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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 194                      **Hearing Date:** June 6, 2017  
**Author:** Patterson  
**Version:** March 2, 2017  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Victim Restitution: Probation: Jurisdiction*

### HISTORY

**Source:** California District Attorneys Association

**Prior Legislation:** AB 2477 (Patterson), 2016, failed passage in the Assembly Committee on Public Safety

**Support:** Unknown

**Opposition:** American Civil Liberties Union of California; California Attorneys for Criminal Justice

**Assembly Floor Vote:** 71 - 4

### PURPOSE

*The purpose of this bill is to extend the court's jurisdiction to impose or modify restitution for a period five years from the date of sentencing or until the expiration of probation or mandatory supervision.*

*Existing law* establishes the right of crime victims to receive restitution directly from the persons convicted of the crimes for losses they suffer. (Cal. Const. art I, § 28, subd. (b).)

*Existing law* requires victim restitution from criminal defendants who have been sentenced by the court in every case in which a victim has suffered an economic loss as a result of the defendant's conduct. (Pen. Code, § 1202.4, subd. (f).)

*Existing law* defines probation as "the suspension of the imposition or execution of a sentence and the order of conditional release in the community under the supervision of a probation officer." (Pen. Code, § 1203, subd. (a).)

*Existing law* gives the court discretion in felony cases to grant probation for up to five years, or no longer than the prison term that can be imposed when the prison term exceeds five years. (Pen. Code, § 1203.1, subd. (a).)

*Existing law* gives the court discretion in misdemeanor cases to generally grant probation for up to three years, or no longer than the consecutive sentence imposed if more than three years. (Pen. Code, § 1203a.)

*Existing law* authorizes the extension of probation for five years in certain misdemeanor cases, such as driving under the influence. (Veh. Code, § 23600, subd. (b)(1).)

*Existing law* requires a court which grants probation to make the payment of the victim restitution order a condition of probation. (Pen. Code, § 1202.4, subd. (m).)

*Existing law* authorizes the court to revoke, modify, extend, or terminate its order of probation. (Pen. Code, §§ 1203.2 & 1203.3.)

*Existing law* authorizes the court to modify the dollar amount of restitution at any time during the term of probation. (Pen. Code, § 1203.3, subd. (b)(5).)

*Existing law* prohibits the court from modifying the restitution obligations due to the defendant's good conduct. (Pen. Code, § 1203.3, subd. (b)(4).)

*Existing law* provides that when the economic losses of a victim cannot be ascertained at the time of sentencing, the court shall retain jurisdiction for purposes of imposing or modifying restitution until such time as the losses may be determined. A victim, the district attorney, or a court on its own motion, is not prohibited from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine. (Pen. Code, § 1202.46.)

*Existing law* provides that a trial court acts in excess of its jurisdiction when it orders or modifies restitution after the expiration of a defendant's probationary period. (*Hilton v. Superior Court* (2014) 239 Cal.App.4th 766; *People v. Waters* (2015) 241 Cal.App.4th 822.)

*This bill* nullifies the holdings in *Hilton v. Superior Court* and *People v. Waters*.

*This bill* provides that the court retains jurisdiction over a defendant for purposes of imposing or modifying restitution for a period of five years following sentencing, or until the expiration of probation or mandatory supervision, whichever is later.

## COMMENTS

### 1. Need for This Bill

According to the author:

California Constitution, (Subdivision (b)(13) of Section 28 of Article One) which requires a court to order restitution in every case, regardless of what the defendant's sentence is: "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a victim suffers a loss." PC1202.4(f) codifies this principle by requiring that the court order a defendant to make restitution to a victim in an amount established by court order.

Current law, Penal Code 1202.46, provides that if economic losses of a victim cannot be ascertained at the time of sentencing, then the court is to retain jurisdiction and modify restitution until a person's losses may be adequately determined. In two recent state appellate court decisions (*Hilton v Superior Court*

of Los Angeles County and *The People v Bufford*), questions arose when it came to deciding whether or not the court had jurisdiction to impose restitution on a person who has committed a crime, after their probationary period has expired.

This is flawed because the initial court hearing and restitution hearing are totally separate from one another. Often times restitution hearings can be delayed due to extraneous circumstances. Generally restitution is not granted at the initial hearing because the court does not have the exact figure that must be paid because some costs may be ongoing, i.e. medical costs.

The expiration of time for the courts to impose restitution is contrary to the California Constitution, which requires restitution be made in every case where a victim suffers a loss a result of a crime. When a victim is denied the right to full restitution, they are denied their right to justice. The probationary period and restitution are two separate facets of the sentencing. The payment of restitution should not be predicated on the probationary period, and restitution should be paid to the victim even if when the probationary period expires. By effectively separating the two, we can then ensure that victims receive the full justice that they deserve and that the initial sentencing of a probationary period and restitution are upheld.

## 2. This Bill would Abrogate Recent Case Law

Two recent appellate court cases have held that a trial court acts in excess of its jurisdiction when it orders or modifies restitution after the expiration of a defendant's probationary period.

In *Hilton v. Superior Court* (2014) 239 Cal.App.4th 766, the Court of Appeal held that once probation expires, the judge cannot modify a restitution order. In *Hilton*, the defendant pled to driving under the influence and the court placed him on probation for three years. At a subsequent restitution hearing, the court ordered the defendant to pay \$3,000 restitution to the victim, which he did. (*Id.* at pp. 769-770.) The victim then sued the defendant civilly and won \$3.5 million. Probation then expired on the criminal case. One year and seven months after probation expired, the victim went back to court and requested that the court order \$886,000 more in restitution, to pay for the costs of the civil suit as well as additional lost wages. The defendant objected based on lack of jurisdiction. (*Id.* at 770.) The Court of Appeal reversed the order, holding that once probation expires, the court loses jurisdiction to modify a restitution order and that any extension of probation was an act in excess of jurisdiction and void. (*Id.* at p. 772.) The court noted that termination of probation occurs by operation of law at the end of the probationary period. (*Id.* at p. 773.) The court also held that the language of Penal Code section 1203.3, reflects legislative intent, consistent with pre-existing law on probation, that the trial court lacks jurisdiction to impose restitution once probation expires. (*Id.* at pp. 775-776.)

*People v. Waters* (2015) 241 Cal.App.4th 822, agreed with the holding in *Hilton*. In that case, the court sought to order restitution two years after the probationary period expired, even though the victim impact statement seeking \$20,000 was filed before the entry of the plea. (*Id.* at p. 825.) The court noted that Penal Code section 1202.4, subdivision (f) requires the trial court to order victim restitution unless the trial court finds compelling and extraordinary reasons for not doing so. Regarding jurisdiction, a trial court's power to modify a sentence usually expires 120 days after judgment (see Pen. Code, § 1170, subd. (d)). (*Id.* at p. 827.) But there is an exception

where victim restitution cannot be ascertained at the time of sentencing and the trial court retains jurisdiction to order restitution. (Pen. Code, § 1202.46.) However, section 1202.46 must be harmonized with the preexisting statutory scheme concerning probation, which limits a trial court's jurisdiction to modify probation to the term of probation (Pen. Code, § 1203.3, subs. (a), (b)(4).) (*Id.* at p. 830-831.) Therefore, the court concluded that the trial court lacked jurisdiction to order restitution after the expiration of the defendant's probationary period. (*Id.* at p. 831.)

This bill seeks to overturn these cases.

### 3. Constitutional Right to Restitution

In 1982, Proposition 8 was approved by California voters to amend the California Constitution to establish the right of crime victims to receive restitution. The initiative provided that “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.” (Cal. Const., art. I, sec. 28, subd. (b).)

A trial court is required to order defendant to pay full restitution to victims of a crime “unless it finds compelling and extraordinary reasons for not doing so and states them on the record.” (Pen. Code, § 1202.4, subd. (f).) If the amount of restitution cannot be ascertained at the time of sentencing, the court shall include a provision in the restitution order that the restitution amount shall be determined at a future time. (*Id.*) The trial court must incorporate the restitution order in the defendant's conditions of probation. (Pen. Code, § 1202.4, subd. (m).)

It has been held that a sentence is invalid where a trial court fails to issue a restitution award to the victim. (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1750–1752.) Generally, a valid sentence may not be changed in a way that increases the sentence. The modification of a sentence to include restitution may constitute an increase in sentence. However, a sentence that is invalid due to the omission of a restitution order may be corrected upon request of a victim, the district attorney, or by a court on its own motion. (*Ibid.*; see also Pen. Code, § 1202.46.)

### 4. Restitution as a Condition of Probation

When the court grants probation, payment of restitution must be made a condition of probation. (Pen. Code, 1202.4, subd. (m).)

When ordering restitution as a condition of probation, the court is not restricted to directing payment to only those victims as defined in the restitution statute. Additionally, the court can order restitution as a condition of probation even when the losses are not necessarily caused by the conduct underlying the defendant's conviction. Rather than having a causal connection, the restitution condition must only be reasonably related to either the defendant's crime or to the goal of deterring future criminality. (*People v. Anderson* (2010) 50 Cal.4th 19, 26-27; see also *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121–1124.)

The court is expressly authorized to modify the dollar amount of restitution at any time during the term of the probation. (Pen. Code, § 1203.3, sub. (b)(5).)

If part of a restitution order has not been paid after a defendant is no longer on probation, it remains enforceable by the victim as though it were a civil judgment. (Pen. Code, 1202.4, subd. (m).) Additionally, if the defendant is unable to pay full restitution within the initial term of probation, the court can modify and extend the period of probation to allow the defendant to pay off all restitution within the probation term. (Pen. Code, § 1203.3, subd. (b)(4); *People v. Cookson* (1991) 54 Cal.3d 1091, 1097.) Generally, the probation term may be extended up to, but not beyond, the maximum probation period allowed for the offense. (*People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1267–1268.)

## 5. Argument in Support

The California District Attorneys Association, the sponsor of this bill, writes in support:

The ability of the trial courts to make orders of restitution has recently been left in disarray by the holdings in *People v. Ford*, 61 Cal. 4<sup>th</sup> 282 (2015), *People v. Waters*, 241 Cal. App. 4<sup>th</sup> 822 (2015), and *People v. Hilton*, 224 Cal. App. 4<sup>th</sup> 47 (2014). Those decisions have found that a court cannot modify or order additional restitution after a probation term has expired because the court acts in excess of its jurisdiction pursuant to Penal Code section 1203.3, absent a waiver by the defendant. Following *Hilton*, the court in *Waters* also “rejected the People’s contention that the trial court retained jurisdiction to impose restitution under section 1202.46, reasoning section 1202.46 must be harmonized with preexisting statutory and case law.” *Waters*, 241 Cal. App. 4<sup>th</sup> at 829 (citing *Hilton*, 224 Cal. App. 4<sup>th</sup> at 780).

Critically, the court in *Hilton* distinguished *People v. Bufford*, 146 Cal. App. 4<sup>th</sup> 966 (2007), in which restitution was ordered pursuant to section 1202.46 after the defendant’s completion of a prison sentence. The court in *Hilton* concluded that “*Bufford* was not a probation case...*Bufford* concluded, inter alia, the trial court retained jurisdiction under section 1202.46. *Bufford* expressly acknowledged ‘[Penal Code] section 1203.3 does not apply in this case, because defendant was not placed on probation.’” *Hilton*, 224 Cal. App. 4<sup>th</sup> at 782 (quoting *Bufford*, 146 Cal. App. 4<sup>th</sup> at 970 n. 4).

Per *Bufford*, the court apparently still has jurisdiction to act to impose or modify a restitution order if it denies probation at the outset and imposes a state prison sentence that is not subject to section 1170(h). However, per *Hilton* and *Waters*, a court acts in excess of its jurisdiction if it orders restitution after the court’s grant of probation has expired, been revoked, or been terminated – including early termination either due to probation violations or the defendant’s good behavior. Because sentencing to local prison pursuant to section 1170(h) includes mandatory supervision that is treated like probation pursuant to section 1170(h)(5)(B) and 1203.3(a), a court arguably acts in excess of its jurisdiction when ordering restitution after the completion of a sentence pursuant to section 1170(h) as well. Thus, a victim is likely not going to be able to obtain full restitution under the current law when restitution is not definitively determined before the expiration of a period of supervision (as that term is defined in PC

1203.2(f)(3)). Likewise, a defendant faces the same uncertainty in having restitution ordered against him or her.

## 6. Argument in Opposition

The American Civil Liberties Union of California opposes this bill and writes:

Under existing law, a court generally only has power to modify a defendant’s sentence within 120 days after judgment.<sup>1</sup> When restitution is ordered, Penal Code section 1203.3(b)(5) expressly allows the court to modify the dollar amount “at any time during the term of the probation.” However, the trial court loses jurisdiction over the defendant – including jurisdiction to impose or modify restitution – when the defendant’s term of probation ends, absent misconduct by the defendant.<sup>2</sup>

These statutes and court decisions reflect California’s longstanding interest in ensuring that a defendant remain subject to the control of the criminal justice system for the period proscribed under statute, as applied in the individual case by the court, and no longer. They give victims and prosecutors incentive to exercise due diligence in promptly determining the claim for restitution. By allowing the court to retain jurisdiction to impose or modify restitution for five years after sentencing, AB 194 would subject criminal defendants – and courts, and victims – to an extended period of uncertainty as to the full requirements imposed on the defendant. For example, a defendant sentenced to a year of probation who successfully completed that term – including payment of whatever restitution was initially ordered – would then be left for four more years not knowing whether further restitution might be ordered. The effect in many cases would be to multiply several times over the amount of time that individual remained subject to the control of the criminal justice system.

In cases in which a defendant plays a role in the delay in proceedings, courts have found that a trial court retains power to order restitution after the expiration of probation.<sup>3</sup> And certainly if restitution is still owing following the expiration of the probationary period, there is nothing that precludes enforcing a restitution order as a civil judgment.<sup>4</sup>

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<sup>1</sup> Penal Code §1170 (d).

<sup>2</sup> See *Hilton v. Superior Court* (2014) 239 Cal.App. 4<sup>th</sup> 766; *People v. Waters* (2015) 241 Cal.App.4<sup>th</sup> 822.

<sup>3</sup> *People v. Ford* (2015) 61 Cal.4<sup>th</sup> 282, 288.

<sup>4</sup> *People v. Sem* (2014) 229 Cal.App.4<sup>th</sup> 1176, 1194.