.” [Citation.] In *Griffin* we applied that reasoning to reject a claim that the trial court had exceeded its jurisdiction in revoking probation after the end of the probation period when the petitioner himself had requested the continuance of the revocation hearing. We reasoned that the contrary rules which apply to time limits established by other civil and criminal statutes were not appropriate to the operation of the probation system.

(*In re Bakke* (1986) 42 Cal.3d 84, 89.)

Appellant agrees that the trial court did not lack fundamental jurisdiction. (AOB 25 [“[Appellant] does not argue that the trial court lacked fundamental jurisdiction over the subject matter”].) Consequently, principles of waiver and estoppel may be invoked. (*People v. Lara, supra*, 48 Cal.4th at pp. 224-225.) Estoppel in this case is proper. At the time of his sentencing, appellant expressly agreed that the court would reserve jurisdiction over restitution. By delaying the proceedings until his

probation expired, appellant sought to better the bargain to which he had agreed. (See *People v. Flood* (2003) 108 Cal.App.4th 504, 508 [“defendants who have received the benefit of their bargain should not be allowed to ‘trifle with the courts’ by attempting to better the bargain through the appellate process”].) Appellant seeks an unfair advantage from continuances that he either sought or agreed to. Such a result is inequitable and should not be permitted.

The probation department sought to extend appellant’s probation for an additional two years after it notified him that the victim had claimed \$221,000 in restitution. (CT 43.) In response, appellant asked the court not to rule on the request because he was waiting only for a few more documents and would agree to a “short extension” while he was “still waiting for the documentation on the final, final number” on the restitution owed. (4 RT 123.) Counsel explained that “any restitution amount is going to be reduced to a civil judgment anyway,” and that appellant had made plans to move back to Massachusetts once his probation ended. (4 RT 123.) Defense counsel said that he wanted probation extended for a “reasonable period” to allow him and the prosecutor “to work this out.” (4 RT 124.) In reliance on those statements, the trial court extended probation until November 2, 2011, and scheduled a further restitution hearing on October 26, 2011. (4 RT 125.)

On March 27, 2012, after further continuances, appellant did not object to delaying the restitution hearing until April 6, 2012, a date after the expiration of his probation on March 30, 2012. (CT 144.) Appellant now asserts that he was not required to object to continuing the hearing past the

expiration of his probation because any objection would have been futile since the prosecutor was in a preliminary hearing.<sup>3</sup> (AOB 26-27.)

On the contrary, appellant was not relieved of his duty to object merely because the prosecutor was in a preliminary hearing. Even if he believed that his objection would be overruled, appellant was required to voice an objection rather than use the futility exception to evade waiver rules. (See *People v. Ervine* (2009) 47 Cal.4th 745, 807 [defendant not entitled to manipulate waiver rules by claiming that the court's silence during the prosecutor's argument meant that any objection to the argument would have been futile].) On this record, it appears that appellant did not object to a continuance because it would have alerted the court to the impending expiration of appellant's probation, which almost certainly would have prompted another extension of the term of probation. Thus, relieving appellant of his duty to object would have the highly untoward effect of rewarding appellant for intentionally not objecting and thereby manipulating the judicial system. (See *People v. Clark* (1992) 3 Cal.4th 41, 115 ["Trial courts are not required to engage in game playing with cunning defendants"].)

Given his initial agreement to the trial court's reservation of jurisdiction, together with his efforts to continually delay the proceedings, as well as his failure to object to holding the restitution hearing after his

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<sup>3</sup> Appellant references a stipulation between the district attorney and defense counsel which stated that the prosecutor was unavailable on March 27, 2012 because she was required to finish a preliminary hearing in another case. (AOB 26-27.) On December 28, 2012, the Court of Appeal issued an order stating, "Because the stipulation postdates the judgment that is the subject of this appeal, it is not a proper subject of an augmentation order." Although the Court of Appeal reserved a determination of whether the stipulation would be considered by judicial notice, a ruling on the matter was not made.

probation had expired, appellant is estopped from claiming the court lacked jurisdiction. (See *In re Bakke, supra*, 42 Cal.3d at p. 89 [“When . . . the 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”].)

**G. Sections 1202.4 and 1202.46 Express the Constitutional and Legislative Imperative to Provide Full Restitution to Crime Victims and Foster Defendant Rehabilitation Without Resulting in Excessive Litigation**

Appellant contends that the “application of section 1202.46 to probationers will defeat the rehabilitative purpose of probation, create a new field of litigation, and override the concept that all claims are subject to a statute of limitations.” (AOB 27.) He overlooks that a restitution order serves a rehabilitative function. “[A]lthough restitution serves the obvious function of compensating the victims of crime, it also impresses upon the offender the gravity of the harm he has inflicted upon another, and provides an opportunity to make amends. As one commentator has noted, “[r]estitution may have a positive treatment connotation. It offers the individual something within reason that he can do here and now, within the limits of his ability, to demonstrate to *himself* that he is changing. A fine is punitive. A jail sentence is retributive. But restitution makes sense.” [Citations.] Restitution, then, can be a valuable tool of rehabilitation.” (*Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 748.)

Appellant attempted to avoid responsibility by fleeing the scene after hitting Jennings with his car. He tried to thwart the authorities in their investigation of the accident and thereby hamper their ability to provide expedient assistance to Jennings. He needs to make amends to Jennings and to fully compensate her. His self-serving claim that providing full restitution to crime victims undermines rehabilitation lacks any basis.

Appellant asserts that crime victims have sufficient mechanisms within the current probationary scheme to obtain restitution and that providing limitless jurisdiction under section 1202.46 for the court to order or modify restitution would lead to “a whole new area of litigation into criminal courts up and down the state.” (AOB 30.) However, victims often suffer harms and losses from crimes that are not necessarily immediately apparent. “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.” (*People v. Giordano, supra*, 42 Cal.4th at pp. 657-658.) As relevant in this case, “[w]ages or profits lost due to injury incurred by the victim, necessarily arise following the occurrence of the crime, and it is likely that many injured crime victims will lose wages or profits for weeks, months, or possibly years following a restitution hearing.” (*Id.* at p. 658, see § 1202.4, subd. (f)(3)(D).) Here, Jennings suffered significant business losses as a self-employed caterer with injuries that caused her to lose six months of work and her business to suffer for a year. (CT 198.) In sections 1202.4, subdivision (f), and 1202.46, the Legislature conferred courts with jurisdiction precisely so that victims like Jennings can be compensated for losses well beyond immediate medical bills and despite numerous court delays through no fault of her own.

Appellant also fails to substantiate his claim that the plain reading of sections 1202.46 and 1202.4, subdivision (f), will result in “a whole new field of litigation” (AOB 27), or that it would enable “[e]ndless litigation” (AOB 29). The more recent of the two provisions, section 1202.46, was enacted by the Legislature in 1999. Appellant presents no convincing evidence of an abuse of the system of restitution since that time. Section 1202.4, subdivision (f), prudently places a trial court in the position to distinguish proper claims from those not subject to restitution. In light of



the trial court's ability to identify the legitimate losses of crime victims, appellant's professed concerns about endless litigation are unfounded. The determination of restitution may only be reserved "until such time as the losses may be determined." (§ 1202.46.) After an award based on that determination, a trial court's jurisdiction terminates.

Appellant's concerns about victim abuse of restitution are misplaced. Jennings diligently pursued her claim of restitution for years and provided proof of her losses to the best of her ability. At the January 27, 2012, restitution hearing, the prosecutor stated, "I am informed that the People did provide [defense] counsel with copies of the victim's tax returns and copies of the victim's profit and loss statement from 2007, 2008, and 2009." (5 RT 212.) Defense counsel confirmed these documents were provided, but sought additional documents regarding Jennings's business losses. (5 RT 211-212.) Jennings did not pursue any stale or frivolous claim of restitution. The prosecution had presented a prima facie restitution amount of \$275,017 by the January 27, 2012 hearing, over two months before appellant's probation expired. (5 RT 234.) Jennings sought restitution within the confines of sections 1202.4 and 1202.46, but—due to no fault of her own—it required two months beyond the expiration of appellant's probation to obtain a full restitution order. That two-month period largely was devoted to litigating the court's jurisdiction. At the May 17, 2012, hearing the trial court said, "This has been going on for a long time and the victim has had to come back many times, and understandably, is upset that this had not been concluded." (RT [5/17/12] 17.) Appellant's victim bears no fault for the matter still not having concluded. The fault lies elsewhere.

Appellant's unduly narrow view of restitution jurisdiction would merely incentivize probationers to delay restitution proceedings. A probationer, like appellant, would have every reason to draw out restitution

proceedings in hopes that probation would expire before full losses could be ascertained and a final award of restitution ordered.

A rule that a court's restitution jurisdiction terminates with probation would unjustifiably deny or, at the very least, delay full restitution for crime victims.

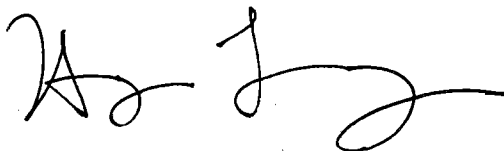
### CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 13, 2014

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
DANE R. GILLETTE  
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**CERTIFICATE OF COMPLIANCE**

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,966 words.

Dated: March 13, 2014

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read 'Huy T. Luong', with a long horizontal flourish extending to the right.

HUY T. LUONG  
Deputy Attorney General  
*Attorneys for Respondent*



**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: *People v. Ford*

No.: **S212940**

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 collection and processing of correspondence for mailing with the United States Postal Service. 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.

On March 14, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Jane Gaskell  
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Attention: Executive Director  
First District Appellate Project  
730 Harrison St., Room 201  
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[Via e-mail only: [eservice@fdap.org](mailto:eservice@fdap.org)]

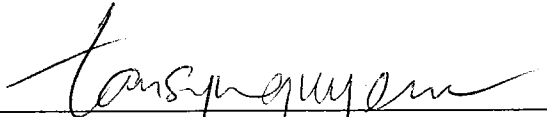
The Honorable Jill Ravitch  
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 14, 2014, at San Francisco, California.

Tan Nguyen  
Declarant

  
Signature