S192176

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LEIVA, Defendant and Appellant.	Crim. _____ No. B214397 (Los Angeles Co. Superior Ct PA035556)

CRC 8.25(b)

-oOo-

APPELLANT'S PETITION FOR REVIEW

HONORABLE BARBARA M. SCHEPER, JUDGE, PRESIDING
LOS ANGELES COUNTY SUPERIOR COURT

MEREDITH J. WATTS, #78520
Attorney at Law
P.O. Box 14346
San Francisco, CA 94114
(415) 252-0170
WattsLaw@gmail.com

Attorney for Appellant
JOSE LEIVA,
(By appointment of the
Court of Appeal)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, Rules, and Other

SUPREME COURT FOR THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LEIVA, Defendant and Appellant.	)	Crim. _____ No. B214397 (Los Angeles Co. Superior Ct PA035556)

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Jose Leiva petitions this Court for review of the above-titled matter after a published opinion rendered by the Court of Appeal, Second Appellate District, filed March 1, 2011.[1] No petition for rehearing was filed in this case. Review is sought pursuant to California Rules of Court, rule 8.500, et seq., to resolve a legal conflict between this published opinion and *People v. Tapia* (2001) 91 Cal.App.4th 738 (*"Tapia"*).

The question involves the interpretation of the "summary revocation" language in Penal Code section 1203.2, subdivision (a). The majority in this case found that a summary revocation tolled the probationary period for all purposes, without end. The eloquent dissent by Presiding Justice Norman Epstein agrees with *Tapia* that it does not.

---

[1] The Court of Appeal's opinion is attached to this petition as Exhibit A.

NECESSITY FOR REVIEW

This case and *Tapia* present the same fact pattern – an individual was granted probation for a minor offense, and then immediately deported after serving his county jail term. In both this case and in *Tapia*, the individual was unable to report to the probation department in person as ordered, and probation was summarily revoked and a bench warrant issued within a year. Both men came to the attention of the authorities again long after their original probationary terms were completed. In both cases, the superior court found the individual in violation of the old probation, which it believed had been "endlessly tolled" under Penal Code section 1203.2, subdivision (a).[2]

The appellate court in *Tapia* reversed the formal finding of violation of probation in that case, reasoning that the probationer's failure to report during the probationary period was not willful, because he was deported against his will. Since there was no proof of any other violation during the probationary period, the superior court was without jurisdiction to revoke that probation years after it expired by operation of law after its own three-year term. (*Tapia, supra*, 91 Cal.App.4th at p. 741.)

The Majority in this case disagrees, and states that it finds *Tapia* was wrongly decided. (Exh A, Majority at p. 6.) It interprets the tolling provision in Penal Code section 1203.2, subdivision (a) -- which attaches to a summary revocation on assertion only -- as a complete tolling of the probationary period for all purposes, conceivably for

---

[2] All further code section references are to the Penal Code unless otherwise indicated.

decades ("endless tolling.") Applying that conclusion here, it found that this appellant violated his 2001 probation by illegally reentering the country in 2007 and failing to report to probation, four years after his original three-year probationary term had expired by its own terms. In other words, the Majority espoused the concept of "endless tolling."

The well-reasoned dissent by Presiding Justice Norman Epstein agrees with *Tapia* and finds that the Legislative history of the amendment resulting in this provision, together with commonsense statutory interpretation, defeat the Majority's literal and mechanistic reading of the tolling provision. Justice Epstein finds that the Majority's interpretation would result in the "absurd consequences" of "endless tolling." In conclusion, Justice Epstein explains that a summary revocation of probation is merely a "placeholder" for the court to "retain the jurisdiction to adjudicate a claim that defendant has violated a term of probation." (Exh A, Dissent at pp. 4-6.)

In this case, review by this Court is necessary to reconcile these different interpretations of law.

-o0o-

QUESTIONS PRESENTED

(1) Whether the tolling provision of Penal Code section 1203.2, subdivision (a) tolls probation for all purposes, making it possible for a person to be found in violation of probation for acts taken years after the original probationary period has run by operation of law, or whether summary revocation under section 1203.2, subdivision (a) merely preserves the court's jurisdiction to adjudicate whether the probationer violated his probation while it was in effect.

(2) Whether a court retains jurisdiction to find a probationer in violation of probation based on the following facts: The defendant is placed on probation in 2000, then deported. A warrant is issued for his arrest, based on the assertion that he has failed to report to the probation department, in 2001. In formal hearings on that alleged violation in 2009, the court does not find that violation true, but rather finds the probationer in violation for conduct that occurred in 2007, three years after probation would have expired? (*Tapia, supra.*)

(3) Whether appellant's due process rights to a fair hearing under *Morrissey, Gagnon,* and *Black* [3]were violated when the court relied on the uncorroborated statement in the probation report that he had admitted reentering the country illegally in 2007, at either the February, 2009 hearing or the October, 2009 hearing?

(4) Whether the documents offered through a deportation officer who had no personal involvement in their creation, and which were created for the purposes of litigation, violated appellant's rights of confrontation and cross-examination at a probation violation hearing, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and under the principles expressed in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, [129 S.Ct. 2527.]

---

[3] *Morrissey v. Brewer* (1972) 408 U.S. 471, 482; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782 ; *Black v. Romano* (1985) 471 U.S. 606, 611-612.

STATEMENT OF THE CASE AND FACTS

A. Introduction.

Appellant respectfully refers the Court to the "Factual and Procedural Background" section of the appellate court's opinion. (Exhibit A, Majority, at pp. 2-4.)

B. Procedural outline.

In addition, appellant offers here an outline of the procedural facts for the Court's convenience.

Original entry of plea and sentencing.

On March 28, 2000, appellant agreed to plead no contest to counts one, two, and six, all vehicle burglaries. (1CT 9.) In a probation report filed at the time, appellant indicated to the officer that he was in this country legally with a Green Card, or temporary work permit. (1CT 16.) Appellant was 21 years of age in the year 2000. (1CT 10.) He had no juvenile or adult criminal record. (1CT 14, 18.)

On April 11, 2000, appellant entered his plea to three counts of auto burglary. (1CT 21-23.) Imposition of sentence was suspended, and he was placed on formal probation for three years on each count, to run concurrently, conditioned on a county jail term. (1CT 21-23.)

Further conditions of probation included the requirement that appellant report to the Probation Officer within "1 business day" of his release from custody. (1CT 22.) He was also advised that, if he left the country voluntarily or was deported, he "shall not return unless legally entitled to do so." (1CT 22.) The balance of the charges was dismissed, in the interest of justice. (1CT 22.)

Appellant was ordered to make restitution to "all victims" as determined by the probation department (amount not specified), as well as to pay a restitution fine of $200. (1CT 21-22.)

Issuance of Bench Warrant.

On September 21, 2001, the court called the matter on a report of possible violation of probation, and appellant did not appear. The court found appellant in violation, and a bench warrant issued. (1CT 24.)

First 2008 Probation Hearing and First Supplemental Report.

On November 10, 2008, after a period of over seven years, appellant was back in custody in Los Angeles County, having been arrested on the bench warrant after a traffic stop. The case was called for a probation violation hearing. The court ordered a supplemental probation report, and delayed setting the matter for evidentiary hearing. Appellant was retained in custody. (1CT 25-26; Supp.1RT A-2.)

The supplemental probation report filed December 1, 2008, noted that appellant had no criminal record at all since his last appearance before the court, that is, since he was admitted to probation. (1CT 27.) It stated that appellant had failed to report to the probation department "monthly," as is apparently normally required, "on the following dates: 4/12/00 -8/1/01 'jail' and 9/1/01 - 'calendared/desertion.'" (1CT 28.)

This supplemental report also reflected a calculation that probation had been "active" for 529 days. "Should the court reinstate probation on the instant date [in 2008], the new expiration date would be 6/20/10." (1CT 28.) Appellant was stated to have a "total financial obligation" of $4,510. (1CT 28.)

The Probation Officer recommended that appellant be found in violation of probation, and be admonished and readmitted to probation "on the same terms and conditions." (1CT 29.)

Further 2008 Probation Violation Proceedings.

At a hearing held December 1, 2008, Public Defender counsel Marya Shahriary for appellant stated that appellant may have failed to report to Probation initially because he was deported directly after his release from county jail custody. (Supp.1RT B-1-B-2.) She requested a further hearing to determine whether appellant's failure to report was "willful." (Supp.RT B-2.)

The court stated its indicated sentence would be two years in state prison, since appellant currently was subject to an immigration hold. (Supp.1RT B-3.) The court granted a request for another probation report to address the question whether appellant was deported when released from County Jail in 2000 or 2001, and set a further hearing. (Supp.1RT B-4-B-5.) The court also requested that the report address the circumstances of appellant's current presence in the United States. (Supp.1RT B-5.)

Formal Probation Violation Hearing on February 13, 2009 (resulting in appeal #B214397).

On February 13, 2009, the court announced a formal, contested hearing. The District Attorney stated that he had been unable to get a representative from the Immigration Service (I.C.E.) to come to testify to appellant's status in this country, and admitted that he could not proceed on the allegation that appellant was illegally in the country,

without a witness. (1RT 1.)

The court suggested it might rely for its findings on appellant's apparent admission to the Probation Officer, reflected in the Second Supplemental Probation Report (1CT 34), that he had returned to this country illegally from El Salvador in February, 2007, and had been working as a carpenter. The report stated flatly: "His citizenship status is illegal." (1RT 2; 1CT 34.)

Appellant's counsel argued that this would be akin to a "corpus delicti" problem, if the only evidence of appellant's immigration status was the hearsay statement in the report. (1RT 3.) The District Attorney contended that the court could rely on the report, and that the "corpus delicti" rule was inapplicable. He pointed out that returning to this country illegally was itself a violation of probation. (1RT 4.)

At the conclusion of the hearing, the court found appellant in violation of probation for illegally reentering the country in 2007 and not immediately reporting. It readmitted appellant to probation, knowing he had a probation hold, and imposed a county jail term of "time served." The court then ordered appellant to contact the Probation Officer within 48 hours of his release from custody. (1RT 4; 1CT 41-42.) Appellant filed a notice of appeal on February 19, 2009, resulting in appeal #B214397. (1CT 43.)

Second case initiation (#B220540) and prehearing proceedings.

Appellant wrote a letter to the Superior Court dated April 8, 2009, stating that he realized that he was on probation, but was out of the country due to deportation, and could not report in person. He asked for guidance about how to satisfy the reporting requirements of his

probation and "finish" or "clear' the probation. (2CT 1.) No response was ever received.

The Probation Department filed a report, the fifth in this case, on May 14, 2009. The report stated that appellant had never reported, had been deported to El Salvador on March 18, 2009, and that this information was verified by the Immigration and Naturalization Service (now I.C.E.). (2CT 2A.)

On June 9, 2009, the court ordered appellant's probation revoked summarily, and issued a no-bail warrant for his arrest. (2CT 4.) Appellant was duly arrested and detained in county jail pending the outcome of these proceedings.

On September 17, 2009, Ms. Shariary argued that the court's ruling in the first case – that appellant was in violation, revoking probation, and reinstating probation to expire June 6, 2011 -- was in error because the court had been without jurisdiction over appellant. (2RT A-4.) She also argued that the court currently had no jurisdiction to finding appellant to be in violation, because he was no longer under an unexpired grant of probation. (2RT A-5.) The court ordered that probation remain revoked, and also ordered another supplemental probation report. (2CT 5; 2RT A-7.)

Formal probation revocation hearing, October 9, 2009.

At the close of the hearing, the court found appellant in violation of probation, rejecting counsel's several arguments. (2CT 8-9.) On November 9, 2009, the court sentenced appellant to prison for two years, the midterm, on count one, and concurrent terms of two years on counts two and six of the original 2000 complaint. (2RT C-1; 2CT 11-13)

The court awarded credits of 607 days. (2RT C-2; 2CT 12.)

Notice of appeal was filed November 9, 2009. (2CT 16.)

C. The appellate court Majority's opinion on the primary issue regarding "endless tolling", in which it disagrees with *Tapia* and with the Dissent.

The Majority recited the facts and holding of the *Tapia* case. (Exh A Majority at pp. 5-6.) It quoted the *Tapia* court's central holding as follows: "[I]t is clear that a summary revocation of probation suspends the running of the probation period and permits extension of the term of probation if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation." (*Tapia, supra,* at p. 741.) The Majority then stated that it found "the reasoning of *Tapia* unpersuasive, and decline to follow it." (Exh A Majority at p. 6.)

Beginning with the language of section 1203.2, subdivision (a), the Majority noted its amendment in 1977 to permit a trial court to revoke probation upon the issuance of a warrant for rearrest, and to provide for the tolling of the probation period. It cited *People v. DePaul* (1982) 137 Cal.App.3d 409, 413 for the proposition that "a revocation of probation suspends the running of the probationary period and if probation is reinstated, the period of revocation cannot be counted in calculating the expiration date." In other words, it endorsed the concept of "endless tolling." (Exh A, Majority at p. 6.)

The Majority reviewed the facts of this case, and applied the "endless tolling" rule to find that when appellant's probation was

reinstated in February 2009, "he had not completed the original three-year term of probation that begin in April 2000." (Exh A, Majority at p. 7.)

The Majority then asserted that *Tapia's* interpretation that section 1203.2 subdivision (a) tolling confers a temporary jurisdiction violates basic principles of statutory construction, because in the Majority's view, the provision is clear and unambiguous, providing that "a [summary] revocation of probation stops the running of the probationary period – nothing more, nothing less." (Exh A, Majority at p. 8.) . The Majority asserted that the *Tapia* court's interpretation effectively added language to the statutory provision "that is simply not there," when it found that the prosecutor would at a hearing have to prove a violation during the original period. (Exh A, Majority at p. 7.)

However, the Majority admitted that the statutory summary tolling provision leaves the question open just when a probationer is finally relieved of his duties under a probationary period that has been endlessly tolled. (Exh A, Majority at p. 8.)

The Majority believed the answer is found in *People v. Lewis* (1992) 7 Cal.App.4th 1949, which was cited in *Tapia,* and also in appellate counsel's and amicus' briefing on appeal. The Majority reviewed the facts and holdings in *Lewis,* and concluded that the case did not support Tapia or appellant's position here. It quoted extensively from *Lewis* emphasizing the court's reference to the trial court's power over a probationer during the term of probation, which extended until the probationer was discharged or imprisoned. (Majority at p. 9, citing *Lewis* at pp. 1954-1955.)

Since appellant was neither discharged from probation nor sentenced to prison before he allegedly reentered the country illegally and failed to report in 2007, and since appellant's probation had not expired under the Majority's "endless tolling" interpretation of summary revocation, therefore he was still bound by the terms of his 2000 probation in 2009 when formal hearings were held. The Majority credited the *Lewis* case for the holding that the trial court "had the power" over defendant at the time of the hearings in 2009 to find him in violation. (Exh A, Majority at p. 9.)

The Majority also opined that the *Tapia* Court's and the Dissent's interpretation – that summary revocation produces a "placeholder" type of jurisdictional tolling – is inconsistent with the intent of the statutory provisions providing for a grant of probation, "in lieu of a harsher sentence." (Exh A, Majority at pp. 9-10.) The Majority admits, as it must, that a probationer who is deported before he can report cannot be found in willful violation of probation under *People v. Galvan* (2007) 155 Cal.App.4th 978, 984. (Exh A, Majority at p. 10.)

However, the Majority continued, that result is inappropriate because a person such as appellant could be deported, be excused from his failure to report, then return to the country illegally after the running of the original probationary term and avoid any obligations imposed in the original grant of probation, such as proving he entered the country legally, or paying the restitution that was ordered.[5] The Majority

---

[5] The Majority's reference to the unpaid restitution is irrelevant. The court did not violate appellant's probation for failure to pay restitution. Furthermore, the practice of the courts is to convert restitution awards to civil judgments that injured victims may pursue once the maximum probation period has been reached. (Section 1203.1, subdivision (a); *see People v. Jackson* (2005) 134

concluded that "[s]uch a result is hardly consistent with the rehabilitative purpose of a grant of probation." (Exh A, Majority at p. 10.)

In conclusion, the Majority wrote: "Of course, the Legislature may limit a court's authority to modify or terminate probation to cases where a violation occurs during the original unexpired probationary period. As of yet, it has chosen not to do so. As a result, the trial court had jurisdiction to modify defendant's probation at the violation hearing in February 2009 and to terminate probation in October 2009." (Exh A, Majority, at p. 10.)

D. Presiding Justice Norman Epstein's Dissent disputing the Majority's "endless tolling" interpretation.

Justice Epstein in his dissent restates the issue as "whether the tolling provision [of § 1203.2, subd. (a)] allows the trial court to revoke probation based on a violation occurring *after* the original period of probation if there had been a summary revocation during that period. I would hold that it does not." (Exh A, Dissent at p. 1, emphasis in the original.)

After again recounting the basic facts leading up to the current proceedings, Justice Epstein recited the language of section 1203.2, subdivision (a), and then asked the essential question: "Does this mean that where there is no proof at the formal revocation hearing that a probation violation occurred during the original probationary period, the court may rely on conduct which occurred after that time to find a violation?" The Justice's answer was no. (Exh A, Dissent at p. 3.)

Cal.App.4th 929, 932-933.)

Justice Epstein next explicated the facts and holding of *Tapia,* and stated his agreement with its language and conclusion. (Exh A, Dissent, at pp. 3-4.) He then pointed out the crucial fact that the language of this statute [§1203.2, subd. (a)] is not at all clear and unambiguous, because it apparently provides for "endless tolling," which is illogical and impractical, and cannot be what the Legislature meant. Therefore, it is susceptible of construction to give it a sensible meaning, and not the absurd one that a summary revocation, based on allegations by a probation officer and nothing more, can produce "endless tolling" for all purposes. (Exh A, Dissent at pp. 3-4.)

Because no hearing is required for the issuance of a summary revocation, it may be based on unsound grounds, such as in this case, where appellant was asserted to have failed to report, but the failure could not be held against him because it was the result of deportation, and therefore not willful. (*People v. Galvan* (2007) 155 Cal.App.4th 978 (Exh A, Dissent at p. 4.)

Then, Justice Epstein did something the Majority studiously avoided – he reviewed the legislative history of this provision, and notes that it was passed to solve a particular problem. The notes of the Assembly Committee on Criminal Justice point out that the Legislature had to address a jurisdictional gap. The cases *Morrissey v. Brewer* (1972) 408 U.S. 471 and *People v. Vickers* (1972) 8 Cal.3d 451, had both come down, and they required that a certain amount of due process be provided in revocation of probation hearings. But, in those circumstances where probation revocation proceedings are found to have been conducted in an illegal or unconstitutional manner, and the matter is reversed on appeal, unless jurisdiction was somehow

maintained, the lower court would not have any way to take the matter up again on remand. Clearly, a "summary revocation," not issued with any sort of due process at all, would not comport with *Morrissey* or *Vickers* to provide for actual formal revocation of probation. The committee was asking itself, "Should this section [1203.2] be amended to provide more detail?" (Exh A, Dissent, at p. 5.)

Justice Epstein concludes that the Legislature's intent in drafting the amendments made in 1977 was directed at making certain that when probation is summarily revoked, "the probationary period is tolled so that the court can proceed with a formal revocation hearing [upon remand], even though the original period of probation has expired." In other words, summary revocation does not comport with due process, and cannot be "endless tolling" for all purposes. Rather, it is in the nature of a "placeholder by which the court retains jurisdiction to adjudicate a claim that the defendant had violated a term of probation." (Exh A, Dissent, at p. 6.)

Justice Epstein cited a case in support of his thesis that is never mentioned by the Majority, even in its footnote responding to the Dissent[6]: "As the court noted in *People v. Pipitone* (1984) 152 Cal.App.3d 1112 [201 Cal.Rptr. 18] [parallel citation omitted], summary 'revocation' of probation following the filing of a petition 'cannot affect a grant of probation or its conditions, ...' (*Id.*, at p. 1117 [201 Cal.Rptr. 18].) Rather, '... it is simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence. [Citation.] If probation is restored there has

---

[6] Exh A, Majority at p. 8, fn. 3.

been in effect, no revocation at all.' (*Ibid.*) Thus, in the context of the statutory scheme governing probation, the term 'revocation' has a meaning quite different from other contexts." (Exh A, Dissent, at p. 6.)

Justice Epstein further noted the irrefutable fact that the language of cases and statutes is not always as clear as could be desired. The *Lewis* opinion, for example, stands for the following proposition: "The term 'reinstatement of probation' suffers from this same misunderstanding of the context in which this phrase is used." (*People v. Lewis, supra,* 7 Cal.App.4th at p. 1955.) In that regard, the term is different from "termination" of probation, or a "discharge" from probation, acts which require that judgment be pronounced if no sentence was imposed when probation was granted. (*Ibid.*) (Exh A, Dissent, at p. 6.)

Addressing the Majority's worry that appellant could get off "scot free," Justice Epstein stated that he cannot, if it is shown at a formal revocation of probation hearing comporting with due process that he violated probation during the original probationary period. Justice Epstein concluded that: "It is undisputed that defendant's probation was revoked in June 2009 and in October 2009, but that neither revocation was based on a violation within the original period of probation. The court lacked jurisdiction to revoke probation based on conduct occurring after probation expired, and its orders doing so should therefore be reversed." (Exh A, Dissent, at pp. 6-7.)

ARGUMENT

I.

THE DISSENT HAS THE BETTER ARGUMENT IN THIS CASE: *PEOPLE V. TAPIA* WAS CORRECTLY DECIDED AND THE TRIAL COURT LACKED JURISDICTION HERE TO FIND A FORMAL VIOLATION OF PROBATION, FOR AN ACTION THAT TOOK PLACE OUTSIDE THE ORIGINAL PROBATIONARY PERIOD

A. Appellant references and adopts the Dissent's reasoning in toto.

The Dissent has made appellant's argument for him in this case, more eloquently than undersigned counsel ever could, and therefore, appellant wholeheartedly adopts and references the Dissent as if it were reproduced herein in toto.

B. The Majority misunderstood *People v. Lewis*.

As is recited above, the Majority found support for its interpretation of section 1203.2, subdivision (a), in *People v. Lewis* (1992) 7 Cal.App.4th 1949. The Majority quoted extensively from *Lewis*, replicated above, but the part it omitted in the ellipses contradicts its conclusions. The omitted portion in the middle of the quoted section reads:

> "Just as the felon sentenced to state prison pursuant to the determinate sentence statutes is informed at judgment of the specific maximum period of incarceration he or she will suffer, **those statutes that**

> **provide for the alternate grant of probation require the terms and conditions of probation be enforced during the specifically imposed length of term of probation.** For instance, section 1203.2, subdivision (a), states "At any time during the probationary period of a person released on probation ... if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and *at any time until the final disposition of the case*, rearrest the person and bring him or her before the court ...." (Italics added.) And section 1203.3, subdivision (a) states: "The court shall have authority *at any time* during the *term* of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. ..." (Italics added by the *Lewis* court.)" (*Ibid* at pp. 1954-1955; bold emphasis added.)

The principle that the Majority purports to extract from *Lewis* is at best dicta, and is taken out of context. The Majority's view of *Lewis* is not consonant with that court's opinion as a whole.

The *Lewis* court was focused on the lower court's jurisdiction to continue to enforce the terms and conditions of probation *"during the specifically imposed length of term of probation."* (*Lewis* at p. 1955, emphasis added.) This makes internal sense, because the *Lewis* court had a very specific problem to solve. The court summed up its issue as follows: "The single issue in this case is a determination as to whether probation terms are enforceable during the period subsequent to the violation of probation hearing [pursuant to *Vickers, supra*] and prior to the court formally proceeding to a disposition thereon." (*Lewis,* 7

Cal.App.4th at p. 1951.)

In brief, defendant Lewis was placed on probation pursuant to a plea agreement, and required to report to the probation department. When he failed to report as directed, his probation was summarily revoked. At the formal violation of probation hearing, Mr. Lewis admitted the probation violation, and sentencing was continued for one month. It was the court's jurisdiction during this one-month hiatus in proceedings that was later challenged. During that month, Mr. Lewis was again arrested and accused of a new offense. But at the scheduled sentencing proceeding on the probation violation, his original probation was reinstated.

The district attorney subsequently filed a petition to revoke probation based upon the arrest for the new offense committed during the month in question. The trial court found defendant in violation of his probation again based on the new offense, and sentenced him to two years in state prison. (*Lewis* at p. 1950-1951.)

The Court of Appeal affirmed, holding that the terms and conditions of probation do not lapse or become unenforceable *between the violation of probation hearing and the reinstatement of probation.* (*See Lewis*, at pp. 1953-1954.) The trial court had not lost its probation supervision jurisdiction over Mr. Lewis.

This was a narrow issue, one of the wrinkles that needed to be ironed out in the wake of *Morrissey* and *Vickers*, which required certain kinds of due process protections at probation revocation hearings. Mr. Lewis's lawyer thought to assert that after the "*Vickers*" hearing and before the sentencing, he was not subject to probation supervision and could not be found in violation for another act during

that month.

Critically, the appellate court found continuing jurisdiction on the part of the lower court, because all of these events fell within the original period of probation, "*during the specifically imposed length of term of probation.*" (*Lewis* at p. 1955, emphasis added.)

The *Lewis* court had no occasion to address what would happen to the court's jurisdiction if the new offense happened years after the "specifically imposed length of term of probation" had run. The Lewis court had no reason to contemplate, nor did it endorse, the "endless tolling" of the terms and conditions of probation as found by the Majority here.

In fact, the *Tapia* court and the Dissent have the better interpretation of *Lewis*. A summary revocation of probation suspends the running of the probation period and permits extension of the term of probation if, *and only if,* probation is reinstated based upon a violation that occurred during the unextended period of probation. (*See People v. Lewis, supra,* 7 Cal.App.4th at p. 1955 --summary revocation is simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence; if probation is restored, there has, in effect, been no revocation at all].)

"Just as the restoration of probation erases the summary revocation, so too does the court's failure to find a violation within the period of probation. Put another way, the jurisdiction retained by the court is to decide whether there has been a violation during the period of probation and, if so, whether to reinstate or terminate probation." (*People v. Tapia, supra,* 91 Cal.App.4th at pp. 741-742.)

C. Application to the case at hand: the prosecutor proved no willful violation during the original term of probation, and therefore the courts had no jurisdiction to readmit appellant or send him to prison in 2009.

In this case, probation was summarily revoked during the original probationary period under section 1203.2, subdivision (a) on the strength of an allegation in a probation report that appellant had failed to report to his probation officer, as required. (1CT 24.)

At the probation violation hearing held February 13, 2009, the People argued appellant should be found in violation based on a statement in a new probation report that he had admitted reentering the country illegally sometime in February 2007. (1CT 34.) Over counsel's objection, the court relied on this admission to find appellant in violation of probation. It readmitted appellant to probation and ordered him to report to probation after his release from County custody. (1RT 7; 1CT 41-42.)

Based on the hearsay of the probation report, defendant admitted reentering the country without the appropriate documents, which would violate the condition that he obey all laws and the condition that he not reenter the country illegally. (*People v. Campos* (1988) 198 Cal.App.3d 917, 921.) However, he did not admit reentering the country before his original probationary period had expired, but only in 2007.

When appellant appeared again in court on September 17, 2009, counsel argued that the prior order reinstating probation was without jurisdiction and that the court now had no power to find

appellant to be in violation, because he was no longer under an unexpired grant of probation, under the authority of *People v. Tapia, supra.* (2RT A-4 - A-7.) At a subsequent hearing on October 9, 2009, a different Superior Court judge again found appellant in violation of probation for reentering the country illegally in 2007. (2RT B-42; see 2RT B-23 - B-24.)

In both instances, the court erred as the Dissent so well demonstrated. The superior court lacked jurisdiction to revoke probation based upon the offense of illegal reentry that appellant apparently committed in 2007, because that reentry did not occur within the original probation period. (*People v. Tapia, supra*, 91 Cal.App.4th at pp. 741-742.)

The *Tapia* court stated:

> "While the summary revocation of probation does suspend the running of the probationary period so that the court retains jurisdiction to determine at a formal revocation hearing whether there has, in fact, been a violation, an unproved violation cannot support the conclusion that, after the date on which probation expired under its original terms, a violation occurred upon Tapia's failure to report to the probation department when he later returned to the United States." (*Tapia, supra*, at p. 741.)

The point is, the summary revocation tolls the time during which the court retains jurisdiction to hold a formal hearing, but does not produce "endless tolling" of all of the terms and conditions of probation. The *Tapia* court correctly relied on *People v. Hawkins* (1975) 44 Cal.App.3d 958, 966-967, for the proposition that the point of a

summary revocation under *Morrissey* was a first step allowing the court to summon the probationer to appear, and comported with due process only because it was not final in and of itself.

The Majority asserts that the court in *People v. DePaul* (1982) 137 Cal.App.3d 409 rejected an interpretation of "tolling" similar to the one adopted by *Tapia,* and urged here. (Exh A, Majority at p.6.) The Majority has misread the *DePaul* court's opinion. When the *DePaul* court discussed the opinion in *People v. Brown* (1952) 111 Cal.App.2d 406, it noted that the summary revocation during Brown's original probation period had preserved the court's jurisdiction to bring Brown back to court, but at that time the probation laws and rules did not allow the court to do anything other than sentence Mr. Brown to prison. (*DePaul* at p. 412.)

The Legislature responded to the *Brown* court's direct plea to revise the law, and under a new version of the probation laws, the court acquired jurisdiction to also readmit a probationer in Brown's shoes to probation. "The purpose of the amendment...was to liberalize the rule and permit the court not only to retain the right to impose sentence at a subsequent time, but also to extend the original term of probation to the maximum time for which it could have been originally fixed in lieu of sentencing or, as an alternative, to grant a completely new term of probation without reference to the length of the original term or time served under it." (*Ibid,* citations omitted.)

Contrary to the Majority's assertions, the *DePaul* court's focus on a review of the *Brown* court's decision and the subsequent Legislative actions and court decisions does not in any way conflict with the *Tapia* court's conclusions that the terms and conditions of probation

expire at the end of the original probationary period. It only specifies that it is within the court's jurisdiction, when it calls a probationer back under a warrant issued after a summary revocation, to do a number of things besides just send the probationer to prison. Under newly applicable Due Process requirements, the next step is a formal revocation of probation hearing before the court can do anything beyond simply summoning the probationer to court.

Furthermore, the *DePaul* court stated specifically that a probationary term continues to run after a summary revocation. "The only case to find a complete interruption or tolling of the probationary period, pushing back the expiration date, was one where criminal proceedings had been suspended and the defendant was committed to CRC. The court concluded that the probationary period was tolled for the duration of the commitment. [citation.]" *(People v. DePaul, supra,* at p. 413.) The Majority's comment that all the DePaul court addressed was the probationary term's "expiration date," misreads the opinion. The assumption that the *term* of probation extends beyond the original probation period is simply not supported at all by *People v. DePaul.* (See RB 11.)

The Majority completely ignores the case *People v. Pipitone* (1984) 152 Cal.App.3d 1112, which was cited by appellant in his briefing and referred to by the dissent. (Exh A, Dissent, at p. 6.) The conclusion in *Pipitone* comports with the thrust of both *Tapia* and the Dissent: "As a matter of due process, summary revocation cannot affect a grant of probation or its conditions, given the right to a hearing as set forth in *People v. Vickers* (1972) 8 Cal.3d 451, 458-459 [citations], except to the extent that probation is suspended *pending the hearing.*"

Clearly, due process considerations expressed in *Morrissey* and *Vickers* would not allow a "summary" revocation to extend the probation terms and conditions themselves, according to the *Pipitone* court. This is not an issue of limited or unlimited jurisdiction over the probationer – the court may bring the probationer before it on the warrant issued once the summary revocation is found. That is substantial personal jurisdiction. However, that jurisdiction is terminated if a violation during the original probationary period is not proved at the subsequent formal hearing.

-oOo-

II.

IT WAS A VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS UNDER *MORRISSEY*, *GAGNON*, AND *BLACK* TO REVOKE HIS PROBATION BASED ON AN ADMISSION REPORTED BY THE PROBATION OFFICER, UNSUPPORTED BY TESTIMONY OR OTHER EVIDENCE

A court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation...." (Pen.Code, § 1203.2, subd. (a).) As the language of section 1203.2 would suggest, the determination whether to revoke probation is largely discretionary. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378-370.) Although that discretion is very broad, the court may not act arbitrarily or capriciously; its determination must be based upon the facts before it. (*People v. Buford* (1974) 42 Cal.App.3d 975, 985.)

"[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982, citing and quoting *People v. Rodriguez* (1990) 51 Cal.3d 437, 439.) However, the evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation. (*People v. Galvan, supra; see also, People v. Zaring, supra,* 8 Cal.App.4th at pp. 378-379 [trial court abused its discretion by revoking probation for a tardy court appearance caused by circumstances beyond probationer's control].)

When the District Attorney stated at the contested hearing on February 13, 2009 that he could not produce a witness competent to testify about appellant's immigration status, that was an admission that he had no proof of a willful violation of probation by appellant by reentering the country illegally and failed to report after doing so.

If there is no competent evidence regarding when appellant returned to this country, a violation for failure to report within a given time frame upon a defendant's return also cannot be found. (*People v. Galvan, supra,* at pp. 982-983.)

The court attempted to get around the problem of no available witnesses from the Immigration Service by seeking the information necessary to make the violation determination from the Probation Department. It directly asked Probation to inquire into appellant's immigration status. (Supp.RT B-5.) In response, the second supplemental probation report contains the somewhat cryptic notation: "On 04-25-00, deportation proceedings were conducted. On 09-16-05, defendant was detained at an immigration check point and was charged with 'entry of alien at improper time or place misrep.' Prosecution was

declined." (1CT 33.)

It is unclear what the meaning of these entries are, and the probation officer who drafted the report was not produced to testify about it. Under *Galvan*, his probation clearly could not be revoked for a failure to report initially, because that failure was presumptively not "willful." (*Galvan, supra*, at p.984.) However, this second supplemental probation report also contained a hearsay statement from appellant. (1CT 34.) He purportedly told the probation officer that he had returned to this country illegally from El Salvador in February of 2007, almost two years before the present formal hearing. (1CT 34.) The court decided it could base the finding of a violation on this hearsay, and it did so. (1RT 4.)

Appellant argued on appeal that *People v. Smith* (1970) 12 Cal. App. 3d 621 stood for the proposition that a probationer could not be violated based on hearsay contained in a probation report. *(People v. Smith, supra*, at p. 628.) The Majority challenges this by emphasizing that the *Smith* court found no allegations of fact in the probation report that it could rely on. (Exh A, Majority at p. 11.)

Appellant disagrees. On review in *Smith*, the appellate court assumed that the defendant's failure to make child support payments would constitute a violation of the term of probation directing him to "obey all laws," but found the mention that he was behind in his payments was not sufficient to satisfy the requirements of an *allegation of the fact* that he had violated the terms of his probation. In that case, the allegation was predicated not on facts known or verified by the probation officer, but on rank hearsay, i.e., "Recently, we were notified" that the defendant was behind in his support payments. (*Smith, supra,*

at p. 628.)

Appellant believes this case is analogous to *Smith*. Although hearsay may be admissible at a revocation of probation hearing, without testimony from the probation officer who conducted the interview, it is impossible to determine if the evidence is competent and reliable. Appellant speaks little English, and always uses an interpreter in court. (*See* 1RT 1.) There is no indication that the probation officer spoke or understood Spanish. With a language barrier, the statements recorded in this report are even less reliable than ordinary hearsay. As the *Smith* court put it: ". . . an order revoking probation is ineffective if the probation officer's report on which the court solely relies has no factual basis. As expressed in *In re Dearo* [1950] 96 Cal.App.2d 141, 143: 'The court may act informally but it may not act arbitrarily; to be valid the order of revocation must be based upon a factual showing sufficient to justify an exercise of discretion.'" (*Smith* at p. 627.)

The probation report in this case is akin to a police report in a garden-variety criminal case, which is not considered evidence of the truth of the hearsay statements from witnesses and sometimes from the accused that it contains. (Evidence Code § 1200; *People v. Baeske* (1976) 58 Cal.App.3d 775, 780.) A statement by the defendant recounted in a postconviction probation officer's report could not be relied upon to determine whether the offense was a "strike." (*People v. Trujillo* (2006) 40 Cal.4th 165, 179.)

However, certain due process rights are guaranteed to probationers and parolees facing revocation of their conditional liberty. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 482.) Certain minimum due process procedures must be observed in the revocation proceeding. (*Id.*

at pp. 488-489.) The following Term, the Court held that these same due process requirements apply to probation revocations. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782 .)

Ten years after *Gagnon* was decided, the Supreme Court reiterated that: '[p]robationers have an obvious interest in retaining their conditional liberty, and the State also has an interest in assuring that revocation proceedings are based on accurate findings of fact and, where appropriate, the informed exercise of discretion." (*Black v. Romano* (1985) 471 U.S. 606, 611-612.) The *Black* court pointedly referred to a probationer's right to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation. (*Black* , supra, at p. 612.)

Therefore, the Court in *Black* and *Gagnon* strengthened the due process rights of probationers facing revocation. Appellant had a right to cross-examine the probation officer who wrote the report asserting that he had admitted reentering the country illegally in 2007. Without that opportunity to confront and cross-examine the witnesses against him, appellant's fundamental rights under the Due Process Clause of the Fourteenth Amendment were violated, and the revocation was based on insufficient evidence.

III.

THE TESTIMONY OFFERED BY A DEPORTATION OFFICER BASED ON I.C.E. DOCUMENTS PRODUCED FOR THIS HEARING VIOLATED APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM

The District Attorney presented the testimony of Terrence Rachel, a Deportation Officer for Immigration and Customs (I.C.E.), formerly known as the INS. (2RT B-6-B-8.) Mr. Rachel testified about exhibits in evidence over a continuing objection from the defense based on hearsay, the Sixth and Fourteenth Amendments, lack of personal knowledge, and foundation. (2RT B-9- B-16.) The documents from I.C.E. files on appellant indicated appellant was deported in September of 2005, and again in February, 2009. (2RT B-20-B-21.) One of the documents, a warrant for removal for deportation, referred to appellant's reentry into the United States in 2007. (2RT B-23 B-24.) The document also indicated that appellant was removed again March, 2009. (2RT B-25.)

Mr. Terrence also testified he could find no record of permission for appellant to legally re-enter the United States. (2RT B-26.)

On cross-examination, counsel established that the witness had not participated in any way in preparing any of these documents. Nor had he been present when they were prepared, signed, or scanned into the computer. Nor had he spoken before this hearing with any of

the people who prepared or signed the documents. (2RT B-28 - B-35.) Mr. Terrence also testified that these documents were prepared to enforce consequences of illegal reentry, which involves court proceedings. (2RT B-35 - B-36.) He also agreed that the Department of Justice relies on these documents to determine whether someone is legally or illegally in this country. (2RT B-37.)

Appellant argues here that the testimony of Mr. Terrence violated appellant's Fourteenth Due Process rights to confront and cross-examine witnesses against him. (*Morrissey v. Brewer, supra, Gagnon v. Scarpelli, supra, Black v. Romano, supra, People v. Vickers, supra.*)

In this proceeding, the District Attorney presented a witness from I.C.E. who testified about documents that he had no personal knowledge of, had not prepared, had not signed, and had not produced. They were retrieved from I.C.E. computers by the agency's "trial attorney" who was not identified. (2RT B-13.)

The opportunity to cross-examine the authors of these documents was denied appellant. Therefore, the presentation of a random deportation officer's testimony about documents he had never seen before, but that were produced by his office's trial attorney for a court proceeding, fails to satisfy defendant's due process right to confrontation. (*See Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (*Crawford*).)

Although these documents are not scientific forensic reports, as were the subject of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ----, 129 S.Ct. 2527, 174 L.Ed.2d 314 (*Melendez-Diaz*), the rule of that case, which is merely an interpretation of *Crawford,* should apply by analogy here. Under *Melendez-Diaz,* there is no substitute for

cross-examination of the creator of a scientific report. Here, defendant had no effective means to challenge whether any of the information entered into his records at I.C.E. was correct. The opportunity for cross-examination is essential to the protection guaranteed by the confrontation clause, because " 'the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.' " (*Melendez-Diaz, supra*, 557 U.S. at p. ----, 129 S.Ct. at p. 2536, quoting *Crawford, supra*, 541 U.S. at pp. 61-62, 124 S.Ct. 1354.)

Melendez-Diaz rejected the contention that evidence of scientific testing is inherently reliable, noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz, supra*, 557 U.S. at p. ----, 129 S.Ct. at p. 2536.) The court noted that many forensic laboratories are, in effect, subsidiaries of the law enforcement agencies they serve, creating this risk of manipulation. *(Ibid.)*

Appellant asserts that the same analysis applies here. Documents kept by I.C.E. but only retrieved for litigation by a trial attorney are testimonial documents, retrieved for litigation purposes, and subject to human error and manipulation. Therefore, trial counsel's objections were correct and to the point, and the court should have rejected the exhibits provided by the District Attorney, as well as the testimony of Mr. Terrence. (*See also, United States v. Martinez-Rios* (5th Cir. 2010) 595 F.3d 181; 186 – Martinez-Rios was unable to cross-examine the person who had prepared a testimonial statement to

be used against him at trial. Therefore, the district court erred in admitting I.C.E. documents without providing the testimony of the records analyst who prepared them.)

-o0o-

CONCLUSION

Appellant prays this court to accept review in this case to decide whether People v. Tapia, supra, and the Dissent are correct that section 1203.2 does not create endless tolling of a probationer's term, and that it is merely a placeholder that permits the court to return him to court to determine if he violated his probation during the term as specifically prescribed.

Respectfully submitted,

Meredith J. Watts

Meredith J. Watts, #78520
Attorney for Appellant
JOSE LEIVA

April 11, 2011

-o0o-

STATEMENT OF WORD COURT
APPELLANT'S PETITION FOR REVIEW

I certify, under penalty of perjury, that the opening brief submitted in this matter by priority mail to the court and first class mail to the service list on April 11, 2011 contains **8,307 words**. This word count is provided in accordance with the Rules of Court, and is based on the word count provided by my computer word processing program.

Respectfully submitted,

Meredith J. Watts

Meredith J. Watts, #78520
Attorney for Appellant
JOSE LEIVA

April 11, 2011

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE LEIVA, Defendant and Appellant.	B214397 (Los Angeles County Super. Ct. No. PA035556)

APPEALS from judgments of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

Michael P. Judge, Public Defender, Albert J. Menaster and Karen Nash, Deputy Public Defenders, for the Public Defender of Los Angeles County as Amicus Curiae.

Defendant Jose Leiva appeals from judgments entered following separate findings that he violated the terms and conditions of his grant of probation.[1] His principal contention is the trial court lacked jurisdiction to revoke probation on either occasion because probation had expired by operation of law. He also asserts there is insufficient evidence to support the court's findings and the court considered inadmissible evidence. We conclude that defendant's claims lack merit and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2000, defendant and another individual were jointly charged in a 10-count complaint that alleged they committed the crimes of grand theft from a vehicle, burglary and attempted burglary of a vehicle, and tampering with a vehicle. (Pen. Code, §§ 487, subd. (a), 459, 664/459, Veh. Code, § 10852.)[2] On that same day, defendant pled no contest to three counts of burglary of a vehicle. At sentencing on April 11, defendant was placed on probation for three years. Included in the terms and conditions of probation were orders that defendant: (1) serve 365 days in the county jail; (2) report to his probation officer within one business day of his release from custody; (3) not reenter the country illegally if deported; (4) report to the probation officer within 24 hours of his return to the country and present documentation proving that he was in the United States legally; and (5) pay restitution to all of the victims.

On September 21, 2001, due to defendant's failure to report to his probation officer and to make restitution payments, probation was summarily revoked and a bench warrant was issued for his arrest.

On November 10, 2008, defendant appeared in court after his arrest on the outstanding warrant. According to a supplemental probation report, defendant was the

---

1 Defendant filed an appeal after each hearing (B214397 & B220540). We ordered the appeals consolidated.

2 All further statutory references are to the Penal Code.

subject of a traffic stop and a warrant check revealed the outstanding bench warrant. The probation officer also wrote that defendant had never reported to the probation department and had failed to pay court-ordered restitution. As a result of the November proceeding, the warrant for defendant's arrest was recalled, his probation remained revoked, and the case was set for a December 1 hearing.

On December 1, defendant's attorney asked that another probation report be prepared to determine whether defendant was deported after his release from custody. Counsel suggested that defendant may have failed to report to probation due to his deportation. Another supplemental report was ordered and the matter was continued several times. A probation violation hearing was conducted on February 13, 2009.

At the February 13 hearing, defendant's counsel argued that the court could not reinstate defendant's probation because the term had expired by operation of law. On the merits, counsel conceded the court could consider defendant's statement that he was deported to El Salvador after his release in 2001 and remained there until he returned to the United States in February 2007, but urged there was insufficient evidence establishing that any failure to report to probation was willful. The court found defendant in violation of probation for failing to report, relying on his statement that he had returned to the country in February 2007. Probation was reinstated on the original terms and conditions, with defendant receiving credit for time served. Defendant filed a timely appeal.

On May 14, 2009, defendant's case was called. He was not present, but was represented by the same attorney who previously had appeared on his behalf. According to the minute order, the court received a supplemental probation report stating that defendant had been deported to El Salvador and had not reported to his probation officer. The court was also provided with a letter defendant had written to the probation department, explaining that he was deported to El Salvador in March 2009 and was trying to contact his probation officer by telephone. On June 9, 2009, defendant's probation was revoked and a warrant for his arrest was issued.

On September 17, 2009, defendant appeared in court after being arrested on the warrant after his return to this state. His counsel again argued that the court had no

jurisdiction because defendant's probationary term had expired. This was so, she asserted, because the original three-year term began on April 11, 2000, and defendant did not willfully violate any of the terms and conditions of probation in the ensuing three years. Counsel stated that the prior court order extending probation was being appealed. Noting that it had to assume the prior order was valid pending appeal, the court ordered that probation remain revoked. Defendant was retained in custody, a supplemental report was ordered, and the case was continued.

On October 9, 2009, a probation violation hearing was held. Terrence Rachel, a deportation officer with Immigration and Customs Enforcement (ICE) testified. He had held different positions with that department (or its predecessor) since 2001. Over defendant's hearsay and Sixth Amendment objections, Rachel identified the following certified copies of documents: (1) a September 23, 2005 order issued by an immigration judge ordering the removal of "Jose Mario Leiva-Gomez" from the United States; (2) a warrant of removal for the same individual that also was issued on September 23, 2005, and stated that he was physically removed from the country and returned to El Salvador on October 26, 2005; (3) a warrant of removal for "Jose Mario Leiva-Gomez" issued on February 19, 2009, that stated he illegally entered the country in February 2007; and (4) a deportation order stating that "Jose Mario Leiva-Gomez" was removed from the country and returned to El Salvador on March 18, 2009. Rachel said there was no record in the immigration system that Jose Mario Leiva-Gomez had received a waiver allowing him to legally reenter the country following his deportation in 2005. Thus, the 2005 removal order barred Leiva-Gomez from legally reentering the country for 20 years.

The court found defendant violated his probation by entering the country illegally, and on November 9, 2009, he was sentenced to two years in prison. Defendant filed a timely appeal.

After defendant filed his opening briefs (he filed separate briefs prior to our consolidation order), we granted the Los Angeles County Public Defender's request to file a brief as amicus curiae.

DISCUSSION

I. The Trial Court Had Jurisdiction to Revoke Probation

Relying on *People v. Tapia* (2001) 91 Cal.App.4th 738 (*Tapia*) (disapproved on another ground in *People v. Wagner* (2009) 45 Cal.4th 1039, 1061, fn. 10), defendant contends the trial court lacked jurisdiction to find him in violation of probation at either the February 2009 or October 2009 hearing. He argues that due to the prosecution's failure to establish he violated a condition of probation during the original three-year probationary term that began in April 2000, probation expired in April 2003.

The facts in *Tapia* are virtually identical to those in the present case. In July 1996, Tapia pled guilty to one count of robbery and was placed on probation for three years. Among other conditions, he was ordered to report to the probation department within 24 hours of his release from custody, to not reenter the country illegally, and if he did return, to report to the probation officer within 24 hours of his return with documentation that he was in the country legally. (*Tapia, supra*, 91 Cal.App.4th at pp. 739-740.)

Upon his release from custody in late 1996, Tapia was deported to Mexico. In March 1997, the trial court was informed that he had failed to report to the probation department. Tapia's probation was summarily revoked and a bench warrant was issued. In September 2000, Tapia was arrested on the warrant after he returned to California. At the probation violation hearing, he admitted that he did not report to his probation officer upon his return and show proof that he was in the country legally. The court found Tapia in violation of probation, reinstated probation, and extended its term to March 2003. Tapia appealed, arguing the trial court lacked jurisdiction to extend the term of probation. (*Tapia, supra*, 91 Cal.App.4th at p. 740.)

The appellate court noted that the basis for the 1997 revocation of Tapia's probation, his alleged failure to report to the probation department upon his release from custody, was never proven. "Since that violation was not proved, the term of probation expired in July 1999—before Tapia reentered the United States. Since his probation had

expired by the time he did reenter in September 2000, the trial court had no jurisdiction to extend the period of probation." (*Tapia, supra*, 91 Cal.App.4th at p. 740.)

The Attorney General argued that the trial court's March 1997 summary revocation of Tapia's probation tolled the running of the probationary term, citing the language in Penal Code section 1203.2, subdivision (a). That provision states in relevant part: "The revocation, summary or otherwise, shall serve to toll the running of the probationary period." The *Tapia* court responded, "while we agree that the period is tolled by summary revocation, and that the period of tolling can be tacked onto the probationary period if probation is reinstated, we do not agree that these rules apply where, as here, there is no proof or admission of a violation during the period of probation." (*Tapia, supra*, 91 Cal.App.4th at p. 741.) The court concluded: "[I]t is clear that a summary revocation of probation suspends the running of the probation period and permits extension of the term of probation if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation." (*Ibid.*) For the reasons set forth below, we find the reasoning of *Tapia* unpersuasive and decline to follow it.

We begin with the language of the tolling provision in section 1203.2, subdivision (a). It was added by a 1977 amendment that altered subdivision (a) in two respects. The first change allowed a trial court to revoke probation upon "the issuance of a warrant for rearrest." (Stats. 1977, c. 358, § 1, p. 1330.) The second change added the last sentence of the subdivision: "The revocation, summary or otherwise, shall serve to toll the running of the probationary period." (*Ibid.*) The language addresses a single aspect of the probationary term—its expiration date. As explained by the court in *People v. DePaul* (1982) 137 Cal.App.3d 409, 413 (*DePaul*), prior to the 1977 amendment, nothing in subdivision (a) prevented the probationary period from continuing to run despite revocation. The court interpreted the plain language of the tolling provision and said succinctly "that a revocation of probation suspends the running of the probationary period and if probation is reinstated the period of revocation cannot be counted in calculating the expiration date." (*Id.* at p. 415.)

Applying that rule here, the period between the September 21, 2001 summary revocation of defendant's probation and the trial court's February 13, 2009 reinstatement of his probation does not count in calculating the expiration date of his probation. Put simply, when defendant's probation was reinstated in February 2009, he had not completed the original three-year term of probation that began in April 2000. *Tapia's* conclusion that a revocation of probation leads to a temporary tolling of the probationary period that expires upon a failure to prove a violation during the original probationary term is not supported by the statutory language or the interpretation of the *DePaul* court. There is nothing in the statute to suggest the tolling provision operates under certain circumstances and does not under others.

Indeed, *Tapia's* interpretation of the tolling provision violates basic principles of statutory construction. "In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) "[I]n construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. 'Our office . . . "is simply to ascertain and declare" what is in the relevant statutes, "not to insert what has been omitted, or to omit what has been inserted."' [Citation.] '"[A] court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language."' [Citation.]" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.) The *Tapia* court's reading of section 1203.2, subdivision (a) adds language to the statute that is simply not there. If the *Tapia* panel is correct, the tolling provision should read: The revocation, summary or otherwise, shall serve to toll the running of the probationary period, *if, and only if, it is proven that the probationer violated the terms of his or her probation during the period of the original probationary term.* If the Legislature intended to restrict the application of the tolling provision to violations that occurred during the original probationary term, it knows how

to use language clearly expressing that intent. (See *People v. Jackson* (2005) 129 Cal.App.4th 129, 169.)[3]

In our view, the language of the tolling provision is clear. It states that a revocation of probation stops the running of the probationary period—nothing more, nothing less. The statute does not address the substantive issue presented in this appeal: When is a probationer relieved of his or her obligation to abide by the terms and conditions of the probationary grant? We have to look beyond the language of section 1203.2, subdivision (a) to find the answer.

Interestingly, the answer is located in a case relied on in *Tapia*, *People v. Lewis* (1992) 7 Cal.App.4th 1949 (*Lewis*). A close reading of the case, however, demonstrates that it does not support the *Tapia* holding. In *Lewis*, the defendant admitted a probation violation on March 1, 1991, sentencing on the violation was continued until April 1, and he was released from custody. On April 1, the court reinstated and extended probation. On May 1, 1991, the prosecution filed a petition seeking to revoke the defendant's probation based on a March 29, 1991 arrest. After the probation violation hearing, the defendant was found in violation and sentenced to state prison. On appeal, he argued that he was not subject to the terms of his probation between his March 1 admission and the April 1 sentencing hearing. (*Id.* at pp. 1951-1952.)

---

[3] The dissent contends we should not interpret the statutory language literally because it would lead to unreasonable consequences that the Legislature could not have intended. (Dis. opn., *post*, at p. 4.) It states the Assembly Committee on Criminal Justice's analysis of the 1977 amendment informs us of the Legislature's intent. (*Id.* at pp. 4-5.) The Committee wrote that the proponents of the bill concluded the tolling provision was necessary to allow trial courts to conduct a new probation violation hearing in the event a prior revocation order was reversed on appeal. Whatever the proponents of the bill may have intended, the language of the tolling provision makes it clear that the Legislature's intent was much broader. As we noted above, the court in *DePaul* concluded that a revocation of probation suspends the running of the probationary period in all cases, not simply those on appeal. In any event, the Assembly Committee's report offers little assistance in resolving the issue presented in this appeal as it did not address whether a probationer is obligated to comply with the terms and conditions of probation during the entire period of revocation.

In rejecting the defendant's contention, the *Lewis* court wrote: "There is no 'window' during the probation *term* which allows the probationer to be free from the terms and conditions originally imposed or later modified, nor during the interim period at issue in this case. Further, the trial court has the power over the defendant at all times during the *term* of probation until the defendant is discharged from probation or the court loses jurisdiction upon the defendant being sentenced to prison. . . . [¶] . . . [¶] Thus, the terms and conditions imposed upon the defendant placed on probation may be enforced at any time during the *term* of probation, and the procedures utilized to enforce the terms and conditions of probation do not toll or suspend for any period of time the terms and conditions of the probation grant. The defendant is not free of these restrictions until the probation period has terminated or he or she has been discharged by law from the probationary term. [Fn. omitted.]" (*Lewis*, *supra*, 7 Cal.App.4th at pp. 1954-1955.) The court then pointed out in a footnote that, "However, '[t]he revocation, summary or otherwise, shall serve to toll the running of the probationary *period*.' (§ 1203.2, subd. (a), italics added.)" (*Id.* at p. 1955, fn. 4.)

There is no dispute that the running of Leiva's probationary term was tolled when the court summarily revoked probation in September 2001. *Lewis* holds that the trial court "[had] the power" over defendant until he was "discharged from probation or the court [lost] jurisdiction upon [his] being sentenced to prison." (*Lewis*, *supra*, 7 Cal.App.4th at p. 1954.) Neither event occurred prior to defendant reentering the country in February 2007 and failing to report to his probation officer with documentation establishing he was here legally. Since defendant's probationary term had not expired because of the tolling provision, he was still bound by the conditions of probation.

Our interpretation of the tolling provision comports with another maxim of statutory construction. We are to construe a statute in a manner that is harmonious with its legislative purpose. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1449.) We must not lose sight of the fact that section 1203.2 is part of the statutory scheme setting forth the court's authority to grant probation in lieu of a harsher sentence. "A grant of probation is *intended* to afford the defendant an opportunity to demonstrate

over the prescribed probationary term that his or her conduct has reformed to the degree that punishment for the offense may be mitigated or waived." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439.) Where, as here, a probationer is deported upon his release from custody, he cannot be found to be in willful violation of his probation for failing to report to the probation department. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 984.) That being the case, if probation were to expire absent proof of a violation during the original probationary term, a probationer, such as defendant, who is deported, returns to this country illegally and is not caught until after the original term of probation expires, could potentially escape from ever having to comply with his or her probationary conditions. Concluding that defendant, who illegally reentered this country, chose not to report to his probation officer upon returning with proof that he was here legally, and failed to pay his financial obligations, has demonstrated that his conduct "has reformed to the degree that punishment for the offense may be mitigated or waived" flies in the face of common sense. Defendant, who committed a string of acts that violated the conditions of his probation, would receive the same benefit as one who complied with all the terms of his or her probationary grant—avoidance of a more severe sentence by *successfully* completing probation. Such a result is hardly consistent with the rehabilitative purpose of a grant of probation.

We conclude, as *Lewis* did, that until a probationary term expires or probation is terminated, a defendant is required to comply with the conditions of probation. Pursuant to section 1203.2, subdivision (a), the court's September 2001 revocation of defendant's probation continued his probationary term until the court took further action either discharging him from the obligations of his probationary grant or sentencing him to prison. This interpretation gives full effect to the plain language of the tolling provision. Of course, the Legislature may limit a court's authority to modify or terminate probation to cases where a violation occurs during the original unexpired probationary period. As of yet, it has chosen not to do so. As a result, the trial court had jurisdiction to modify defendant's probation at the violation hearing in February 2009 and to terminate probation in October 2009.

II. Sufficient Evidence Supports the February 13, 2009 Finding

Defendant contends the single hearsay statement from the supplemental probation report upon which the court relied is insufficient to prove that he failed to report to probation or reentered the country illegally. We are not persuaded.

The court found "that Mr. Leiva is in violation of probation for [failing] to report to probation. I am relying on his statement that he has been back in the United States since February of 2007, and not his citizenship status since I think more would be required to establish that." Thus, the court determined that defendant violated his probation by reentering the country and failing to report to his probation officer within 24 hours of his return with proof that he was here legally.

The court considered information contained in the supplemental probation report. Defendant did not challenge the admissibility of the information in that report during the hearing and does not do so on appeal. The report included defendant's admission that he returned to this country in 2007 and also informed the court that defendant had never reported to his probation officer, a fact that is not in dispute. In the face of nothing to the contrary, the probation report contained sufficient evidence supporting the court's finding that defendant reentered the country and did not report to the probation department within 24 hours of his return, an express condition of his grant of probation.

The case defendant cites, *People v. Smith* (1970) 12 Cal.App.3d 621, does not alter our conclusion. Contrary to defendant's contention, the case does not hold that a court may not rely on information contained in a probation report to find a probationer in violation. Instead, the *Smith* court stated, "We fail to find in the special report any allegation of *fact* from which the court could reasonably find that the appellant had violated the terms of his probation." (*Id.* at p. 627.) In other words, the report contained insufficient evidence establishing a violation. That is not the case here.

Defendant claims the court's reliance on his uncorroborated statement to the probation officer violated his right to due process. He is incorrect. In the context of a probation violation hearing, a probationer must be provided counsel, written notice of the

alleged violation of probation, and an opportunity to be heard in person, including the right to present evidence and cross-examine adverse witnesses. (*People v. Vickers* (1972) 8 Cal.3d 451, 457-462.) Defendant had an opportunity to contest the accuracy of the statement in the report that was attributed to him. He declined to do so. Due process requires no more.

III. The Evidence Underlying the October 2009 Finding Was Admissible

As discussed, in October 2009, the prosecution alleged defendant had violated his probation by reentering the country illegally. A deportation officer employed by ICE was shown various documents and testified they established that defendant had been removed from the country in October 2005 and March 2009 and did not have a right to return. Defendant contends the documentary evidence received by the court violated his right to confrontation as interpreted by the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L.Ed.2d 314, 129 S.Ct. 2527]. The principles set forth in that case do not apply here.

"Revocation of probation is not part of a criminal prosecution, and therefore the full panoply of rights due in a criminal trial does not apply to probation revocations." (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) The cases of the United States Supreme Court, most recently *Melendez-Diaz*, which bar testimonial hearsay in criminal prosecutions where the declarant is unavailable and the defendant did not have a prior opportunity to cross-examine the declarant are inapplicable to probation revocation proceedings. This is so "because the Sixth Amendment confrontation clause applies only to 'criminal prosecutions,' and a probation revocation hearing is not a 'criminal prosecution.' [Citations.]" (*Id.* at p. 78; *People v. Gomez* (2010) 181 Cal.App.4th 1028, 1039 ["[T]he confrontation clause is inapplicable to the probation revocation context."].)

Defendant repeats his due process argument. Again, we reject it. During the October 2009 hearing, defendant had an opportunity to cross-examine the witness against him and the evidence presented consisted of certified copies of official government records, the type of reliable documents that may serve as substitutes for live testimony at

probation violation hearings. (See *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782, fn. 5; *People v. Maki* (1985) 39 Cal.3d 707, 716-717.) Defendant was afforded the due process protection to which he was entitled.

DISPOSITION

The judgments are affirmed.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

I concur:

WILLHITE, J.

EPSTEIN, P. J.

I respectfully dissent.

Penal Code section 1203.2, subdivision (a),[1] provides for revocation of probation at any time during the probationary period. The statute also provides that revocation of probation, whether summary or otherwise, tolls the running of the probationary period. The issue in this case is whether the tolling provision allows the trial court to revoke probation based on a violation occurring *after* the original period of probation if there had been a summary revocation during that period. I would hold that it does not. And for the reasons that follow, I do not believe the case of *People v. Tapia* (2001) 91 Cal.App.4th 738, was wrongly decided on this issue.

As recounted in the majority opinion, after a car burglary crime spree, defendants Jose Mario Leiva and Yashi Valmir Lima were charged on March 31, 2000 with 10 felony counts of vehicle burglary and related crimes. Defendant pled nolo contendere to three counts of second degree burglary of a vehicle in violation of section 459. He told the probation officer that he had emigrated from El Salvador and was in the United States legally on a temporary work permit. On April 11, 2000, imposition of sentence was suspended, and defendant was placed on formal probation for three years on each count, to run concurrently, under the condition that he serve 365 days in county jail, make restitution to the victims, and pay a restitution fine. The remaining counts were dismissed. Defendant's conditions of probation included reporting to his probation officer within one business day after release from custody, and, if he left the country voluntarily or was deported, that he "not return unless legally entitled to do so." The court further ordered that, if he did return, he was to report to the probation department within one business day and present documentation proving that he was in the country legally.

---

[1] All statutory references are to the Penal Code.

On September 21, 2001, the case was called for a probation violation hearing based on an allegation that defendant failed to report to his probation officer as required. The court summarily revoked probation and issued a bench warrant.

In November 2008, defendant was stopped for talking on a cell phone while driving. A warrant check revealed the September 2001 warrant, and defendant was arrested. At the November 10, 2008 hearing, the court continued the matter to December 1 for a supplemental probation report.

According to the supplemental report, defendant had failed to report to his probation officer and failed to make any restitution payments. Expressing the hope that defendant would respond to admonishment from the court, the report recommended finding a probation violation and continuing probation on the same terms and conditions. At the December 1, 2008 hearing, the court noted that defendant had not suffered any new arrests or convictions since being placed on probation. Defense counsel argued the reason defendant did not report might be that he was deported. The court ordered another supplemental probation report to address the circumstances of defendant's arrest and determine whether defendant was deported after his release from custody.

According to the second supplemental report, dated December 12, 2008, defendant told the probation officer that he had been deported to El Salvador upon his release from jail. He remained in El Salvador from 2001 to 2007, when he returned to the United States illegally.

Section 1203.2, subdivision (a), provides that "[a]t any time during the probationary period of a person released on probation . . . if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation

officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. . . . *The revocation, summary or otherwise, shall serve to toll the running of the probationary period.*" (Italics added.) Does this mean that where there is no proof at the formal revocation hearing that a probation violation occurred during the original probationary period, the court may rely on conduct which occurred after that time to find a violation?

Defendant's three-year probationary period was set to expire in April 2003. Probation was summarily revoked and a bench warrant issued in September 2001. Defendant was not arrested on the warrant until November 2008. At the formal revocation hearing in February 2009, no proof was presented that a violation of probation had occurred during the original three-year probationary period. Instead, the court relied on defendant's statement to his probation officer that he reentered the country in February 2007, and found defendant in violation for failure to report to his probation officer within 48 hours of his return.

Defendant argues that absent proof that he violated probation *during* the original probationary period, his probation expired by operation of law in April 2003. Direct support for this conclusion is found in *People v. Tapia, supra*, 91 Cal.App.4th 738, a case in which, as stated by the majority, the facts are similar to those presented here. On appeal, the People argued that under the language of section 1203.2, subdivision (a), the summary revocation tolled the running of the probationary period and preserved the court's jurisdiction over the defendant. Thus, they claimed, the trial court had jurisdiction to find a violation based on the defendant's proven violation, committed after what would otherwise have been the natural expiration of probation. The appellate court rejected that argument: "While the summary revocation of probation does suspend the running of the probationary period so that the court retains jurisdiction to determine at a formal revocation hearing whether there has, in fact, been a violation, an unproved violation cannot support the conclusion that, after the date on which probation expired

under its original terms, a violation occurred upon Tapia's failure to report to the probation department when he later returned to the United States. . . . [W]hile we agree that the period is tolled by summary revocation, and that the period of tolling can be tacked onto the probationary period if probation is reinstated, we do not agree that these rules apply where, as here, there is no proof or admission of a violation during the period of probation." (*Tapia, supra,* 91 Cal.App.4th at p. 741.)

The majority here concludes that *Tapia* was wrongly decided because it is inconsistent with the plain language of the statute. Generally, where the language of a statute is clear and unambiguous, there is no need for construction or resort to indicia of legislative intent, but "courts will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended." (*In re J.W.* (2002) 29 Cal.4th 200, 210.) If the tolling language were applied literally, once a defendant's probation was summarily revoked, the probationary period would *never* expire until the formal revocation hearing is conducted, even though it turned out there had been no violation during the probationary period set by the court.

Unreasonable consequences would flow from this interpretation. Consider a defendant who is placed on three years probation, which is summarily revoked during this time period for an alleged but mistaken claim of violation. Twenty years later, the defendant is stopped for a traffic violation, and a warrant check reveals the bench warrant from the summary revocation. The basis of the summary revocation is not sound, and there is no proof of any other probation violation during the three-year probationary period. But if the tolling language is read as the majority would read it, the defendant's probationary period never ends. With the benefit of the legislative materials, I would reach a different conclusion from that reached by the majority in this case.

There is no indication the Legislature intended the tolling provision to subject a probationer to possible revocation for conduct occurring after the conclusion of the probationary period. Instead it appears from the analysis of the measure, which amended section 1203.2, subdivision (a) adding this tolling provision (Stats. 1977, ch. 358, p. 1330, §1), that the provision was necessary to address an insular problem which could

arise when a revocation decision is reversed on appeal. The Assembly Committee on Criminal Justice stated in its analysis of the bill:[2] "Should the probationary period be tolled upon revocation of probation? What does this mean? Upon revocation, the period is terminated. The proponents of this bill indicate that this 'tolling' language is necessary in cases where the revocation proceedings were conducted in an illegal manner and the decision is reversed upon appeal. Without the tolling language, the period may have expired and the court would be powerless to act in conducting a new probation revocation hearing." (Assem. Com. on Criminal Justice, Rep. on Sen. Bill No. 426 (1977-1978 Reg. Sess.) as amended May 19, 1977.) The enrolled bill report submitted to the Governor by the Secretary of Legal Affairs stated that the bill was "basically a cleanup measure" and "[t]he State Public Defender has no objection." If the tolling provision had the literal meaning now claimed for it by the majority, it would have been far more than a mere cleanup measure, and would most certainly have been opposed by the State Public Defender. But what is significant about these reports is that they focus on the problem the bill was designed to solve.

In its comments to the proposed amendment to section 1203.2, the Assembly Committee on Criminal Justice explained: "The principles of *Morrissey* [*Morrisey v. Brewer* (1972) 408 U.S. 471, 480] and *Vickers* [*People v. Vickers* (1972) 8 Cal.3d 451, 458] . . . apply to revocation of probation hearings. The probationer must be afforded the opportunity to confront adverse witnesses and to present testimony. However, there may be a 'summary' revocation by the court with later allowance for the full hearing. Section 1203.2 deals with the revocation of probation procedure. However, it does not provide for the 'summary' revocation as is required in decisional law. Should this section be amended to provide more detail?" (Assem. Com. on Criminal Justice, Rep. on Sen. Bill No. 426 (1977-1978 Reg. Sess.) as amended May 19, 1977.) The Legislature provided statutory authority for the summary revocation procedure approved by the courts.

---

[2] Legislative Committee reports and analyses and enrolled bill reports are proper subjects of judicial notice. (See *People v. Epps* (2001) 25 Cal.4th 19, 24 & fn. 2, 25; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19.)

I agree with the observation that we should consider whether the "literal application of the words of the statute comports with its purpose. [Citation.]" (*People v. Meyer* (2010) 186 Cal.App4th 1279, 1283.) What the Legislature intended, and what the *Tapia* court understood, is that when probation is summarily revoked, the probationary period is tolled so that the court can proceed with a formal revocation hearing even though the original period of probation has expired. Despite the imprecise language, the statute cannot reasonably be read to mean that conduct occurring after the expiration of that original period can be the basis of a probation revocation. This is particularly true when, as in this case, the basis for summary revocation is ultimately unproven.

As "[T]he language of the cases and statutes is not always as precise as could be desired, requiring us to examine closely the actual effects of a court's probation orders rather than simply relying on the court's language. As the court noted in *People v. Pipitone* (1984) 152 Cal.App.3d 1112 [parallel citation omitted], summary 'revocation' of probation following the filing of a petition 'cannot affect a grant of probation or its conditions, . . .' (*Id.,* at p. 1117.) Rather, '. . . it is simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence. [Citation.] If probation is restored there has been in effect, no revocation at all.' (*Ibid.*) Thus, in the context of the statutory scheme governing probation, the term 'revocation' has a meaning quite different from other contexts. The term 'reinstatement of probation' suffers from this same misunderstanding of the context in which this phrase is used." (*People v. Lewis* (1992) 7 Cal.App.4th 1949, 1955.) In that regard, the term is different from "termination" of probation, or a "discharge" from probation, acts which require that judgment be pronounced if no sentence was imposed when probation was granted. (*Ibid.*) Summary probation is, thus, in the nature of a placeholder by which the court retains jurisdiction to adjudicate a claim that the defendant had violated a term of probation.

The majority opinion argues that unless its construction of the statutory scheme is accepted, "a probationer, such as defendant, who is deported, returns to this country illegally and is not caught until after the original term of probation expires, could

potentially escape from ever having to comply with his or her probation conditions." (Maj. opn. *ante*, at p. 9.) To the contrary, if the defendant committed a new offense during the original probation period – such as willfully failing to report to a probation officer, failing to pay a fine or restitution, or illegally entering the United States – he or she would be subject to revocation of probation at any time. And if he or she committed a new crime during or after that period, he or she would be subject to prosecution for that crime, like anyone else.

It is undisputed that defendant's probation was revoked in June 2009 and in October 2009, but that neither revocation was based on a violation within the original period of probation. The court lacked jurisdiction to revoke probation based on conduct occurring after probation expired, and its orders doing so should therefore be reversed.

EPSTEIN, P.J.

Certificate of Service

The undersigned hereby certifies that copies of the foregoing Petition for Review in the case People v. Leiva, # B214937, were mailed on this date, first class, with postage prepaid in the United States mail in San Francisco, California, to the following:

Joseph A. Lane, Clerk (TWO COPIES)
California Court of Appeals
Second Appellate District (DIV. 4)
300 So. Spring St., 2d Floor
Los Angeles, CA 90013

David C. Cook, Esq.
Deputy Attorney General
300 So. Spring Street, 5th Floor
Los Angeles, CA 90013
(Representing the People)

Maria Morrison, Esq.
California Appellate Project
520 So. Grand Ave., 4th Floor
Los Angeles, CA 90071

Jose Leiva
Current address

Los Angeles County
District Attorney's Office
111 No. Hill Street
Los Angeles, CA 90012

Karen Nash, Esq.
Deputy Public Defender
210 West Temple St.
Los Angeles, CA 90012

Criminal Appeals Clerk
Los Angeles County Superior Court
Attn: The Honorable Sanjay T. Kumar
210 West Temple St.
Los Angeles, CA 90012

I certify under penalty of perjury that the foregoing is true and correct. Executed on April 11, 2011, at San Francisco, California.

Meredith J. Watts

Meredith J. Watts, #78520