

*MENDOCINO COUNTY
DISTRICT ATTORNEY'S
OFFICE*

Marijuana/Cannabis & H&S 11470.2
Dispositions

August 22, 2011
Eureka, California

INDEX

A. The Outside Looking In ...

Suddenly Righteous Dudes

Washington Post, July 27, 2009

B. An Enforcement Tool/Option: H&S 11470.2

- Health and Safety Code § 11470.1
- Health and Safety Code § 11470.2
- *People v. Narron* (1987) 192 Cal.App.3d 724 Lake
- *People v. Brach* (2002) 95 Cal.App.4th 571 Siskiyou
- *People v. Martinez* (2005) 36 Cal.4th 384 Merced
- *People v. Wilen* (2008) 165 Cal.App.4th 270 Contra Costa

C. The Mendocino County Experience

- DA 11470.2 Misdemeanor Dispositions:
Standardized Sentencing Recommendations (July 2011)
- Stipulation Sample: Stipulation and Order Re: Recovery
of Expenses [Health and Safety Code § 11470.2]

- February 15, 2011 to June 30, 2011

47 defendants

\$227,325 to Sheriff's Office — 40; \$227,325

~~\$15,000 to Ukiah Police Department~~ (1; \$4,000)

- July 1, 2011 to August 22, 2011

13 defendants

\$131,280 to Sheriff's Office — 32; 245,870

\$12,089 ordered w/ payments agreement

\$7,200 delinquent (2 defendants) with VOP anticipated

MCSO 1/12 — 6/30 32: 323,289

Wm 2: \$7580

100 2 \$37,000

F-6: (3) \$1400

balance:
\$1,275.00

40: 5
\$25,880

A.

The Outside Looking In ...

Suddenly Righteous Dudes

Washington Post, July 27, 2009

Suddenly Righteous Dudes

By Karl Vick, Washington Post Staff Writer

Published: Washington Post, Monday, July 27, 2009

Fort Bragg, Calif. -- The steel-haired old hippies who grow the finest marijuana in the world began taking over Mendocino County four decades ago.

"Going back to the '60s, early '70s in Mendocino County, land was cheap," said Tony Craver, twice elected sheriff, now retired. "Thirty-five hundred square miles, only three population centers, very little law enforcement. . . . The hippies, if you will, moved in and started growing pot. The hippies became the establishment."

Democratic government serves at the consent of the governed; in this jurisdiction, enforcement of marijuana laws would be lax at best. A "grow" became an accepted component of the homesteads established by the back-to-the-land transplants who made their way across the Golden Gate Bridge, past the vineyards of Sonoma and into the woods. At Area 101, a club named for the highway lined with billboards for hydroponics and fertilizer, December brings the Emerald Cup, a public competition for the "best bud" in the county, if not the world.

"It's so a part of Mendocino County," said K.C. Meadows, managing editor of the Ukiah Daily Journal. "There are fairly large businesses in this town that got their start with marijuana money. And that's okay with people."

How, then, to explain what happened to arrests here last year? Pot busts up 60 percent.

And what could account for the vote to roll back the nation's first law ordering police to make enforcement of marijuana laws their very lowest priority?

A paradox indeed: The clampdown was set in motion by the entire state of California barreling down the path Mendocino blazed. In a Rube Goldberg sequence of cause and effect, growing acceptance of marijuana elsewhere in the Golden State unleashed a confluence of demand, tolerance and legal ambiguity rooted in political cowardice.

The result set in motion forces that seriously harshed the mellow here and brought the "war on drugs" to the one place in America it had never really reached.

Pebbles Trippet arrived in Mendocino in 1970, escaping the drug laws of New York state. "California beckoned," said Trippet, an activist, columnist and grower who has been heard to ask, "Can I pay you in bud?"

The year she arrived, Congress passed the Controlled Substance Act, which ranked all drugs by capacity for harm. Marijuana landed alongside PCP and heroin on "Schedule 1," a ranking even the establishment found reason to revisit just two years later. A commission appointed by President Richard Nixon recommended lightening up.

"Damn near puked," Nixon said of this on the White House tapes, where he was heard ordering up a pot law "that just tears the [posterior] out of them." Meaning the longhaired, antiwar, free-love counterculture that was as much the object of the original war on drugs as any substance was.

But in the years ahead more and more Americans sampled marijuana, and the republic remained standing. Then doctors defied the premise of the Schedule 1 holding of "no medicinal value" by reporting that marijuana alleviated conditions from glaucoma to asthma.

Today, Trippet, 66, is president of the Mendocino Medical Marijuana Patients Union, a title that tidily sums up the current state of play on the issue: In 1996 California's voters passed Proposition 215, legalizing pot for medical use.

Lawmakers in Sacramento took a few years to gauge the politics of the required implementing legislation. When they finally did, it was a wink: They decreed in 2003 that marijuana could be used to treat "any . . . illness."

And if that wasn't clear enough, the bill was numbered SB420 -- 420 being a code phrase in the pot subculture. 420 Magazine competes with High Times.

In May, the U.S. Supreme Court endorsed the new reality: Anyone with a doctor's card can smoke dope. What remains woefully unclear is where they are supposed to find it. Mendocino was an obvious place to look.

In 2001, two years before the wink from Sacramento, Mendocino residents approved Measure G, permitting the holder of a medical card to grow 25 plants.

It was a strong signal to city dwellers hard-pressed for the space to grow their own. Indeed, the county's growers were superbly positioned. Aside from the let-it-grow culture, the high-end strains originally cultivated in Mendocino became the preferred stock for the storefront "dispensaries" that began opening elsewhere in the state.

"Things just took off," Trippet said. "Just about everyone felt they could grow. By then it was half the county. Now it's probably two-thirds."

The money was easy. At the service window of a dispensary, patients page through binders of bagged snippets of Purple Kush and Train Reck. The tag says \$50 for an eighth of an ounce. Growers could expect \$4,000 for a pound, and get four harvests a year, growing indoors.

"What a difference a couple of years make!" proclaimed the emcee at the Emerald Cup. "We all have medical permits. Everyone grows in the full sun. Marijuana is blooming right into mainstream America. The judging gets harder every year. And it's only going to get better!"

But it didn't.

As growers lost sight of limits, things somehow got worse. The money changed people.

Now some growers planted in town, considered declasse because flowering buds put up a powerful stink. In Ukiah, the county seat, a man was shot after climbing into a fenced pot patch. Another suffered a heart attack halfway over.

"It's a huge problem in our schools," said Meredith Lintott, the district attorney. "Children come in reeking of marijuana."

Worse, outsiders poured in, some armed. In September, three carloads of men aged 18 to 24 arrived from Sacramento carrying guns, radios and pruning shears. They had read about Mendocino in High Times. Home invasions rose to 40 from 24 the previous year.

None of this was the Mendocino way. Mexican cartels grow pot in Northern California, but off in the national forests in huge grows that produce inferior herb. Locals brought a specific sensibility to their work, one in the spirit of the "New Settlers" who produced the nation's first organic commercial wine, at Frey Vineyards, and the first organic microbrew, at Ukiah Brewing Co.

The outsiders, "these are people who had no pride of ownership," said Tom Allman, who was elected sheriff amid the tumult. "They don't care what they do to our land. A guy with a Caterpillar took off tops of two hills. . . . This is where government has to step in and do compliance checks."

"I think after 2007, people started to look around and say, you know what? This isn't great the way it is going down," said Scott Zeramby, who runs a small garden supply store in Fort Bragg. "We've all seen it go from back-to-the-landers, where people wanted to get away from it all, to people who came here to get it all. Property values got so high, the only way you could afford it was to break the law."

And so, in November, a measure passed to scale back Mendocino's legal limit to the state's suggested six-plant minimum. The sheriff sensed a mandate. Tips rolled in, and deputies saddled up.

On Feb. 20, they busted the younger sister of a student shot dead at Kent State in 1970. Allison Krause was the young woman who said of the flowers in the barrels of the National Guardsmen who would shoot her and four others: "Flowers are better than bullets."

"I thought this was a community that was forward-thinking, progressive -- that thought marijuana was a good thing!" said Laurel Krause, who was accused of having too many plants.

Her doctor's card recommended pot to alleviate post-traumatic stress disorder occasioned by Allison's death.

The social dynamics of small towns played a role in the backlash. Krause, who arrived from Silicon Valley, counts as an outsider. Her 24 plants grew under lights in a shipping container -- outsized PG&E bills are a reliable tip-off to cultivation -- but it vented onto the land of a neighbor, who called the sheriff.

"They'd be growing 75 plants in their back yard," Craver said. "It'd be stinking -- and it does in the summer, while your neighbor's trying to have a barbecue."

But there are greater forces at work as well. When state lawmakers legalized medical marijuana, they left the supply chain in the shadows. Drug dealers got to call themselves dispensary operators. But what were growers?

Baffled.

"When you come out, you have confused notions about what's possible," said Trippet, who grew 100 plants on her property a couple of years ago, but is down to 60 out of prudence. "You're not used to working at this end of the envelope. Many didn't know about the limits."

Jerry Brown, known as Gov. Moonbeam in the '80s, is California's attorney general. His office last year took a stab at the open question of supply, publishing guidelines for enforcement of SB420. The guidelines hewed to the notion that suppliers of medical marijuana are "caregivers" and allowed "patients" to organize themselves as collectives.

"The AG's new guidelines basically require the industry be vertically integrated. And to do that, you've got to get big. And that comes with risks," said a Fort Bragg resident, hollow-eyed from lack of sleep after her arrest. She was swept up with her boyfriend's huge grow, taken down even though it was supplying dispensaries.

"I wouldn't have gotten involved if I didn't think it was legal," she said.

A San Francisco Assembly member, Tom Ammiano, has introduced a bill taking what he calls the logical next step: legalizing marijuana, regulating it and taxing it. Gov. Arnold Schwarzenegger urged a serious debate, now unfolding in the state's media.

"If everybody doesn't do it together -- state, federal, county -- it doesn't work," said Zeramby, the garden shop owner. "The communities with the most liberal standards are going to be inundated with the most opportunistic people."

Legalization might well serve the consumer. "There is no way it costs \$3,000 to \$4,000 a pound to cultivate marijuana," said Keith Faulder, a former prosecutor who now defends pot cases in Ukiah. "These are the costs of keeping it underground."

Growers, however, may well prefer the status quo, even with the risks. That would put them in a rare alliance with the police and prosecutors who back in 1996 campaigned against Proposition 215, warning against precisely what has come to pass.

"It's going, definitely, in a direction that I don't believe in," said Ron Brooks, president of the National Narcotics Officers' Associations' Coalition. His last, best case against: "Even if it's no worse than alcohol, we all know of people who lost their livelihood and their lives. Why would we admit legal respectability to another powerful drug?"

In Mendocino, though, the quest is only for the clarity ducked by lawmakers, and emerging from courts at a pace that does little to help Sheriff Allman. Constituents pepper him with questions.

Down at the courthouse, the district attorney sighs:

"It's extremely confusing, even for those who work in it every single day," Lintott said. "Clearly when the law was passed the cover was cancer, glaucoma -- real distinct health issues. We're not there anymore."

She sagged a bit behind her desk.

"Quite frankly, I might benefit from a card. This is a high-stress job. It would probably do me good to go home and smoke some pot in the evening."

///

B.

Health and Safety Code § 11470.1



1 of 2 DOCUMENTS

DEERING'S CALIFORNIA CODE ANNOTATED
Copyright © 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 43 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE
SUBJECT TO REPEAL BY PROPOSITION 22.

HEALTH AND SAFETY CODE
Division 10. Uniform Controlled Substances Act
Chapter 8. Seizure and Disposition

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11470.1 (2010)

§ 11470.1. Civil action for recovery of expenses of seizing controlled substance

(a) The expenses of seizing, eradicating, destroying, or taking remedial action with respect to, any controlled substance or its precursors shall be recoverable from:

(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division.

(b) The expenses of taking remedial action with respect to any controlled substance or its precursors shall also be recoverable from any person liable for the costs of that remedial action under Chapter 6.8 (commencing with *Section 25300*) of Division 20 of the Health and Safety Code.

(c) It shall not be necessary to seek or obtain a criminal conviction prior to the entry of judgment for the recovery of expenses. However, if criminal charges are pending against the defendant for the unlawful manufacture or cultivation of any controlled substance or its precursors, an action brought pursuant to this section shall, upon a defendant's request, be continued while the criminal charges are pending.

(d) The action may be brought by the district attorney, county counsel, city attorney, the State Department of Health Services, or Attorney General. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

(e)

(1) The burden of proof as to liability shall be on the plaintiff and shall be by a preponderance of the evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (1) of subdivision (a). The burden of proof as to liability shall be on the plaintiff and shall be by clear and convincing evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (2) of subdivision (a). The burden of proof as to the amount of expenses recoverable shall be on the plaintiff and shall be by a preponderance of the evidence in any action brought pursuant to subdivision (a).

(2) Notwithstanding paragraph (1), for any person convicted of a criminal charge of the manufacture or cultivation of a controlled substance or its precursors there shall be a presumption affecting the burden of proof that that person is liable.

(f) Only expenses which meet the following requirements shall be recoverable under this section:

(1) The expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors or in taking remedial action with respect to a hazardous substance. These expenses may not include any costs incurred in use of the herbicide paraquat.

(2) The expenses were incurred as a proximate result of the defendant's manufacture or cultivation of a controlled substance in violation of this division.

(3) The expenses were reasonably incurred.

(g) For purposes of this section, "remedial action" shall have the meaning set forth in Section 25322.

(h) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

(i) Notwithstanding *Section 526 of the Code of Civil Procedure*, the plaintiff may be granted a temporary restraining order or a preliminary injunction, pending or during trial, to restrain the defendant from transferring, encumbering, hypothecating, or otherwise disposing of any assets specified by the court, if it appears by the complaint that the plaintiff is entitled to the relief demanded and it appears that the defendant may dispose of those assets to thwart enforcement of the judgment.

(j) The Legislature finds and declares that civil penalties for the recovery of expenses incurred in enforcing the provisions of this division shall not supplant criminal prosecution for violation of those provisions, but shall be a supplemental remedy to criminal enforcement.

(k) Any testimony, admission, or any other statement made by the defendant in any proceeding brought pursuant to this section, or any evidence derived from the testimony, admission, or other statement, shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct.

(l) No action shall be brought or maintained pursuant to this section against a person who has been acquitted of criminal charges for conduct which may be the basis for an action under this section if, in the criminal action, there has been a finding of factual innocence by the court pursuant to standards set forth in subdivision (b) of *Section 851.8 of the Penal Code*.

HISTORY:

Added Stats 1983 ch 931 § 1. Amended Stats 1986 ch 1031 § 1.5.

NOTES:

Amendments:

1986 Amendment:

(1) Substituted "destroying, or taking remedial action with respect to," for "or destroying" in the introductory clause of subd (a); (2) added subd (b); (3) redesignated former subds (b)-(e) to be subds (c)-(f); (4) substituted "city attorney, the State Department of Health Services, or Attorney General" for "or city attorney" at the end of the first sentence of subd (d); (5) deleted "of this section" after "subdivision (a)" wherever it appears in subd (e); (6) added subd (g); and (7) redesignated former subds (f)-(j) to be subds (h)-(l).

Cross References:

Commencement of civil action: *CCP* §§ 350, 411.10 et seq.

Collateral References:

Witkin & Epstein, Criminal Law (3d ed), Punishment § 209.

Cal Jur 3d (Rev) Criminal Law § 1579.

Hierarchy Notes:

Div. 10, Ch. 8 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Non-Pharmacy Drug Controls

NOTES OF DECISIONS 1. Generally 2. Construction With Other Law 3. Legislative Intent

1. Generally

H & S C §§ 11470.1, 11470.2 are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs, in accordance with the mandate of *Cal Const Art I* § 28(b), of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes; hence, a restitution order pursuant to *Pen C* § 1202.4(f) may not be made for cleanup costs. *People v. Martinez* (2005) 36 Cal 4th 384, 30 Cal Rptr 3d 779, 115 P3d 62, 2005 Cal LEXIS 7302.

2. Construction With Other Law

Because *H & S C* §§ 11470.1 and 11470.2, are aimed particularly at the recovery of expenses for seizing, eradicating, destroying or taking remedial action with respect to controlled substances or their precursors, whereas *Pen C* §§ 1203.1 and 1203.04, are general statutes on probation and restitution, to the extent *H & S C* §§ 11470.1 and 11470.2, conflict with the procedures required to impose a restitution condition under *Pen C* §§ 1203.1 and 1203.04, the former Health and Safety Code provisions, which allow the government to recover a specific type of expense, should govern. *People v. Narron* (1987, Cal App 1st Dist) 192 Cal App 3d 724, 237 Cal Rptr 693, 1987 Cal App LEXIS 1808.

3. Legislative Intent

Because of the all-encompassing nature of the remedy provided by the Legislature to law enforcement for the recovery of expenses related to eradicating drug operations in *H & S C* §§ 11470.1 and 11470.2, it may be presumed the Legislature intended to preclude the imposition of such expenses outside the procedures set forth in those statutes. The statutes apply to every possible procedural setting in which the recovery of expenses may be sought, § 11470.2 applies when a defendant is being tried for or has been convicted of the offense underlying the expenses, while § 11470.1 contains no "underlying offense" limitation, and thus may be used to recover expenses not only on conviction of the underlying offense, but where the expenses did not directly flow from the underlying offense, and, in either event, where no criminal charges were filed. *People v. Narron* (1987, Cal App 1st Dist) 192 Cal App 3d 724, 237 Cal Rptr 693, 1987 Cal App LEXIS 1808.

The aims of *H & S C* §§ 11470.1 and 11470.2, are twofold. First, they are intended to provide law enforcement authorities with a broad remedy to recover the cost of seizing or disposing of controlled substances and their precursors. Prior to the legislation, such costs were recoverable only on a criminal conviction, and then only as part of a restitution condition where probation was granted. Second, they are intended to set forth formal procedures for the recovery of expenses and to define those expenses which are recoverable. The procedures are designed to strike a balance between protecting the rights of defendants and alleviating law enforcement's financial burden of seizing or disposing of controlled substances and their precursors. The determination that the recovery of such costs cannot be pursued by other means is consistent with the achievement of these twin objectives. *People v. Narron* (1987, Cal App 1st Dist) 192 Cal App 3d 724, 237 Cal Rptr 693, 1987 Cal App LEXIS 1808.

B.

Health and Safety Code § 11470.2



2 of 2 DOCUMENTS

DEERING'S CALIFORNIA CODE ANNOTATED
 Copyright © 2011 by Matthew Bender & Company, Inc.
 a member of the LexisNexis Group.
 All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 43 & EXTRA. SESS. CH. 8 ***
 OF THE 2011 SESSION

SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE
 SUBJECT TO REPEAL BY PROPOSITION 22.

HEALTH AND SAFETY CODE
 Division 10. Uniform Controlled Substances Act
 Chapter 8. Seizure and Disposition

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11470.2 (2010)

§ 11470.2. Alternative procedures for recovery of expenses by prosecuting attorney

(a) In lieu of a civil action for the recovery of expenses as provided in Section 11470.1, the prosecuting attorney in a criminal proceeding may, upon conviction of the underlying offense, seek the recovery of all expenses recoverable under Section 11470.1 from:

(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division. The trier of fact shall make an award of expenses, if proven, which shall be enforceable as any civil judgment. If probation is granted, the court may order payment of the expenses as a condition of probation. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

(b) The prosecuting attorney may, in conjunction with the criminal proceeding, file a petition for recovery of expenses with the superior court of the county in which the defendant has been charged with the underlying offense. The petition shall allege that the defendant had manufactured or cultivated a controlled substance in violation of Division 10 (commencing with *Section 11000*) of the *Health and Safety Code* and that expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors. The petition shall also state the amount to be assessed. The prosecuting attorney shall make service of process of a notice of that petition to the defendant.

(c) The defendant may admit to or deny the petition for recovery of expenses. If the defendant admits the allegations of the petition, the court shall rule for the prosecuting attorney and enter a judgment for recovery of the expenses incurred.

(d) If the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties.

(e) At the hearing, the burden of proof as to the amount of expenses recoverable shall be on the prosecuting attorney and shall be by a preponderance of the evidence.

(f) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

HISTORY:

Added Stats 1983 ch 931 § 2.

NOTES:

Collateral References:

Witkin & Epstein, Criminal Law (3d ed), Punishment § 209.

Cal Jur 3d (Rev) Criminal Law § 1579.

Hierarchy Notes:

Div. 10, Ch. 8 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Non-Pharmacy Drug Controls

NOTES OF DECISIONS 1. Construction With Other Law 2. Legislative Intent 3. Procedure

1. Construction With Other Law

Because *H & S C* §§ 11470.1 and 11470.2, are aimed particularly at the recovery of expenses for seizing, eradicating, destroying or taking remedial action with respect to controlled substances or their precursors, whereas *Pen C* §§ 1203.1 and 1203.04, are general statutes on probation and restitution, to the extent *H & S C* §§ 11470.1 and 11470.2, conflict with the procedures required to impose a restitution condition under *Pen C* §§ 1203.1 and 1203.04, the former Health and Safety Code provisions, which allow the government to recover a specific type of expense, should govern. *People v. Narron* (1987, Cal App 1st Dist) 192 Cal App 3d 724, 237 Cal Rptr 693, 1987 Cal App LEXIS 1808.

H & S C §§ 11470.1, 11470.2 are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs, in accordance with the mandate of *Cal Const Art I* § 28(b), of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes; hence, a restitution order pursuant to *Pen C* § 1202.4(f) may not be made for cleanup costs. *People v. Martinez* (2005) 36 Cal 4th 384, 30 Cal Rptr 3d 779, 115 P3d 62, 2005 Cal LEXIS 7302.

In a case where trial court ordered defendant to pay hazardous clean-up expenses after defendant pleaded guilty to controlled substance crimes, defendant did not waive the opportunity to contend that he was deprived of his statutory right to a jury trial pursuant to *H & S C* § 11470.2(d) when defendant acknowledged that he would be subject to pay restitution to the victim and a restitution fine; none of the agencies compensated by trial court's order qualified as a direct victim entitled to restitution under *Pen C* § 1202.4. *People v. Wilen* (2008, 1st Dist) 2008 Cal App LEXIS 1152.

2. Legislative Intent

Because of the all-encompassing nature of the remedy provided by the Legislature to law enforcement for the recovery of expenses related to eradicating drug operations in *H & S C* §§ 11470.1 and 11470.2, it may be presumed the Legislature intended to preclude the imposition of such expenses outside the procedures set forth in those statutes. The statutes apply to every possible procedural setting in which the recovery of expenses may be sought, § 11470.2 applies when a defendant is being tried for or has been convicted of the offense underlying the expenses, while § 11470.1 contains no "underlying offense" limitation, and thus may be used to recover expenses not only on conviction of the under-

lying offense, but where the expenses did not directly flow from the underlying offense, and, in either event, where no criminal charges were filed. *People v. Narron* (1987, Cal App 1st Dist) 192 Cal App 3d 724, 237 Cal Rptr 693, 1987 Cal App LEXIS 1808.

The aims of *H & S C* §§ 11470.1 and 11470.2, are twofold. First, they are intended to provide law enforcement authorities with a broad remedy to recover the cost of seizing or disposing of controlled substances and their precursors. Prior to the legislation, such costs were recoverable only on a criminal conviction, and then only as part of a restitution condition where probation was granted. Second, they are intended to set forth formal procedures for the recovery of expenses and to define those expenses which are recoverable. The procedures are designed to strike a balance between protecting the rights of defendants and alleviating law enforcement's financial burden of seizing or disposing of controlled substances and their precursors. The determination that the recovery of such costs cannot be pursued by other means is consistent with the achievement of these twin objectives. *People v. Narron* (1987, Cal App 1st Dist) 192 Cal App 3d 724, 237 Cal Rptr 693, 1987 Cal App LEXIS 1808.

3. Procedure

In a case where the People filed a petition pursuant to *H & S C* § 11470.2 for recovery of hazardous clean-up expenses after defendant pleaded guilty to controlled substance crimes, although trial court erred in denying defendant's demand for a jury trial and his demand to be present at the hearing that determined his liability for the clean-up expenses, given the very limited scope and impersonal nature of the issue that would have been put before a jury, the errors were not prejudicial. *People v. Wilen* (2008, 1st Dist) 2008 Cal App LEXIS 1152.

Defendant has a statutory right to be present at the hearing to determine liability under *H & S C* § 11470.2. *People v. Wilen* (2008, 1st Dist) 2008 Cal App LEXIS 1152.

Defendant who has pleaded guilty to controlled substance crimes and who is the subject of a petition for recovery of hazardous clean-up expenses has a right under *H & S C* § 11470.2(d) to have liability for those expenses decided by a jury. *People v. Wilen* (2008, 1st Dist) 2008 Cal App LEXIS 1152.

B.

People v. Narron (1987) 192 Cal.App.3d 724
(Lake County)



8 of 13 DOCUMENTS



Questioned
As of: Aug 20, 2011

THE PEOPLE, Plaintiff and Respondent, v. LELAND JEFFREY NARRON, Defendant and Appellant

No. A033024

Court of Appeal of California, First Appellate District, Division Three

192 Cal. App. 3d 724; 237 Cal. Rptr. 693; 1987 Cal. App. LEXIS 1808

June 12, 1987

PRIOR HISTORY: [***1] Superior Court of Lake County, No. CR1847, John J. Golden, Judge.

DISPOSITION: "Conditions of probation which are not authorized by law are severable and do not affect the valid conditions of the order." (*In re Allen* (1969) 71 Cal.2d 388, 394 [78 Cal.Rptr. 207, 455 P.2d 143], disapproved on other grounds in *Fuller v. Oregon* (1974) 417 U.S. 40 [40 L.Ed.2d 642, 94 S.Ct. 2116].) The restitution condition of probation was imposed in an unauthorized manner and therefore must be stricken. The order granting probation is otherwise affirmed. The case is remanded for proceedings consistent with this opinion.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant challenged an order of the Superior Court of Lake County (California), which imposed a condition of probation requiring him to make restitution to the government for expenses incurred in disposing of dangerous chemicals found in appellant's residence. Appellant claimed that the condition was not authorized by either Cal. Penal Code §§ 1203.1 or 1203.04.

OVERVIEW: Appellant pled guilty to possession of a firearm by an ex-felon and cultivation of marijuana, and was sentenced to three years' probation and restitution. Appellant contested the condition of restitution. The

court found that the trial court properly imposed restitution as a condition of probation under Cal. Penal Code §§ 1203.1 and 1203.04, but held that where the government sought compensation for the expenses recoverable under Cal. Health & Safety Code §§ 11470.1 and 11470.2, the government must abide by the procedures set out in the applicable statutes. The court found that the government failed to do so, and struck the restitution order. The order granting probation was otherwise affirmed and the case remanded for proceedings consistent with the opinion.

OUTCOME: The order of the trial court regarding restitution was stricken because that condition of defendant's probation was imposed in an unauthorized manner, and the order granting probation was otherwise affirmed. The case was remanded for proceedings consistent with the opinion.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview
Criminal Law & Procedure > Guilty Pleas > General Overview
Criminal Law & Procedure > Appeals > Reviewability > General Overview

[HN1] The appealability of a restitution condition and the significance of an appellant's consent are appealable without a certificate of probable cause, *Cal. Pen. Code* § 1237.5, if conditions of probation were not part of the plea bargain and were imposed after entry of the plea.

Criminal Law & Procedure > Sentencing > Appeals > General Overview

[HN2] The acceptance of probation does not preclude a challenge on appeal to the validity of a probation condition. By accepting the benefits of probation a defendant does not waive the right to urge the invalidity of an improper, a void, condition on direct appeal from that judgment or on habeas corpus.

Criminal Law & Procedure > Sentencing > Imposition > General Overview

Governments > Legislation > Statutory Remedies & Rights

Pensions & Benefits Law > Governmental Employees > County Pensions

[HN3] Because the prosecution did not contemplate bringing an action for the recovery of expenses under *Cal. Health & Safety Code* § 11470.1, an appellant cannot waive his statutory right to have the prosecution abide by the procedures set forth therein. If an appellant was not apprised of his right to these procedures before a restitution condition was imposed, a purported waiver of a statutory right is not legally effective unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect of the waiver presented to him, and his full understanding of the explanation.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

[HN4] Courts have broad discretion to determine whether probation should be granted and on what conditions.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > General Overview

[HN5] See *Cal. Penal Code* § 1203.1.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

[HN6] A condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct

which is not reasonably related to future criminality. Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

[HN7] The court's power to require restitution to a crime as a condition of probation is also beyond question. *Cal. Penal Code* § 1203.1 provides that in granting probation the court may, in its discretion, provide for restitution in proper cases. The court shall consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund. *Cal. Penal Code* § 1203.1.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

[HN8] 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, § 28(b)*. To carry out this mandate, legislation was enacted which requires courts to impose restitution as a condition in all cases in which probation is granted. *Cal. Pen. Code*, § 1203.04(a). Restitution shall be made (1) to the victim, if the crime involved a victim, or (2) to the Restitution Fund, if the crime did not involve a victim.

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Governments > Legislation > Interpretation

[HN9] Restitution is not necessarily limited to persons. Neither *Cal. Penal Code* § 1203.1 nor § 1203.04 defines the term "victim." The policies of these provisions favor a definition which includes the government where it suffered loss flowing from a defendant's criminal conduct. Including the government as a potential "victim" accords with the court's discretion to employ probation conditions which ensure that amends be made to society for the breach of the law. *Cal. Penal Code* § 1203.1. The concept of restitution embodies not only the notion that people who suffer loss as a result of criminal activity should be compensated for those losses, *Cal. Const. art.*

I, § 28(b), but also a perception of the value of restitution as a deterrent to future criminality, and to rehabilitate the criminal. Both aims are furthered by imposing a restitution condition in appropriate cases whether or not the victim is an individual.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution Evidence > Privileges > Government Privileges > Classified Information Procedures Act

[HN10] The propriety of a particular restitution condition must be determined by reference to the purposes of probation in light of the facts and circumstances of each case. Restitution is permissible to any victim who suffered "actual loss flowing from the charged offense or from related misconduct. Application of established principles of probation leads to the conclusion that restitution to the government would be permissible even though it was not a direct victim of a crime.

Criminal Law & Procedure > Guilty Pleas > General Overview

Criminal Law & Procedure > Sentencing > Restitution

[HN11] While the permissible scope of restitution for conduct not resulting in a conviction is somewhat elusive, *Cal. Health & Safety Code* § 11470.1 explicitly permits the government to recoup the expenses sought in this case even where they are unrelated to the underlying offense.

Criminal Law & Procedure > Sentencing > Restitution

[HN12] See *Cal. Health & Safety Code* § 11470.1.

Civil Procedure > Counsel > General Overview

Criminal Law & Procedure > Sentencing > Restitution

[HN13] See *Cal. Health & Safety Code* § 11470.2.

Criminal Law & Procedure > Sentencing > Restitution Governments > Courts > Court Personnel

[HN14] Restitution pursuant to *Cal. Penal Code* §§ 1203.1 and 1203.04 may not be ordered absent a judicial hearing on the issue. The court may not base a restitution order on its mere belief that defendant owes money to the victim or solely on information provided by the probation officer. The court must determine, based on evidence, the appropriate amount of restitution in light of the value of the victim's loss, the defendant's culpability and his ability to pay, and the purposes of restitution. In determining the propriety and amount of restitution, the

preponderance of the evidence standard satisfies due process. The defendant is not entitled to a jury trial and the requisite hearing need not approximate the formality of a civil trial.

Criminal Law & Procedure > Sentencing > Restitution

[HN15] Under *Cal. Health & Safety Code* § 11470.1, the liability of an aider and abettor must be proven by clear and convincing evidence.

Governments > Legislation > Interpretation

[HN16] The expression of certain things in a statute necessarily involves exclusion of other things not expressed -- *expressio unius est exclusio alterius*. The principle of this rule is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.

Governments > Legislation > Interpretation

[HN17] Courts must construe statutes toward giving them meaning and effect.

Governments > Legislation > Interpretation

[HN18] Where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Governments > Legislation > Interpretation

[HN19] In the construction of a particular statute, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The statutes should be construed together if they harmonize and achieve a uniform and consistent legislative purpose.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant pled guilty to possession of a firearm by an ex-felon (*Pen. Code*, § 12021, *subd. (a)*) and cultivation of marijuana (*Health & Saf. Code*, § 11358), was admitted to three years' probation, with one condition being that he provide restitution to the county for its expenses in hiring a professional chemical disposal com-

pany to dispose of dangerous items recovered from his residence. (Superior Court of Lake County, No. CR1847, John J. Golden, Judge.)

The Court of Appeal ordered the restitution condition of probation stricken, otherwise affirmed the order granting probation, and remanded for proceedings consistent with its opinion. The court held the manner in which the restitution condition was imposed was improper, in that the prosecution failed to comply with the procedures for the recovery of such expenses set forth in *Health & Saf. Code*, § 11470.1, allowing persons to be held civilly liable for the cost of eradicating drug operations, and that that statute, along with *Health & Saf. Code*, § 11470.2, provides the exclusive remedy for reimbursement of the expenses recoverable under the statutes. The court held that a trial court may impose, as a condition of probation, the costs for which a defendant was found liable pursuant to a § 11470.1 hearing. (Opinion by White, P. J., with Barry-Deal and Merrill, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Criminal Law § 500--Probation--Conditions--Acceptance--Appeal. --The acceptance of probation does not preclude a challenge by defendant on appeal to the validity of a probation condition. By accepting the benefits of probation a defendant does not waive the right to urge the invalidity of an improper or void condition on direct appeal from that judgment or on habeas corpus.

(2) Estoppel and Waiver § 19--Waiver--Requisites--Statutory Right. --A purported waiver of a statutory right is not legally effective unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect of the waiver presented to him, and his full understanding of the explanation.

(3) Criminal law § 497--Probation--Discretion of Trial Court. --Courts have broad discretion (*Pen. Code*, § 1203.1) to determine whether probation should be granted and on what conditions.

(4) Criminal law § 500--Probation--Conditions--Validity. --A condition of probation is not invalid unless it has no relationship to the crime of which the offender was convicted; relates to conduct which is not in itself criminal; and requires or forbids conduct which is not

reasonably related to future criminality. Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality. A court's power to require restitution to a crime victim as a condition of probation is beyond question.

(5) Criminal Law § 503--Probation--Conditions--Restitution--Government as Beneficiary. --The concept of restitution (*Pen. Code*, § 1203.1) embodies not only the notion that people who suffer a loss as a result of criminal activity should be compensated for those losses, but also a perception of the value of restitution as a deterrent to future criminality and to rehabilitate the criminal. Both aims are furthered by imposing a restitution condition in appropriate cases whether or not the victim is an individual. Thus, the government may be the beneficiary of restitution if it has incurred actual loss due to the crime.

(6) Criminal Law § 503--Probation--Conditions--Restitution--Direct Victim. --Because the propriety of a particular restitution condition (*Pen. Code*, § 1203.1) must be determined by reference to the purposes of probation in light of the facts and circumstances of each case, the government may receive restitution even though it was not the direct victim of a crime. Restitution is permissible to any victim who suffered actual loss flowing from the charged offense or from related misconduct.

(7) Criminal Law § 503--Probation--Conditions--Restitution--Hearing and Determination. --Restitution pursuant to *Pen. Code*, §§ 1203.1 and 1203.04, may not be ordered absent a judicial hearing on the issue. The court may not base a restitution order on its mere belief that defendant owes money to the victim or solely on information provided by the probation officer. The court must determine, based on evidence, the appropriate amount of restitution in light of the value of the victim's loss, the defendant's culpability and his ability to pay, and the purposes of restitution. In determining the propriety and amount of restitution, the preponderance of the evidence standard satisfies due process. The defendant is not entitled to a jury trial and the requisite hearing need not approximate the formality of a civil trial.

(8a) (8b) Criminal Law § 503--Probation--Conditions--Restitution--Controlled Substance Eradication Expense. --Because of the all-encompassing nature of the remedy provided by the Legislature to law enforcement for the recovery of expenses related to eradicating drug operations in *Health & Saf. Code*, §§ 11470.1 and 11470.2, it may be presumed the Legislature intended to

preclude the imposition of such expenses outside the procedures set forth in those statutes. The statutes apply to every possible procedural setting in which the recovery of expenses may be sought: § 11470.2 applies when a defendant is being tried for or has been convicted of the offense underlying the expenses, while §§ 11470.1 contains no "underlying offense" limitation, and thus may be used to recover expenses not only on conviction of the underlying offense, but where the expenses did not directly flow from the underlying offense, and, in either event, where no criminal charges were filed.

(9) Statutes § 28--Construction--Expression of Certain Things and Exclusion of Others. --The expression of certain things in a statute necessarily involves exclusion of other things not expressed. The principle of this rule is that when legislation expressly provides a particular remedy or remedies, the court should not expand the coverage of the statute to subsume other remedies. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Its application is especially appropriate where the Legislature has established comprehensive and detailed procedures and criteria for the recovery of expenses.

(10) Statutes § 20--Construction--Judicial Function. --Courts must construe statutes toward giving them meaning and effect.

(11) Statutes § 46--Construction--Presumptions--Legislative Intent. --The Legislature is presumed to act with full knowledge of the state of the law at the time.

(12) Statutes § 52--Construction--Codes--Conflicting Provisions--General and Specific Provisions. --Where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears.

(13) Criminal Law § 503--Probation--Conditions--Restitution--Controlled Substance Eradication Expense. --Because *Health & Saf. Code*, §§ 11470.1 and 11470.2, are aimed particularly at the recovery of expenses for seizing, eradicating, destroying or taking remedial action with respect to controlled substances or their precursors, whereas *Pen. Code*, §§ 1203.1 and 1203.04, are general statutes on probation and restitution, to the extent *Health & Saf. Code*, §§ 11470.1 and 11470.2, conflict with the procedures required to impose a restitution condition under *Pen. Code*, §§ 1203.1 and 1203.04, the Health and Safety Code provisions, which allow the government to recover a specific type of expense, should govern.

(14) Criminal Law § 503--Probation--Conditions--Restitution--Controlled Substance Eradication Expense--Statutory Scheme. --The aims of *Health & Saf. Code*, §§ 11470.1 and 11470.2, are twofold. First, they are intended to provide law enforcement authorities with a broad remedy to recover the cost of seizing or disposing of controlled substances and their precursors. Prior to the legislation, such costs were recoverable only on a criminal conviction, and then only as part of a restitution condition where probation was granted. Second, they are intended to set forth formal procedures for the recovery of expenses and to define those expenses which are recoverable. The procedures are designed to strike a balance between protecting the rights of defendants and alleviating law enforcement's financial burden of seizing or disposing of controlled substances and their precursors. The determination that the recovery of such costs cannot be pursued by other means is consistent with the achievement of these twin objectives.

(15a) (15b) Criminal Law § 503--Probation--Conditions--Restitution--Controlled Substance Eradication Expense--Procedure. --In a prosecution for a controlled substance violations, the trial court erred in imposing as a condition of probation that defendant provide restitution to the county for the expenses incurred in disposing of dangerous chemicals found in defendant's residence, since the prosecution failed to comply with the procedures for the recovery of such expenses set forth in *Health & Saf. Code*, § 11470.1 (civil action by government for recovery). The prosecution should have instituted civil action for recovery under § 11470.1, and because it failed to do so, the trial court's restitution order as a condition of probation was imposed in an unauthorized manner.

(16a) (16b) Criminal Law § 503--Probation--Conditions--Restitution--Controlled Substance Eradication Expense. --A court may impose, as a condition of probation, the costs of seizure or disposal of controlled substances for which defendant was found liable pursuant to a *Health & Saf. Code*, § 11470.1, hearing. Such a hearing may precede the trial on the criminal charges, or, if defendant exercises his right to continue the § 11470.1 action, the hearing may function in lieu of a restitution hearing following the grant of probation.

(17) Statutes § 51--Construction--Codes--Conflicting Provisions--Reconciliation. --In reconciling conflicting statutes, courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. In the construction of a particular statute, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together consti-

tuting one law. The statutes should be construed together if they harmonize and achieve a uniform and consistent legislative purpose.

(18) Criminal Law § 500--Probation--Severability of Conditions. --Conditions of probation which are not authorized by law are severable and do not affect the valid conditions of the order.

COUNSEL: Manuel E. Nestle, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, David D. Salmon, John Runde and Derald E. Granberg, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by White, P. J., with Barry-Deal and Merrill, JJ., concurring.

OPINION BY: WHITE

OPINION

[*729] [**694] Appellant contests the validity of a condition of probation requiring him to make restitution to Lake County for expenses incurred in disposing of dangerous chemicals found in appellant's residence. He claims that neither [**2] *Penal Code section 1203.1* nor *1203.04* authorizes the condition, because the county was not a direct victim of his crimes and the expenses incurred in destroying the chemicals were not related to any crime to which he pled guilty. We need not ultimately resolve these contentions because, as will be seen, the manner in which the condition was imposed was improper in that the prosecution failed to [**695] comply with the procedures for the recovery of such expenses set forth in *Health and Safety Code section 11470.1*.¹ We hold that this statute, along with *section 11470.2*, provides the exclusive remedy for reimbursement of the expenses recoverable under these statutes.²

1 Further statutory references are to the Health and Safety Code unless otherwise specified.

2 We raised the issue of the applicability of *sections 11470.1* and *11470.2* after requesting and receiving supplemental briefing from the parties. (See *Gov. Code, § 68081*.)

I. Facts

During a legal search of appellant's mobilehome, the [**3] police seized firearms, a vial of LSD tablets, marijuana and drug paraphernalia. They also detected chemicals and chemical equipment in the residence which were later destroyed. The probation officer's report to the court stated that "a professional chemical dis-

posal company had to be summoned as many of the items recovered from the defendant's residence were too dangerous to store. This cost a total of \$ 1,132.50."

Appellant explained at the sentencing hearing that some of these chemicals and equipment were for soil and water analysis; one chemical was a component substance of methamphetamine; others were for the manufacture of "acetic acid ethylacetate" and "sulfuric oxide." Many of these chemicals were quite toxic. Appellant objected to their seizure. He volunteered to identify the chemicals so the police could handle and analyze them safely, but this offer was not accepted.

Appellant pled guilty to possession of a firearm by an ex-felon (*Pen. Code, § 12021, subd. (a)*) and cultivation of marijuana (*§ 11358*). Three other charges, including possession of LSD, were dropped.³ He was admitted to three years' probation. One of his conditions of probation was that [*730] [***4] "by way of providing restitution to the County of Lake[,] [the] defendant will pay the sum of \$ 1,132.50 to the probation officer in such installments as he shall direct." Appellant initially objected to this condition and requested a restitution hearing; at the scheduled hearing, however, he consented to the condition. Appellant contests the condition on appeal.

3 Appellant contends by way of petition for writ of habeas corpus that the court should have granted his motion to withdraw his plea because of inadequate advisement by counsel of the consequences of his plea. We dispose of this issue in the petition.

II. The Issues in This Appeal Were Not Waived by Appellant

Before addressing the substantive issues, we note several points relevant to [HN1] the appealability of the restitution condition and the significance of appellant's consent. First, these issues are appealable without a certificate of probable cause (*Pen. Code, § 1237.5*) because the conditions of probation were not part of the plea bargain [***5] and were imposed after entry of the plea. (*People v. Sumstine* (1984) 36 Cal.3d 909, 915, fn. 3 [206 Cal.Rptr. 707, 687 P.2d 904]; *Cal. Rules of Court, rule 31 (d)*.)

(1) Second, [HN2] the acceptance of probation does not preclude a challenge on appeal to the validity of a probation condition. "[By] accepting the benefits of probation a defendant does not waive the right to urge the invalidity of an improper, a void, condition on direct appeal from that judgment or on habeas corpus." [Citation.] (*In re Mackey* (1983) 142 Cal.App.3d 38, 43 [190

Cal. Rptr. 716]; *In re Bushman* (1970) 1 Cal.3d 767, 776 [83 Cal. Rptr. 375, 463 P.2d 727].)

Third, [HN3] because the prosecution did not contemplate bringing an action for the recovery of expenses under section 11470.1, appellant could not have waived his statutory right to have the prosecution abide by the procedures set forth therein. (2) Appellant was not apprised of his right to these procedures before the restitution condition was imposed, and "a purported "waiver" of a statutory right is not legally effective unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect [***6] of the "waiver" presented to him, and his full understanding of the explanation." [Citation.]" (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 389 [***696] [216 Cal. Rptr. 733, 703 P.2d 73].)

Fourth, we need not decide whether appellant waived his right to contest the validity of the restitution condition under Penal Code sections 1203.1 and 1203.04 in light of our holding that the prosecution could recover the disposal costs only pursuant to section 11470.1. We nevertheless briefly discuss the issues related to appellant's contention that restitution was unauthorized because the county was not a direct victim of his crimes. Such a discussion will provide background for the question we are called upon to [*731] resolve and is relevant to our analysis of the interplay between sections 11470.1 and 11470.2 and the above Penal Code provisions.

III. A County May Receive Restitution Even Though It Is Not a Direct Victim

(3) It is well established that [HN4] courts have broad discretion to determine whether probation should be granted and on what conditions. (*People v. Richards* (1976) 17 Cal.3d 614, 619 [131 Cal. Rptr. 537, 552 P.2d [***7] 97]; *People v. Lent* (1975) 15 Cal.3d 481, 486 [124 Cal. Rptr. 905, 541 P.2d 545].) Such discretion is embodied in [HN5] Penal Code section 1203.1: "The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends be made to society for the breach of the law, for any injury done to any person resulting from that breach and generally and specifically for the reformation and rehabilitation of the probationer, . . ." (*Pen. Code*, § 1203.1.)

(4) In view of such discretionary power, [HN6] "[a] condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct

which is not reasonably related to future criminality . . ." (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627 [64 Cal. Rptr. 290].) Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which [***8] the defendant was convicted or to future criminality." (*People v. Lent*, *supra*, 15 Cal.3d at p. 486; fn. omitted.)

[HN7] The court's power to require restitution to a crime as a condition of probation is also beyond question. Penal Code section 1203.1 provides that in granting probation the court may, in its discretion, "provide for restitution in proper cases; . . ." and further: "The court shall consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund. . . ." (*Pen. Code*, § 1203.1.) Furthermore, in passing Proposition 8, the People of the State of California announced their "unequivocal intention . . . 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. [para.] [HN8] 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, § 28, *subd. (b)*.) To carry out this mandate, legislation was [*732] enacted which [***9] requires courts to impose restitution as a condition in all cases in which probation is granted. (*Pen. Code*, § 1203.04, *subd. (a)*.)⁴ Restitution shall be made "(1) To the victim, if the crime involved a victim. . . [para.] (2) To the Restitution Fund, if the crime did not involve a victim." (*Ibid.*)

4 Other legislation implementing Proposition 8 is Penal Code section 1202.4 which requires the court to impose a restitution fine "[in] any case in which a defendant is convicted of a felony, . . ." Such a fine was imposed against appellant, and he did not contest its validity.

We first note as a general proposition that [HN9] restitution is not necessarily limited to persons. Neither Penal Code section 1203.1 nor section 1203.04 defines the term "victim." However, the policies of these provisions favor a definition which includes the government where it suffered loss [***697] flowing from a defendant's criminal conduct. Including the government as a potential "victim" accords with the court's discretion [***10] to employ probation conditions which ensure "that amends . . . be made to society for the breach of the law, . . ." (*Pen. Code*, § 1203.1.) (5) Moreover, the concept of restitution embodies not only the notion that people who suffer loss as a result of criminal activity should be compensated for those losses (*Cal. Const.*, art. I, § 28,

subd. (b)), but also a perception of the value of restitution as a "deterrent to future criminality" (*People v. Lent*, *supra*, 15 Cal.3d at p. 486), and "to rehabilitate the criminal." (*People v. Richards*, *supra*, 17 Cal.3d at p. 620.) Both aims are furthered by imposing a restitution condition in appropriate cases whether or not the victim is an individual. We therefore agree with the dictum that "[the] government may be the beneficiary of [restitution] if it has incurred actual loss due to the crime, as in the instance of tax evasion or theft of government property, . . ." (*People v. Baker* (1974) 39 Cal.App.3d 550, 559 [113 Cal.Rptr. 248]; *People v. Burnett* (1978) 86 Cal.App.3d 320, 322 [150 Cal.Rptr. 126].)⁵

5 Our conclusion is consistent with cases which interpret 18 *United States Code*, section 3651 as permitting the government to be the beneficiary of restitution even though the statute is silent regarding restitution to the government. (See *United States v. Lynch* (7th Cir. 1982) 699 F.2d 839, 845; Annot. (1964) 97 A.L.R. 2d 799-800, § 1, and cases cited therein.)

Our conclusion is also consistent with the proposition that counties may be the victims of crime for purposes of stating a criminal offense in an accusatory pleading. (*People v. Dale* (1966) 239 Cal.App.2d 634, 639 [49 Cal.Rptr. 253]; *People v. Diamondstein* (1919) 42 Cal.App. 490, 491 [183 P. 679].)

[***11] It also appears that Lake County could be considered a "victim" of appellant's criminal activity. While the county was not a direct victim as in the case of tax fraud or theft of government property, restitution is not limited to direct victims. (6) Courts have rejected the argument "that a restitution condition may never be ordered in favor of anyone other than the direct victim of a crime [Rather] the appropriate rule . . . [is that] [HN10] the propriety of a particular restitution condition must be determined by [*733] reference to the purposes of probation in light of the facts and circumstances of each case." (*People v. Clark* (1982) 130 Cal.App.3d 371, 385 [181 Cal.Rptr. 682].) Thus, restitution provisions have been upheld where defendant was ordered to provide restitution to a crime victim's children (*id.*, at pp. 386-387) and to an automobile accident victim's insurer. (*People v. Calhoun* (1983) 145 Cal.App.3d 568, 572 [193 Cal.Rptr. 394].)⁶ These cases demonstrate that restitution is permissible to any victim who suffered "actual loss flowing from the charged offense or from related misconduct." (*People v. Baker*, *supra*, 39 Cal.App.3d [***12] at p. 559; cf. 18 U.S.C. § 3651 [allowing restitution for "actual damages or loss caused by the offense"].) Thus, while we have uncovered no cases in which the government was permitted to receive restitu-

tion even though it was not the direct victim of a crime, application of established principles of probation leads to the conclusion that restitution would be permissible in such cases.

6 We note further that restitution to a homicide victim's "immediate surviving family" is authorized by *Penal Code* section 1203.04, subdivision (a)(1).

We need not address the problems raised by appellant's second contention -- that the restitution condition was not related to any crime to which he pled guilty. [HN11] While the permissible scope of restitution for conduct not resulting in a conviction is somewhat elusive (see *People v. Richards*, *supra*, 17 Cal.3d at pp. 619-624; *People v. Lent*, *supra*, 15 Cal.3d at pp. 486-487; *People v. Williams* (1966) 247 Cal.App.2d 394, 408 [55 Cal.Rptr. 550]), section [***13] 11470.1 explicitly permits the government to recoup the expenses sought in this case even where they are unrelated to the underlying offense.⁷ We therefore [**698] proceed to discuss the applicability of this statute, as well as its companion statute, section 11470.2, to this case.

7 In light of the statutory authority provided in sections 11470.1 and 11470.2, we need not consider appellant's contention at oral argument that permitting restitution would constitute an unauthorized reimbursement for the cost of prosecution. (See *People v. Burnett*, *supra*, 86 Cal.App.3d at pp. 322-323; *People v. Baker*, *supra*, 39 Cal.App.3d at pp. 558-560.)

IV. Compliance With Section 11470.1 Was Mandatory

A. The Statutory Scheme

Sections 11470.1 and 11470.2 were enacted together by the Legislature in 1983.⁸ [**699] (Stats. 1983, ch. 931, §§ 1, 2, pp. 3369-3371.) Both statutes permit [*734] the government to recover the "expenses of seizing, eradicating, destroying, or taking remedial action [***14] with respect to, any controlled substance or its [*735] precursors. . . ." (§§ 11470.1, *subd. (a)*; 11470.2, *subd. (a)* [hereafter recovery of expenses].) Section 11470.1 also allows the recovery of the costs of taking "remedial action" with respect to hazardous substances. (§ 11470.1, *subd. (b)*.) These expenses are recoverable from "[any] person who manufactures or cultivates a controlled substance or its precursors in violation of this division" (§§ 11470.1, *subd. (a)(1)*; 11470.2, *subd. (a)(1)*), or from certain persons who aid and abet or knowingly profit from such illegal activity. (§§ 11470.1, *subd. (a)(2)*; 11470.2, *subd. (a)(2)*.) Section 11470.1 establishes a civil remedy for the recovery of expenses.

The government must show the expenses are recoverable by a preponderance of the evidence. If, however, the action is brought against an aider and abettor, proof must be by clear and convincing evidence. (§ 11470.1, *subd. (e)(1)*.) Recoverable expenses are those which (1) "were incurred in seizing, eradicating, or destroying the controlled substance or its precursors or in taking remedial action with respect to a hazardous substance . . ."; (2) "were incurred as a [*736] [***15] proximate result of the defendant's manufacture or cultivation of a controlled substance in violation of this division"; and (3) "were reasonably incurred." (§ 11470.1, *subd. (f)(1)-(3)*.)

8 The full text of these statutes is set forth below. [HN12] *Section 11470.1* reads: "(a) The expenses of seizing, eradicating, destroying, or taking remedial action with respect to, any controlled substance or its precursors shall be recoverable from:

"(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

"(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division.

"(b) The expenses of taking remedial action with respect to any controlled substance or its precursors shall also be recoverable from any person liable for the costs of that remedial action under Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.

"(c) It shall not be necessary to seek or obtain a criminal conviction prior to the entry of judgment for the recovery of expenses. However, if criminal charges are pending against the defendant for the unlawful manufacture or cultivation of any controlled substance or its precursors, an action brought pursuant to this section shall, upon a defendant's request, be continued while the criminal charges are pending.

"(d) The action may be brought by the district attorney, county counsel, city attorney, the State Department of Health Services, or Attorney General. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

"(e)(1) The burden of proof as to liability shall be on the plaintiff and shall be by a prepon-

derance of the evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (1) of subdivision (a). The burden of proof as to liability shall be on the plaintiff and shall be by clear and convincing evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (2) of subdivision (a). The burden of proof as to the amount of expenses recoverable shall be on the plaintiff and shall be by a preponderance of the evidence in any action brought pursuant to subdivision (a).

"(2) Notwithstanding paragraph (1), for any person convicted of a criminal charge of the manufacture or cultivation of a controlled substance or its precursors there shall be a presumption affecting the burden of proof that that person is liable.

"(f) Only expenses which meet the following requirements shall be recoverable under this section:

"(1) The expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors or in taking remedial action with respect to a hazardous substance. These expenses may not include any costs incurred in use of the herbicide paraquat.

"(2) The expenses were incurred as a proximate result of the defendant's manufacture or cultivation of a controlled substance in violation of this division.

"(3) The expenses were reasonably incurred.

"(g) For purposes of this section, 'remedial action' shall have the meaning set forth in Section 25322.

"(h) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

"(i) Notwithstanding *Section 526 of the Code of Civil Procedure*, the plaintiff may be granted a temporary restraining order or a preliminary injunction, pending or during trial, to restrain the defendant from transferring, encumbering, hypothecating, or otherwise disposing of any assets specified by the court, if it appears by the complaint that the plaintiff is entitled to the relief demanded and it appears that the defendant may dispose of those assets to thwart enforcement of the judgment.

"(j) The Legislature finds and declares that civil penalties for the recovery of expenses incurred in enforcing the provisions of this division shall not supplant criminal prosecution for violation of those provisions, but shall be a supplemental remedy to criminal enforcement.

"(k) Any testimony, admission, or any other statement made by the defendant in any proceeding brought pursuant to this section, or any evidence derived from the testimony, admission, or other statement, shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct.

"(l) No action shall be brought or maintained pursuant to this section against a person who has been acquitted of criminal charges for conduct which may be the basis for an action under this section if, in the criminal action, there has been a finding of factual innocence by the court pursuant to standards set forth in *subdivision (b) of Section 851.8 of the Penal Code*.

[HN13] *Section 11470.2* reads: "(a) In lieu of a civil action for the recovery of expenses as provided in *Section 11470.1*, the prosecuting attorney in a criminal proceeding may, upon conviction of the underlying offense, seek the recovery of all expenses recoverable under *Section 11470.1* from:

"(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

"(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division. The trier of fact shall make an award of expenses, if proven, which shall be enforceable as any civil judgment. If probation is granted, the court may order payment of the expenses as a condition of probation. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

"(b) The prosecuting attorney may, in conjunction with the criminal proceeding, file a petition for recovery of expenses with the superior court of the county in which the defendant has been charged with the underlying offense. The petition shall allege that the defendant had manufactured or cultivated a controlled substance in violation of Division 10 (commencing with *Section 11000*) of the Health and Safety Code and

that expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors. The petition shall also state the amount to be assessed. The prosecuting attorney shall make service of process of a notice of that petition to the defendant.

"(c) The defendant may admit to or deny the petition for recovery of expenses. If the defendant admits the allegations of the petition, the court shall rule for the prosecuting attorney and enter a judgment for recovery of the expenses incurred.

"(d) If the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties.

"(e) At the hearing, the burden of proof as to the amount of expenses recoverable shall be on the prosecuting attorney and shall be by a preponderance of the evidence.

"(f) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity."

[**16] In lieu of a civil action, the prosecution may bring a "petition for recovery of expenses" under *section 11470.2* in the same trial court in which defendant is being tried for the "underlying offense" which led to the seizure or destruction of the controlled substance or its precursors. (§ *11470.2, subds. (a), (b)*.) The petition shall allege that expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors and the amount to be assessed. (§ *11470.2, subd. (b)*.) If defendant admits the petition, the court enters a judgment for recovery of the expenses incurred. (§ *11470.2, subd. (c)*.) If defendant denies the petition, a hearing is held after conviction on the underlying offense at which the prosecution must prove the amount of expenses under a preponderance of the evidence standard. (§ *11470.2, [**700] subds. (d), (e)*.) *Section 11470.2* incorporates the three limitations on recoverable expenses set forth in *subdivision (f) of section 11470.1*. (§ *11470.2, subd. (a)*.) Payment for recoverable expenses may be imposed as a condition of probation. (§ *11470.2, subd. (a)(2)*.)

These statutes do not purport to alter a court's authority [***17] to impose a restitution condition of probation under *Penal Code* sections 1203.1 and 1203.04. The question we confront in interpreting sections 11470.1 and 11470.2 is their interplay with these *Penal Code* provisions. *Penal Code* section 1203.1 authorizes and *Penal Code* section 1203.04 mandates the imposition of restitution conditions upon probation, but neither sets forth procedures for imposing such conditions. Certain procedures have been mandated judicially to comport with due process requirements. Our question is whether these procedures, which are less formal and demanding than those set forth in sections 11470.1 and 11470.2, may be employed in cases falling within the scope of the new statutes.

(7) [HN14] Restitution pursuant to *Penal Code* sections 1203.1 and 1203.04 may not be ordered absent a judicial hearing on the issue. The court may not base a restitution order on its mere belief that defendant owes money to the victim (*People v. Richards, supra*, 17 Cal.3d at p. 621) or solely on information provided by the probation officer. (*People v. Hartley* (1984) 163 Cal.App.3d 126, 129-130 [209 Cal.Rptr. 131]; *People v. Cervantes* (1984) 154 Cal.App.3d 353, 360-361 [***18] [201 Cal.Rptr. 187].) The court must determine, based on evidence, the appropriate amount of restitution in light of the value of the victim's loss (*People v. Baumann* (1985) 176 Cal.App.3d 67, 79 [222 Cal.Rptr. 32]; *Hartley, supra*, at p. 130), the defendant's culpability and his ability to pay (*Cervantes, supra*, at p. 361), and the purposes of restitution. (*Richards, supra*, at pp. 621-622.) In determining the propriety [*737] and amount of restitution, the preponderance of the evidence standard satisfies due process. (*Baumann, supra*, at p. 80.) The defendant is not entitled to a jury trial (*ibid*). and "the requisite hearing [need not] approximate the formality of a civil trial." (*Hartley, supra*, at p. 130.)

The procedures for the recovery of expenses under sections 11470.1 and 11470.2 are more stringent in several respects. Both statutes require the prosecution to bring a formal action for the recovery of expenses. Section 11470.2 affords the defendant the opportunity to have the restitution issue decided by a jury. [HN15] Under section 11470.1, the liability of an aider and abettor must be proven by clear and convincing evidence.

B. Relationship [***19] of Sections 11470.1 and 11470.2 With *Penal Code* Sections 1203.1 and 1203.04

(8a) In determining whether sections 11470.1 and 11470.2 comprise the exclusive method for the recovery of expenses of seizing or disposing of controlled substances or their precursors, our primary task is to discern the Legislature's intent. The extant legislative history provides no clear answer to this question. The preface to

the legislation contains only a summary of its contents. Some insight is provided by the comments of the Assembly Office of Research in connection with the bill's third reading in the Assembly. It states: "This bill is sponsored by the Attorney General (AG),⁹ who feels that those who engage in illegal drug activities should bear the costs of eradicating their abuses because the cost of eradicating drug operations is becoming prohibitively expensive, especially for small rural law enforcement agencies. [para.] The central policy issue raised by this bill involves standard of proof. The bill allows persons to be held civilly liable for [***701] eradication expenses even if they have not been convicted of unlawful drug activities. [para.] Proponents argue that recovery [***20] of expenses in civil court without a criminal conviction is just and necessary. Existing law, for example, permits the cost of cleaning up illegal toxic waste dumping to be sought under the same terms as under this bill." (Assem. Office of Research, 3d reading analysis of Sen. Bill No. 1121 (1983-1984 Reg. Sess.) Aug. 30, 1983.)

9 The bill, Senate Bill No. 1121, was also supported by the California Highway Patrol. (See Note (1983) 15 Pacific L.J. 596.)

Since we have no direct evidence of the intended effect of the legislation on existing procedures for imposing restitution, we resort to recognized rules of statutory construction. (9) First, [HN16] "the expression of certain things in a statute necessarily involves exclusion of other things not expressed -- *expressio unius est exclusio alterius*." (*Crippen v. Superior Court* (1984) 159 Cal.App.3d 254, 260 [205 Cal.Rptr. 477].) The principle of this [*738] rule "is that when legislation expressly provides a particular remedy or remedies, courts should [***21] not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" (*Passenger Corp. v. Passengers Assn.* (1974) 414 U.S. 453, 458 [38 L.Ed.2d 646, 652, 94 S.Ct. 690].)

This rule has been applied in a variety of contexts. (See *Transamerica Mortgage Advisors, Inc. v. Lewis* (1979) 444 U.S. 11, 17 [62 L.Ed.2d 146, 153, 100 S.Ct. 242] [no private right of action implied where not provided by statute]; *Botany Mills v. United States* (1929) 278 U.S. 282, 288-289 [73 L.Ed.2d 379, 385, 49 S.Ct. 129] [statute prescribing the method for compromising tax cases precludes compromise by other methods]; *Garson v. Juarique* (1979) 99 Cal.App.3d 769, 773-774 [160 Cal.Rptr.461] [ordinance requiring physical restraint of dogs excludes psychological restraints].) We think its application especially appropriate where the Legislature

has established comprehensive and detailed procedures and criteria for the recovery of expenses.

(8b) The comprehensive nature of the statutory scheme is evidenced by the applicability of either *section 11470.1* or *11470.2*, or both, [***22] to every possible procedural setting in which the recovery of expenses may be sought. *Section 11470.2* applies where a defendant is being tried for or has been convicted of the offense underlying the expenses. *Section 11470.1* contains no "underlying offense" limitation. Therefore, the statute may be used to recover expenses not only upon conviction of the underlying offense, but where the expenses did not directly flow from the underlying offense, and, in either event, where no criminal charges were filed. Because of the all-encompassing nature of the remedy provided by the Legislature to law enforcement for the recovery of expenses, we may presume it intended to preclude the imposition of such expenses outside the procedures set forth in *sections 11470.1* or *11470.2*.

(10) Second, [HN17] we must construe statutes "toward giving [them] meaning and effect. [Citations.]" (*East Bay Municipal Utility Dist. v. Appellate Department* (1979) 23 Cal.3d 839, 843 [153 Cal.Rptr. 597, 591 P.2d 1249].) Were we to hold that expenses were recoverable through the procedures normally accompanying restitution proceedings, the meaning and effect of these statutes would be undermined. The meaning [***23] and effect of *section 11470.2* would in large measure be nullified because restitution could alternatively be sought as a condition of probation pursuant to *Penal Code sections 1203.1* and *1203.04*. The statute would retain vitality only where probation was not granted. Given the choice between the informal procedures required by decisional law to impose restitution and the formal procedures, [*739] including the right to a jury trial, required by *section 11470.2*, the statute would seldom, if ever, be implemented. Interpreting the procedures of *section 11470.2* as discretionary would, in large part, emasculate the effect of this statute.

The same holds true for *section 11470.1*, insofar as the statute authorizes the recovery in a criminal case of expenses not attributable to an underlying offense. Most prosecutors would, given the choice, prefer to avoid the formal procedures of a civil [**702] action. This is especially true where those procedures demand, in some cases, a more exacting burden of proof than that employed in standard restitution hearings.

The Legislature's intent to bring all actions for the recovery of expenses under the umbrella of *sections 11470.1* and [***24] *11470.2* is further demonstrated by the exclusion of "costs incurred in use of the herbicide paraquat." (§ 11470.1, *subd. (f)(1)*.) It cannot reasonably be argued that this provision applies only where either

section 11470.1 or *11470.2* is invoked, but that such costs are recoverable if the prosecution seeks restitution outside this statutory scheme.

Similarly, had the Legislature believed the existing procedures were adequate, it would not have had strong reason to enact *section 11470.2*. As noted, expenses could be recovered as a condition of probation under the principles of decisional law then existing. (11) The Legislature is presumed to act "with full knowledge of the state of the law at the time." (*In re Misener* (1985) 38 Cal.3d 543, 552 [213 Cal.Rptr. 569, 698 P.2d 637].) We can therefore assume that the Legislature intended to supplant the decisional authority with the more comprehensive procedures of *section 11470.2*.

(12) A third applicable rule of statutory construction "is that [HN18] where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute [***25] and controls unless an intent to the contrary clearly appears." (*Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 446 [147 Cal.Rptr. 265].) (13) *Sections 11470.1* and *11470.2* are aimed particularly at the recovery of expenses for seizing, eradicating, destroying or taking remedial action, with respect to controlled substances or their precursors, whereas *Penal Code sections 1203.1* and *1203.04* are general statutes on probation and restitution. Thus, to the extent *sections 11470.1* and *11470.2* conflict with the procedures required to impose a restitution condition under *Penal Code sections 1203.1* and *1203.04*, the former statutes, because they allow the government to recover a specific type of expenses, should govern.

[*740] (14) In sum, we view the aims of *sections 11470.1* and *11470.2* as twofold. First, the Legislature intended to provide law enforcement authorities with a broad remedy to recover the costs of seizing or disposing of controlled substances and their precursors. Prior to the legislation, such costs were recoverable only upon a criminal conviction, and then only as part of a restitution condition where probation was [***26] granted. Second, the Legislature intended to set forth formal procedures for the recovery of expenses and to define those expenses which are recoverable. As the legislative history reveals, these procedures were designed to strike a balance between protecting the rights of defendants and alleviating law enforcement's financial burden of seizing or disposing of controlled substances and their precursors. Our holding that the recovery of such costs cannot be pursued by other means is consistent with the achievement of these twin objectives.

(15a) We hold, based on the foregoing, that where the government seeks compensation for the expenses

recoverable under *sections 11470.1 and 11470.2*, the government must abide by the procedures of the applicable statute or statutes. In this case, because the expenses were not directly related to an "underlying offense," the prosecution should have instituted a civil action for recovery under *section 11470.1*. Because it failed to do so, the restitution order must be stricken.

(16a) We address one final matter relevant to the disposition of this case: whether the costs recoverable under *section 11470.1* may be imposed as a condition of probation. As noted, [***27] this statute may be used where *section 11470.2* applies, and also where the expenses are not related to the "underlying offense." Unlike *section 11470.2*, however, this statute does not provide that expenses may be imposed as a condition of probation. However, interpreting this statute to preclude a probation condition would contravene *Penal Code section 1203.04's* directive [**703] that restitution "shall" be required as a condition of probation. (17) In reconciling these statutes, we "are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (*In re Marriage of Brown* (1979) 99 Cal.App.3d 702, 706 [160 Cal.Rptr. 524].) "[HN19] In the construction of a particular statute, . . . all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law." [Citations.] The statutes should be construed together if they harmonize and achieve a uniform and consistent legislative purpose. [Citations.]" (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590-591 [116 Cal.Rptr. 376, 526 P.2d 528].)

(16b) To achieve this end, we hold that a court may impose, as [***28] a condition of probation, the costs for which defendant was found liable [*741] pursuant to a *section 11470.1* hearing. Such a hearing may precede the trial on the criminal charges, or, if defendant exercises his right to continue the *section 11470.1* action pursuant to subdivision (c), the hearing may function in lieu of a restitution hearing following the grant of probation. This result preserves the integrity of both *section 11470.1* and *Penal Code section 1203.04*. It furthers the legislative intent that restitution be part of a defendant's conditions of probation. It also ensures compliance with *section 11470.1* even where the prosecution seeks to impose the costs of recovery as a condition of probation. A contrary result would create an unjustified distinction between persons convicted of an underlying offense and persons convicted of an offense unrelated to the recovery of expenses. Therefore, we do not interpret *section 11470.1* as depriving the court of its power to impose a restitution condition for recoverable expenses proved under *section 11470.1*, nor do we interpret *Penal Code section 1203.04* as obviating the necessity to seek the recovery of expenses under *section [***29] 11470.1*.

(18) "Conditions of probation which are not authorized by law are severable and do not affect the valid conditions of the order." (*In re Allen* (1969) 71 Cal.2d 388, 394 [78 Cal.Rptr. 207, 455 P.2d 143], disapproved on other grounds in *Fuller v. Oregon* (1974) 417 U.S. 40 [40 L.Ed.2d 642, 94 S.Ct. 2116].) (15b) The restitution condition of probation was imposed in an unauthorized manner and therefore must be stricken. The order granting probation is otherwise affirmed. The case is remanded for proceedings consistent with this opinion.



Copyright 2011 SHEPARD'S(R) - 54 Citing references

People v. Narron, 192 Cal. App. 3d 724, 237 Cal. Rptr. 693, 1987 Cal. App. LEXIS 1808 (Cal. App. 1st Dist. 1987)

Restrictions: *Unrestricted*
 FOCUS(TM) Terms: *No FOCUS terms*
 Print Format: *FULL*
 Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No subsequent appellate history.

Citing References:

 Questioned Analyses:	Questioned (5)
Cautionary Analyses:	Distinguished (5)
Positive Analyses:	Followed (3)
Neutral Analyses:	Dissenting Op. (2), Explained (2), Quest. Precedent (12)
Other Sources:	Law Reviews (2), Statutes (2), Court Documents (2)

LexisNexis Headnotes: HN1 (3), HN2 (1), HN6 (2), HN7 (24), HN8 (9), HN9 (18), HN10 (9), HN11 (2), HN12 (2), HN13 (2), HN14 (18), HN15 (3), HN16 (1), HN19 (1)

PRIOR HISTORY (0 citing references)

(CITATION YOU ENTERED):

People v. Narron, 192 Cal. App. 3d 724, 237 Cal. Rptr. 693, 1987 Cal. App. LEXIS 1808 (Cal. App. 1st Dist. 1987)

CITING DECISIONS (48 citing decisions)

CALIFORNIA SUPREME COURT

1. Cited by:
People v. Soria, 48 Cal. 4th 58, 104 Cal. Rptr. 3d 780, 224 P.3d 99, 2010 Cal. LEXIS 872 (2010)
LexisNexis Headnotes HN8
 48 Cal. 4th 58 p.66
 104 Cal. Rptr. 3d 780 p.785
 224 P.3d 99 p.104

2. Cited by:
People v. Giordano, 42 Cal. 4th 644, 68 Cal. Rptr. 3d 51, 170 P.3d 623, 2007 Cal. LEXIS 13172 (2007)
LexisNexis Headnotes HN7, HN8, HN14
 42 Cal. 4th 644 p.652
 68 Cal. Rptr. 3d 51 p.56

170 P.3d 623 p.628

3. **Followed by, Cited by:**

People v. Martinez, 36 Cal. 4th 384, 30 Cal. Rptr. 3d 779, 115 P.3d 62, 2005 Cal. LEXIS 7302, 2005 Cal. Daily Op. Service 6175, 2005 D.A.R. 8411 (2005) LexisNexis Headnotes **HN1, HN7, HN9, HN10, HN11, HN14, HN15**

Followed by:

36 Cal. 4th 384 p.394
30 Cal. Rptr. 3d 779 p.786
115 P.3d 62 p.67

Cited by:

36 Cal. 4th 384 p.388
30 Cal. Rptr. 3d 779 p.782
115 P.3d 62 p.63

4. **Questioned by:**

People v. Birkett, 21 Cal. 4th 226, 87 Cal. Rptr. 2d 205, 980 P.2d 912, 1999 Cal. LEXIS 4996, 99 Cal. Daily Op. Service 6250, 99 D.A.R. 8025 (1999) LexisNexis Headnotes **HN7, HN9**

21 Cal. 4th 226 p.238
87 Cal. Rptr. 2d 205 p.214
980 P.2d 912 p.920

5. **Cited by:**

People v. Crow, 6 Cal. 4th 952, 26 Cal. Rptr. 2d 1, 864 P.2d 80, 1993 Cal. LEXIS 6424, 49 Cal. Daily Op. Service 67, 94 Cal. Daily Op. Service 67, 94 D.A.R. 155 (1993) LexisNexis Headnotes **HN7, HN9, HN14**

6 Cal. 4th 952 p.957
26 Cal. Rptr. 2d 1 p.3
864 P.2d 80 p.83

CALIFORNIA COURTS OF APPEAL

6. **Cited by:**

People v. Smith, 2011 Cal. App. LEXIS 1065 (Cal. App. 3d Dist. Aug. 12, 2011)
2011 Cal. App. LEXIS 1065

7. **Cited in Dissenting Opinion at:**

People v. Moret, 180 Cal. App. 4th 839, 104 Cal. Rptr. 3d 1, 2009 Cal. App. LEXIS 2083 (Cal. App. 1st Dist. 2009) LexisNexis Headnotes **HN1**

180 Cal. App. 4th 839 p.884
104 Cal. Rptr. 3d 1 p.38

8. **Followed by, Cited by:**

People v. Wilen, 165 Cal. App. 4th 270, 80 Cal. Rptr. 3d 895, 2008 Cal. App. LEXIS 1152 (Cal. App. 1st Dist. 2008) LexisNexis Headnotes **HN7, HN12, HN13, HN14**

Followed by:

165 Cal. App. 4th 270 p.284
80 Cal. Rptr. 3d 895 p.905

Cited by:

165 Cal. App. 4th 270 p.281

80 Cal. Rptr. 3d 895 p.903

9. **Cited in questionable precedent at:**
People v. Soria, 163 Cal. App. 4th 247, 77 Cal. Rptr. 3d 421, 2008 Cal. App. LEXIS 771 (Cal. App. 6th Dist. 2008) LexisNexis Headnotes HN8, HN9
163 Cal. App. 4th 247 p.255
77 Cal. Rptr. 3d 421 p.428
10. **Cited by:**
People v. Ozkan, 124 Cal. App. 4th 1072, 21 Cal. Rptr. 3d 854, 2004 Cal. App. LEXIS 2089, 2004 Cal. Daily Op. Service 10823, 2004 D.A.R. 14810 (Cal. App. 1st Dist. 2004) LexisNexis Headnotes HN7, HN9, HN14
124 Cal. App. 4th 1072 p.1077
21 Cal. Rptr. 3d 854 p.858
11. **Questioned by, Cited by:**
People v. Brach, 95 Cal. App. 4th 571, 115 Cal. Rptr. 2d 753, 2002 Cal. App. LEXIS 653, 2002 Cal. Daily Op. Service 705, 2002 D.A.R. 910 (Cal. App. 3d Dist. 2002) LexisNexis Headnotes HN19
Questioned by:
95 Cal. App. 4th 571 p.579
115 Cal. Rptr. 2d 753 p.760
Cited by:
95 Cal. App. 4th 571 p.576
115 Cal. Rptr. 2d 753 p.757
12. **Cited in questionable precedent at:**
People v. Bucy, 71 Cal. App. 4th 589, 83 Cal. Rptr. 2d 885, 1999 Cal. App. LEXIS 344, 99 Cal. Daily Op. Service 2882, 99 D.A.R. 3714 (Cal. App. 4th Dist. 1999)
71 Cal. App. 4th 589 p.600
83 Cal. Rptr. 2d 885 p.892
13. **Cited by:**
People v. Torres, 59 Cal. App. 4th 1, 68 Cal. Rptr. 2d 644, 1997 Cal. App. LEXIS 938, 97 Cal. Daily Op. Service 8560, 97 D.A.R. 13827 (Cal. App. 1st Dist. 1997) LexisNexis Headnotes HN7, HN8, HN9
14. **Cited in Dissenting Opinion at, Cited by:**
People v. Honig, 48 Cal. App. 4th 289, 55 Cal. Rptr. 2d 555, 1996 Cal. App. LEXIS 755, 96 Cal. Daily Op. Service 5920, 96 D.A.R. 9647 (Cal. App. 3d Dist. 1996) LexisNexis Headnotes HN6, HN7, HN9, HN14
Cited in Dissenting Opinion at:
48 Cal. App. 4th 289 p.365
55 Cal. Rptr. 2d 555 p.602
Cited by:
48 Cal. App. 4th 289 p.359
55 Cal. Rptr. 2d 555 p.598

15. **Cited by:**
People v. Kwolek, 40 Cal. App. 4th 1521, 48 Cal. Rptr. 2d 325, 1995 Cal. App. LEXIS 1204, 95 Cal. Daily Op. Service 9541, 95 D.A.R. 16491 (Cal. App. 6th Dist. 1995) LexisNexis Headnotes HN9
40 Cal. App. 4th 1521 p.1534
48 Cal. Rptr. 2d 325 p.332
16. **Cited in questionable precedent at:**
People v. Correia, 36 Cal. App. 4th 1779, 43 Cal. Rptr. 2d 302, 1995 Cal. App. LEXIS 692, 95 Cal. Daily Op. Service 5828, 95 D.A.R. 9855 (Cal. App. 4th Dist. 1995) LexisNexis Headnotes HN7, HN9
36 Cal. App. 4th 1779 p.1784
36 Cal. App. 4th 1779 p.1786
43 Cal. Rptr. 2d 302 p.303
43 Cal. Rptr. 2d 302 p.305
17. **Cited in questionable precedent at:**
People v. Hart, 29 Cal. App. 4th 560, 34 Cal. Rptr. 2d 540, 1994 Cal. App. LEXIS 1072, 94 Cal. Daily Op. Service 8068, 94 D.A.R. 14901 (Cal. App. 3d Dist. 1994) LexisNexis Headnotes HN7, HN9, HN12, HN13, HN15
29 Cal. App. 4th 560 p.563
29 Cal. App. 4th 560 p.564
34 Cal. Rptr. 2d 540 p.541
34 Cal. Rptr. 2d 540 p.542
18. **Distinguished by, Cited by:**
People v. Mendoza, 28 Cal. App. 4th 568, 33 Cal. Rptr. 2d 655, 1994 Cal. App. LEXIS 946, 94 Cal. Daily Op. Service 7251, 94 D.A.R. 13288 (Cal. App. 5th Dist. 1994) LexisNexis Headnotes HN7, HN11, HN14, HN15
Distinguished by:
28 Cal. App. 4th 568 p.573
33 Cal. Rptr. 2d 655 p.658
Cited by:
28 Cal. App. 4th 568 p.571
33 Cal. Rptr. 2d 655 p.656
19. **Cited in questionable precedent at:**
People v. Dancer, 26 Cal. App. 4th 1133, 32 Cal. Rptr. 2d 461, 1994 Cal. App. LEXIS 739, 94 Cal. Daily Op. Service 5514, 94 D.A.R. 10059 (Cal. App. 3d Dist. 1994) LexisNexis Headnotes HN7, HN14
26 Cal. App. 4th 1133 p.1136
32 Cal. Rptr. 2d 461 p.463
20. **Distinguished by questionable precedent at:**
People v. Sargent, 25 Cal. App. 4th 766, 30 Cal. App. 4th 1057, 30 Cal. Rptr. 2d 754, 1994 Cal. App. LEXIS 592, 94 Cal. Daily Op. Service 4392, 94 D.A.R. 8019 (Cal. App. 5th Dist. 1994)
30 Cal. App. 4th 1057 p.1060
30 Cal. Rptr. 2d 754 p.756
21. **Distinguished by questionable precedent at:**
People v. Sargent, 25 Cal. App. 4th 766 (Cal. App. 5th Dist. 1994)

25 Cal. App. 4th 766 p.769

22. **Cited in questionable precedent at:**
People v. Loftis, 24 Cal. App. 4th 1763, 29 Cal. App. 4th 1203, 30 Cal. Rptr. 2d 196, 1994 Cal. App. LEXIS 530, 94 Cal. Daily Op. Service 4001, 94 D.A.R. 7440 (Cal. App. 4th Dist. 1994) LexisNexis Headnotes HN8, HN9, HN10, HN14
29 Cal. App. 4th 1203 p.1210
30 Cal. Rptr. 2d 196 p.200
23. **Cited in questionable precedent at:**
People v. Loftis, 24 Cal. App. 4th 1763 (Cal. App. 4th Dist. 1994)
24 Cal. App. 4th 1763 p.1770
24. **Questioned by questionable precedent at, Cited in questionable precedent at:**
People v. Severns, 24 Cal. App. 4th 1140, 29 Cal. App. 4th 1015, 30 Cal. Rptr. 2d 297, 1994 Cal. App. LEXIS 445, 94 Cal. Daily Op. Service 3231, 94 D.A.R. 6081 (Cal. App. 1st Dist. 1994) LexisNexis Headnotes HN7, HN8, HN9, HN10, HN14
Questioned by questionable precedent at:
29 Cal. App. 4th 1015 p.1022
30 Cal. Rptr. 2d 297 p.301

Cited in questionable precedent at:
29 Cal. App. 4th 1015 p.1019
30 Cal. Rptr. 2d 297 p.299
25. **Questioned by questionable precedent at, Cited in questionable precedent at:**
People v. Severns, 24 Cal. App. 4th 1140 (Cal. App. 1st Dist. 1994)
Questioned by questionable precedent at:
24 Cal. App. 4th 1140 p.1147

Cited in questionable precedent at:
24 Cal. App. 4th 1140 p.1144
26. **Followed by:**
People v. Beck, 17 Cal. App. 4th 209, 21 Cal. Rptr. 2d 250, 1993 Cal. App. LEXIS 735, 93 Cal. Daily Op. Service 5434, 93 D.A.R. 9156 (Cal. App. 6th Dist. 1993) LexisNexis Headnotes HN8, HN9, HN10
17 Cal. App. 4th 209 p.221
21 Cal. Rptr. 2d 250 p.256
27. **Explained by:**
People v. Foster, 14 Cal. App. 4th 939, 18 Cal. Rptr. 2d 1, 1993 Cal. App. LEXIS 358, 93 Cal. Daily Op. Service 2500, 93 D.A.R. 4217 (Cal. App. 4th Dist. 1993) LexisNexis Headnotes HN7, HN9
14 Cal. App. 4th 939 p.951
18 Cal. Rptr. 2d 1 p.8
28. **Explained by:**
People v. Crow, 4 Cal. App. 4th 1473, 15 Cal. App. 4th 1459, 6 Cal. Rptr. 2d 574, 1992 Cal. App. LEXIS 444, 92 Cal. Daily Op. Service 2867, 92 D.A.R. 4453 (Cal. App. 1st Dist. 1992) LexisNexis Headnotes

HN7, HN9

6 Cal. Rptr. 2d 574 p.579

29. **Cited in questionable precedent at, Cited by:**

People v. Gregg, 3 Cal. App. 4th 794, 20 Cal. App. 4th 622, 4 Cal. Rptr. 2d 720, 1992 Cal. App. LEXIS 166, 92 Cal. Daily Op. Service 1350, 92 D.A.R. 2165 (Cal. App. 3d Dist. 1992) **LexisNexis Headnotes HN7, HN8, HN9, HN14**

Cited in questionable precedent at:

20 Cal. App. 4th 622 p.627

Cited by:

4 Cal. Rptr. 2d 720 p.722

30. **Cited by:**

People v. Fritchey, 2 Cal. App. 4th 829, 3 Cal. Rptr. 2d 585, 1992 Cal. App. LEXIS 50, 92 Cal. Daily Op. Service 452, 92 D.A.R. 662 (Cal. App. 5th Dist. 1992) **LexisNexis Headnotes HN7**

2 Cal. App. 4th 829 p.837

3 Cal. Rptr. 2d 585 p.589

31. **Distinguished by, Cited by:**

People v. Wardlow, 227 Cal. App. 3d 360, 278 Cal. Rptr. 1, 1991 Cal. App. LEXIS 107, 91 D.A.R. 1571 (Cal. App. 4th Dist. 1991) **LexisNexis Headnotes HN2, HN7, HN10**

Distinguished by:

227 Cal. App. 3d 360 p.368

278 Cal. Rptr. 1 p.5

Cited by:

227 Cal. App. 3d 360 p.366

278 Cal. Rptr. 1 p.3

32. **Distinguished by:**

People v. Blankenship, 213 Cal. App. 3d 992, 262 Cal. Rptr. 141, 1989 Cal. App. LEXIS 911 (Cal. App. 4th Dist. 1989) **LexisNexis Headnotes HN7, HN14**

213 Cal. App. 3d 992 p.997

262 Cal. Rptr. 141 p.144

33. **Cited by:**

People v. Harris, 195 Cal. App. 3d 717, 240 Cal. Rptr. 891, 1987 Cal. App. LEXIS 2228 (Cal. App. 3d Dist. 1987)

195 Cal. App. 3d 717 p.725

240 Cal. Rptr. 891 p.896

UNPUBLISHED CALIFORNIA APPELLATE DECISIONS34. **Cited by:**

People v. Lopez, 2011 Cal. App. Unpub. LEXIS 2367 (Cal. App. 4th Dist. Mar. 30, 2011) **LexisNexis Headnotes HN7**

35. **Cited by:**

People v. Price, 2010 Cal. App. Unpub. LEXIS 2233 (Cal. App. 6th Dist. Mar. 29, 2010) LexisNexis Headnotes HN1

36. Cited by:
People v. Macierez, 2010 Cal. App. Unpub. LEXIS 1772 (Cal. App. 6th Dist. Mar. 11, 2010) LexisNexis Headnotes HN14
37. Cited by:
People v. Sanchez, 2007 Cal. App. Unpub. LEXIS 7160 (Cal. App. 5th Dist. Sept. 4, 2007) LexisNexis Headnotes HN7, HN8, HN10
38. Cited by:
PEOPLE v. ARVIZU, 2006 Cal. App. Unpub. LEXIS 10031 (Cal. App. 3d Dist. Nov. 2, 2006)
39. Cited by:
PEOPLE v. COMBS, 2006 Cal. App. Unpub. LEXIS 1757 (Cal. App. 1st Dist. Feb. 28, 2006) LexisNexis Headnotes HN14
40. Cited by:
PEOPLE v. DUNN, 2006 Cal. App. Unpub. LEXIS 240 (Cal. App. 2d Dist. Jan. 10, 2006) LexisNexis Headnotes HN10
41. Cited by:
PEOPLE v. CARMICHAEL, 2006 Cal. App. Unpub. LEXIS 149 (Cal. App. 1st Dist. Jan. 9, 2006) LexisNexis Headnotes HN10
42. Cited by:
PEOPLE v. KING, 2005 Cal. App. Unpub. LEXIS 9657 (Cal. App. 3d Dist. Oct. 25, 2005) LexisNexis Headnotes HN7, HN9, HN10, HN14
43. Cited by:
PEOPLE v. HANSON, 2004 Cal. App. Unpub. LEXIS 960 (Cal. App. 1st Dist. Jan. 30, 2004) LexisNexis Headnotes HN7, HN14
44. Cited by:
PEOPLE v. HENDERSON, 2002 Cal. App. Unpub. LEXIS 10039 (Cal. App. 4th Dist. Oct. 30, 2002) LexisNexis Headnotes HN14

CALIFORNIA

45. Questioned by:
Cal. & Cal. App. Dkts. No. A062928
Cal. & Cal. App. Dkts. No. A062928

9TH CIRCUIT - COURT OF APPEALS

46. Cited by:
California v. H & H Ship Serv. Co., 1995 U.S. App. LEXIS 30986 (9th Cir. Cal. Oct. 17, 1995) LexisNexis Headnotes HN14

9TH CIRCUIT - U.S. DISTRICT COURTS

47. Cited by:
Shabaz v. Polo Ralph Lauren Corp., 586 F. Supp. 2d 1205, 2008 U.S. Dist. LEXIS 95084 (C.D. Cal. 2008)

LexisNexis Headnotes HN16
586 F. Supp. 2d 1205 p.1210

NEVADA SUPREME COURT

48. Cited by:
Igbinovia v. State, 111 Nev. 699, 895 P.2d 1304, 1995 Nev. LEXIS 74, 111 Nev. Adv. Rep. 69 (1995)
LexisNexis Headnotes HN6, HN7, HN9
111 Nev. 699 p.716
895 P.2d 1304 p.1315

ANNOTATED STATUTES (2 Citing Statutes)

49. *Cal. Health & Safety Code sec. 11470.1*
50. *Cal. Health & Safety Code sec. 11470.2*

LAW REVIEWS AND PERIODICALS (2 Citing References)

51. *CALIFORNIA SUPREME COURT SURVEY: February 1993 - December 1993*, 21 Pepp. L. Rev. 1478 (1994)
52. *NOTE: LET THE DRUG DEALER BEWARE: MARKET-SHARE LIABILITY IN MICHIGAN FOR THE INJURIES CAUSED BY THE ILLEGAL DRUG MARKET*, 32 Val. U.L. Rev. 139 (1997)
32 Val. U.L. Rev. 139 p.139

BRIEFS (1 Citing Brief)

53. *CATLIN v. SUPERIOR COURT*, 2008 CA S. Ct. Briefs 557457, 2009 CA S. Ct. Briefs LEXIS 1420 (Cal. Feb. 4, 2009)

MOTIONS (1 Citing Motion)

54. *AGUAYO v. U.S. BANK*, 2008 U.S. Dist. Ct. Motions 600226, 2009 U.S. Dist. Ct. Motions LEXIS 47107 (S.D. Cal. Jan. 14, 2009)

B.

People v. Brach (2002) 95 Cal.App.4th 571
(Siskiyou County)



5 of 13 DOCUMENTS



Caution

As of: Aug 20, 2011

THE PEOPLE, Plaintiff and Respondent, v. ANNE MARIE BRACH et al., Defendants and Appellants.

No. C037369.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

95 Cal. App. 4th 571; 115 Cal. Rptr. 2d 753; 2002 Cal. App. LEXIS 653; 2002 Cal. Daily Op. Service 705; 2002 Daily Journal DAR 910

January 24, 2002, Decided

SUBSEQUENT HISTORY: [***1] As Modified January 30, 2002. These Modifications do not change the judgment.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Siskiyou County. Super. Ct. No. SCCRF00-2016. Robert F. Kaster, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Criminal defendants appealed from a judgment of the Superior Court of Siskiyou County, California, ordering their conviction for pleading guilty to cultivating marijuana, *Cal. Health & Safety Code* § 11358, and possession of marijuana for sale, *Cal. Health & Safety Code* § 11359.

OVERVIEW: Defendants were found guilty of cultivating marijuana, *Cal. Health & Safety Code* § 11358, and possession of marijuana for sale, *Cal. Health & Safety Code* § 11359. The trial court suspended imposition of sentence, placed defendants on probation, and ordered them to serve local jail terms. At issue on appeal were conditions of probation requiring defendants to reimburse the Siskiyou County Sheriff's Department for expenses incurred in the eradication of defendants' mari-

juana. Defendants claimed the People and the trial court failed to comply with *Cal. Health & Safety Code* §§ 11470.1, 11470.2, which set forth the procedures for recovery of eradication expenses. The appellate court concluded the claim was waived, as neither defendant objected in the trial court.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview
[HN1] See *Cal. Health & Safety Code* § 11470.1 (a).

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview
[HN2] See *Cal. Penal Code* § 11470.2.

Civil Procedure > Counsel > General Overview
Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

[HN3] *Cal. Health & Safety Code* § 11470.2 expressly provides authority to order reimbursement of eradication expenses as a condition of probation, and the statute was cited in the probation reports. Only the procedural prerequisites for invocation of the statute are lacking. The waiver doctrine applies to procedural errors.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview

Criminal Law & Procedure > Sentencing > Costs

[HN4] Under *Cal. Health & Safety Code* § 11470.1 (a), the government may recover the expenses of seizing, eradicating, destroying, or taking remedial action with respect to, any controlled substance or its precursors. In lieu of a civil action under § 11470.1, the prosecutor may invoke *Cal. Health & Safety Code* § 11470.2 in a criminal proceeding and, upon conviction of the underlying offense, seek the recovery of all expenses recoverable under § 11470.1. *Cal. Health & Safety Code* §§ 11470.1, 11470.2 together provide the exclusive remedy for reimbursement of the expenses recoverable under these statutes.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

[HN5] Under *Cal. Health & Safety Code* § 11470.2 (a)(2), restitution for eradication expenses can be made a condition of any grant of probation. But as a prerequisite to the recovery of such expenses, the prosecutor must file a petition and provide service of process to the defendant. *Cal. Health & Safety Code* § 11470.2 (b). The defendant may then admit or deny the allegations in the petition. *Cal. Health & Safety Code* § 11470.2 (c). If the defendant denies the allegations, the matter must be heard promptly after conviction before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties. *Cal. Health & Safety Code* § 11470.2 (d).

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview

[HN6] Claims of error relating to sentences which, though otherwise permitted by law, are imposed in a procedurally or factually flawed manner are waived on appeal if not first raised in the trial court. For example, the waiver doctrine precludes appellate review in cases

where a defendant fails to object to the reasonableness of a probation condition. A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis.

Criminal Law & Procedure > Juries & Jurors > Waiver of Jury Trial > General Overview

Criminal Law & Procedure > Sentencing > Imposition > Findings

[HN7] The unauthorized sentence exception is a narrow exception to the waiver doctrine that normally applies where the sentence could not lawfully be imposed under any circumstance in the particular case, for example, where the court violates mandatory provisions governing the length of confinement. The class of nonwaivable claims includes obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Criminal Law & Procedure > Juries & Jurors > Waiver of Jury Trial > Right of Waiver

Governments > Legislation > Statutory Remedies & Rights

[HN8] The requirement of an express, personal jury trial waiver relates solely to the jury trial right guaranteed by the Constitution and not to situations in which the right to trial is merely statutory. Since the deprivation of the statutory right to jury trial on the prior prison term allegations does not implicate the state or federal constitutional right to jury trial, defendant's claim of ineffectual waiver of the jury trial was precluded on appeal absent an objection to the discharge of the jury or commencement of court trial.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Restitution

[HN9] The jury trial guarantee is merely statutory and does not implicate defendants' constitutional right to jury trial. *Cal. Health & Safety Code* § 11470.2 sets forth a procedure for the recovery of a particular type of restitution: eradication expenses. There is no constitutional right to a jury trial on issues of restitution. Rather, a defendant's due process rights are protected if he is given

notice of the amount of restitution sought and an opportunity to contest that amount; the rigorous procedural safeguards required during the guilt phase, including the right to a jury, are not required.

**Criminal Law & Procedure > Sentencing > Alternatives
> Probation > Conditions
Governments > Legislation > Statutory Remedies &
Rights**

[HN10] The waiver doctrine precludes appellate review of the eradication expenses imposed as conditions of defendants' probation.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Two defendants were convicted of cultivating marijuana (*Health & Saf. Code*, § 11358) and possession of marijuana for sale (*Health & Saf. Code*, § 11359). Their probation reports recommended that the trial court impose reimbursement to the county for eradication expenses as a condition of probation, and the trial court did so. (Superior Court of Siskiyou County, No. SCCRF00-2016, Robert F. Kaster, Judge.)

The Court of Appeal affirmed. It held that defendants waived any claim that the trial court failed to comply with the statutory procedure for recovery of eradication expenses (*Health & Saf. Code*, §§ 11470.1 and 11470.2) in imposing probation conditions including reimbursement for those expenses, since defendants had notice that such reimbursement would be sought and they failed to object in the trial court. The court held that the waiver doctrine applies to such procedural errors, and the unauthorized sentence exception to that doctrine was inapplicable, since the trial court did not lack statutory authority to order reimbursement; only compliance with procedural requirements was lacking. The court held that, although defendants had a right to a jury trial on the issue of eradication expenses (*Health & Saf. Code*, § 11470.2, *subd. (d)*), that right was statutory only, and thus was also subject to waiver. (Opinion by Sims, Acting P. J., with Raye and Callahan, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Drugs and Narcotics § 23--Offenses--Sentence and Punishment--Recovery of Expenses of Seizing or Destroying Controlled Substances. --Together, *Health & Saf. Code*, §§ 11470.1 and 11470.2 (procedures for re-

covering expenses involved in seizing, destroying, or taking remedial action as to controlled substances), provide the exclusive remedy for reimbursement of the expenses recoverable under these statutes.

(2a) (2b) (2c) (2d) Drugs and Narcotics § 23--Offenses--Sentence and Punishment--Recovery of Expenses of Seizing or Destroying Controlled Substances--Requirements for Imposition of Probation Condition--Waiver. --In a prosecution for cultivating marijuana (*Health & Saf. Code*, § 11358) and possession of marijuana for sale (*Health & Saf. Code*, § 11359), defendants waived any claim that the trial court failed to comply with the statutory procedure for recovery of eradication expenses (*Health & Saf. Code*, §§ 11470.1 and 11470.2) in imposing probation conditions including reimbursement for those expenses, where defendants had notice that such reimbursement would be sought but they failed to object in the trial court. The waiver doctrine applies to such procedural errors, and the unauthorized sentence exception to that doctrine was inapplicable, since the trial court did not lack statutory authority to order reimbursement; only compliance with procedural requirements was lacking. Although defendants had a right to a jury trial on the issue of eradication expenses (*Health & Saf. Code*, § 11470.2, *subd. (d)*), that right was statutory only, and thus was also subject to waiver.

[See 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 209.]

(3) Criminal Law § 563--Appellate Review--Presenting and Preserving Objections--Punishment--Probation Conditions. --Claims of error relating to sentences that, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner are waived on appeal if not first raised in the trial court. For example, the waiver doctrine precludes appellate review in cases where a defendant fails to object to the reasonableness of a probation condition. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis.

(4) Criminal Law § 605--Appellate Review--Scope of Review--Who May Urge Errors--Waiver of, or Estoppel to Urge, Error--Unauthorized Sentence. --The unauthorized sentence exception is a narrow exception to the waiver doctrine that normally applies where the sentence could not lawfully be imposed under any circumstance in the particular case, for example, where the court violates mandatory provisions governing the length of confinement. The class of nonwaivable claims includes obvious legal errors at sentencing that are correct-

able without referring to factual findings in the record or remanding for further findings.

(5) Criminal Law § 514.2--Punishment--Restitution to Victim--Jury Trial. --There is no right to a jury trial on issues of restitution. Rather, a criminal defendant's due process rights are protected if the defendant is given notice of the amount of restitution sought and an opportunity to contest that amount. The rigorous procedural safeguards required during the guilt phase, including the right to a jury, are not required.

COUNSEL: Linn Davis, under appointment of the Court of Appeal, for Defendant and Appellant Anne Marie Brach.

James L. Lozenski, under appointment of the Court of Appeal, for Defendant and Appellant William Sanford Gardner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Brian G. Smiley, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Sims, Acting P. J., with Raye and Callahan, JJ., concurring.

OPINION BY: SIMS

OPINION

[*573] [**755] SIMS, Acting P. J.

Defendants Anne Marie Brach and William Sanford Gardner pleaded guilty to cultivating marijuana (*Health & Saf. Code*, § 11358)¹ and possession of marijuana for sale (§ 11359). The trial court suspended imposition of sentence, placed defendants on probation, and ordered them to serve local jail terms. [***2]

¹ All further undesignated statutory references are to the Health and Safety Code.

At issue on appeal are conditions of probation requiring defendants to reimburse the Siskiyou County Sheriff's Department for expenses incurred in the eradication of defendants' marijuana. Defendants claim the People and [*574] the trial court failed to comply with sections 11470.1 and 11470.2, which set forth the procedures for recovery of eradication expenses.² We conclude the claim is waived [**757] because neither defendant objected in the trial court. We shall therefore affirm the judgment.

² [HN1] Section 11470.1 provides: "(a) The expenses of seizing, eradicating, destroying, or tak-

ing remedial action with respect to, any controlled substance or its precursors shall be recoverable from:

"(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

"(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division.

"(b) The expenses of taking remedial action with respect to any controlled substance or its precursors shall also be recoverable from any person liable for the costs of that remedial action under Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.

"(c) It shall not be necessary to seek or obtain a criminal conviction prior to the entry of judgment for the recovery of expenses. However, if criminal charges are pending against the defendant for the unlawful manufacture or cultivation of any controlled substance or its precursors, an action brought pursuant to this section shall, upon a defendant's request, be continued while the criminal charges are pending.

"(d) The action may be brought by the district attorney, county counsel, city attorney, the State Department of Health Services, or Attorney General. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

"(e)(1) The burden of proof as to liability shall be on the plaintiff and shall be by a preponderance of the evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (1) of subdivision (a). The burden of proof as to liability shall be on the plaintiff and shall be by clear and convincing evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (2) of subdivision (a). The burden of proof as to the amount of expenses recoverable shall be on the plaintiff and shall be by a preponderance of the evidence in any action brought pursuant to subdivision (a).

"(2) Notwithstanding paragraph (1), for any person convicted of a criminal charge of the manufacture or cultivation of a controlled substance or its precursors there shall be a presump-

tion affecting the burden of proof that that person is liable.

"(f) Only expenses which meet the following requirements shall be recoverable under this section:

"(1) The expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors or in taking remedial action with respect to a hazardous substance. These expenses may not include any costs incurred in use of the herbicide paraquat.

"(2) The expenses were incurred as a proximate result of the defendant's manufacture or cultivation of a controlled substance in violation of this division.

"(3) The expenses were reasonably incurred.

"(g) For purposes of this section, 'remedial action' shall have the meaning set forth in Section 25322.

"(h) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

"(i) Notwithstanding Section 526 of the Code of Civil Procedure, the plaintiff may be granted a temporary restraining order or a preliminary injunction, pending or during trial, to restrain the defendant from transferring, encumbering, hypothecating, or otherwise disposing of any assets specified by the court, if it appears by the complaint that the plaintiff is entitled to the relief demanded and it appears that the defendant may dispose of those assets to thwart enforcement of the judgment.

"(j) The Legislature finds and declares that civil penalties for the recovery of expenses incurred in enforcing the provisions of this division shall not supplant criminal prosecution for violation of those provisions, but shall be a supplemental remedy to criminal enforcement.

"(k) Any testimony, admission, or any other statement made by the defendant in any proceeding brought pursuant to this section, or any evidence derived from the testimony, admission, or other statement, shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct.

"(l) No action shall be brought or maintained pursuant to this section against a person who has

been acquitted of criminal charges for conduct which may be the basis for an action under this section if, in the criminal action, there has been a finding of factual innocence by the court pursuant to standards set forth in subdivision (b) of Section 851.8 of the Penal Code."

[HN2] Section 11470.2 provides: "(a) [HN3] In lieu of a civil action for the recovery of expenses as provided in Section 11470.1, the prosecuting attorney in a criminal proceeding may, upon conviction of the underlying offense, seek the recovery of all expenses recoverable under Section 11470.1 from:

"(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

"(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division. The trier of fact shall make an award of expenses, if proven, which shall be enforceable as any civil judgment. If probation is granted, the court may order payment of the expenses as a condition of probation. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

"(b) The prosecuting attorney may, in conjunction with the criminal proceeding, file a petition for recovery of expenses with the superior court of the county in which the defendant has been charged with the underlying offense. The petition shall allege that the defendant had manufactured or cultivated a controlled substance in violation of Division 10 (commencing with Section 11000) of the Health and Safety Code and that expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors. The petition shall also state the amount to be assessed. The prosecuting attorney shall make service of process of a notice of that petition to the defendant.

"(c) The defendant may admit to or deny the petition for recovery of expenses. If the defendant admits the allegations of the petition, the court shall rule for the prosecuting attorney and enter a judgment for recovery of the expenses incurred.

"(d) If the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried and shall be

promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties.

"(e) At the hearing, the burden of proof as to the amount of expenses recoverable shall be on the prosecuting attorney and shall be by a preponderance of the evidence.

"(f) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity."

[**3] [*575] FACTS

Police found hundreds of healthy and cut marijuana plants in a greenhouse operated by defendants. Police seized a total of 540 plants. Defendants were [*576] charged with cultivating marijuana and possession of marijuana for sale. They subsequently reached a plea agreement with the prosecutor. Under the agreement, defendants pleaded guilty to the charges in exchange for guarantees they would receive probation.

Before sentencing, the trial court received probation reports concerning defendants. Both reports indicated that the Siskiyou County Sheriff's Department had incurred \$ 1,195 in eradication expenses presumably in connection with the marijuana seized in this case. Both reports recommended that the trial court require defendants to reimburse the county for "[e]radication costs pursuant to *Health and Safety Code section 11470.2* as conditions of probation."

At sentencing, neither defendant contested the recommended probation conditions concerning eradication expenses. Indeed, Brach's counsel asked that money seized from Brach by police "be applied to the eradication fine and the [criminal] fine." The trial court [***4] adopted the probation department's recommendation and imposed probation conditions requiring defendants "jointly and severally" to pay \$ 1,195 for eradication expenses. Defendants accepted the probation conditions without objection or complaint.

DISCUSSION

Defendants' sole contention on appeal is that the condition of probation requiring them to pay \$ 1,195 in eradication expense must be stricken because the prosecution failed to comply with the provisions of sections 11470.1 and 11470.2.

[HN4] Under section 11470.1, the government may recover "[t]he expenses of seizing, eradicating, destroy-

ing, or taking remedial action with respect to, any controlled substance or its precursors." (§ 11470.1, subd. (a).) "In lieu of a civil action" under section 11470.1, the prosecutor may invoke *section 11470.2* in a criminal proceeding and, "upon conviction of the underlying offense, seek the recovery of all expenses recoverable under *Section 11470.1*." (§ 11470.2, subd. (a).) (1) *Sections 11470.1* and *11470.2* together provide "the exclusive remedy for reimbursement of the expenses recoverable under these statutes. [***5] " (*People v. Narron* (1987) 192 Cal. App. 3d 724, 729 [237 Cal. Rptr. 693].)

In this case, the probation reports recommended defendants pay restitution for eradication expenses pursuant to *section 11470.2*. [HN5] Under *section 11470.2*, restitution for eradication expenses can be made a condition of any grant of probation. (§ 11470.2, subd. (a)(2).) But as a prerequisite to the recovery of [*577] such expenses, the prosecutor must file a petition and provide service of process to the defendant. (§ 11470.2, subd. (b).) The defendant may then admit or deny the allegations in the petition. (§ 11470.2, subd. (c).) If the defendant denies the allegations, the matter must be heard promptly after conviction "before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties." (§ 11470.2, subd. (d).)

(2a) There is no dispute that, in the instant case, the People and the trial court failed [**758] to comply with the statutory procedure for the recovery of eradication expenses. No petition for eradication expenses appears in the [***6] record, and there is no showing defendants expressly consented to forgo their right to have the jury decide the issue.

There is also no dispute that neither defendant objected to the imposition of the condition of probation requiring the eradication expense, nor did either defendant ask that the procedures of *section 11470.2* be followed.

The question is whether defendants waived their rights under *section 11470.2* by failing to assert those rights in the trial court. (3) [HN6] Claims of error relating to sentences "which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner" are waived on appeal if not first raised in the trial court. (*People v. Scott* (1994) 9 Cal. 4th 331, 354 [36 Cal. Rptr. 2d 627, 885 P.2d 1040], italics added.) For example, the waiver doctrine precludes appellate review in cases where a defendant fails to object to the reasonableness of a probation condition. (*People v. Welch* (1993) 5 Cal. 4th 228, 236-237 [19 Cal. Rptr. 2d 520, 851 P.2d 802].) The California Supreme Court has explained: "A timely [***7] objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case.

The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (*Id.* at p. 235.)

(2b) Here, the record supports application of the waiver doctrine. The probation reports gave defendants notice that the county sheriff's department was requesting \$ 1,195 for eradication expenses under section 11470.2, and that defendants would be required to pay restitution for these expenses as conditions of probation. At sentencing defendants' attorneys stated that each had timely received a copy of the probation report. Notwithstanding these advisements, neither defendant objected to or otherwise challenged the imposition of probation conditions requiring them to pay the restitution amount.

[*578] Defendants nevertheless argue that appellate review is not precluded because the trial court's [***8] imposition of restitution for the eradication expenses constitutes an "unauthorized" sentence involving a pure question of law. (4) [HN7] The unauthorized sentence exception is "a narrow exception" to the waiver doctrine that normally applies where the sentence "could not lawfully be imposed under any circumstance in the particular case," for example, "where the court violates mandatory provisions governing the length of confinement." (*People v. Scott, supra*, 9 Cal. 4th at p. 354; see also *People v. Welch, supra*, 5 Cal. 4th at p. 235.) The class of nonwaivable claims includes "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings." (*People v. Smith* (2001) 24 Cal. 4th 849, 852 [102 Cal. Rptr. 2d 731, 14 P.3d 942].)

(2c) The unauthorized sentence exception is inapplicable here. The trial court had authority to order each defendant to reimburse the county for eradication expenses as a condition of probation. As previously noted, [***9] section 11470.2 expressly provides that authority, and the statute was cited in the probation reports. Only the procedural prerequisites for invocation of the statute are lacking. And, as previously noted, the waiver doctrine has been held to apply to procedural errors. (See *People v. Scott, supra*, 9 Cal. 4th at p. 354.) Moreover, [**759] defendants' claim of error is not the sort of "obvious" and easily correctable error that merits appellate review notwithstanding their failure to object. (See *People v. Smith, supra*, 24 Cal. 4th at pp. 852, 854.) Rather, were we to sustain defendants' claims, we would be obliged to remand the matter to the trial court for further proceedings on the issue of eradication expenses.

We are cognizant of the fact that defendants were statutorily guaranteed a jury trial on the issue of eradica-

tion expenses "unless waived by the consent of all parties." (§ 11470.2, subd. (d).) But that does not preclude application of the waiver doctrine even though there is no indication defendants personally and expressly waived their statutory right to a trial. This is so [***10] for reasons stated by the California Supreme Court's decision in *People v. Vera* (1997) 15 Cal. 4th 269 [62 Cal. Rptr. 2d 754, 934 P.2d 1279] (*Vera*).

Vera involved a defendant's statutory right to a jury determination of the truth of an allegation the defendant had suffered a prior felony conviction and prison term. (*Vera, supra*, 15 Cal. 4th at pp. 271-272.) Although the defendant in *Vera* had not personally waived his statutory right to have the jury determine the validity of alleged priors, the trial court discharged the jury and proceeded to conduct a court trial. (*Id.* at p. 272.) The California Supreme Court held the defendant's claim of error on this ground was [*579] precluded on appeal since the defendant had failed to object or otherwise assert his right to have the jury make the requisite determination. (*Ibid.*)

The Supreme Court rejected the argument that it was necessary for the defendant personally and expressly to waive the statutory right to jury trial. (*Vera, supra*, 15 Cal. 4th at pp. 277-278.) The court held that [***11] [HN8] "the requirement of an express, personal jury trial waiver relates solely to the jury trial right guaranteed by the Constitution" and not to situations in which the right to trial is merely statutory. (*Id.* at p. 278.) The court explained that since "the deprivation of the statutory right to jury trial on the prior prison term allegations does not implicate the state or federal constitutional right to jury trial," the defendant's claim of ineffectual waiver of the jury trial was precluded on appeal "[a]bsent an objection to the discharge of the jury or commencement of court trial." (*Ibid.*)

As in *Vera*, [HN9] the jury trial guarantee at issue here is merely statutory and does not implicate defendants' constitutional right to jury trial. Section 11470.2 sets forth a procedure for the recovery of a particular type of restitution: eradication expenses. (5) And there is no constitutional right to a jury trial on issues of restitution. (See *People v. Rivera* (1989) 212 Cal. App. 3d 1153, 1160-1161 [261 Cal. Rptr. 93].) Rather, "a defendant's due process rights are [***12] protected if he is given notice of the amount of restitution sought and an opportunity to contest that amount; the rigorous procedural safeguards required during the guilt phase, including the right to a jury, are not required." (*Id.* at p. 1161; cf. *People v. Baumann* (1985) 176 Cal. App. 3d 67, 79-80 [222 Cal. Rptr. 32]; *U.S. v. Smith* (9th Cir. 1991) 944 F.2d 618, 622 [stating that in the context of restitution, due process is satisfied if defendant has adequate opportunity to present any objections].)

3 In *Vera*, the court noted that the defendant's claim of ineffectual waiver of a jury trial did not constitute a federal due process claim "[s]o long as defendant received a fair court trial on the truth of the prior prison term allegations." (*Vera, supra*, 15 Cal. 4th at p. 281.) But, as noted above, due process does not require a formal trial on issues of restitution. Due process was satisfied in the instant case since both defendants had ample notice and opportunity to object to the eradication expenses the trial court ultimately imposed.

[**13] [**760] (2d) Defendants cite language in *People v. Narron, supra*, 192 Cal. App. 3d 724, that could be read to suggest that waiver is inapplicable here. *Narron* is not persuasive authority on this point, since it precedes development of the waiver doctrine by our Su-

preme Court in *People v. Welch, supra*, 5 Cal. 4th 228 and *People v. Scott, supra*, 9 Cal. 4th 331.

In sum, both defendants had notice and an opportunity to contest the eradication expenses and invoke their statutory rights under section 11470.2. Defendants did not avail themselves of their statutory rights or otherwise [*580] contest the eradication expenses. Accordingly, [HN10] the waiver doctrine precludes appellate review of the eradication expenses imposed as conditions of defendants' probation.

DISPOSITION

The judgments are affirmed.

Raye, J., and Callahan, J., concurred.

On January 30, 2002, the opinion was modified to read as printed above.



Copyright 2011 SHEPARD'S(R) - 54 Citing references

People v. Brach, 95 Cal. App. 4th 571, 115 Cal. Rptr. 2d 753, 2002 Cal. App. LEXIS 653, 2002 Cal. Daily Op. Service 705, 2002 D.A.R. 910 (Cal. App. 3d Dist. 2002)

Restrictions: *Unrestricted*
 FOCUS(TM) Terms: *No FOCUS terms*
 Print Format: *FULL*
 Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No subsequent appellate history.

Citing References:

▲ Cautionary Analyses:	Distinguished (3)
Positive Analyses:	Followed (1)
Neutral Analyses:	Quest. Precedent (1)
Other Sources:	Treatises (1), Court Documents (3)

LexisNexis Headnotes: HN3 (2), HN4 (2), HN5 (3), HN6 (30), HN7 (8), HN8 (7), HN9 (11), HN10 (2)

PRIOR HISTORY (0 citing references)

(CITATION YOU ENTERED):

People v. Brach, 95 Cal. App. 4th 571, 115 Cal. Rptr. 2d 753, 2002 Cal. App. LEXIS 653, 2002 Cal. Daily Op. Service 705, 2002 D.A.R. 910 (Cal. App. 3d Dist. 2002)

CITING DECISIONS (50 citing decisions)

CALIFORNIA SUPREME COURT

1. Cited by:
People v. Martinez, 36 Cal. 4th 384, 30 Cal. Rptr. 3d 779, 115 P.3d 62, 2005 Cal. LEXIS 7302, 2005 Cal. Daily Op. Service 6175, 2005 D.A.R. 8411 (2005) LexisNexis Headnotes HN4, HN5, HN9
 36 Cal. 4th 384 p.388
 30 Cal. Rptr. 3d 779 p.782
 115 P.3d 62 p.63

CALIFORNIA COURTS OF APPEAL

2. Followed by:
People v. Garcia, 185 Cal. App. 4th 1203, 111 Cal. Rptr. 3d 435, 2010 Cal. App. LEXIS 951 (Cal. App. 4th Dist. 2010) LexisNexis Headnotes HN6, HN7
 185 Cal. App. 4th 1203 p.1218
 111 Cal. Rptr. 3d 435 p.446

3. **Distinguished by, Cited by:**
People v. \$10,153.38 in United States Currency, 179 Cal. App. 4th 1520, 102 Cal. Rptr. 3d 584, 2009 Cal. App. LEXIS 1992 (Cal. App. 2d Dist. 2009) LexisNexis Headnotes HN6, HN9
Distinguished by:
179 Cal. App. 4th 1520 p.1528
102 Cal. Rptr. 3d 584 p.590
Cited by:
179 Cal. App. 4th 1520 p.1527
102 Cal. Rptr. 3d 584 p.589
4. **Cited by:**
People v. Turrin, 176 Cal. App. 4th 1200, 98 Cal. Rptr. 3d 471, 2009 Cal. App. LEXIS 1391 (Cal. App. 3d Dist. 2009) LexisNexis Headnotes HN7
176 Cal. App. 4th 1200 p.1205
98 Cal. Rptr. 3d 471 p.474
5. **Distinguished by questionable precedent at:**
People v. \$10,153.38 United States Currency, 174 Cal. App. 4th 629, 94 Cal. Rptr. 3d 515, 2009 Cal. App. LEXIS 849 (Cal. App. 2d Dist. 2009) LexisNexis Headnotes HN8, HN9
174 Cal. App. 4th 629 p.635
94 Cal. Rptr. 3d 515 p.519
6. **Distinguished by, Cited by:**
People v. Wilen, 165 Cal. App. 4th 270, 80 Cal. Rptr. 3d 895, 2008 Cal. App. LEXIS 1152 (Cal. App. 1st Dist. 2008) LexisNexis Headnotes HN4, HN5, HN8, HN9
Distinguished by:
165 Cal. App. 4th 270 p.285
80 Cal. Rptr. 3d 895 p.907
Cited by:
165 Cal. App. 4th 270 p.277
80 Cal. Rptr. 3d 895 p.900
7. **Cited by:**
People v. Randolph, 68 Cal. Comp. Cas. (MB) 386 (Cal. App. 2d Dist. 2003)
68 Cal. Comp. Cas. (MB) 386 p.391
8. **Cited by:**
People v. Robinson, 104 Cal. App. 4th 902, 128 Cal. Rptr. 2d 619, 2002 Cal. App. LEXIS 5215, 2002 Cal. Daily Op. Service 12376, 2022 D.A.R. 14509 (Cal. App. 3d Dist. 2002) LexisNexis Headnotes HN3
104 Cal. App. 4th 902 p.906
128 Cal. Rptr. 2d 619 p.622

UNPUBLISHED CALIFORNIA APPELLATE DECISIONS

9. **Cited by:**

- People v. Hammond*, 2011 Cal. App. Unpub. LEXIS 4774 (Cal. App. 3d Dist. June 27, 2011) LexisNexis Headnotes HN6
10. Cited by:
In re C.J., 2011 Cal. App. Unpub. LEXIS 3340 (Cal. App. 3d Dist. May 4, 2011) LexisNexis Headnotes HN7
11. Cited by:
People v. Douglass, 2011 Cal. App. Unpub. LEXIS 2741 (Cal. App. 3d Dist. Apr. 14, 2011) LexisNexis Headnotes HN6
12. Cited by:
People v. Chisum, 2010 Cal. App. Unpub. LEXIS 2056 (Cal. App. 4th Dist. Mar. 23, 2010) LexisNexis Headnotes HN3
13. Cited by:
People v. Mackey, 2010 Cal. App. Unpub. LEXIS 418 (Cal. App. 1st Dist. Jan. 21, 2010) LexisNexis Headnotes HN6, HN7
14. Cited by:
People v. Schneider, 2009 Cal. App. Unpub. LEXIS 4183 (Cal. App. 6th Dist. May 28, 2009) LexisNexis Headnotes HN8, HN9
15. Cited by:
People v. Gonzales, 2009 Cal. App. Unpub. LEXIS 2036 (Cal. App. 5th Dist. Mar. 13, 2009) LexisNexis Headnotes HN9
16. Cited by:
People v. Garcia, 2008 Cal. App. Unpub. LEXIS 10579 (Cal. App. 1st Dist. Dec. 31, 2008) LexisNexis Headnotes HN6
17. Cited by:
People v. Marshall, 2008 Cal. App. Unpub. LEXIS 10053 (Cal. App. 1st Dist. Dec. 15, 2008) LexisNexis Headnotes HN6
18. Cited by:
People v. Schuh, 2008 Cal. App. Unpub. LEXIS 3569 (Cal. App. 5th Dist. Apr. 30, 2008) LexisNexis Headnotes HN6
19. Cited by:
People v. Gomez, 2007 Cal. App. Unpub. LEXIS 10511 (Cal. App. 4th Dist. Dec. 24, 2007)
20. Cited by:
People v. Horowitz, 2007 Cal. App. Unpub. LEXIS 8198 (Cal. App. 4th Dist. Oct. 9, 2007) LexisNexis Headnotes HN5, HN6, HN10
21. Cited by:
People v. Pashmfouroush, 2007 Cal. App. Unpub. LEXIS 1906 (Cal. App. 2d Dist. Mar. 8, 2007) LexisNexis Headnotes HN8
22. Cited by:
PEOPLE v. DIESSNER, 2006 Cal. App. Unpub. LEXIS 6014 (Cal. App. 3d Dist. July 11, 2006) LexisNexis Headnotes HN6
23. Cited by:

- PEOPLE v. COMBS*, 2006 Cal. App. Unpub. LEXIS 1757 (Cal. App. 1st Dist. Feb. 28, 2006) LexisNexis Headnotes HN6, HN9, HN10
24. Cited by:
PEOPLE v. FORDJOUR, 2006 Cal. App. Unpub. LEXIS 1168 (Cal. App. 6th Dist. Feb. 9, 2006) LexisNexis Headnotes HN9
25. Cited by:
People v. Stanley, 2005 Cal. App. Unpub. LEXIS 9689 (Cal. App. 4th Dist. Oct. 25, 2005) LexisNexis Headnotes HN6
26. Cited by:
PEOPLE v. RENFRO, 2005 Cal. App. Unpub. LEXIS 9029 (Cal. App. 3d Dist. Oct. 4, 2005) LexisNexis Headnotes HN8
27. Cited by:
PEOPLE v. FRIES, 2005 Cal. App. Unpub. LEXIS 3911 (Cal. App. 3d Dist. Apr. 29, 2005) LexisNexis Headnotes HN7
28. Cited by:
PEOPLE v. IVEY, 2005 Cal. App. Unpub. LEXIS 3609 (Cal. App. 1st Dist. Apr. 25, 2005) LexisNexis Headnotes HN6
29. Cited by:
PEOPLE v. MACIAS, 2005 Cal. App. Unpub. LEXIS 3281 (Cal. App. 1st Dist. Apr. 13, 2005) LexisNexis Headnotes HN6
30. Cited by:
PEOPLE v. CAPUTO, 2005 Cal. App. Unpub. LEXIS 2744 (Cal. App. 4th Dist. Mar. 28, 2005) LexisNexis Headnotes HN6
31. Cited by:
In re JORGE M., Coming Under the Juvenile Court Law, 2005 Cal. App. Unpub. LEXIS 2176 (Cal. App. 1st Dist. Mar. 10, 2005) LexisNexis Headnotes HN6
32. Cited by:
PEOPLE v. CLARK, 2005 Cal. App. Unpub. LEXIS 1941 (Cal. App. 3d Dist. Mar. 3, 2005) LexisNexis Headnotes HN7
33. Cited by:
PEOPLE v. SAMPLE, 2005 Cal. App. Unpub. LEXIS 1573 (Cal. App. 3d Dist. Feb. 24, 2005) LexisNexis Headnotes HN9
34. Cited by:
PEOPLE v. WRIGHT, 2005 Cal. App. Unpub. LEXIS 1515 (Cal. App. 1st Dist. Feb. 23, 2005) LexisNexis Headnotes HN6
35. Cited by:
PEOPLE v. DELONGIS, 2005 Cal. App. Unpub. LEXIS 987 (Cal. App. 1st Dist. Feb. 3, 2005) LexisNexis Headnotes HN6
36. Cited by:
PEOPLE v. MORALES, 2004 Cal. App. Unpub. LEXIS 11268 (Cal. App. 1st Dist. Dec. 13, 2004) LexisNexis Headnotes HN6

37. Cited by:
PEOPLE v. WILSON, 2004 Cal. App. Unpub. LEXIS 10712 (Cal. App. 1st Dist. Nov. 24, 2004) LexisNexis Headnotes HN6
38. Cited by:
PEOPLE v. HUGHES, 2004 Cal. App. Unpub. LEXIS 10660 (Cal. App. 1st Dist. Nov. 23, 2004) LexisNexis Headnotes HN6
39. Cited by:
PEOPLE v. REED, 2004 Cal. App. Unpub. LEXIS 10458 (Cal. App. 1st Dist. Nov. 16, 2004) LexisNexis Headnotes HN6
40. Cited by:
In re XAVIERA F., Coming Under the Juvenile Court Law, 2004 Cal. App. Unpub. LEXIS 9796 (Cal. App. 1st Dist. Oct. 27, 2004) LexisNexis Headnotes HN6
41. Cited by:
PEOPLE v. SAMSON, 2004 Cal. App. Unpub. LEXIS 9304 (Cal. App. 1st Dist. Oct. 14, 2004) LexisNexis Headnotes HN6
42. Cited by:
PEOPLE v. GUTHERY, 2004 Cal. App. Unpub. LEXIS 8840 (Cal. App. 1st Dist. Sept. 28, 2004) LexisNexis Headnotes HN7
43. Cited by:
PEOPLE v. MOORE, 2004 Cal. App. Unpub. LEXIS 7047 (Cal. App. 1st Dist. July 28, 2004) LexisNexis Headnotes HN6
44. Cited by:
In re IVAN G., Coming Under the Juvenile Court Law, 2004 Cal. App. Unpub. LEXIS 6536 (Cal. App. 1st Dist. July 13, 2004) LexisNexis Headnotes HN6
45. Cited by:
PEOPLE v. COURTOIS, 2004 Cal. App. Unpub. LEXIS 3669 (Cal. App. 1st Dist. Apr. 15, 2004) LexisNexis Headnotes HN6
46. Cited by:
PEOPLE v. BAUSCH, 2003 Cal. App. Unpub. LEXIS 9652 (Cal. App. 1st Dist. Oct. 9, 2003) LexisNexis Headnotes HN6
47. Cited by:
PEOPLE v. RITCHIE, 2003 Cal. App. Unpub. LEXIS 4674 (Cal. App. 3d Dist. May 14, 2003) LexisNexis Headnotes HN6, HN7, HN8
48. Cited by:
PEOPLE v. REED, 2003 Cal. App. Unpub. LEXIS 2759 (Cal. App. 3d Dist. Mar. 20, 2003) LexisNexis Headnotes HN8, HN9
49. Cited by:
PEOPLE v. RANDOLPH, 2003 Cal. App. Unpub. LEXIS 1914 (Cal. App. 2d Dist. Feb. 27, 2003) LexisNexis Headnotes HN9
50. Cited by:
PEOPLE v. RISENHOOVER, 2002 Cal. App. Unpub. LEXIS 8174 (Cal. App. 5th Dist. Aug. 27, 2002) LexisNexis Headnotes HN6

TREATISE CITATIONS (1 Citing Source)

51. 6-145 *California Criminal Defense Practice* @ 145.01A

BRIEFS (3 Citing Briefs)

52. *PEOPLE v. U.S. CURRENCY*, 2010 CA S. Ct. Briefs 79688, 2010 CA S. Ct. Briefs LEXIS 318 (Cal. Jan. 21, 2010)
53. *STATE v. RAYGOZA*, 2006 CA S. Ct. Briefs 42488, 2006 CA S. Ct. Briefs LEXIS 1918 (Cal. Apr. 10, 2006)
54. *PACIFIC SUN DISTRIB. & RAY DAVIS v. MARTIN*, 2010 CA App. Ct. Briefs 21716, 2010 CA App. Ct. Briefs LEXIS 3954, 1 Exp. Wit. 271338, 1 Exp. Wit. 296586 (2010)

B.

People v. Martinez (2005) 36 Cal.4th 384
(Merced County)



1 of 13 DOCUMENTS



Caution

As of: Aug 20, 2011

THE PEOPLE, Plaintiff and Respondent, v. VICTOR MANUEL MARTINEZ, Defendant and Appellant.

S118180

SUPREME COURT OF CALIFORNIA

36 Cal. 4th 384; 115 P.3d 62; 30 Cal. Rptr. 3d 779; 2005 Cal. LEXIS 7302; 2005 Cal. Daily Op. Service 6175; 2005 Daily Journal DAR 8411

July 14, 2005, Filed

PRIOR HISTORY: Superior Court of Merced County, No. 25556, Frank Dougherty, Judge. Court of Appeal, Fifth Dist., No. F039200.
People v. Martinez, 110 Cal. App. 4th 353, 1 Cal. Rptr. 3d 733, 2003 Cal. App. LEXIS 1035 (Cal. App. 5th Dist., 2003)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment of the Court of Appeal, Fifth Appellate District (California), which affirmed a trial court's order requiring defendant, upon conviction of the offense of attempt to manufacture a controlled substance, to pay restitution for cleanup costs incurred in removing hazardous waste from defendant's illegal drug laboratory.

OVERVIEW: After observing suspicious items in defendant's car, the police searched his residence and found a methamphetamine laboratory. The trial court ordered defendant, pursuant to Cal. Penal Code § 1202.4(f), to make restitution to the California Department of Toxic Substances Control for the cleanup costs. The court of appeal upheld the order, concluding that the Department was a direct victim, under § 1202.4(k) because the cleanup costs resulted directly from defendant's criminal conduct. The court reversed, reasoning that defendant's attempt to manufacture methamphetamine was not an

offense committed against the Department, nor was the Department the immediate object of his crime. Therefore, the Department was not a direct victim for purposes of § 1202.4. The court stated that Cal. Health & Safety Code §§ 11470.1, 11470.2 were the exclusive means by which a government entity that was not a direct victim of a crime could recoup its costs, in accordance with the mandate of Cal. Const. art. I, § 28(b), of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes.

OUTCOME: The court reversed the judgment of the court of appeal and directed that court to remand the case to the trial court with instructions to strike the portion of the order that required defendant to pay restitution.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview

Criminal Law & Procedure > Sentencing > Restitution
[HN1] See Cal. Health & Safety Code § 11470.1.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview

Criminal Law & Procedure > Sentencing > Costs

Criminal Law & Procedure > Sentencing > Restitution

[HN2] See *Cal. Health & Safety Code* § 11470.2(b).

Criminal Law & Procedure > Sentencing > Restitution

[HN3] See *Cal. Penal Code* § 1202.4(k).

Environmental Law > Hazardous Wastes & Toxic Substances > Cleanup

[HN4] See *Cal. Health & Safety Code* § 25354.5(a).

Criminal Law & Procedure > Sentencing > Restitution

[HN5] See *Cal. Penal Code* § 1202.4(f).

Criminal Law & Procedure > Sentencing > Restitution

[HN6] *Cal. Penal Code* § 1202.4(k) permits restitution to a business or governmental entity only when it is a direct victim of crime.

Criminal Law & Procedure > Sentencing > Restitution

[HN7] Restitution to entities that are direct victims of crime limits restitution to entities against which the crimes have been committed—that is, entities that are the immediate objects of the offenses.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > General Overview

Criminal Law & Procedure > Sentencing > Restitution

[HN8] *Cal. Health & Safety Code* §§ 11470.1, 11470.2 are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes.

Criminal Law & Procedure > Sentencing > Restitution

[HN9] See *Cal. Const. art. I, § 28(b)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Manufacture > Elements

Criminal Law & Procedure > Sentencing > Restitution

[HN10] The legislature has carried out the constitutional mandate of *Cal. Const. art. I, § 28(b)* by enacting a comprehensive scheme that allows the government to recoup

its crime-related losses. When the government is a direct victim of crime, it is entitled to restitution under *Cal. Penal Code* § 1202.4(k). When a governmental agency must dispose of hazardous substances or their precursors at an illegal drug manufacturing site, it can recoup its costs by bringing a civil action under *Cal. Health & Safety Code* § 11470.1 or it can seek recovery of its costs in the criminal proceeding pending against the defendant, as set forth in *Cal. Health & Safety Code* § 11470.2.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court issued an order requiring defendant, upon conviction of the offense of attempt to manufacture a controlled substance, to pay restitution for cleanup costs incurred in removing hazardous waste from defendant's illegal drug laboratory. After observing suspicious items in defendant's car, the police searched his residence and found a methamphetamine laboratory. The trial court ordered defendant, pursuant to *Pen. Code*, § 1202.4, *subd. (f)*, to make restitution to the California Department of Toxic Substances Control for the cleanup costs. (Superior Court of Merced County, No. 25556, Frank Dougherty, Judge.) The Court of Appeal, Fifth Dist., No. F039200, upheld the order, concluding that the department was a direct victim under § 1202.4, *subd. (k)*, because the cleanup costs resulted directly from defendant's criminal conduct.

The Supreme Court reversed the judgment of the Court of Appeal and directed that court to remand the case to the trial court with instructions to strike the portion of the order that had required defendant to pay restitution. The court reasoned that defendant's attempt to manufacture methamphetamine was not an offense committed against the department, nor was the department the immediate object of his crime. Therefore, the department was not a direct victim for purposes of § 1202.4. The court stated that *Health & Saf. Code*, §§ 11470.1, 11470.2, are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs, in accordance with the mandate of *Cal. Const., art. I, § 28, subd. (b)*, of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes. (Opinion by Kennard, J., expressing the unanimous view of the court.) [*385]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 514.2--Judgment, Sentence, and Punishment--Punishment--Restitution to Victim--

Business or Governmental Entity as Direct Victim.--
Pen. Code, § 1202.4, subd. (k), permits restitution to a business or governmental entity only when it is a direct victim of crime.

(2) Criminal Law § 514.2--Judgment, Sentence, and Punishment--Punishment--Restitution to Victim--Business or Governmental Entity as Direct Victim--Entity Against Which Offense Committed.--
Restitution to entities that are direct victims of crime is limited to entities against which the crimes have been committed--that is, entities that are the immediate objects of the offenses.

(3) Criminal Law § 514.2--Judgment, Sentence, and Punishment--Punishment--Restitution to Victim--Restitution to Government Agency for Drug Manufacturing Cleanup.--
Defendant's attempt to manufacture methamphetamine was not an offense committed against the California Department of Toxic Substances Control, nor was the department the immediate object of his crime. Therefore, the department was not a direct victim entitled to recover its cleanup costs under *Pen. Code, § 1202.4. Health & Saf. Code, §§ 11470.1, 11470.2*, is the exclusive means by which a government entity that is not a direct victim of a crime can recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes.

[3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 209; 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 902.]

(4) Criminal Law § 514.2--Judgment, Sentence, and Punishment--Punishment--Restitution to Victim--Restitution to Government Agency for Drug Manufacturing Cleanup.--
The Legislature has carried out the constitutional mandate of *Cal. Const., art. I, § 28, subd. (b)*, by enacting a comprehensive scheme that allows the government to recoup its crime-related losses. When the government is a direct victim of crime, it is entitled to restitution under *Pen. Code, § 1202.4, subd. (k)*. When a governmental agency must dispose of hazardous substances or their precursors at an illegal drug manufacturing site, it can recoup its [*386] costs by bringing a civil action under *Health & Saf. Code, § 11470.1*, or it can seek recovery of its costs in the criminal proceeding pending against the defendant, as set forth in *Health & Saf. Code, § 11470.2*. (Disapproving *In re Brian N.* (2004) 120 Cal.App.4th 591 [15 Cal. Rptr. 3d 337] to the extent inconsistent.)

COUNSEL: Shama H. Mesiwala and Linnéa M. Johnson, under appointments by the Supreme Court, and William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Patrick Whelan, Janet E. Neeley, Stan Cross and Lee E. Seale, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Kennard, J., expressing the unanimous view of the court.

OPINION BY: KENNARD [*62]

OPINION

[***780] **KENNARD, J.**--A jury convicted defendant of attempting to manufacture methamphetamine. Treating the state agency that disposed of the hazardous substances found at the illegal drug laboratory as a crime victim, the trial court ordered defendant to reimburse the agency for its cleanup costs of \$ 5,402.67. The court did so under *Penal Code section 1202.4, subdivision (f)*, which requires restitution to a crime victim when, "as a result of the defendant's conduct," the victim "has suffered economic loss." We conclude that this statute was an improper basis for the restitution order because the agency was not a direct victim of defendant's criminal conduct. The exclusive statutory basis for reimbursement to the [*63] agency is provided by [*781] *Health and Safety Code sections 11470.1 and 11470.2*, which establish special procedures by which public entities such as the Department of Toxic Substance Control, the agency involved here, may recover their costs of cleaning up hazardous substances, or their precursors, at illegal drug manufacturing sites. Because these special procedures were not followed here, the reimbursement order is invalid.

I. Factual and Procedural Background

Around 9:30 a.m. on January 7, 2001, Joe Demello of the Fresno County Sheriff's Department stopped defendant as he was driving a Honda hatchback away from a Merced County residence that was under surveillance as a [*387] suspected site of an illegal methamphetamine laboratory. After stopping defendant, Demello walked around the hatchback and saw through its large rear window that it contained various objects--including a metal cylinder, bags of ice, and a stained cardboard box--that the officer, based on his experience, believed were associated with methamphetamine manufacture. A later search of the premises revealed a "super lab" capable of manufacturing large quantities of methamphetamine.

Defendant was charged with manufacturing methamphetamine, a controlled substance. (*Health &*

Saf. Code, § 11379.6, subd. (a).) A jury acquitted him of the charged offense, but it convicted him of the lesser included offense of attempt (*Pen. Code, § 664*) to manufacture a controlled substance (*Health & Saf. Code, § 11379.6, subd. (a)*). The trial court imposed a prison term of two years and six months and ordered restitution of \$ 5,402.67 to the Department of Toxic Substances Control (Department) under *Penal Code section 1202.4, subdivision (f)*.

Defendant appealed. He challenged the validity of the trial court's restitution order made under *Penal Code section 1202.4*, arguing that the Department was not a direct victim within the meaning of that statute, and therefore it was not entitled to reimbursement of costs incurred in removing the hazardous waste from the illegal drug laboratory. In response, the Attorney General maintained the order was proper because it reimbursed the government for cleanup costs resulting from defendant's crime, rather than for expenses incurred in investigating or prosecuting him.

The Court of Appeal upheld the order. It noted that the Legislature has expressly directed the Department, once it is notified by a law enforcement agency of the presence of hazardous substances in an illegal drug laboratory, to remove "waste material from the unlawful manufacture of a controlled substance." (*Health & Saf. Code, § 25354.5, subd. (b)(1)*.) The court concluded that the \$ 5,402.67 the Department spent in cleanup costs resulted directly from defendant's criminal conduct, thus making the Department a direct victim and therefore entitled to receive restitution under the direct victim provision of *Penal Code section 1202.4*.

Defendant petitioned for a rehearing in the Court of Appeal, contending that the court's analysis had overlooked *Health and Safety Code sections 11470.1 and 11470.2*, which expressly allow the prosecutor, either by means of a civil action or a criminal proceeding, to seek recovery of the costs of destroying controlled substances or their precursors. Defendant asserted that because the Department was not a direct victim of his attempt to manufacture [*388] methamphetamine, these Health and Safety Code provisions are the exclusive means through which the Department could recoup its cleanup costs. The Court [***782] of Appeal denied defendant's rehearing petition.

In considering the Department to be a direct victim, thus entitling it to restitution under *Penal Code section 1202.4*, the Court of Appeal created a conflict with two previous Court of Appeal decisions, *People v. Narron* (1987) 192 Cal. App. 3d 724 [237 Cal. Rptr. 693] (*Narron*), and *People v. Brach* (2002) 95 Cal. App. 4th 571 [115 Cal. Rptr. 2d 753] (*Brach*). Those two cases concluded that *Health and Safety Code sections 11470.1 and*

11470.2 provide the exclusive remedies for the recovery of costs incurred in disposing of controlled substances. We granted review to resolve the conflict.

[**64] II. Relevant Statutes

We begin with a review of the statutes at issue here. On June 8, 1982, the voters of California adopted Proposition 8, an initiative amending our Constitution (*Cal. Const., art. I, § 28, subd. (b)*) to grant "victims of crime a constitutional right" to receive restitution from defendants convicted of crimes that caused the victims economic loss. (*People v. Carbajal* (1995) 10 Cal. 4th 1114, 1122 [43 Cal. Rptr. 2d 681, 899 P.2d 67]; *People v. Broussard* (1993) 5 Cal. 4th 1067, 1069 [22 Cal. Rptr. 2d 278, 856 P.2d 1134].) In response, the Legislature enacted an array of statutes covering restitution or recovery of expenses by crime victims. Among those statutes are *Health and Safety Code sections 11470.1 and 11470.2*, as well as *Penal Code section 1202.4*.

In March 1983, at the urging of the Attorney General, state Senator Barry Keene introduced Senate Bill No. 1121 (1983-1984 Reg. Sess.) to add *sections 11470.1 and 11470.2* to the Health and Safety Code. The purpose of the bill was "to require those who engage in illegal drug activities" to repay the costs incurred in seizing and destroying unlawful substances akin to "the charges imposed under existing law for abating other nuisances." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1121 (1983-1984 Reg. Sess.) as amended May 16, 1983, p. 2.) The bill sought to alleviate the financial burden on law enforcement agencies--especially those in small rural areas--of eradicating marijuana plants and closing clandestine drug labs. (Assem. Off. of Research, 3d reading analysis of Sen. Bill No. 1211 (1983-1984 Reg. Sess.) as amended Aug. 25, 1983, p. 2.) By permitting law enforcement to recover its cleanup costs, the legislation sought to ensure that "those who engage in illegal drug activities" would "bear the costs of [*389] eliminating their abuses." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1121 (1983-1984 Reg. Sess.) as amended May 16, 1983, p. 2.) The new legislation took effect on January 1, 1984.

Health and Safety Code section 11470.1 allows a civil action against [HN1] "[a]ny person who manufactures or cultivates a controlled substance or its precursors." (*Health & Saf. Code, § 11470.1, subd. (a)(1)*.) The action "may be brought by the district attorney, county counsel, city attorney, the State Department of Health Services, or Attorney General." (*Id.*, § 11470.1, subd. (d).)

Instead of bringing a civil action under *Health and Safety Code section 11470.1*, the prosecution can, under *section 11470.2*, seek recovery of costs incurred by the

governmental entity in removal or destruction of the controlled substances or their precursors by filing a petition for cost recovery in the criminal proceeding [HN2] "in which the defendant has been charged with the underlying offense." (*Health & Saf. Code*, § 11470.2, *subd. (b)*.)

Here, the trial court ordered defendant to reimburse the Department for \$ 5,402.67 it had spent in disposing of the toxic substances found at the illegal drug lab site where defendant was working. The court [***783] looked to *Penal Code* section 1202.4's restitution provisions as authority for the award. That *Penal Code* section, like *Health and Safety Code* sections 11470.1 and 11470.2, was enacted by the Legislature in 1983 (Stats. 1983, ch. 1092, § 320.1, p. 4058) in response to the voters' passage of Proposition 8 described earlier. (*Review of 1983 Selected Calif. Legislation* (1984) 15 Pacific L.J. 559, 561.) As originally enacted in 1983, *Penal Code* section 1202.4 provided for restitution to crime victims; it made no mention of restitution to entities, governmental or otherwise, as crime victims. Not until 1994 did the Legislature amend *Penal Code* section 1202.4 to expressly permit restitution to a "government, [**65] governmental subdivision, agency, or instrumentality" when it "is a direct victim of a crime." (*Pen. Code*, § 1202.4, former *subd. (p)*, added by Stats. 1994, ch. 1106, § 3, p. 6550, since amended by Stats. 1996, ch. 629, § 3 [moving provision into *subd. (k)*] & Stats. 1999, ch. 584, § 4, [dividing *subd. (k)* into *pars. (1)* and *(2)* and adding *par. (3)*].)

We apply the statutory scheme in existence in 2001 when defendant committed his crime. In 2001, *Penal Code* section 1202.4, *subdivision (k)* provided that for the purposes of the section the term " 'victim' " includes [HN3] "all of the following: [¶] (1) The immediate surviving family of the actual victim. [¶] (2) Any corporation, business trust, estate, trust, partnership, [**390] association, joint venture, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime. [¶] (3) 'Derivative victims' as defined in Section 13960 of the Government Code." (Stats. 1999, ch. 584, § 4, *italics added*.) All the derivative victims enumerated in the referenced section are natural persons. (*Gov. Code*, former § 13960, *subd. (a)(2)*, Stats. 1998, ch. 895, § 1.4, repealed by Stats. 2002, ch. 1141, § 10.)

III. Relevant Cases

Two Court of Appeal decisions deserve discussion because, as in this case, they involved the applicability of *Health and Safety Code* sections 11470.1 and 11470.2 when a governmental entity seeks recovery of its costs of hazardous substance cleanup. Neither opinion was cited by the Court of Appeal here.

In *Narron*, *supra*, 192 Cal. App. 3d 724, the defendant pleaded guilty to cultivating marijuana and was ordered by the trial court, as a condition of probation (*Pen. Code*, former § 1203.1), to pay the county's costs of cleaning up hazardous chemicals found during a search of his mobilehome. (*Narron*, *supra*, at p. 729.) On appeal, the defendant challenged the restitution condition, arguing that the county's exclusive remedy for recouping its cleanup costs was to comply with either section 11470.1 or section 11470.2 of the *Health and Safety Code*.

The Court of Appeal in *Narron* concluded that if the Legislature had intended to permit government recoupment of cleanup costs by way of a restitution probation condition, it would have had no reason to enact the two *Health and Safety Code* sections. (*Narron*, *supra*, 192 Cal. App. 3d at p. 739.) The court explained: "Prior to the legislation, such costs were recoverable only upon a criminal conviction, and then only as a part of a restitution condition where probation was granted." (*Id.* at p. 740.) It noted that *Health and Safety Code* sections 11470.1 and 11470.2 represent a balancing of two competing concerns reflected in the legislative history of the two statutes--that law enforcement not go unreimbursed for controlled substance [***784] eradication or cleanup costs and that defendants receive certain procedural protections before reimbursement can be imposed. (*Narron*, *supra*, at p. 739.) For example, a criminal defendant who contests a petition for recovery filed in the prosecution for a drug offense is entitled to a jury trial before recovery can be granted (*Health & Saf. Code*, § 11470.2, *subd. (d)*); and if the People bring a civil action against a person who aids, abets, or profits from controlled substance manufacture, that defendant is entitled to [**391] have liability proven by clear and convincing evidence (§ 11470.1, *subd. (e)(1)*). Given the contrast between these strict procedural requirements--filing a formal petition, requiring a jury trial on the petition's allegations, imposing an elevated standard of proof for aiders and abettors--and "the informal procedures" used in awarding restitution under the *Penal Code*, the *Narron* court concluded that if the stringent procedures of the *Health and Safety Code* were discretionary, governmental agencies would not use them. (*Narron*, *supra*, at pp. 738-739.) Accordingly, the Court of Appeal concluded that *Health and Safety Code* sections 11470.1 and 11470.2 provided "the exclusive remedy for reimbursement of the expenses" that were recoverable by the county. (*Narron*, *supra*, at p. 729.)

In *Brach*, *supra*, 95 Cal.App.4th 571, the defendants pleaded guilty to cultivating and possessing marijuana for sale, and they were granted probation. One condition of their probation required them to reimburse the county sheriff's department for its costs in destroying the mari-

juana crop. On appeal, the defendants challenged the restitution order, arguing it was infirm because the sheriff's department had not complied with *Health and Safety Code* sections 11470.1 or 11470.2. (*Brach, supra*, at p. 576.) The Court of Appeal acknowledged that the two *Health and Safety Code* sections "provide 'the exclusive remedy for reimbursement of the expenses recoverable under these statutes.'" (*Ibid.*, quoting *Narron, supra*, 192 Cal. App. 3d at p. 729.) It upheld the order, because, despite having [**66] [**67] notice that the sheriff's department was requesting restitution under *Health and Safety Code* section 11470.2, defendants had entered into the plea agreement without objecting to the probation condition requiring restitution. (*Brach, supra*, at p. 577.)

IV. This Case

As mentioned earlier, after a jury convicted defendant of attempted manufacture of a controlled substance, the trial court sentenced him to two years and six months in prison and ordered him to reimburse the Department \$ 5,402.67 for its cost of cleaning up the illegal drug laboratory. The trial court based its restitution order on *Penal Code* section 1202.4, subdivision (f), which requires restitution "[i]n every case in which a victim has suffered economic loss as a result of the defendant's conduct."

In affirming the trial court, the Court of Appeal reasoned that defendant's attempt to manufacture methamphetamine "resulted in damage to the environment," necessitating the Department's expenditure of \$ 5,402.67 to clean up [392] toxic substances at the illegal laboratory. This expenditure, the Court of Appeal said, "resulted directly from defendant's actions," and thus was "an appropriate matter for restitution."

In rejecting defendant's contention that the Department was not a direct victim of the crime, the Court of Appeal pointed to *Health and Safety Code* section 25354.5. Subdivision (a) of section 25354.5 requires law enforcement personnel to notify the [785] Department when, in the course of their official duties, they become aware of a suspected [HN4] "hazardous substance at a site where an illegal controlled substance is or was manufactured." Upon this notification, subdivision (b) of section 25354.5 requires the Department to minimize the danger at the illegal laboratory site posed by the hazardous substance or its precursor.

The Court of Appeal concluded: "In light of the language of [*Penal Code*] section 1202.4 and the mandate in *Health and Safety Code* section 25354.5, we find the Department of Toxic Substances Control was a direct victim of defendant's criminal activity."

In briefing to this court, the People argue for the first time that, because defendant did not object at trial to the restitution order as impermissible under *Penal Code* sec-

tion 1202.4, he may not now raise this claim. Irrespective of whether defendant has preserved the claim, however, it is within our discretion to decide this recurring issue for the guidance of government entities seeking cleanup costs and of trial courts ordering restitution. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 [69 Cal. Rptr. 2d 917, 948 P.2d 429].)

We disagree with the Court of Appeal's conclusion that subdivision (f) of *Penal Code* section 1202.4 was a proper basis for the trial court's restitution award to the Department for its cleanup costs. Subdivision (f) of section 1202.4 requires that, [HN5] "[i]n every case in which a victim has suffered economic loss" resulting from a defendant's conduct, the trial court must order full restitution "based on the amount of loss claimed by the victim ... or any other showing to the court." The definition of the term "victim" in subdivision (k) of section 1202.4 encompasses not only a victim who is a natural person but also a victim that is a "corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime." (*Id.*, § 1202.4, subd. (k)(2), italics added.)

[393] (1) Thus, [HN6] *Penal Code* section 1202.4, subdivision (k) permits restitution to a business or governmental entity only when it is a *direct victim* of crime. Before 1994, when the Legislature first inserted the direct victim language into section 1202.4, case law had recognized that restitution to the government was proper when it was a victim of a crime, but also that restitution was not proper when a governmental loss resulted from prosecuting a crime. (See *People v. Burnett* (1978) 86 Cal. App. 3d 320, 322 [150 Cal. Rptr. 126]; *People v. Baker* (1974) 39 Cal. App. 3d 550, 559 [113 Cal. Rptr. 248].) Relying on these cases, the Court of Appeal in *Narron*, decided in 1987, observed that a government entity is a *direct victim* of a crime when, for example, it is a victim of tax evasion or theft of its property. (*Narron, supra*, 192 Cal. App. 3d at p. 732.) In *People v. Crow* (1993) 6 Cal.4th 952 [26 Cal. Rptr. 2d 1, 864 P.2d 80], we relied on this passage from *Narron* in the course of sustaining a restitution order to the county based on fraudulently obtaining welfare payments. (*Id.*, at pp. 957-958.) Thus, when in 1994 the Legislature added the direct victim language to *Penal Code* section 1202.4, that term already carried a precise meaning.¹

1 Cases decided after the Legislature's 1994 addition of the direct victim language to *Penal Code* section 1202.4 have preserved the distinction. For example, in *People v. Torres* (1997) 59 Cal.App.4th 1 [68 Cal. Rptr. 2d 644], the Court of Appeal invalidated a restitution order to a sher-

iff's department for money its undercover officers used to buy illegal drugs during an investigation, but which it never recovered from the sellers. "Under the relevant case law and the statutory scheme, public agencies are not directly 'victimized' for purposes of restitution under *Penal Code* section 1202.4 merely because they spend money to investigate crimes or apprehend criminals." (*People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077 [21 Cal. Rptr. 3d 854].)

Recently *In re Johnny M.* (2002) 100 Cal.App.4th 1128 [123 Cal. Rptr. 2d 316], upheld a juvenile court restitution order to a school district that had twice been burglarized by a minor. The order was made under *Welfare and Institutions Code* section 730.6, subdivision (k), which permits restitution to an entity when it is "a direct victim" of a juvenile offense. Johnny M.'s break-ins at the school caused physical damage and required cleanup and repairs, made in part by salaried district employees, so that classes and normal school operations could resume. (*In re Johnny M.*, *supra*, 100 Cal.App.4th at pp. 1130-1131.) The school district was thus a direct victim of the burglaries of its school building.

(2) We reiterated that meaning in *People v. Birkett* (1999) 21 Cal.4th 226 [87 Cal. ***786] Rptr. 2d 205, 980 P.2d 912], in which we described a provision in *Penal Code* former section 1203.04 permitting [HN7] restitution to entities that are "direct" victims of crime as limiting restitution to "entities against which the probationer's crimes had been committed"--that is, entities that are the "immediate objects of the probationer's offenses." (*Birkett*, *supra*, at pp. 232-233.)

(3) Here, in contrast, defendant's attempt to manufacture methamphetamine was not an offense committed against the Department, nor was the Department the immediate object of his crime. Therefore, the Department [*394] was not a direct victim entitled to recover its cleanup costs under *Penal Code* section 1202.4. But the unavailability of restitution under *Penal Code* section 1202.4 does not mean that the Department cannot recoup its costs in disposing of hazardous substances at an illegal drug laboratory. As noted earlier, the Legislature has expressly provided for reimbursement of such costs through *Health and Safety Code* sections 11470.1 and 11470.2. Reimbursement can be obtained either by bringing a civil action (*Health & Saf. Code*, § 11470.1) or, in the criminal proceeding pending against the defendant, by filing a recovery petition (§ 11470.2). We agree with the Court of Appeal in *Narron*, *supra*, 192 Cal. App. 3d at page 729, that [HN8] these provisions are the "exclusive" means by which a government entity that is

not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes.

(4) The Attorney General argues that restitution to the Department under *Penal Code* section 1202.4, subdivision (f) is proper, indeed compelled, because that broader provision reflects our state's constitutional mandate that [HN9] "all persons who suffer losses as a result of criminal activity" have a right to receive restitution from convicted criminals whose crimes result in that loss. (*Cal. Const.*, art. I, § 28, subd. (b); *People v. Birkett*, *supra*, 21 Cal.4th at p. 228.) Our answer is that [HN10] the Legislature has carried out that constitutional mandate by enacting a comprehensive scheme that allows the government to recoup its crime-related losses. When the government is a direct victim of crime, it is entitled to restitution under section 1202.4, subdivision (k).² When, as in this case, the [**68] governmental agency must dispose of hazardous substances [***787] or their precursors at an illegal drug manufacturing site, it can recoup its costs by bringing a civil action under *Health and Safety Code* section 11470.1 or it can seek recovery of its costs in the criminal proceeding pending against the defendant, as set forth in *Health and Safety Code* section 11470.2.

Thus in this case, the Department may, subject to any claim of untimeliness, bring a civil action against defendant to recover its cleanup costs, as permitted under *Health and Safety Code* section 11470.1.

2 We disapprove *In re Brian N.* (2004) 120 Cal.App.4th 591 [15 Cal. Rptr. 3d 337] to the extent it holds that a fire department that has incurred labor costs in fighting a fire on a vacant lot not owned by the department is a direct victim of the crime of unlawfully causing a fire (*Pen. Code*, § 452, subd. (c)) within the meaning of *Welfare and Institutions Code*, section 730.6. "[S]ection 730.6[, which is applicable to juvenile offenders,] parallels *Penal Code* section 1202.4, which governs adult restitution." (*In re Johnny M.*, *supra*, 100 Cal.App.4th at p. 1132.)

[*395] Disposition

The judgment of the Court of Appeal is reversed, and that court is directed to remand the case to the trial court, directing it to strike the portion of its order that defendant pay \$ 5,402.67 in restitution to the Department of Toxic Substance Control.

George, C. J., Baxter, J., Werdegart, J., Chin, J., and Moreno, J., concurred.



Copyright 2011 SHEPARD'S(R) - 77 Citing references

People v. Martinez, 36 Cal. 4th 384, 30 Cal. Rptr. 3d 779, 115 P.3d 62, 2005 Cal. LEXIS 7302, 2005 Cal. Daily Op. Service 6175, 2005 D.A.R. 8411 (2005)

Restrictions: *Unrestricted*
 FOCUS(TM) Terms: *No FOCUS terms*
 Print Format: *FULL*
 Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No subsequent appellate
 history. Prior history
 available.

Citing References:

▲ Cautionary Analyses:	Distinguished (3)
Positive Analyses:	Followed (5)
Neutral Analyses:	Quest. Precedent (3)
Other Sources:	Statutes (7), Treatises (2), Court Documents (4)

LexisNexis Headnotes: HN2 (1), HN3 (7), HN5 (7), HN6 (40), HN7 (31), HN8 (16), HN10 (20)

PRIOR HISTORY (7 citing references)

1. *People v. Martinez*, 110 Cal. App. 4th 353, 1 Cal. Rptr. 3d 733, 2003 Cal. App. LEXIS 1035, 2003 Cal. Daily Op. Service 6065, 2003 D.A.R. 7596 (Cal. App. 5th Dist. 2003)
2. **Rehearing denied by:**
People v. Martinez, 2003 Cal. App. LEXIS 1201 (Cal. App. 5th Dist. July 28, 2003)
3. **Review granted, Depublished by:**
People v. Martinez, 5 Cal. Rptr. 3d 31, 77 P.3d 2, 2003 Cal. LEXIS 7208, 2003 Cal. Daily Op. Service 8652, 2003 D.A.R. 10916 (Cal. 2003)
4. **Later proceeding at:**
People v. Martinez, 2003 Cal. LEXIS 8447 (Cal. Oct. 15, 2003)
5. **Later proceeding at:**
People v. Martinez, 2003 Cal. LEXIS 8686 (Cal. Nov. 13, 2003)
6. **Later proceeding at:**
People v. Martinez, 2004 Cal. LEXIS 716 (Cal. Jan. 21, 2004)
7. **Request granted:**
People v. Martinez, 2005 Cal. LEXIS 5871 (Cal. May 19, 2005)

Reversed by, Remanded by, Superseded by (CITATION YOU ENTERED):

People v. Martinez, 36 Cal. 4th 384, 30 Cal. Rptr. 3d 779, 115 P.3d 62, 2005 Cal. LEXIS 7302, 2005 Cal. Daily Op. Service 6175, 2005 D.A.R. 8411 (2005)

CITING DECISIONS (57 citing decisions)

CALIFORNIA SUPREME COURT

8. **Cited by:**
People v. Anderson, 50 Cal. 4th 19, 112 Cal. Rptr. 3d 685, 235 P.3d 11, 2010 Cal. LEXIS 7063 (2010)
LexisNexis Headnotes HN6, HN7, HN10
50 Cal. 4th 19 p.28
112 Cal. Rptr. 3d 685 p.692
235 P.3d 11 p.17
9. **Cited by:**
N. (Brian), In re, 2005 Cal. LEXIS 13409 (Cal. Nov. 30, 2005)
2005 Cal. LEXIS 13409

CALIFORNIA COURTS OF APPEAL

10. **Distinguished by, Cited by:**
People v. Verni, 197 Cal. App. 4th 124, 2011 Cal. App. LEXIS 883 (Cal. App. 3d Dist. 2011) **LexisNexis Headnotes HN6, HN7**
Distinguished by:
197 Cal. App. 4th 124 p.131

Cited by:
197 Cal. App. 4th 124 p.128
11. **Followed by:**
People v. Brunette, 194 Cal. App. 4th 268, 124 Cal. Rptr. 3d 521, 2011 Cal. App. LEXIS 432 (Cal. App. 6th Dist. 2011) **LexisNexis Headnotes HN6, HN8**
194 Cal. App. 4th 268 p.280
124 Cal. Rptr. 3d 521 p.530
12. **Followed by, Cited by:**
People v. Kelly, 189 Cal. App. 4th 73, 116 Cal. Rptr. 3d 646, 2010 Cal. App. LEXIS 1750, 98 U.S.P.Q.2d (BNA) 1848 (Cal. App. 4th Dist. 2010) **LexisNexis Headnotes HN6, HN10**
Followed by:
189 Cal. App. 4th 73 p.79
116 Cal. Rptr. 3d 646 p.650

Cited by:
189 Cal. App. 4th 73 p.77
116 Cal. Rptr. 3d 646 p.649
13. **Distinguished by questionable precedent at, Cited by:**
People v. Runyan, 188 Cal. App. 4th 1010, 115 Cal. Rptr. 3d 865, 2010 Cal. App. LEXIS 1669 (Cal. App. 2d Dist. 2010) **LexisNexis Headnotes HN6, HN7**

Distinguished by questionable precedent at:188 Cal. App. 4th 1010 *p.1014*115 Cal. Rptr. 3d 865 *p.868***Cited by:**188 Cal. App. 4th 1010 *p.1013*115 Cal. Rptr. 3d 865 *p.867*14. **Cited by:***People v. Williams*, 184 Cal. App. 4th 142, 108 Cal. Rptr. 3d 772, 2010 Cal. App. LEXIS 587 (Cal. App. 4th Dist. 2010) LexisNexis Headnotes HN6184 Cal. App. 4th 142 *p.146*108 Cal. Rptr. 3d 772 *p.775*15. **Cited by:***People v. Bartell*, 170 Cal. App. 4th 1258, 88 Cal. Rptr. 3d 844, 2009 Cal. App. LEXIS 143 (Cal. App. 3d Dist. 2009) LexisNexis Headnotes HN8170 Cal. App. 4th 1258 *p.1262*88 Cal. Rptr. 3d 844 *p.847*16. **Followed by:***People v. Slattery*, 167 Cal. App. 4th 1091, 84 Cal. Rptr. 3d 672, 2008 Cal. App. LEXIS 1679 (Cal. App. 3d Dist. 2008) LexisNexis Headnotes HN6, HN7, HN8, HN10167 Cal. App. 4th 1091 *p.1095*84 Cal. Rptr. 3d 672 *p.674*17. **Followed by, Cited by:***People v. Wilen*, 165 Cal. App. 4th 270, 80 Cal. Rptr. 3d 895, 2008 Cal. App. LEXIS 1152 (Cal. App. 1st Dist. 2008) LexisNexis Headnotes HN2, HN3, HN5, HN6, HN8, HN10**Followed by:**165 Cal. App. 4th 270 *p.283*80 Cal. Rptr. 3d 895 *p.904***Cited by:**165 Cal. App. 4th 270 *p.280*80 Cal. Rptr. 3d 895 *p.902*18. **Followed by:***In re Imran Q.*, 158 Cal. App. 4th 1316, 71 Cal. Rptr. 3d 121, 2008 Cal. App. LEXIS 52 (Cal. App. 2d Dist. 2008) LexisNexis Headnotes HN6158 Cal. App. 4th 1316 *p.1320*71 Cal. Rptr. 3d 121 *p.123*19. **Distinguished by questionable precedent at, Cited in questionable precedent at:***People v. Ayala*, 155 Cal. App. 4th 604, 66 Cal. Rptr. 3d 228, 2007 Cal. App. LEXIS 1588 (Cal. App. 6th Dist. 2007) LexisNexis Headnotes HN6, HN7**Distinguished by questionable precedent at:**155 Cal. App. 4th 604 *p.620*66 Cal. Rptr. 3d 228 *p.240*

Cited in questionable precedent at:155 Cal. App. 4th 604 *p.620*66 Cal. Rptr. 3d 228 *p.240*20. **Cited by:***In re Dina V.*, 151 Cal. App. 4th 486, 59 Cal. Rptr. 3d 862, 2007 Cal. App. LEXIS 851, 2007 Cal. Daily Op. Service 6004 (Cal. App. 1st Dist. 2007) LexisNexis Headnotes HN7151 Cal. App. 4th 486 *p.489*59 Cal. Rptr. 3d 862 *p.864*21. **Cited in questionable precedent at:***In re Imran Q.*, 149 Cal. App. 4th 581, 57 Cal. Rptr. 3d 233, 2007 Cal. App. LEXIS 507, 2007 Cal. Daily Op. Service 3729, 2007 D.A.R. 4712 (Cal. App. 2d Dist. 2007) LexisNexis Headnotes HN3, HN5, HN6149 Cal. App. 4th 581 *p.585*57 Cal. Rptr. 3d 233 *p.236*22. **Cited by:***In re Tommy A.*, 131 Cal. App. 4th 1580, 33 Cal. Rptr. 3d 103, 2005 Cal. App. LEXIS 1298, 2005 Cal. Daily Op. Service 7435, 2005 D.A.R. 10141 (Cal. App. 4th Dist. 2005) LexisNexis Headnotes HN7131 Cal. App. 4th 1580 *p.1587*33 Cal. Rptr. 3d 103 *p.107***UNPUBLISHED CALIFORNIA APPELLATE DECISIONS**23. **Cited by:***People v. Smith*, 2011 Cal. App. Unpub. LEXIS 5382 (Cal. App. 3d Dist. July 19, 2011) LexisNexis Headnotes HN724. **Cited by:***People v. Scott*, 2011 Cal. App. Unpub. LEXIS 1551 (Cal. App. 6th Dist. Mar. 4, 2011) LexisNexis Headnotes HN6, HN725. **Cited by:***In re Samuel R.*, 2010 Cal. App. Unpub. LEXIS 8434 (Cal. App. 4th Dist. Oct. 26, 2010)26. **Cited by:***In re T.tr.*, 2010 Cal. App. Unpub. LEXIS 8377 (Cal. App. 1st Dist. Oct. 21, 2010) LexisNexis Headnotes HN6, HN1027. **Cited by:***People v. Francis*, 2010 Cal. App. Unpub. LEXIS 7585 (Cal. App. 2d Dist. Sept. 23, 2010) LexisNexis Headnotes HN628. **Cited by:***People v. Nichols*, 2010 Cal. App. Unpub. LEXIS 4960 (Cal. App. 5th Dist. June 29, 2010) LexisNexis Headnotes HN6, HN729. **Cited by:***People v. T.R.*, 2010 Cal. App. Unpub. LEXIS 4333 (Cal. App. 4th Dist. June 10, 2010) LexisNexis Headnotes HN6

30. Cited by:
People v. Nunez, 2010 Cal. App. Unpub. LEXIS 3735 (Cal. App. 2d Dist. May 20, 2010) LexisNexis Headnotes HN6, HN7, HN8, HN10
31. Cited by:
People v. Bassett, 2010 Cal. App. Unpub. LEXIS 2570 (Cal. App. 3d Dist. Apr. 9, 2010) LexisNexis Headnotes HN6, HN7
32. Cited by:
People v. Uptegrove, 2010 Cal. App. Unpub. LEXIS 2136 (Cal. App. 3d Dist. Mar. 25, 2010) LexisNexis Headnotes HN8
33. Cited by:
People v. Kristian Jonathon Land, 2010 Cal. App. Unpub. LEXIS 1396 (Cal. App. 4th Dist. Feb. 26, 2010) LexisNexis Headnotes HN6, HN7
34. Cited by:
People v. Coleman, 2009 Cal. App. Unpub. LEXIS 8203 (Cal. App. 1st Dist. Oct. 14, 2009) LexisNexis Headnotes HN6, HN8, HN10
35. Cited by:
People v. Dennis, 2009 Cal. App. Unpub. LEXIS 4159 (Cal. App. 5th Dist. May 28, 2009) LexisNexis Headnotes HN7, HN8
36. Cited by:
People v. Davis, 2009 Cal. App. Unpub. LEXIS 3826 (Cal. App. 2d Dist. May 13, 2009) LexisNexis Headnotes HN6, HN7
37. Cited by:
People v. Sharpe, 2009 Cal. App. Unpub. LEXIS 3219 (Cal. App. 3d Dist. Apr. 27, 2009) LexisNexis Headnotes HN6, HN10
38. Cited by:
In re R.M., 2008 Cal. App. Unpub. LEXIS 7898 (Cal. App. 5th Dist. Sept. 24, 2008)
39. Cited by:
People v. Coleman, 2008 Cal. App. Unpub. LEXIS 5149 (Cal. App. 1st Dist. June 25, 2008) LexisNexis Headnotes HN6, HN7, HN8
40. Cited by:
People v. Thomas, 2008 Cal. App. Unpub. LEXIS 4819 (Cal. App. 4th Dist. June 13, 2008) LexisNexis Headnotes HN6, HN7
41. Cited by:
People v. Kirkland, 2007 Cal. App. Unpub. LEXIS 10533 (Cal. App. 3d Dist. Dec. 26, 2007) LexisNexis Headnotes HN6
42. Cited by:
People v. Horowitz, 2007 Cal. App. Unpub. LEXIS 8198 (Cal. App. 4th Dist. Oct. 9, 2007) LexisNexis Headnotes HN8
43. Cited by:
People v. Kuechmann, 2007 Cal. App. Unpub. LEXIS 7434 (Cal. App. 4th Dist. Sept. 13, 2007) LexisNexis Headnotes HN3, HN5, HN6

44. Cited by:
People v. Sanchez, 2007 Cal. App. Unpub. LEXIS 7160 (Cal. App. 5th Dist. Sept. 4, 2007) LexisNexis Headnotes HN3, HN5, HN6, HN7, HN10
45. Cited by:
In re Kimberly C., 2007 Cal. App. Unpub. LEXIS 7096 (Cal. App. 1st Dist. Aug. 31, 2007) LexisNexis Headnotes HN6, HN7, HN8
46. Cited by:
People v. Oscar Biviano Aragon, 2007 Cal. App. Unpub. LEXIS 5805 (Cal. App. 5th Dist. July 17, 2007) LexisNexis Headnotes HN6, HN7, HN10
47. Cited by:
In re PHILLIP O., Coming Under the Juvenile Court Law, 2007 Cal. App. Unpub. LEXIS 3683 (Cal. App. 6th Dist. May 8, 2007) LexisNexis Headnotes HN6, HN7
48. Cited by:
People v. Silva, 2007 Cal. App. Unpub. LEXIS 1591 (Cal. App. 2d Dist. Feb. 27, 2007) LexisNexis Headnotes HN6, HN7, HN8, HN10
49. Cited by:
In re WILLIAM C., Coming Under the Juvenile Court Law, 2006 Cal. App. Unpub. LEXIS 11707 (Cal. App. 5th Dist. Dec. 28, 2006)
50. Cited by:
PEOPLE v. TORRALVA, 2006 Cal. App. Unpub. LEXIS 11604 (Cal. App. 1st Dist. Dec. 27, 2006) LexisNexis Headnotes HN7
51. Cited by:
PEOPLE v. ARVIZU, 2006 Cal. App. Unpub. LEXIS 10031 (Cal. App. 3d Dist. Nov. 2, 2006) LexisNexis Headnotes HN8, HN10
52. Cited by:
In re CHRISTOPHER L., Coming Under the Juvenile Court Law, 2006 Cal. App. Unpub. LEXIS 7938 (Cal. App. 5th Dist. Sept. 6, 2006)
53. Cited by:
In re JASON D., Coming Under the Juvenile Court Law, 2006 Cal. App. Unpub. LEXIS 6818 (Cal. App. 3d Dist. Aug. 2, 2006) LexisNexis Headnotes HN6, HN7, HN10
54. Cited by:
In re OSCAR M., Coming Under the Juvenile Court Law, 2006 Cal. App. Unpub. LEXIS 3403 (Cal. App. 1st Dist. Apr. 26, 2006) LexisNexis Headnotes HN7
55. Cited by:
PEOPLE v. JOHNS, 2006 Cal. App. Unpub. LEXIS 2682 (Cal. App. 5th Dist. Mar. 29, 2006) LexisNexis Headnotes HN6, HN7, HN10
56. Cited by:
PEOPLE v. ROWELL, 2006 Cal. App. Unpub. LEXIS 1967 (Cal. App. 3d Dist. Mar. 9, 2006) LexisNexis Headnotes HN6, HN10
57. Cited by:
PEOPLE v. COMBS, 2006 Cal. App. Unpub. LEXIS 1757 (Cal. App. 1st Dist. Feb. 28, 2006) LexisNexis

Headnotes HN8, HN10

58. Cited by:
PEOPLE v. AGUILAR, 2006 Cal. App. Unpub. LEXIS 664 (Cal. App. 4th Dist. Jan. 26, 2006) LexisNexis
Headnotes HN3, HN5, HN6, HN10
59. Cited by:
PEOPLE v. KYLE, 2006 Cal. App. Unpub. LEXIS 534 (Cal. App. 5th Dist. Jan. 23, 2006) LexisNexis
Headnotes HN6, HN7
60. Cited by:
PEOPLE v. CARMICHAEL, 2006 Cal. App. Unpub. LEXIS 149 (Cal. App. 1st Dist. Jan. 9, 2006)
LexisNexis Headnotes HN3, HN5, HN6, HN7, HN8, HN10
61. Cited by:
In re ISALAH F., Coming Under the Juvenile Court Law, 2005 Cal. App. Unpub. LEXIS 10451 (Cal. App. 1st Dist. Nov. 15, 2005)
62. Cited by:
People v. Stanley, 2005 Cal. App. Unpub. LEXIS 9689 (Cal. App. 4th Dist. Oct. 25, 2005) LexisNexis
Headnotes HN6, HN7, HN8, HN10
63. Cited by:
PEOPLE v. KING, 2005 Cal. App. Unpub. LEXIS 9657 (Cal. App. 3d Dist. Oct. 25, 2005) LexisNexis
Headnotes HN3, HN5, HN6, HN7, HN10
64. Cited by:
PEOPLE v. GARCIA-MORIEL, 2005 Cal. App. Unpub. LEXIS 9233 (Cal. App. 2d Dist. Oct. 11, 2005)
LexisNexis Headnotes HN6, HN7

ANNOTATED STATUTES (7 Citing Statutes)

65. *Cal Const, Art. I @ 28*
66. *Cal. Health & Safety Code sec. 11470.1*
67. *Cal. Health & Safety Code sec. 11470.2*
68. *Cal. Health & Safety Code sec. 25354.5*
69. *Cal. Penal Code sec. 452*
70. *Cal. Penal Code sec. 1202.4*
71. *Cal. Welf. & Inst. Code sec. 730.6*

TREATISE CITATIONS (2 Citing Sources)

72. *5-91 California Criminal Defense Practice @ 91.120*
73. *6-145 California Criminal Defense Practice @ 145.01A*

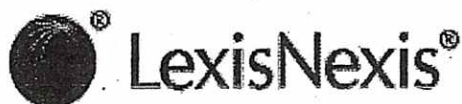
BRIEFS (4 Citing Briefs)

74. *PEOPLE v. BARTELL*, 2009 CA S. Ct. Briefs 71038, 2009 CA S. Ct. Briefs LEXIS 803 (Cal. Mar. 9, 2009)

75. *PEOPLE v. ANDERSON*, 2009 CA S. Ct. Briefs 70778, 2009 CA S. Ct. Briefs LEXIS 1354 (Cal. Mar. 2, 2009)
76. *PEOPLE v. SEIMA*, 2009 CA S. Ct. Briefs 70286, 2009 CA S. Ct. Briefs LEXIS 1643 (Cal. Feb. 3, 2009)
77. *PEOPLE v. BATES*, 2007 CA S. Ct. Briefs 49557, 2007 CA S. Ct. Briefs LEXIS 3428 (Cal. Jan. 18, 2007)

B.

People v. Wilen (2008) 165 Cal.App.4th 270
(Contra Costa County)



4 of 13 DOCUMENTS



Positive

As of: Aug 20, 2011

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CLAUDE WILEN, Defendant and Appellant.

A115861

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

165 Cal. App. 4th 270; 80 Cal. Rptr. 3d 895; 2008 Cal. App. LEXIS 1152

July 25, 2008, Filed

PRIOR HISTORY: [***1]

Superior Court of Contra Costa County, No. 050516658, Theresa J. Canepa, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: After defendant pleaded guilty to controlled substance crimes, the People filed a petition pursuant to *Health & Saf. Code*, § 11470.2, for recovery of hazardous clean-up expenses. The Contra Costa County Superior Court, California, ordered defendant to pay \$ 2,631.04. Defendant appealed the post-judgment order.

OVERVIEW: The instant court concluded that defendant had a right under § 11470.2, *subd. (d)*, to have his liability for the clean-up expenses decided by a jury, even though defendant had pleaded guilty to the underlying charges. The trial court erred in denying defendant's demand for a jury trial and in denying defendant's demand to be present at the hearing that determined his liability. However, the errors were not prejudicial. The hearing was not a full-blown trial. The issue of guilt or innocence had already been settled by defendant's pleas of guilty. The only issue was the amount that defendant would be ordered to pay. The need for the cleanup was not denied. The fact that it had actually occurred was never challenged. All that could be contested was the

bottom line of what it cost. Defendant was not a percipient witness to the cleanup operation, so he could not offer personal input that would impeach any testimony concerning the operations. Because there was not a reasonable probability that a jury would have returned a more lenient verdict had defendant been present at the hearing, the trial court's errors could be treated as non-prejudicial.

OUTCOME: The postjudgment order was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
 [HN1] See *Health & Saf. Code*, § 11470.1, *subd. (a)(1)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
 [HN2] A civil action to recover the expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance or its precursors may

be brought by the district attorney, county counsel, city attorney, the California Department of Health Services, or the Attorney General of California. *Health & Saf. Code*, § 11470.1, *subd. (d)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN3] See *Health & Saf. Code*, § 11470.1, *subd. (c)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Verdicts > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
Evidence > Judicial Admissions > General Overview
[HN4] Testimony or admissions made by the defendant in a civil action to recover the expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance or its precursors shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct. *Health & Saf. Code*, § 11470.1, *subd. (k)*. An acquittal in the criminal proceeding will bar the civil action only if there was a factual finding of innocence by the court in the criminal case. § 11470.1, *subd. (l)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN5] See *Health & Saf. Code*, § 11470.2, *subd. (a)(1)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN6] See *Health & Saf. Code*, § 11470.2, *subd. (b)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN7] A defendant may admit to or deny a petition for recovery of expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance or its precursors. If the defendant admits the allegations of the petition, the court shall rule for the

prosecuting attorney and enter a judgment for recovery of the expenses incurred. *Health & Saf. Code*, § 11470.2, *subd. (c)*. However, if the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying offense will be tried and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties. § 11470.2, *subd. (d)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN8] *Health & Saf. Code*, §§ 11470.1 & 11470.2, are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes.

Criminal Law & Procedure > Sentencing > Fines
Criminal Law & Procedure > Sentencing > Restitution
[HN9] The concept of a "direct victim" derives from *Pen. Code*, § 1202.4, which is the primary statute implementing the constitutional right of a crime victim to restitution. In accordance with the constitutional command, § 1202.4, *subd. (a)(1)*, declares that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime. Upon conviction, the sentencing court must order the defendant to pay a restitution fine and restitution to the victim. § 1202.4, *subd. (a)(3)*. The amount of the restitution fine is, within minimum and maximum amounts, dependent upon the nature of the offense and the sentencing court's discretion; only in compelling and extraordinary cases may a restitution fine not be imposed. § 1202.4, *subds. (b)-(c)*.

Criminal Law & Procedure > Sentencing > Restitution
[HN10] Victim restitution compensates for economic loss suffered as a result of the defendant's conduct. *Pen. Code*, § 1202.4, *subds. (a)(1), (f)(3)*. The defendant has a right to a hearing to dispute the determination of the amount of restitution. § 1202.4, *subd. (f)(1)*. The amount is fixed by the sentencing court, based on the amount of loss claimed by the victim 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. § 1202.4, subd. (f).

Criminal Law & Procedure > Sentencing > Restitution
[HN11] In the context of restitution, the term "victim" is statutorily defined to include specified classes of persons, and any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any

other legal or commercial entity when that entity is a direct victim of a crime. *Pen. Code*, § 1202.4, subd. (k).

Criminal Law & Procedure > Sentencing > Fines
Criminal Law & Procedure > Sentencing > Restitution
[HN12] Restitution fines are virtually mandatory upon conviction, even in the absence of a victim, except when the sentencing court finds compelling and extraordinary reasons for not imposing a restitution fine. *Pen. Code*, § 1202.4, subd. (c). Collected restitution fines do not go directly to a victim, but are deposited in the restitution fund in the state treasury. § 1202.4, subd. (e). Restitution fines are statutorily defined as punishment imposed within the context of a criminal proceeding. By contrast, victim restitution is discretionary, dependent upon the existence of a victim, and enforceable in civil courts.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN13] See *Health & Saf. Code*, § 11470.1, subd. (d).

Governments > Legislation > Interpretation
[HN14] To seek the meaning of a statute is not simply to look up the dictionary definitions and then stitch together the results. Rather, it is to discern the sense of a statute, and therefore its words, in the legal and broader culture.

Governments > Courts > Authority to Adjudicate
[HN15] Courts cannot give or withhold at pleasure. If a claim is enforced or recognized, it is because the claim is a right.

Governments > Legislation > Interpretation
[HN16] Where statutory language is plain and its meaning unambiguous, it is to be enforced according to the usual and ordinary meaning of its terms.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN17] A defendant has a right to be present at critical stages of a criminal prosecution, a right protected by both the U.S. Constitution and the California Constitution. *U.S. Const.*, 6th & 14th Amends; *Cal. Const.*, art. I, §§ 15 & 16. California has also guaranteed the right by statute.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN18] See *Pen. Code*, § 977, subd. (b)(1).

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
Criminal Law & Procedure > Sentencing > Imposition > Pronouncement
[HN19] The right of a defendant to be present at critical stages of a criminal prosecution includes sentencing and pronouncement of judgment.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
Criminal Law & Procedure > Sentencing > Costs
Criminal Law & Procedure > Sentencing > Restitution
[HN20] A defendant has a statutory right to be present at the hearing to determine his or her liability under *Health & Saf. Code*, § 11470.2.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
[HN21] When the right to a jury trial is purely a creature of state statutory law, denial of that right is governed by case law. The same Watson standard governs error under state statutes guaranteeing defendant's presence; reversal is required only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN22] A criminal defendant is entitled to be in court if his or her presence will have a reasonably substantial relation to the opportunity to defend against the charges.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

After defendant pleaded guilty to controlled substance crimes, the People filed a petition pursuant to *Health & Saf. Code, § 11470.2*, for recovery of hazardous cleanup expenses. The trial court entered a post-judgment order directing defendant to pay \$2,631.04. (Superior Court of Contra Costa County, No. 050516658, Theresa J. Canepa, Judge.)

The Court of Appeal affirmed the postjudgment order. The court concluded that defendant had a right under *Health & Saf. Code, § 11470.2, subd. (d)*, to have his liability for the cleanup expenses decided by a jury, even though he pleaded guilty to the underlying charges. The trial court erred in denying defendant's demand for a jury trial and in denying his demand to be present at the hearing that determined his liability. However, the errors were not prejudicial. The hearing was not a full-blown trial. The issue of guilt or innocence had already been settled by defendant's pleas of guilty. The only issue was the amount that defendant would be ordered to pay. The need for the cleanup was not denied. The fact that it had actually occurred was never challenged. All that could be contested was the bottom line of what it cost. Defendant was not a percipient witness to the cleanup operation, so he could not offer personal input that would impeach any testimony concerning the operations. Because there was not a reasonable probability that a jury would have returned a more lenient verdict had defendant been present at the hearing, the trial court's errors could be treated as nonprejudicial. (Opinion by Richman, J., with Haerle, Acting P. J., and Lambden, J., concurring.) [*271]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Drugs and Narcotics § 23--Offenses--Punishment--Recovery of Cleanup Expenses.--A civil action to recover the expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance or its precursors may be brought by the district attorney, county counsel, city attorney, the State Department of Health Services, or the Attorney General (*Health & Saf. Code, § 11470.1, subd. (d)*).

(2) Drugs and Narcotics § 23--Offenses--Punishment--Recovery of Cleanup Expenses--Testimony or Admissions--Acquittal in Criminal Proceeding.--Testimony or admissions made by the defendant in a civil action to recover the expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled

substance or its precursors shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct (*Health & Saf. Code, § 11470.1, subd. (k)*). An acquittal in the criminal proceeding will bar the civil action only if there was a finding of factual innocence by the court in the criminal case (*§ 11470.1, subd. (l)*).

(3) Drugs and Narcotics § 23--Offenses--Punishment--Recovery of Cleanup Expenses--Admission or Denial.--A defendant may admit to or deny a petition for recovery of expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance or its precursors. If the defendant admits the allegations of the petition, the court shall rule for the prosecuting attorney and enter a judgment for recovery of the expenses incurred (*Health & Saf. Code, § 11470.2, subd. (c)*). However, if the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties (*§ 11470.2, subd. (d)*).

(4) Drugs and Narcotics § 23--Offenses--Punishment--Recovery of Cleanup Expenses.--*Health & Saf. Code, §§ 11470.1 & 11470.2*, are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes.

(5) Criminal Law § 514.2--Punishment--Restitution Fine--Constitutional Right.--The concept of a "direct victim" derives from *Pen. Code, § 1202.4*, which is the primary statute implementing the constitutional [*272] right of a crime victim to restitution. In accordance with state constitutional command, *§ 1202.4, subd. (a)(1)*, declares that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime. Upon conviction, the sentencing court must order the defendant to pay a restitution fine and restitution to the victim (*§ 1202.4, subd. (a)(3)*). The amount of the restitution fine is, within minimum and maximum amounts, dependent upon the nature of the offense and the sentencing court's discretion; only in compelling and extraordinary cases may a restitution fine not be imposed (*§ 1202.4, subds. (b)-(c)*).

(6) Criminal Law § 514.2--Punishment--Restitution--Amount of Loss.--Victim restitution compensates for economic loss suffered as a result of the defendant's con-

duct (*Pen. Code*, § 1202.4, subds. (a)(1), (f), (f)(3)). The defendant has a right to a hearing to dispute the determination of the amount of restitution (§ 1202.4, subd. (f)(1)). The amount is fixed by the sentencing court, based on the amount of loss claimed by the victim 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 (§ 1202.4, subd. (f)).

(7) Criminal Law § 514.2--Punishment--Restitution--Victim.--In the context of restitution, the term "victim" is statutorily defined to include specified classes of persons, and any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime (*Pen. Code*, § 1202.4, subd. (k)).

(8) Criminal Law § 514.2--Punishment--Restitution Fine.--Restitution fines are virtually mandatory upon conviction, even in the absence of a victim, except when the sentencing court finds compelling and extraordinary reasons for not imposing a restitution fine (*Pen. Code*, § 1202.4, subd. (c)). Collected restitution fines do not go directly to a victim, but are deposited in the restitution fund in the state treasury (§ 1202.4, subd. (e)). Restitution fines are statutorily defined as punishment imposed within the context of a criminal proceeding. By contrast, victim restitution is discretionary, dependent upon the existence of a victim, and enforceable in civil courts.

(9) Statutes § 31--Construction--Words.--To seek the meaning of a statute is not simply to look up dictionary definitions and then stitch [*273] together the results. Rather, it is to discern the sense of a statute, and therefore its words, in the legal and broader culture.

(10) Courts § 3--Powers and Organization--Enforcement or Recognition of Claim.--Courts cannot give or withhold at pleasure. If a claim is enforced or recognized, it is because the claim is a right.

(11) Statutes § 30--Construction--Ordinary Meaning.--Where statutory language is plain and its meaning unambiguous, it is to be enforced according to the usual and ordinary meaning of its terms.

(12) Criminal Law § 48--Rights of Accused--Presence at Critical Stages.--A defendant has a right to be present at critical stages of a criminal prosecution, a right protected by both the U.S. Constitution and the California

Constitution (*U.S. Const.*, 6th & 14th Amends.; *Cal. Const.*, art. I, §§ 15, 16). California has also guaranteed the right by statute.

(13) Criminal Law § 48--Rights of Accused--Presence at Sentencing and Pronouncement.--The right of a defendant to be present at critical stages of a criminal prosecution includes sentencing and pronouncement of judgment.

(14) Drugs and Narcotics § 23--Offenses--Punishment--Recovery of Cleanup Expenses--Right of Presence.--A defendant has a statutory right to be present at the hearing to determine his or her liability under *Health & Saf. Code*, § 11470.2.

(15) Criminal Law § 48--Rights of Accused--Presence--Denial--Reversible Error.--When the right to a jury trial is purely a creature of state statutory law, denial of that right is governed by case law. The same standard governs error under state statutes guaranteeing defendant's presence: reversal is required only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

(16) Criminal Law § 48--Rights of Accused--Presence.--A criminal defendant is entitled to be in court if his or her presence will have a reasonably substantial relation to the opportunity to defend against the charges.

(17) Drugs and Narcotics § 23--Offenses--Punishment--Recovery of Cleanup Expenses--Jury Trial--Presence of Defendant--Denial--Nonprejudicial Errors.--In a case in which the People filed a petition pursuant to *Health & Saf. Code*, § 11470.2, for recovery of hazardous cleanup [*274] expenses after defendant pleaded guilty to controlled substance crimes, the trial court erred in denying defendant's demand for a jury trial and his demand to be present at the hearing that determined his liability for the cleanup expenses. However, given the very limited scope, and impersonal nature, of the issue that would have been put before a jury, the errors did not qualify as prejudicial.

[*Erwin et al.*, *Cal. Criminal Defense Practice* (2008) ch. 80, § 80.05; 3 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Punishment, § 209; 5 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Criminal Trial, § 425.]

COUNSEL: Violet Elizabeth Grayson for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Dorian Jung and Jill

M. Thayer, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Richman, J., with Haerle, Acting P. J., and Lambden, J., concurring.

OPINION BY: Richman

OPINION

[**897] **RICHMAN, J.**--This appeal is by a criminal defendant from a postjudgment order directing him to pay \$ 2,631.04. The amount is small, and the odds of collecting it problematic. But the two issues raised by the appeal are, on the surface, as important as any we can confront: (1) Does a defendant who has pleaded guilty to controlled substance crimes and who is subject of a petition for recovery of hazardous cleanup expenses have a right under *Health and Safety Code section 11470.2* to have liability for those expenses decided by a jury? and (2) Does [**898] the defendant have a right to be present at the hearing when that liability is decided? We conclude that the plain and unambiguous statutory language compels the conclusion that the answer to each question is "Yes." [***2] The trial court answered otherwise, refusing a timely demand for a jury, and ruling that defendant had no right to be personally present when the amount of cleanup expenses was determined. In short, the trial court erred on both counts. Nevertheless, given the very limited scope, and impersonal nature, of the issue that would have been put before a jury, we conclude the errors do not qualify as prejudicial. We thus affirm.

BACKGROUND

In July 2004, police discovered defendant Michael Claude Wilen and Thomas Bonnetta operating a methamphetamine laboratory. The salient events with which we are concerned, all of which occurred in 2006, are easily recounted. [*275]

On July 28, both defendants entered open pleas of guilty to numerous charges and admitted a number of enhancement allegations. Among the charges admitted were manufacturing methamphetamine (*Health & Saf. Code, § 11379.6, subd. (a)*) and possessing precursors to that substance (*id.*, § 11383, *subd. (c)(1)*).

On August 9, the District Attorney of Contra Costa County filed a petition pursuant to *Health and Safety Code section 11470.2* for recovery of \$6,500 incurred in "seizing, eradicating, or destroying" the methamphetamine defendants had been [***3] manufacturing.

On September 15, the trial court sentenced defendant to state prison for a total term of six years eight months; Bonnetta's total term was eight years.¹ The court

imposed a "restitution fine" of \$1,200 on defendant, and \$1,600 on Bonnetta. The reasons for defendant being treated slightly more leniently than Bonnetta were explained by the court as follows: "[T]he Court has viewed Mr. Wilen in a different light than his codefendant, Mr. Bonnetta. Upon [***4] my review of the preliminary hearing testimony and the other documents that were submitted, I find that his culpability in this offense is less[] than that of Mr. Bonnetta[.]. [¶] There was manufacturing equipment not located in his [defendant's] locked bedroom. He was living with his girlfriend at the time of the offense, although he had a bedroom in Mr. Bonnetta's house for five months, while Mr. Bonnetta had lived in the house for two years.^[2] The house belonged to Mr. Bonnetta. His criminal history, while extensive, is less extensive than Mr. Bonnetta's."

1 The sentencing occurred over the vehement protests of the district attorney. His disagreement was so strong that he appealed for the purpose of overturning what he believed to be an excessively lenient sentence. One of the grounds on which the district attorney attacked the sentence was that various dismissals made by the trial court did not comply with *Penal Code section 1385*. We reluctantly agreed, holding that Supreme Court precedent required us to reverse without undertaking to inquire whether the trial court's noncompliance was subject to harmless error analysis. The Supreme Court recently granted review to examine the issue. (*People v. Bonnetta* (2007) 156 Cal.App.4th 1315 [68 Cal. Rptr. 3d 161], review granted Mar. 12, 2008, S159133.)

2 At a later point in the sentencing hearing, the prosecutor made a point of noting that "The People would also dispute the Court's finding about who lived at the residence based on the preliminary hearing transcript, for the record."

Before defendant was sentenced, the matter of the petition was brought up. [**899] While codefendant Bonnetta was being arraigned for sentence, counsel for defendant advised the court "We want to contest it ... I believe Mr. Wilen is entitled to a jury trial on the amount per the statute, so we would ask for a jury trial." The prosecutor responded, "Set it forthwith, please." A moment later, the prosecutor [***5] added, "Actually ... because--I think this is a civil matter under *Health and Safety Code section 11470.2(b)*, I don't think their presence is required." The court stated, "I don't believe it's required." [*276]

After Bonnetta was sentenced, but before defendant was sentenced, there was some discussion about the absence of supporting documentation.³ During this discus-

sion, the prosecutor stated: "My issue is are we going to have a court hearing or are they going to insist on a jury trial ... ? If we're going to insist on a jury trial, I want it set at the earliest possible date so that this can be resolved." The court put the matter over for a week, to September 22, the time before the abstract of judgment would be prepared, "and on that date you make your decision. You want a jury trial, you want a court trial, whatever it is that you want."

3 Although the amount specified in the petition was \$6,500, Bonnetta's counsel observed that "the supporting documents don't come close to 6,500. In fact, they're in the 3,000 range. And there's no underlying documents even for that." The prosecutor advised the court that she was still waiting for documentation from "Hazmat" (i.e., persons responsible [***6] for disposing of "hazardous materials") and the sheriff's department. At a later point in the hearing, the court gently chided the prosecutor for this delay: "frankly, it seems that they had plenty of time to figure out what their costs are. It's two years old."

The hearing on September 22 opened with the district attorney advising the court that the amount sought by the petition was reduced to \$4,552.10. Counsel for Bonnetta complained that \$2,600 of this amount was "supported by nothing more than a footnote" in the prosecutor's supporting papers, but that his client was nevertheless willing to have the matter heard at that time by the court "and deal with the amount that we just got in court today." The court asked defendant's counsel, "are you planning on setting a hearing or not?" Counsel replied "Yeah. [¶] ... [¶] Are we going to agree to this amount today? No." The court then set a "restitution hearing" for October 13.

But there remained the petition as against codefendant Bonnetta. The prosecutor told the court, "I need a jury trial waiver, [¶] ... [¶] Judge, I need a jury trial waiver." This is what followed:

"THE COURT: You want to take it?

"[THE PROSECUTOR]: Yes. [¶] Mr. [***7] Bonnetta, you have a statutory right to a jury trial on the petition in this matter. [¶] Do you understand that right?

"DEFENDANT BONNETTA: Yes.

"[THE PROSECUTOR]: And do you agree to give that right up so that only a court will decide the restitution amount?

"DEFENDANT BONNETTA: Yes.

"[THE PROSECUTOR]: Counsel, join and concur? [277]

"[COUNSEL FOR BONNETTA]: Yes.

"[THE PROSECUTOR]: The People also waive jury trial."

There followed an extensive discussion among the court and counsel for the three parties concerning the nature of the proceeding and whether it could be conducted in the absence of defendants. The [**900] court and the prosecutor believed that it could, and should not in any event delay the start of defendants' prison commitments. ⁴ The hearing ended with the prosecutor stating, "I need a jury trial waiver from Mr. Wilen." Defendant's counsel replied that "I want[] to see whether he's going to have the right to be here or not before he decides whether he's going to be waiving jury trial or not."

4 "[THE PROSECUTOR]: [T]he defendants don't have a constitutional right to be present at a trial where the only provision for it to exist is by statute. There's no constitutional right to a trial [***8] on the restitution amount, so the defendants need not be present. Nothing should hold them up from being sent to the Department of Corrections."

At one point in the hearing the court addressed defendant's counsel: "The Court has entered judgment. For all intents and purposes he's done. He can be shipped off tomorrow. [¶] ... [¶] He has no right to be present. This is strictly a monetary issue. He has no right to be present. So unless you can give me something that says there's a reason under the Constitution that he has a right to be present here, he's going to be shipped out."

At another point the prosecutor stated that while *Health and Safety Code section 11470.2* "creates a statutory right to a jury trial ... [t]he statute itself does not contain a right for the defendant to be present."

At the hearing the court gave defendant's counsel 72 hours to produce a letter brief with authority showing that defendant had a right to be present at the next hearing on October 13. On September 25, counsel for defendant submitted a memorandum to the court, arguing that defendant was entitled to be present at the hearing by virtue of *Penal Code section 977*, and that such right was also inherent [***9] in the concept of the jury trial promised by *Health and Safety Code section 11470.2*.

That same day the prosecutor submitted a letter brief that disputed both of defendant's points. First, citing *People v. Brach* (2002) 95 Cal.App.4th 571 [115 Cal. Rptr. 2d 753] (*Brach*), the prosecutor contended that "the constitutional right to jury trial is inapplicable to any

restitution hearing, including the hearing in such a case as this one." Second, "There is no provision within *section 11470.2* for the personal presence of the defendant. Accordingly, defendant has no constitutional or statutory right to be present at the restitution hearing in this case."

Neither defendant nor Bonnetta was present on October 13. The hearing opened with their counsel again maintaining that their clients had a right to be present. Reversing the course she had taken earlier, the prosecutor now [*278] argued that neither defendant had a right to a jury trial: "It's the People's position that where the defendant has waived jury trial in order to admit or plead no contest to the charges underlying the restitution petition, then a new [*sic*] jury to decide the issues for restitution lies in the discretion of the trial court."

Counsel for defendant responded, [***10] "this petition wasn't filed until after his waiver of a jury trial had already been entered and accepted by the Court, so he clearly was not told or informed or even knew that the People were going for ... restitution under 11470.2." Then, addressing the language of *Health and Safety Code section 11470.2*,⁵ counsel continued: "I think when it talks about in the discretion of the [**901] judge, that's saying whether it's the same jury or whether it should be ... a new jury in the discretion of the Court comma unless waived by the consent of all parties. [¶] I really believe that the way that's written is that it's up to the Court to decide whether it should be the same jury or a different jury. That's something they're leaving to the discretion of the Court. [¶] But in whether the defendant gets a jury trial, I don't believe the Court has any discretion on that. And he has not personally waived that. And they specifically add that at the end, that this is all unless waived."

5 Specifically, *subdivision (d)*, which provides: "If the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried [***11] and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties." (*Health & Saf. Code, § 11470.2, subd. (d)*.)

Apparently agreeing with the prosecutor about the impact of *Brach*, *supra*, 95 Cal.App.4th 571, the trial court ruled that defendant "does not have [a] right to be present, and therefore I'm going to deny the request to have him present. [¶] Now the second issue, ... is whether ... he does have a right to the jury trial when there has not been a jury impaneled for the purposes of the guilt proceedings. [¶] Under *Brach* it seems to state in its discussion that he is not entitled to a jury trial. [¶] ... [¶] ...

There is no constitutional right to a jury trial on issues of restitution, and there is no such right under *Health and Safety Code section 11470.2* to determine that restitution amount for eradication expenses. [¶] So under my reading of *Brach* ... the issue of whether or not it's the guilt phase jury versus the restitution phase jury is in the discretion of the Court ... [¶] But I don't [***12] read that case to say that there is an absolute right to a jury trial where there's been a waiver of his right to trial and he has pled guilty ... [¶] So I am going to deny that as well, and that is under *People v. Brach*."

The prosecutor then called three witnesses. The first was "an account clerk for the crime lab for the Sheriff's Department," who testified from the invoice [*279] she prepared for \$ 2,689.50 (16.3 hours at \$ 165 per hour), and that it represented "the total amount of expenditures for the crime lab in this case in seizing, eradicating, and destroying the methamphetamine laboratory." ⁶ The second witness worked for the hazardous materials program in the Contra Costa County Health Department, and testified about the \$ 782 cost of cleanup efforts by him and another county employee for red phosphorus. The third witness, employed by California's Department of Toxic Substances Control, testified his agency paid \$ 504.29 towards disposal costs of the red phosphorus. ⁷ The hearing was continued to November 3.

6 This testimony was received over objection by defense counsel that the witness had no personal knowledge of the cleanup operations, and thus had no foundation for expressing [***13] hearsay conclusions about the costs incurred during the cleanup operations.

7 It appears that local authorities collect and package the chemicals and materials, which are transmitted to the state agency, which in turn sends it out of state for incineration. In this case, the agents were dealing with approximately two ounces of red phosphorus residue in a large bucket. There was no dispute that the red phosphorus was seized at a location that defendant was using as his residence, i.e., not the location of the actual manufacturing site that was owned by Bonnetta.

On November 3, a fourth witness testified to \$1,080.60--20 hours at \$54.03 per hour--incurred by the drug investigation unit of the sheriff's department. ⁸ After [***902] hearing extensive argument from counsel, the court "set this over for decision" to November 17.

8 Defendant attacked this testimony on the ground that it came from an officer who was not present, was not even in the drug suppression unit at the time, and who thus did not know how much

of the time claimed was actually devoted to cleanup efforts, as opposed to "general detective duties."

On November 17, the court ruled that "the total recovery" against defendant would be [***14] \$2,631.04, and against Bonnetta \$1,344.75. Five days later the court filed a "Decision Regarding Defendant's Restitution," directing defendant to pay \$2,631.04. On December 7, defendant filed a timely notice of appeal from the written order.

DISCUSSION

The Statutes Governing Reimbursement of Illegal Drug Manufacturing Cleanup Costs

On his appeal, defendant contends that the evidentiary hearing held on the prosecution's petition was deficient in two respects. First, that it was conducted by the trial court acting as the trier of fact, when the trier of fact should have been a jury, as statutorily provided, and as defendant demanded in a timely fashion. Second, and without regard to who was acting as the trier of fact, defendant was entitled to be present when the merits of the petition were decided. [*280]

Before addressing the first of these contentions, it is useful to repeat the brief survey of the relevant statutes and their history, set out in a recent decision by our Supreme Court:

"On June 8, 1982, the voters of California adopted Proposition 8, an initiative amending our Constitution (*Cal. Const.*, art. I, § 28, *subd. (b)*) to grant 'victims of crime a constitutional right' to receive [***15] restitution from defendants convicted of crimes that caused the victims economic loss. [Citations.] In response, the Legislature enacted an array of statutes covering restitution or recovery of expenses by crime victims. Among those statutes are *Health and Safety Code section 11470.1* and *11470.2*, as well as *Penal Code section 1202.4*.

"In March 1983, at the urging of the Attorney General, state Senator Barry Keene introduced Senate Bill No. 1121 ... to add *sections 11470.1* and *11470.2* to the Health and Safety Code. The purpose of the bill was 'to require those who engage in illegal drug activities' to repay the costs incurred in seizing and destroying unlawful substances akin to 'the charges imposed under existing law for abating other nuisances.' [Citation.] The bill sought to alleviate the financial burden on law enforcement agencies--especially those in small rural areas--of eradicating marijuana plants and closing clandestine drug labs. [Citation.] By permitting law enforcement to recover its cleanup costs, the legislation sought to ensure that 'those who engage in illegal drug activities' would 'bear the costs of eliminating their abuses.' [Citation.]

The new legislation took [***16] effect on January 1, 1984." (*People v. Martinez* (2005) 36 Cal.4th 384, 388-389 [30 Cal. Rptr. 3d 779, 115 P.3d 62] (*Martinez*).)

Health and Safety Code sections 11470.1 and *11470.2* established a two-track approach for recovering the costs incurred in cleaning up illegal substance operations.

[HN1] (1) "The expenses of seizing, eradicating, destroying, or taking remedial action with respect to, any controlled substance or its precursors shall be recoverable from: [¶] (1) Any person who manufactures or cultivates a controlled substance or its precursors" (*Health & Saf. Code*, § 11470.1, *subd. (a)(1)*.) [HN2] [***903] A civil action to recover these expenses "may be brought by the district attorney, county counsel, city attorney, the State Department of Health Services, or Attorney General." (*Id.*, *subd. (d)*.) [HN3] "It shall not be necessary to seek or obtain a criminal conviction prior to the entry of judgment for the recovery of expenses. However, if criminal charges are pending against the defendant for the unlawful manufacture or cultivation of any controlled substance or its precursors, an action brought pursuant to this section shall, upon a defendant's request, be continued while the criminal charges are pending." (*Id.*, *subd. (c)*.) [HN4] (2) Testimony [***17] or admissions made by the [*281] defendant in a civil action "shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct." (*Id.*, *subd. (k)*.) An acquittal in the criminal proceeding will bar the civil action only if there was "a finding of factual innocence by the court" in the criminal case. (*Id.*, *subd. (l)*.)

Health and Safety Code section 11470.2 specifies an alternate procedure for recovering those expenses. In parallel language it provides that [HN5] "In lieu of a civil action for the recovery of expenses as provided in Section 11470.1, the prosecuting attorney in a criminal proceeding may, upon conviction of the underlying offense, seek the recovery of all expenses recoverable under Section 11470.1 from: [¶] (1) Any person who manufactures or cultivates a controlled substance or its precursors" (*Id.*, *subd. (a)(1)*.)

[HN6] "The prosecuting attorney may, in conjunction with the criminal proceeding, file a petition for recovery of expenses with the superior court of the county in which the defendant has been charged with the underlying offense. The petition shall allege that the defendant had manufactured or cultivated a controlled substance ... and that [***18] expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors. The petition shall also state the amount to be assessed." (*Health & Saf. Code*, § 11470.2, *subd. (b)*.)

[HN7] (3) The defendant "may admit to or deny the petition for recovery of expenses. If the defendant admits the allegations of the petition, the court shall rule for the prosecuting attorney and enter a judgment for recovery of the expenses incurred." (*Health & Saf. Code*, § 11470.2, *subd. (c)*.) However, "If the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties." (*Id.*, *subd. (d)*.)

(4) According to our Supreme Court, [HN8] "these provisions are the 'exclusive' means by which a government entity that is not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes." ⁹ (*Martinez, supra*, 36 Cal.4th 384, 394.)

9 The [***19] court was here quoting the characterization of Division Three of this appellate district in *People v. Narron* (1987) 192 Cal.App.3d 724, 729 [237 Cal. Rptr. 693] (*Narron*), that "Health and Safety Code section 11470.1 ... along with section 11470.2, provides the exclusive remedy for reimbursement of the expenses recoverable under these statutes." The *Narron* characterization was also accepted in *Brach, supra*, 95 Cal.App.4th 571, 576. Both *Narron* and *Brach* figured prominently, and favorably so, in the *Martinez* opinion.

[*282]

[**904] [HN9] (5) The concept of a "direct victim" derives from *Penal Code* section 1202.4, which is the primary statute implementing the constitutional right of a crime victim to restitution. In accordance with the constitutional command, section 1202.4 opens by declaring that "a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." (*Pen. Code*, § 1202.4, *subd. (a)(1)*.) Upon conviction, the sentencing court must order the defendant to pay a "restitution fine" and "[r]estitution to the victim." (*Id.*, *subd. (a)(3)*.) The amount of the restitution fine is, within minimum and maximum amounts, dependent upon the nature [***20] of the offense and the sentencing court's discretion; only in "compelling and extraordinary" cases may a restitution fine not be imposed. (*Id.*, *subds. (b)-(c)*.)

[HN10] (6) Victim restitution compensates for "economic loss" suffered as a result of the defendant's conduct. (*Pen. Code*, § 1202.4, *subds. (a)(1), (f), (f)(3)*.)

"The defendant has a right to a hearing ... to dispute the determination of the amount of restitution." (*Id.*, *subd. (f)(1)*.) The amount is fixed by the sentencing court, "based on the amount of loss claimed by the victim 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" (*Id.*, *subd. (f)*.)

[HN11] (7) "Victim" is statutorily defined to include specified classes of persons, and "Any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim [***21] of a crime." (*Pen. Code*, § 1202.4, *subd. (k)(2)*.)

Defendant Did Not Waive the Opportunity to Contend That He Was Deprived of His Statutory Right to a Jury Trial

As a threshold matter, the Attorney General contends that the merits of the jury trial issue are not properly before us because any jury trial right conferred by *Health and Safety Code* section 11470.2 was surrendered by defendant when he entered his pleas of guilty to the substantive offenses. The Attorney General is referring to a provision of the written change of plea form, where defendant initialed the following: "I understand that conviction of the charge(s) will require me to pay appropriate restitution to the victim(s) of my crimes and/or to pay a restitution fine of not less than \$ 200 and not more than \$ 10,000 [for a felony conviction] or not less than \$ 100 and not more than \$ 1,000 [for a misdemeanor conviction]." As the Attorney General [*283] reasons, even if it assumed that defendant had a purely statutory right to have a jury determine the prosecutor's petition, that right was encompassed within defendant's broader waiver of jury trial when he pleaded guilty. We cannot agree, because *Martinez* puts a large hole in the Attorney General's waiver [***22] argument.

Martinez considered the propriety of an order, made under the authority of *Penal Code* section 1202.4, for more than \$ 5,400 for drug laboratory cleanup expenses incurred by the same Department of Toxic Substances Control that helped remediate the laboratory run by defendant and Bonnetta. [**905] The Supreme Court held that the state department did not qualify as a direct "victim" entitled to restitution under the *Penal Code* provision because "defendant's attempt to manufacture methamphetamine was not an offense committed against the Department, nor was the Department the immediate object of his crime." (*Martinez, supra*, 36 Cal.4th 384,

392-394.) Expressly agreeing with *Narron*, the court held that, for a governmental entity which does not qualify as a direct victim of crime, *Health and Safety Code sections 11470.1 and 11470.2* "are the 'exclusive' means by which a government entity that is not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic hazardous substances resulting from controlled substance crimes." (36 Cal.4th at p. 394.)

(8) Restitution fines are a very different animal. [HN12] They are virtually mandatory upon conviction, even in the absence of a victim, except [***23] when the sentencing court finds "compelling and extraordinary reasons" for not imposing a restitution fine. (*Pen. Code, § 1202.4, subd. (c).*) Collected restitution fines do not go directly to a victim, but are "deposited in the Restitution Fund in the State Treasury." (*Id., subd. (e).*) And restitution fines are statutorily defined as punishment imposed within the context of a criminal proceeding. By contrast, victim restitution is discretionary, dependent upon the existence of a victim, and enforceable in civil courts. (See *People v. Hanson* (2000) 23 Cal.4th 355, 361-362 [97 Cal. Rptr. 2d 58, 1 P.3d 650]; *People v. Harvest* (2000) 84 Cal.App.4th 641, 647-648 [101 Cal. Rptr. 2d 135].)

There can be no doubt that the concepts of "restitution" and "restitution fine" as those terms were used in defendant's change of plea form derive from *Penal Code section 1202.4*; this can be verified with a quick glance at the statute's language.¹⁰ At the time defendant changed his pleas, both terms [***284] had established meanings. Equally established was the "exclusive remedy" of *Health and Safety Code sections 11470.1 and 11470.2*, certainly in this appellate district since *Narron* in 1987, and statewide since *Martinez*, which was decided in July 2005, more than a year [***24] before defendant changed his pleas.

10 "Upon a person being convicted of any crime in the State of California, the court ... [¶] ... shall order the defendant to pay both of the following: [¶] (A) A restitution fine in accordance with subdivision (b). [¶] (B) Restitution to the victim or victims" (*Pen. Code, § 1202.4, subd. (a)(2)-(3).*) "The restitution fine ... shall not be less than two hundred dollars (\$ 200), and not more than ten thousand dollars (\$ 10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars (\$ 100), and not more than one thousand dollars (\$ 1,000), if the person is convicted of a misdemeanor." (*Id., subd. (b)(1).*) The actual language of the plea provision language is obviously taken from subdivision (b)(1).

Here, none of the agencies compensated by the trial court's order qualifies as a direct victim entitled to resti-

tution. The Attorney General does not argue otherwise. The reporter's transcript of the hearing at which defendant changed his pleas is silent on the matter of restitution or cleanup costs. Thus, we cannot conclude that this was an instance where "the parties intended to leave the amount of defendant's [***25] restitution ... to the discretion of the court" (*People v. Crandell* (2007) 40 Cal.4th 1301, 1309 [57 Cal. Rptr. 3d 349, 156 P.3d 364].) Moreover, it is only common sense that defendant cannot [***906] be held to have knowingly and intelligently waived a right which up to then had never been mentioned--and which might never become an issue. (See *People v. Davis* (2005) 36 Cal.4th 510, 531-532 [31 Cal. Rptr. 3d 96, 115 P.3d 417]; *People v. Dorado* (1965) 62 Cal.2d 338, 353 [42 Cal. Rptr. 169, 398 P.2d 361] ["Obviously, defendant could not waive the right ... unless he knew of that right."].)

In light of the foregoing, we conclude that defendant did not waive his right to invoke the procedural protections of *Health and Safety Code section 11470.2* when he acknowledged at the time he changed his pleas that he would be subject to pay "restitution to the victim" and "a restitution fine." "

11 We also note an anomaly in the Attorney General's logic. Suppose that the cleanup costs exceeded \$ 10,000. Following the Attorney General's reasoning, defendant's purported waiver would limit recovery of expenses to the \$ 10,000 specified in the change of plea form. In light of the number of personnel and agencies required to clean up the site in this case, it is easy to imagine that remediation expenses for a major [***26] illegal laboratory could easily surpass that figure. It would follow that, if recovery in excess of that amount was sought, the waiver would not be effective, and *Health and Safety Code section 11470.2* would have to be used for the excess. This would merely return matters to where we began. Such a result would, to say the least, be peculiar.

It should be borne in mind that while there is no limit on direct victim restitution (see *People v. Giordano* (2007) 42 Cal.4th 644 [68 Cal. Rptr. 3d 51, 170 P.3d 623] [\$ 167,711.65]; *People v. Hove* (1999) 76 Cal.App.4th 1266 [91 Cal. Rptr. 2d 128] [\$ 286,565.92]), restitution fines are statutorily capped at \$ 10,000. (*People v. Crandell, supra*, 40 Cal.4th 1301, 1310; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534 [86 Cal. Rptr. 2d 134].)

The Trial Court Erred in Denying Defendant's Demand for Jury Trial

Much before us is undisputed. There is no doubt that the prosecuting attorney invoked *Health and Safety Code section 11470.2* as the basis for his [*285] petition. And no doubt that defendant did not admit the allegations of the petition. Most significantly, defendant did not waive his right to a jury deciding the allegations of the petition--indeed, he repeatedly demanded that a jury be empanelled.

Subdivision (d) of Health and Safety Code section 11470.2 [***27] could hardly be more clear: [HN13] "If the defendant denies the petition or declines to admit it, the petition shall be heard ... and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be heard either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties." Not surprisingly, all of the reported decisions take the defendant's right to jury trial as self-evident from the statutory language. (See *Martinez, supra*, 36 Cal.4th 384, 390 ["a criminal defendant who contests a petition for recovery filed in the prosecution for a drug offense is entitled to a jury trial before recovery can be granted ..."]; *Brach, supra*, 95 Cal.App.4th 571, 577 ["there is no showing defendants expressly consented to forgo their right to have the jury decide the issue"]; *Narron, supra*, 192 Cal.App.3d 724, 737 ["Section 11470.2 affords the defendant the opportunity to have the restitution issue decided by a jury."]; *id. at pp. 738-739* ["the formal procedures, including the right to a jury trial, required by section 11470.2"].)

[HN14] (9) "[T]o seek the meaning of a statute is not simply to look up dictionary [**907] definitions and [***28] then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, in the legal and broader culture. ..." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 [86 Cal. Rptr. 2d 884, 980 P.2d 433].) That is not hard here. We think it noteworthy that, apart from arguing that defendant has waived the point, the Attorney General makes no effort to argue that the words of *subdivision (d) of Health and Safety Code section 11470.2* have a meaning that differs from that argued by defendant--and recognized by *Martinez, Brach*, and *Narron*. However, out of respect for the trial court, we consider whether *Brach* demonstrates that denial of defendant's demand for a jury trial was proper.

Brach involved a defendant who pleaded guilty to cultivating marijuana. Repayment of the cleanup expenses was made a condition of her probation. On appeal, she attacked the condition as invalid because it was not imposed in compliance with *Health and Safety Code section 11470.2*. The Court of Appeal held--and this is all it held--that the objection was waived because it was not first raised before the trial court. (*Brach, supra*, 95 Cal.App.4th 571, 577-580.) The situation in *Brach* is

obviously distinguishable. [***29] We are not dealing with cleanup expenses imposed as a condition of probation, and we certainly do not have defendant failing to assert his rights under *section 11470.2*. Thus, we conclude that the trial court's ruling cannot be upheld under authority of *Brach*. [*286]

(10) If the issue of defendant's guilt or innocence had been submitted to a jury, *subdivision (d) of Health and Safety Code section 11470.2* gives the trial court the discretion to submit the contested factual issue of his liability for cleanup expenses to the same jury, or to empanel a new jury to determine that more limited issue. Because defendant pleaded guilty to the underlying charges, the former course was not an option. But the absence of a formal trial on the substantive offenses does not mean that the statute then became a dead letter. The language of the statute clearly contemplates that a separate jury may be empanelled, after the underlying charges have been resolved, and solely for the purpose of determining liability for cleanup expenses, if the defendant does not forgo or waive that option. That is what defendant sought. The trial court's discretion under the statute did not extend to a complete denial of what the [***30] statute provided. [HN15] "Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right" (*Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 220 [61 L. Ed. 1086, 37 S. Ct. 524] (dis. opn. of Holmes, J.).)

(11) The statute means what it says. [HN16] Because the statutory language is plain and its meaning unambiguous, it is to be enforced according to the usual and ordinary meaning of its terms. (*People v. Lawrence* (2000) 24 Cal.4th 219, 230-231 [99 Cal. Rptr. 2d 570, 6 P.3d 228]; *People v. Coronado* (1995) 12 Cal.4th 145, 151 [48 Cal. Rptr. 2d 77, 906 P.2d 1232]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299].) ¹² We therefore conclude that the trial court erred when it denied defendant's request for the [**908] jury trial guaranteed him by *subdivision (d) of Health and Safety Code section 11470.2*. We defer assessing the impact of this error until after we address defendant's second contention.

12 Moreover, in the event there are any doubts or statutory ambiguities, they would have to be resolved in favor of securing the right to trial by jury. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956, 958 [32 Cal. Rptr. 3d 5, 116 P.3d 479]; *Maldonado v. Superior Court* (1984) 162 Cal.App.3d 1259, 1266-1267 [209 Cal. Rptr. 199]; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 [141 Cal. Rptr. 604].)

The Trial Court Erred [*31] in Denying Defendant's Demand to Be Present at the Hearing on the Petition**

[HN17] (12) A defendant has a right to be present at critical stages of a criminal prosecution, a right protected by both the federal constitution and the state constitution. (*U.S. Const., 6th & 14th Amendments; Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [96 L. Ed. 2d 631, 107 S. Ct. 2658]; *Cal. Const., art. I, §§ 15, 16; People v. Perry* (2006) 38 Cal.4th 302, 311 [42 Cal. Rptr. 3d 30, 132 P.3d 235].) California has also guaranteed the right by statute: [HN18] "In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those [*287] portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present" (*Pen. Code, § 977, subd. (b)(1)*; see *id.*, § 1043, subd. (a) ["the defendant in a felony case shall be personally present at the trial"].)

[HN19] (13) The right includes the defendant's presence at "critical stage[s] of the criminal prosecution," which includes "sentencing and pronouncement [***32] of judgment." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257 [70 Cal. Rptr. 2d 334, 949 P.2d 31]; see *People v. Robertson* (1989) 48 Cal.3d 18, 60 [255 Cal. Rptr. 631, 767 P.2d 1109]; *People v. Dial* (2004) 123 Cal.App.4th 1116, 1122 [20 Cal. Rptr. 3d 573].)

We are unable to follow the logic of the Attorney General's efforts to argue that denying defendant the opportunity to be present at the trial guaranteed by *subdivision (d) of Health and Safety Code section 11470.2* was not error. The argument that "A criminal defendant does not have the right to confrontation at the sentencing stage of a criminal prosecution" is clearly predicated on the idea that a trial held pursuant to *section 11470.2* would constitute a part of sentencing. Yet by integrating that hearing into the sentencing process, the Attorney General inadvertently backs into the right of personal presence guaranteed by *Penal Code sections 977 and 1043*, as well as *section 1193*.¹³

13 The last cited statute provides in pertinent part: "Judgment upon persons convicted of commission of crime shall be pronounced as follows: [¶] (a) If the conviction is for a felony, the defendant shall be personally present when judgment is pronounced against him or her, unless the defendant, in open court and on the record, or in a notarized [***33] writing, requests that judgment be pronounced against him or her in his or

her absence ... and the court approves his or her absence during the pronouncement of judgment, or unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his or her absence" (*Pen. Code, § 1193, subd. (a)*, italics added.)

None of the reported decisions considering these provisions has held that it is harmless for a trial court to exclude a defendant who wishes to be present at the time judgment is pronounced. On the contrary, the defendant's absence has by itself been treated as error, frequently prejudicial. (See *In re Perez* (1966) 65 Cal.2d 224, 229 [***909] [53 Cal. Rptr. 414, 418 P.2d 6] (maj. opn. of Traynor, C. J.) ["Pronouncement of judgment ... is a critical stage in the criminal prosecution when the constitutional rights 'to appear and defend, in person and with counsel' [citation] apply, and a judgment pronounced in violation of those rights can be attacked by habeas corpus." (Italics added.)]; *In re Levi* (1952) 39 Cal.2d 41, 45 [244 P.2d 403] (maj. opn. of Traynor, J.) ["With certain exceptions not applicable here [citations], judgment and sentence [***34] in felony cases may be imposed only in the presence of the accused. [*288] If judgment is pronounced in his absence, and no justifying circumstances are shown, the judgment must be set aside. [Citations.]" (Italics added.)].) Even one of the decisions cited by the Attorney General finds the Court of Appeal stating that "a hearing on an amount of restitution ... is part and parcel of the sentencing process." (*People v. Cain* (2000) 82 Cal.App.4th 81, 87 [97 Cal. Rptr. 2d 836].)

(14) Nor are we persuaded by the Attorney General using the quotation from *People v. Waidla* (2000) 22 Cal.4th 690, 742 [94 Cal. Rptr. 2d 396, 996 P.2d 46], to the effect that "under sections 977 and 1043 of the Penal Code, a criminal defendant does not have a right to be personally present where he does not have such a right under section 15 of article I of the California Constitution." The exclusion in *Waidla* involved a defendant in a capital case who was not present at "16 conferences at bench, outside the presence of the jury, that related essentially to procedural, evidentiary, and housekeeping and other matters," plus "a single conference in chambers, outside the presence of the jury, that related to instructions." (*Id.* at p. 741.) We cannot [***35] conclude that *Waidla*, fairly read, stands for the proposition that a defendant may be categorically excluded from a proceeding where the Legislature has provided the right to have a jury determine a matter of contested fact. Thus, we conclude that [HN20] defendant did have at least a statutory right to be present at the hearing to determine his liability under *Health and Safety Code section 11470.2*.

We now address whether this error, and the denial of defendant's jury trial right, qualify as prejudicial, requiring reversal.

The Errors Were Not Prejudicial

Defendant argues in his brief that the denial of his statutory right to jury trial was structural error of federal constitutional dimension and requires a rule of per se reversal. We disagree, given that restitution in criminal cases is hardly a novel concept. Indeed, neither in his briefs nor at oral argument was defendant able to muster a single explicit decision sustaining his position. And the federal authorities are decisively to the contrary. (See *U.S. v. Milkiewicz* (1st Cir. 2006) 470 F.3d 390, 403, fn. 24 ["courts have concluded that restitution is not the sort of 'punishment' to which the Sixth Amendment applies"]; *U.S. v. Rostoff* (1st Cir. 1999) 164 F.3d 63, 71 [***36] ["All circuits that have decided the issue have held that ... the Seventh Amendment simply does not apply to a determination of the amount of a restitution order."]; cf. *U.S. v. Carruth* (8th Cir. 2005) 418 F.3d 900, 904 ["Those circuits which have considered the question anew in light of *Blakely* are in agreement that it did not alter the analysis or lead to a different result."].) [***289]

(15) In any event, we are not required to deliver an authoritative answer. For present purposes we shall proceed in the [***910] belief that the jury trial right provided by subdivision (d) of Health and Safety Code section 11470.2 is governed by state standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243], because our Supreme Court has held in an analogous context [HN21] when "the right to a jury trial ... is purely a creature of state statutory law," denial of that right is governed by *Watson*. (*People v. Epps* (2001) 25 Cal.4th 19, 29 [104 Cal. Rptr. 2d 572, 18 P.3d 2].) ¹⁴ The same standard governs error under state statutes guaranteeing defendant's presence: reversal is required "only if" "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Davis*, *supra*, 36 Cal.4th 510, 532-533, [***37] quoting *Watson*.)

14 In his reply brief, defendant appears to realize that *Epps* dooms his structural error argument, but he nonetheless "respectfully asserts that *Epps* was wrongly decided, in violation off the United States Constitution, and explicitly preserves the issue for federal review."

[HN22] (16) A criminal defendant is entitled to be in court if his presence will have a reasonably substantial relation to the opportunity to defend against the charges. (*People v. Ochoa* (2001) 26 Cal.4th 398, 433 [110 Cal. Rptr. 2d 324, 28 P.3d 78]; *People v. Waidla*, *supra*, 22

Cal.4th 690, 742; *People v. Ervin* (2000) 22 Cal.4th 48, 74 [91 Cal. Rptr. 2d 623, 990 P.2d 506].)

At first blush, it seems one can hardly talk about harmless error when considering a criminal hearing where the defendant is excluded, and his lawful demand for a jury spurned. But the hearing was not a full-blown trial, and the issue of guilt or innocence had already been settled by defendant's pleas of guilty. The subject of the hearing was infinitely more modest, namely, whether, and in what amount, defendant would be adjudged liable to pay for the costs of cleaning up the detritus of the criminal acts he had already admitted. The inquiry was actually even more restricted than that. By reason of his guilty pleas, [***38] there was no chance defendant would get off scot-free and Bonnetta would be stuck with the entire bill. In short, the only issue was the amount defendant would be ordered to pay.

And that issue would be decided on the most desiccated of grounds. The need for the cleanup would not be denied. The fact that it had actually occurred was never challenged. All that could be contested was the bottom line of what it cost. Defendant was not a percipient witness to the cleanup operation, so he could not offer personal input that would impeach any testimony concerning the operations.

People v. Epps, *supra*, 25 Cal.4th 19, is unusually apposite to the inquiry, because it too involved a denial of a statutory right to have a jury decide an issue collateral to guilt in a criminal proceeding, i.e., whether the defendant [***290] had as alleged suffered prior felony convictions. (See *Pen. Code*, §§ 1025, 1158.) The issue here, the amount only of cleanup costs, is only abstractly wider. Both were, in essence, decided on the basis of documents, here via witnesses who in effect authenticated the documents on which the matter was decided by the court.

Finally, the Attorney General draws our attention, and correctly so, [***39] to *People v. Bradford* (1997) 15 Cal.4th 1229, 1357 [65 Cal. Rptr. 2d 145, 939 P.2d 259], where our [***911] Supreme Court held that a defendant whose right of personal presence was denied bears the burden of demonstrating prejudice. This is significant because defendant in his briefs does not identify how his presence would have sharpened the questions his counsel asked at the hearing beyond asserting he "knew what chemicals and equipment belonged where ... and what belonged to him versus what belonged to his codefendant." But none of the witnesses called at the hearing had any personal knowledge of the layout of the drug laboratory. There thus appears to have been no lines of cross-examination, and certainly no real impeachment, that defendant could have suggested to his counsel had he been present.

On the other hand, the approach adopted by defendant's counsel at the hearing was that the bills submitted were in effect padded with improper factors such as bureaucratic overhead that would have been incurred in any event. This approach appears to have enjoyed some success. Of the total of \$5,056.39 sought by the prosecutor, the court assessed defendant a little over half that amount, \$2,631.04. There is no dispute that the [***40] \$782 and \$504.29 figures were correctly assessed only against defendant because they were attributable to disposing of the red phosphorus: as the prosecutor told the court, "Mr. Wilen was found in possession of the red phosphorus and Mr. Bonnetta had already been arrested." Defendant did not challenge them in the trial court, nor does he now on this appeal. The rest of the award was comprised of \$1,344.75, that is, exactly half of the \$2,689.50 of the claimed expenses of the sheriff's de-

partment crime laboratory. Not one cent from the claim for the \$1,080.60 purportedly incurred by the drug investigation unit of the sheriff's department was included. Nothing in defendant's briefs argues that his presence would have contributed to substantiating this approach, or increasing the potency of its delivery.

(17) We do not think there is a reasonable probability that a jury would have returned a more lenient verdict to defendant's face. The errors may thus be treated as nonprejudicial. (*Cal. Const., art. V, § 13; People v. Watson, supra*, 46 Cal.2d 818, 836.) [*291]

DISPOSITION

The order is affirmed.

Haerle, Acting P. J., and Lambden, J., concurred.

***** Print Completed *****

123WZM

Time of Request: Saturday, August 20, 2011 14:59:29 EST

Print Number: 2829:302120136

Number of Lines: 876

Number of Pages:

Send To: Eyster, David
MENDOCINO COUNTY DISTRICT ATTORNEY
100 N STATE ST RM 9
UKIAH, CA 95482-4416



Copyright 2011 SHEPARD'S(R) - 12 Citing references

People v. Wilen, 165 Cal. App. 4th 270, 80 Cal. Rptr. 3d 895, 2008 Cal. App. LEXIS 1152 (Cal. App. 1st Dist. 2008)

Restrictions: *Unrestricted*
 FOCUS(TM) Terms: *No FOCUS terms*
 Print Format: *FULL*
 Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted Shepard's Summary
 No subsequent appellate history.

Citing References:

◆ Positive Analyses:	Followed (1)
Other Sources:	Statutes (2), Treatises (1)

LexisNexis Headnotes: HN9 (1), HN10 (1), HN12 (2), HN17 (1), HN19 (3), HN20 (1), HN21 (1), HN22 (1)

PRIOR HISTORY (0 citing references)

(CITATION YOU ENTERED):

People v. Wilen, 165 Cal. App. 4th 270, 80 Cal. Rptr. 3d 895, 2008 Cal. App. LEXIS 1152 (Cal. App. 1st Dist. 2008)

CITING DECISIONS (9 citing decisions)

CALIFORNIA COURTS OF APPEAL

1. **Cited by:**
People v. Disandro, 186 Cal. App. 4th 593, 111 Cal. Rptr. 3d 857, 2010 Cal. App. LEXIS 1068 (Cal. App. 4th Dist. 2010)
 186 Cal. App. 4th 593 p.604
 111 Cal. Rptr. 3d 857 p.867

2. **Followed by:**
People v. Chappelone, 183 Cal. App. 4th 1159, 107 Cal. Rptr. 3d 895, 2010 Cal. App. LEXIS 515 (Cal. App. 1st Dist. 2010)
 183 Cal. App. 4th 1159 p.1184
 107 Cal. Rptr. 3d 895 p.915

UNPUBLISHED CALIFORNIA APPELLATE DECISIONS

3. **Cited by:**

People v. Hernandez, 2010 Cal. App. Unpub. LEXIS 8920 (Cal. App. 6th Dist. Nov. 9, 2010) LexisNexis Headnotes HN10

4. Cited by:

People v. De Jesus Hernandez, 2010 Cal. App. Unpub. LEXIS 7057 (Cal. App. 5th Dist. Sept. 3, 2010) LexisNexis Headnotes HN17, HN19

5. Cited by:

People v. Brown, 2010 Cal. App. Unpub. LEXIS 4950 (Cal. App. 2d Dist. June 30, 2010) LexisNexis Headnotes HN12

6. Cited by:

People v. Brown, 2009 Cal. App. Unpub. LEXIS 6066 (Cal. App. 2d Dist. July 27, 2009) LexisNexis Headnotes HN19

7. Cited by:

People v. Allen, 2009 Cal. App. Unpub. LEXIS 2576 (Cal. App. 4th Dist. Mar. 30, 2009) LexisNexis Headnotes HN21

8. Cited by:

People v. Robinson, 2009 Cal. App. Unpub. LEXIS 393 (Cal. App. 1st Dist. Jan. 16, 2009) LexisNexis Headnotes HN9, HN12

9. Cited by:

In re E.G., 2008 Cal. App. Unpub. LEXIS 10561 (Cal. App. 4th Dist. Dec. 30, 2008) LexisNexis Headnotes HN19, HN20, HN22

ANNOTATED STATUTES (2 Citing Statutes)

10. *Cal. Health & Safety Code sec. 11470.2*

11. *Cal. Penal Code sec. 1202.4*

TREATISE CITATIONS (1 Citing Source)

12. *6-145 California Criminal Defense Practice @ 145.01A*

C.

The Mendocino County Experience ...

**District Attorney 11470.2 Misdemeanor Dispositions:
Standardized Sentencing Recommendations (July 2011)**

District Attorney 11470.2 Misdemeanor Dispositions:

Standardized Sentencing Recommendations (July 2011)

H&S § 11357(c) – Possession of more than one ounce of marijuana

Two (2) years summary probation:

- Community Service, as stated on the record;
- Search and Seizure (4th Amendment waiver);
- H&S 11470.2 restitution, as stated on the record;
(addressed as a condition precedent and by written stipulation);
- No possession or cultivation of marijuana without a valid physician's 215 recommendation and then only in compliance with same;
- No cultivation in Mendocino County without mandatory compliance with 9.31 ordinance and Sheriff's zip tie program (meaning a zip tie is required for one plant or more);
- Marijuana and other contraband forfeited;
- Obey all laws;
- Aggregate court fines and fees = \$195.00

\$100 Victim Restitution Fine
\$40 Security Fee
\$30 Conviction Fee
\$25 Booking Fee

H&S § 11366.5 – Maintaining a place where controlled substances manufactured, stored and/or cultivated.

Three (3) years summary probation:

- Community Service, as stated on the record;
- Search and Seizure (4th Amendment waiver);
- H&S 11470.2 restitution, as stated on the record;
(addressed as a condition precedent and by written stipulation);
- No possession or cultivation of marijuana without a valid physician's 215 recommendation and then only in compliance with same;
- No cultivation in Mendocino County without mandatory compliance with 9.31 ordinance and Sheriff's zip tie program (meaning a zip tie is required for one plant or more);
- Marijuana and other contraband forfeited;
- H&S 11590 registration required;
- Obey all laws;
- Aggregate court fines and fees = \$955.00

\$570 Drug Program Fee
\$190 Criminal Lab Fee
\$100 Victim Restitution Fine
\$40 Security Fee
\$30 Conviction Fee
\$25 Booking Fee

C.

The Mendocino County Experience ...

**Stipulation Sample
Stipulation and Order Re: Recovery of Expenses
[Health and Safety Code § 11470.2]**

1 C. DAVID EYSTER
2 District Attorney
3 Mendocino County
4 Courthouse, Room 9
5 P.O. Box 1000
6 Ukiah, CA 95482
7 Telephone: (707) 463-4211

8 Attorney for Plaintiff

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF MENDOCINO

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA

13 PLAINTIFF,

14 vs.

15 [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx],

16 DEFENDANT.

MCUK CRCR 11-xxxxx

STIPULATION AND ORDER RE:
RECOVERY OF EXPENSES
[Health and Safety Code § 11470.2]

17 Defendant [xxxxxxx], by and through his/her attorney of record, *Joe and Jane*
18 *Defense Lawyer*, and the People of the State of California, by and through District Attorney
19 David Eyster, do hereby agree and stipulate, as follows:

20 1. That Health and Safety Code § 11470.2 allows the District Attorney to file a
21 petition for recovery of expenses in a criminal action to recover law enforcement and other
22 expenses incurred as a result of seizing, destroying and/or taking remedial action regarding the
23 controlled substance that is the subject of litigation in the instant criminal action.

24 2. That the instant defendant knowingly and intelligently, and with the advice of
25 counsel, waives the filing of a separate petition, and any notice that would have been provided
26 therein, for the recovery of expenses, as allowed by §11470.2.

3. That the instant defendant knowingly and intelligently waives both a generalized and itemized accounting of the reasonable expenses incurred by law enforcement in the instant case.

4. That the parties hereby stipulate for all purposes that the reasonable expenses incurred by law enforcement as a result of seizing, destroying and/or taking remedial action regarding the controlled substance that is the subject of litigation in the instant criminal action shall be deemed to be \$[xxxxx.00], and that said amount shall be paid to the Mendocino County Sheriff's Office.

5. The parties further stipulate that the above amount has been paid in full, as of [xxxxxx, xx, 2011]. The recovery of pertinent restitution is full and complete.

DATED this _____ day of xxxxxxxx 2011.

C. David Eyster
District Attorney

[Defendant's Name]
Defendant

[*Defense Lawyer's Name*]
Attorney for Defendant Clutter

ORDER

By stipulation of the parties and GOOD CAUSE APPEARING, the Court hereby accepts and orders the above terms and conditions.

DATED this _____ day of xxxxxx 2011.

JUDGE OF THE SUPERIOR COURT