IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LEIVA, Defendant and Appellant.	No. S192176

SUPREME COURT
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Second District Court of Appeal, Division Four, Case No. B214397
Los Angeles County Superior Court Case No. PA035556
Honorable Barbara M. Scheper, Judge Presiding

DEFENDANT'S OPENING BRIEF ON THE MERITS

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DEFENDANT'S OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

"(1) Did the trial court have jurisdiction to revoke defendant's probation?"

"(2) Did sufficient evidence support the trial court's finding that defendant either failed to report to his probation officer or reentered the country illegally?"

"(3) Did the trial court's finding rely upon admissible evidence?"

FACTUAL AND PROCEDURAL BACKGROUND

Defendant adopts the Factual and Procedural Background set forth in the Court of Appeal's Opinion, and notes that it accurately, concisely, and comprehensively sets forth the applicable factual and procedural background of this case. (Slip Opn. pp. 2-4.)

ARGUMENT

I

THE TRIAL COURT LACKED JURISDICTION TO REVOKE DEFENDANT'S PROBATION BASED ON ACTS COMMITTED IN 2007 AND 2009

The trial court lacked jurisdiction to revoke defendant's probation because there was no evidence, and the trial court did not purport to find, that defendant committed a willful violation of his probation during the original three-year probationary term imposed by the court.

On April 11, 2000, after pleading guilty to three counts of burglary of a vehicle, defendant was placed on probation for three years on terms and conditions that he serve 365 days in jail, report to his probation officer within one business day of his release from custody, not reenter the country illegally if deported, 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 pay restitution to all victims. (Slip Opn. p. 2.) On September 21,

2001, defendant's probation was summarily revoked, and a bench warrant was issued for his arrest, because defendant had not reported to his probation officer upon his release from custody and had not made his restitution payments. (Slip Opn. p. 2.)

In November of 2008, defendant appeared in court again after being arrested on the outstanding warrant as a result of a traffic stop. (Slip Opn. pp. 2-3.) It was subsequently determined that defendant had been deported to El Salvador following his release from custody in 2001, and remained there until he returned to the United States in 2007. (Slip Opn. p. 3.)

At a formal probation revocation hearing conducted on February 13, 2009, the trial court did not find that defendant had willfully violated any of the terms of his probation prior to April 10, 2003, the date probation naturally would have expired under the original three-year term, but nevertheless found defendant in violation of his 2000 probation for reentering the United States in February of 2007 and not reporting to the probation department within 24 hours of that reentry. (Slip. Opn. p. 3; 2 R.T.[1] pp. 2-4.) On that same date, the

[1] The three Reporter's Transcripts in this case are not numbered by volume. For purposes of clarity, defendant will refer to them chronologically as volumes 1, 2, and 3.

court reinstated probation on the same terms and conditions with additional credit for time served in custody. (Slip Opn. p. 3; 1 R.T. p. 4.)

Defendant was again deported after his release from custody in February of 2009, and on June 9, 2009, another warrant was issued for his arrest for failing to report to his probation officer after his release from custody in 2009. (Slip Opn. p. 3; 2 C.T.[2] pp. 3-4.) On September 17, 2009, defendant appeared in court again after returning to the United States and being arrested on the outstanding warrant. (Slip Opn. p. 3; 2 C.T. p. 5.) On October 9, 2009, another formal probation violation hearing was held, and the court found defendant in violation of the terms of his 2000 probation for reentering the country illegally between 2005 and 2009. (Slip Opn. p. 4; 3 R.T. p. B-42.) On November 9, 2009, the court sentenced defendant to serve two years in prison. (Slip Opn. p. 4; 3 R.T. pp. C-1-C-3.)

Based on the above procedural history, the trial court lacked jurisdiction to find defendant in violation of his 2000 probation on either February 13, 2009 or October 9, 2009, because there was no evidence that

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[2] The two Clerk's Transcripts in this case are also not numbered by volume. For purposes of clarity, defendant will also refer to them chronologically as volumes 1 and 2.

defendant had committed a willful violation of his probation within the initial three-year term of probation.

As held by the Court of Appeal, in order to find a defendant in violation of probation, the violation must be "willful." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982.) Thus, when a defendant is deported immediately upon his release from custody, it is not a willful violation of probation to fail to report to a probation officer within 24 hours of his release because it is impossible to do so due to the fact that the federal government deported him. (*Id.* at p. 983; see also *People v. Sanchez* (1987) 190 Cal.App.3d 224, 231 ["Obviously, a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed."].)

In the case at bar, defendant was deported upon his release from local custody in 2001. (Slip Opn. p. 3.) Thus, defendant's failure to report to the probation officer after his release from custody was not a willful violation of his probation. (*People v. Galvan, supra,* 155 Cal.App.4th at p. 982.) Moreover, between the April 11, 2000 grant of probation and the original three-year period of probation ending on April 10, 2003, there was no evidence that defendant committed any other crime or willfully violated any of the other terms of his probation. (See also 1 R.T. p. B-1 [defendant was not

arrested for any other offenses between the time he was placed on probation in 2000 and arrested on the bench warrant in 2008].) Under these circumstances, the trial court lacked jurisdiction to find defendant in violation of his probation based on different acts that occurred in 2007 and 2009.

The Court of Appeal in *Tapia* previously reached this conclusion based on facts that are substantively identical to those in the case at bar. (*People v. Tapia* (2001) 91 Cal.App.4th 738.) In *Tapia*, the defendant pleaded guilty in July of 1996 to one count of robbery, and was placed on probation for three years. (*Id.* at pp. 739-740.) As conditions of his probation, he was ordered to serve one year in jail, report to the probation department within 24 hours of his release from custody, not reenter the country illegally, and if he did return, report to the probation officer within 24 hours of his return with documentation that he was in the country legally. (*Id.* at p. 740.)

Upon his release from custody in late 1996, defendant Tapia was deported to Mexico. In March of 2007, the trial court was informed that the defendant had failed to report to the probation department, his probation was summarily revoked, and a bench warrant was issued. (*People v. Tapia, supra,* 91 Cal.App.4th at p. 740.) The defendant was subsequently arrested in California on the warrant in September of 2000, and a probation violation hearing was held in November of 2000. (*Ibid.*) The defendant admitted that

he did not report to his probation officer when he returned to the United States in September of 2000, and admitted that upon his reentry in 2000 he did not show proof to his probation officer that he was in the United States legally. (*Ibid.*) Based on the defendant's admissions, the trial court found a violation, revoked probation, and then reinstated probation and extended it to March 21, 2003. (*Ibid.*)

Based on the above, the Court of Appeal in *Tapia* unanimously held that the trial court lacked jurisdiction to extend the defendant's term of probation beyond July of 1999, and the trial court's order finding him in violation for an act committed after that date was void. (*People v. Tapia, supra,* 91 Cal.App.4th at pp. 740-742.)

The Court reasoned:

"Although Tapia's probation was summarily revoked based upon his failure to report to his probation officer when he was released from custody in late 1996, that is not the violation he admitted at the formal probation revocation hearing. All he 'admitted' was that he did not report to the probation department when he returned to the United States in September 2000, and that he did not at that time present proof that his reentry was legal. *He did not admit a failure to report in 1996....* Since no evidence was presented, the basis for the summary revocation — a claim that Tapia had

failed to report to the probation department in 1996 — was not proved. 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." (*People v. Tapia, supra,* 91 Cal.App.4th at p. 740, emphasis in original.)

In addition, the Court of Appeal rejected the Attorney General's argument that, pursuant to Penal Code section 1203.2, subdivision (a), the summary revocation of the defendant's probation for failing to report to his probation officer after his release from custody and deportation in 1996 tolled the period of the defendant's probation indefinitely. (*People v. Tapia, supra,* 91 Cal.App.4th at p. 741-742.)

In rejecting this argument, the Court reasoned:

"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. The rules cited by the Attorney General

simply do not apply where, as here, the People have failed to prove that a violation occurred *during the term of probation.* Thus, 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.

"As we explained in *People v. Hawkins* (1975) 44 Cal.App.3d 958, 966, the trial court has 'the power and duty to summarily revoke ... probation on the information supplied by the probation officer and to issue a bench warrant as the only practical and expeditious way to bring the defendant swiftly before the court, to give him notice of the *claimed* violations and to afford him a hearing.' (Italics added.) But when it comes to the tolling contemplated by Penal Code section 1203.2, subdivision (a), and *People v. DePaul* [1982] 137 Cal.App.3d [409], 415, it 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. (See *People v. Lewis* (1992) 7 Cal.App.4th 1949, 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. When the court finds there has been no violation during the period of probation, there is no need for further jurisdiction. And where, as here, the term of probation has expired, the defendant is also entitled to an order discharging him from probation. (*People v. Lewis, supra,* 7 Cal.App.4th at pp. 1955-1956.)

"It follows that Tapia's probation expired in July 1999, that the order finding him in violation is void, and that he is entitled to an order discharging him from probation." (*People v. Tapia, supra,* 91 Cal.App.4th at pp. 741-742, all emphasis in original.)

The majority of the Court of Appeal in the case at bar disagreed with the *Tapia* decision, and held that a summary revocation of probation does indefinitely toll the period of probation such that a defendant can be found in violation of probation based solely on an act that was committed years after probation would have otherwise expired. (Slip Opn. pp. 5-10.) Presiding

Justice Epstein filed a dissent, disagreeing with the majority in the case at bar and agreeing with the unanimous panel in *Tapia*. (Dis. Slip Opn. pp. 1-7.)

The panel in *Tapia* and Presiding Justice Epstein have the better of the argument.

The majority opinion in the case at bar relies heavily on the last sentence of Penal Code section 1203.2, subdivision (a),[3] which provides that "[t]he revocation, summary or otherwise, shall serve to toll the running of the

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[3] In its entirety, Penal Code section 1203.2, subdivision (a), provides:

"At any time during the probationary period of a person released on probation under the care of a probation officer pursuant to this chapter, or of a person released on conditional sentence or summary probation not under the care of a probation officer, 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. However, probation shall not be revoked for failure of a person to make restitution pursuant to Section 1203.04 as a condition of probation unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Restitution shall be consistent with a person's ability to pay. The revocation, summary or otherwise, shall serve to toll the running of the probationary period." (Pen. Code § 1203.2, subd. (a).)

probationary period," and which was added by the Legislature in 1977. (Stats. 1977, c. 358, § 1, p. 1330.) However, as observed by Justice Epstein in dissent, the Legislature's purpose in enacting this provision was not to extend the probationary period indefinitely so that probation could be revoked for conduct occurring after the conclusion of the original probationary period. (Dis. Slip Opn. pp. 4-6.)

Instead, as provided in the legislative materials underlying the current statute, section 1203.2 was amended in 1977 in the wake of the summary revocation, followed by a formal hearing, procedure for revocation of probation recognized in *Morrissey v. Brewer* (1972) 408 U.S. 471, 480 [92 S.Ct. 2593, 33 L.Ed.2d 484] and *People v. Vickers* (1972) 8 Cal.3d 451, 458. (Assem. Com. On Criminal Justice, Rep. on Sen. Bill No. 426 (1977-1978 Reg. Sess.) as amended May 19, 1977.) Moreover, the proponents of the bill indicated the "'tolling' language is necessary" to address a problem which could arise if a revocation "decision is reversed on appeal." (*Ibid.*) The Assembly Committee observed that "without the tolling language, the period may have expired and the court would be powerless to act in conducting a new probation revocation hearing." (*Ibid.*)

Thus, as recognized in *Tapia*, the dissent herein, and the legislative materials underlying the enactment of the statutory provision, the tolling

provision was added so that the trial court would not lose jurisdiction over a violation committed during the probationary period for which probation was summarily revoked, but in which the final, formal revocation hearing on the alleged violation was not conducted until after the original probationary period has expired. (See Assem. Com. On Criminal Justice, Rep. on Sen. Bill No. 426 (1977-1978 Reg. Sess.) as amended May 19, 1977.) This is a fairly unremarkable and uncontroversial proposition, and as recognized in the Enrolled Bill Report submitted to the Governor by the Secretary of Legal Affairs, the bill is "basically a cleanup measure" that was unopposed by the Public Defender. (Governor's Ch. Bill File, Ch. 358 (SB 426) 1977.)

The majority's quite remarkable interpretation of the above statutory tolling provision to instead provide that a probationer must comply with all of the terms and conditions of his probation for a period of decades or even the rest of his or her life, simply upon the issuance of a summary revocation of probation, even a wrongful summary revocation, is inconsistent with the legislative intent behind the provision, logic, and fundamental fairness. (See *In re J.W.* (2002) 29 Cal.4th 200, 210 [a statute should be interpreted to avoid absurd results that the Legislature could not have intended].) This is particularly true in the case at bar in which the basis for the summary revocation ultimately was not proven even to be a violation.

In addition, while legislative inaction is not necessarily conclusive, the fact that the Legislature has not sought to amend the statute at any time over the last 10 years in response to the *Tapia* decision implicitly indicates the Legislature's approval of *Tapia*'s interpretation of the relevant statute and further supports defendant's argument. (See *People v. Williams* (2006) 26 Cal.4th 779, 789-790 [the longevity of a judicial interpretation of a statute without legislative action to overrule that interpretation is not necessarily conclusive, but tends to indicate legislative acquiescence in the judicial interpretation].)

In reaching its conclusion to the contrary, the majority herein also relied upon the Court of Appeal's decision in *People v. Lewis, supra,* 7 Cal.App.4th 1949. (Slip Opn. pp. 8-9.) However, the majority's reliance on *Lewis* is misplaced. The "single issue" decided in that case was that a defendant must continue to comply with the conditions of his probation during the time between a formal finding of violation of probation and his sentencing on the violation. (*People v. Lewis, supra,* 7 Cal.App.4th at p. 1951.) In addition, the summary revocation, formal finding of a violation, and sentencing on the violation in *Lewis* all occurred within the original two-year probationary period. (*Id.* at pp. 1951-1952.) Thus, *Lewis* simply did not consider the issue herein.

Finally, the majority determined that its construction of the statute was harmonious with its legislative purpose, because otherwise 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." (Slip Opn. p. 10.) Defendant respectfully maintains this analysis is flawed for several reasons.

First, "[t]he courts have long recognized that the decision whether to grant probation to a deportable alien presents special issues." (*People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1074.) For example, the Court of Appeal has held that "a defendant's status as an illegal alien is highly relevant to the issue of whether to grant probation because it bears directly on whether the defendant can comply with the terms of probation." (*People v. Sanchez, supra,* 190 Cal.App.3d at pp. 230-231.) In this case, the court chose to grant probation to defendant. The fact that defendant was predictably deported after serving his jail sentence, and therefore could not report to his probation officer after his release, should not be regarded as either a reward or a basis to impose a lifetime requirement of probation. Indeed, given the option, many, if not the vast majority, of aliens would likely prefer to remain in this country

and comply with all the conditions of probation rather than be forcibly deported.

Second, if a defendant was deported and reentered the country before the original term of probation expires, that defendant's probation could be violated on that basis. However, defendant did not do so in this case, and instead complied with that term of his probation.

Third, a potential failure by law enforcement to discover a violation is not an appropriate basis to impose an endless term of probation. Any defendant who is placed on probation may violate that probation unbeknownst to law enforcement.

Fourth, any new criminal offense committed after the original term of probation expires, including an illegal entry into this country, can be prosecuted for exactly what it is -- a subsequent violation of the criminal laws, rather than what it is not -- a violation of an already expired term of probation.

For all of the above reasons, as well as the additional reasons set forth in *Tapia* and the dissent in the case at bar, the trial court lacked jurisdiction to find defendant in violation of his probation based on acts committed in 2007 and 2009.

Finally, if the current statutory scheme is deemed ambiguous, which defendant asserts it is not, then it should be construed in defendant's favor. ""“When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted.”"" (*In re Christian S.* (1994) 7 Cal.4th 768, 780; *People v. Stuart* (1956) 47 Cal.2d 167, 175; *People v. Ralph* (1944) 24 Cal.2d 575, 581.)

II

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FEBRUARY 13, 2009 FINDING THAT DEFENDANT VIOLATED HIS PROBATION BY FAILING TO REPORT TO HIS PROBATION OFFICER UPON HIS 2007 REENTRY INTO THE UNITED STATES

As noted above, in order to find a defendant in violation of probation, the violation must be “willful.” (*People v. Galvan, supra,* 155 Cal.App.4th at p. 982; see also *People v. Quiroz* (2011) ___ Cal.App.4th ___, ___(E051131, filed 10/6/11); *In re Victor L.* (2010) 182 Cal.App.4th 902, 913; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295; *People v. Zaring* (1992) 8 Cal.App.4th 362, 378-379.)

The trial court's February 13, 2009 finding that defendant violated his probation by failing to report to the probation department upon his 2007 reentry into the United States was not supported by sufficient evidence

because a reasonable person in defendant's position would not have felt obligated to report to a probation officer four years after his probation was to have expired. Thus, his failure to report in 2007 cannot be deemed a willful violation.

Galvan illustrates this point. (*People v. Galvan, supra,* 155 Cal.App.4th 978.) In *Galvan*, the defendant was ordered as a condition of his probation to report to a probation officer within 24 hours of his release from custody. (*Id.* at pp. 980-981.) However, upon his release from custody, the defendant was deported. (*Id.* at p. 981.) In finding the defendant had not willfully violated the terms of his probation, the Court of Appeal observed:

"Galvan's deportation obviously prevented him from reporting in person. *We also believe a reasonable person in Galvan's position would have assumed that, in these circumstances, the 24-hour reporting requirement would be excused.* Hence, in the words of *Zaring*, Galvan's failure to report was not 'the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court,' nor did it 'constitute[ ] a willful violation of [his probation] condition.' (*People v. Zaring, supra,* 8 Cal.App.4th at p. 379.)" (*People v. Galvan, supra,* 155 Cal.App.4th at p. 985, emphasis added.)

As also recently observed by the Court of Appeal, due process requires that a probationer be informed *in advance* whether his conduct comports with or violates a condition of probation. (*In re Victor L., supra,* 182 Cal.App.4th at p. 913, emphasis in original.)

In the case at bar, defendant did not willfully violate his probation in 2001 by failing to report after his release from custody because defendant was deported. (*People v. Galvan, supra,* 155 Cal.App.4th at p. 984.) In addition, there was no evidence that defendant willfully violated any of the other terms of his probation during the originally imposed three-year term of probation. There also was no evidence that defendant received any notice of the 2001 summary revocation of his probation.

Under these circumstances, a reasonable person in defendant's position would not have felt required to report to a probation officer in 2007, four years after his probation was to have expired. Thus, there was insufficient evidence that defendant's failure to report to a probation officer within 24 hours of his reentry into the United States in 2007 constituted a willful violation of the terms of his probation imposed in 2000. (*People v. Galvan, supra,* 155 Cal.App.4th at p. 985; *In re Victor L., supra,* 182 Cal.App.4th at p. 913.)

III

THE TRIAL COURT'S FEBRUARY 13, 2009 FINDING THAT DEFENDANT VIOLATED HIS PROBATION BY FAILING TO REPORT TO HIS PROBATION OFFICER UPON HIS 2007 REENTRY INTO THE UNITED STATES WAS BASED ON INADMISSIBLE HEARSAY AND RESULTED IN A VIOLATION OF HIS DUE PROCESS RIGHT TO CONFRONTATION

At the outset of defendant's February 13, 2009 formal probation violation hearing, the prosecution advised the court that it could not produce any witnesses and was not prepared to proceed. (2 R.T. pp. 1-2.)

As a substitute for testimony at the hearing, the trial court instead relied upon a supplemental probation report in which the probation officer stated that defendant stated that he returned to the United States in 2007. (2 R.T. pp. 2-4; 1 C.T. p. 34 [supplemental probation report].) Based on this written report, the court found defendant in violation of his probation for failing to report to probation within 24 hours of his reentry into this country. (2 R.T. p. 4.)

A review of the pertinent case law reveals that the probation officer's report constituted inadmissible hearsay, and the trial court's exclusive reliance upon it to formally revoke defendant's probation constituted a violation of defendant's due process right to confrontation.

The pertinent California statute, Penal Code section 1203.2, prescribes few procedural guidelines governing probation revocation proceedings. The two seminal United States Supreme Court decisions, however, *Morrissey* v. *Brewer*, *supra*, 408 U.S. 471, and *Gagnon v. Scarpelli* (1973) 411 U.S. 778 [93 S.Ct. 1756, 36 L.Ed.2d 656], set forth the procedural safeguards required by the federal Constitution for revocation proceedings. In 1972, in *Morrissey*, the Supreme Court defined the minimal due process requirements for parole revocation, recognizing that parolees enjoy a "conditional liberty" requiring constitutional protection (*Morrissey v. Brewer, supra,* 408 U.S. at p. 484), and that both the parolee and society have a stake "in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole ...." (*Ibid.*)

Morrissey set forth a two-step procedure required in order to afford parolees due process of law: an initial preliminary hearing to determine whether probable cause exists to believe that a parole violation has occurred, and thus to justify temporary detention, and a more formal, final revocation hearing requiring factual determinations and a disposition based upon those determinations. (*Morrissey v. Brewer, supra,* 408 U.S. at pp. 487-488.)

In discussing the minimum constitutional requirements applicable to the final revocation proceeding, *Morrissey* held that due process requires "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right *to confront and* cross-examine adverse witnesses (*unless the hearing officer specifically finds good cause for not allowing confrontation*); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." (*Morrissey* v. *Brewer*, *supra*, 408 U.S. at p. 489, emphasis added.) At the same time, *Morrissey* emphasized that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Ibid.*)

The following year, in *Gagnon*, the Supreme Court, extending the *Morrissey* protections to probationers, held a probationer is entitled to preliminary and final revocation hearings under the conditions specified in *Morrissey*. (*Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at p. 782.) The Court commented upon the rights of probationers to present witnesses and to confront and cross-examine adverse witnesses, stating: "[The attorney

general's] greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." (*Id.* at p. 783, fn. 5.)

In *People v. Vickers, supra,* 8 Cal.3d 451, decided after *Morrissey* but before *Gagnon*, this Court held *Morrissey*'s minimum due process requirements were applicable to state probation revocation proceedings, and concluded that although a *summary* revocation of probation may be based upon a probation officer's report (*Id.* at pp. 460-461), thereafter the probationer must be afforded a second-stage *Morrissey* hearing with its attendant due process protections. (*Id.* at pp. 455-461.) This Court further determined the defendant's probation had been revoked without affording him several of the safeguards mandated by *Morrissey*, including the right to confront and cross-examine witnesses. (*Id.* at p. 459.)

In *People v. Winson* (1981) 29 Cal.3d 711, 713-714, this Court held that, at a probation revocation hearing, the prosecution may not introduce the transcript of a witness's preliminary hearing testimony in lieu of the

witnesses' live testimony "in the absence of the declarant's unavailability or other good cause."

In *People v. Maki* (1985) 39 Cal.3d 707, this Court addressed the admissibility at a probation revocation hearing of hearsay evidence of a documentary nature. The documentary evidence in that case consisted of a hotel receipt bearing the defendant's name and a car rental invoice bearing his signature, which were found in the defendant's home at the time of his arrest and were offered to prove that the defendant had been out of state without permission. (*Id.* at pp. 709-710.) This Court concluded that although the prosecution failed to establish the documents qualified as a business record or otherwise fell within any other hearsay exception (*Id.* at pp. 710-714), this documentary evidence, in particular the car-rental invoice which was a typical invoice used by Hertz and contained its place of issue and defendant's signature, and which was compared to a known copy of the defendant's signature, was sufficiently trustworthy to be relied upon by the trial court in revoking probation. (*Id.* at p. 717.)

In *People v. Arreola* (1994) 7 Cal.4th 1144, 1159, this Court reaffirmed its decision in *Winson* "requiring a showing of good cause before a defendant's right of confrontation at a probation revocation hearing can be dispensed with by the admission of a preliminary hearing transcript

in lieu of live testimony." In doing so, this Court expressly rejected the Attorney General's argument that under *Maki* all hearsay was now admissible in probation violation hearings if it bore sufficient indicia of reliability, and distinguished the rule for documentary evidence in *Maki* (car rental and hotel receipts) from that for using a preliminary hearing transcript as a substitute for live testimony of an adverse witness at a revocation hearing. (*Id.* at pp. 1156-1157.) This Court observed that "the need for confrontation is particularly important where the evidence is testimonial," whereas the witness's demeanor is generally "not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action. [fn.]" (*Id.* at p. 1157.)

This Court further emphasized that a showing of good cause for the admission of hearsay at a probation revocation hearing is "*compelled* by the due process requirements imposed by the United States Supreme Court." (*People v. Arreola, supra,* 7 Cal.4th at pp. 1157–1158, emphasis in

original.) It quoted and emphasized the following statement by the United States Supreme Court regarding former testimony: "'*If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version.*'" (*Id.* at pp. 1158–1159, emphasis in original.)

"Thus, in determining the admissibility of the evidence on a case-by-case basis, the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether, instead, the former testimony constitutes the sole evidence establishing a violation of probation. Several federal circuit courts have adopted a similar approach, balancing the defendant's need for confrontation against the prosecution's showing of good cause for dispensing with confrontation. (See, e.g., *U.S. v. Martin* (9th Cir. 1993) 984

F.2d 308, 311; *United States v. Bell* [8th Cir. 1986] 785 F.2d 640, 643.)" (*People v. Arreola, supra,* 7 Cal.4th at p. 1160.)

Applying the above principles, the Court of Appeal in *Kentron D.* addressed the situation present in the case bar, revocation of probation solely upon the basis of a probation report. (*In re Kentron D.* (2002) 101 Cal.App.4th 1381.) In that case, the probation report set forth the observations of the minor's misconduct (a verbal altercation nearly resulting in a physical altercation with another ward in camp) by six probation officers and was prepared by a seventh probation officer. Four of the percipient probation officer witnesses were present in the courtroom, but the prosecutor did not call any of them to testify. (*Id.* at pp. 1384-1387, 1393.)

On appeal, the minor argued that the juvenile court's reliance on the contents of the probation report to revoke his probation violated his due process right to confront and cross-examine witnesses, and the Court of Appeal agreed. (*In re Kentron D, supra,* 101 Cal.App.4th at p. 1387.) It distinguished the probation report from the documentary evidence at issue in *Maki*, *supra*, 39 Cal.3d 707, and the testimony of a police officer in *People v. Brown* (1989) 215 Cal.App.3d 452 (*Brown*) [finding admissible the officer's testimony that a chemist analyzed a substance seized from the

probationer and determined it contained cocaine], saying, "The *Arreola* court clearly stated that *Maki*, which permitted the admission of reliable documentary hearsay, did not impliedly overrule the holding of *Winson*. [Citation.] The hearsay at issue in *Brown*... also involved documentary evidence. However, the hearsay at issue here is a substitute for live testimony describing the acts which constitute the alleged violation. This hearsay is governed by the considerations set forth in *Arreola* and *Winson*...." (*Kentron D.* at p. 1391.) "There was no showing of good cause to permit the expedient of allowing the People to submit solely on the basis of a written report, which denied appellant, as well as the trier of fact, the opportunity to observe the demeanor of appellant's accusers, one of the essential components of the right of confrontation." (*Id.* at p. 1393.) Because the improperly admitted probation report was the sole basis for the juvenile court's finding that the minor violated his probation, the error could not be found harmless and required reversal. (*Id.* at p. 1394.)

More recently, the Court of Appeal in *Abrams* again considered the admissibility of evidence from a probation report. (*People v. Abrams* (2007) 158 Cal.App.4th 396.) In that case one probation officer testified [Dangerfield] based on his own personal knowledge and his own report, as well as based on the report of another probation officer [Smith], both of

which indicated the defendant had not reported to probation. (*Id.* at p. 404.) Dangerfield also testified as to departmental computer records that he had personally reviewed, which indicated that the defendant had not called the probation office. (*Ibid.*) The defendant also testified at the hearing and admitted that he had not reported to probation. (*Id.* at p. 399.)

The Court of Appeal concluded that the trial court properly admitted Dangerfield's testimony regarding the contents of Smith's report and the probation department's computer records. (*People v. Abrams*, *supra*, 158 Cal.App.4th at p. 401.) The Court stated, "The presence of DPO Smith likely would not have added anything to the truth-furthering process, because he would be testifying to a negative: that defendant did not make any appointments and that Smith had not spoken to defendant. [Citation.] Adding a computer custodian of records to recount the process of logging in calls likewise would have been of little assistance. The credibility of those two witnesses was not critical to the court's determination whether defendant had violated his probation. As the court in *Arreola* stated it: 'the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts....' (*Arreola*, *supra*, 1 Cal.4th at p. 1157.)... We conclude that the evidence from the probation reports had sufficient 'indicia

of reliability'...." (*People v. Abrams*, *supra*, 158 Cal.App.4th at pp. 404–405.)

Most pertinent to the case at bar, the Court of Appeal in *Abrams* then proclaimed the following principles: "Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely falls on the *Winson-Arreola* side of the line. [Citations.] We hold the rule is otherwise where the evidence involves more routine matters such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead upon the record of his or her own action.'" (*People v. Abrams*, *supra*, 158 Cal.App.4th at p. 405.)

Applying these authorities to the case at bar, and under an appropriate de novo standard of review, the trial court's February 13, 2009 reliance on the probation officer's report to find defendant in violation of his probation constituted a violation of defendant's due process right to confrontation. (See *People v. Stanphill* (2009) 170 Cal.App.4th 61, 78 [a contention that admission of hearsay evidence at a probation violation hearing constituted a violation of the due process right to confrontation is evaluated under a de novo standard of review].)

The probation officer's report contained a statement by the probation officer concerning a statement by the defendant, and thus constituted double hearsay. While defendant's statement would have constituted a party admission (Evid. Code § 1220), there was no applicable hearsay exception for the probation officer's hearsay statement contained in the report.

Moreover, the statement at issue, that defendant had allegedly said that he had reentered the United States in 2007, was offered as a substitute for live testimony describing the acts which constitute the alleged violation. It was also offered as substantive evidence of the alleged violation. It was also the exclusive basis for a finding of a violation. Thus, for each of the above reasons, and consistent with the decision in *Kentron D.* and the analysis in *Abrams,* this case falls on the *Winson-Arreola* side of the line. (*In re Kentron D, supra,* 101 Cal.App.4th at p. 1391; *People v. Abrams, supra,* 158 Cal.App.4th at p. 405.)

In addition, there was absolutely no showing that the probation officer who prepared the report was legally unavailable to testify. This constituted a denial of defendant's due process right of confrontation. (See *In re Kentron D, supra,* 101 Cal.App.4th at p. 1393.) Furthermore, because the improperly admitted probation report was the sole basis for the court's finding that defendant violated his probation, the error cannot be found

harmless. (See *Id.* at p. 1394.) The trial court's February 13, 2009 finding of a violation of probation therefore should be reversed.

IV

TO THE EXTENT DEFENDANT COULD PROPERLY BE FOUND IN VIOLATION OF THE PROBATION IMPOSED IN 2000 FOR AN ACT COMMITTED IN 2009, IT APPEARS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S OCTOBER 9, 2009 FINDING THAT DEFENDANT VIOLATED THAT PROBATION BY REENTERING THE COUNTRY ILLEGALLY AND THAT THIS FINDING WAS BASED ON ADMISSIBLE EVIDENCE

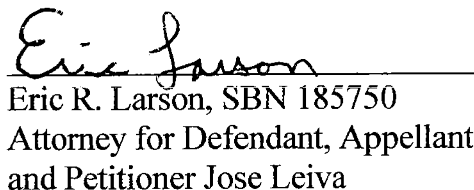
To the extent defendant could properly be found in violation of the probation imposed in 2000 for an act committed in 2009, it appears there was sufficient evidence to support the trial court's October 9, 2009 finding that defendant violated that probation by reentering the country illegally and that this finding was based on admissible evidence.

CONCLUSION

For the foregoing reasons, and in the interests of justice, defendant respectfully requests the judgment of the Court of Appeal affirming the violations of probation be reversed.

Dated: 10/19/11

Respectfully submitted,



Eric R. Larson, SBN 185750
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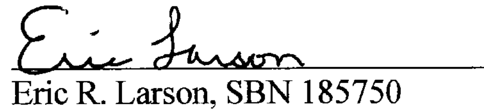
CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520(c)(1), that according to the Microsoft Word Microsoft Word computer program used to prepare this document, Defendant's Opening Brief On The Merits contains a total of 6,853 words.

Executed this 19th day of October, 2011, in San Diego, California.



Eric R. Larson, SBN 185750

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Supreme Court No.: S192176
Court of Appeal No.: B214397

DECLARATION OF SERVICE BY MAIL

I, Eric R. Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, # 609, San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 19th day of October, 2011, I caused to be served the following document(s):

DEFENDANT'S OPENING BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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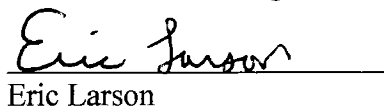
(Attn: Hon. Barbara M. Scheper)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 19, 2011, at San Diego, California.



Eric Larson