In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSE LEIVA,** **Defendant and Appellant.**

Case No. S192176

Second Appellate District, Case No. B214397
San Francisco County Superior Court, Case No. BA03556
Honorable Barbara M. Scheper, Judge

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

On April 11, 2000, appellant was placed on three years formal probation. Because appellant was not a legal resident of the United States, he was deported immediately after being placed on probation. Appellant's probation was summarily revoked in 2001 for failing to report to the probation department.

At his probation revocation hearing conducted on February 13, 2009, appellant conceded that the trial court could admit into evidence his statement in a supplemental probation report that he illegally reentered the country in 2007 and had not reported to the probation department since his return. The trial court revoked appellant's probation due to his willful failure to report to the probation department following his reentry to the United States.

On appeal, appellant contended that the trial court lacked jurisdiction to revoke his probation for conduct that occurred after the initially imposed period of probation ended on April 11, 2003. Appellant also contended that the supplemental probation report was inadmissible hearsay, and that its admission violated his constitutional rights to due process and confrontation. He also contended that there

was insufficient evidence that his violation of the terms and conditions of his probation was willful. In a split decision, the Court of Appeal disagreed and affirmed the trial court's judgment revoking probation. The court found that the summary revocation of probation in 2001 tolled the running of the probation period, that appellant waived his contentions regarding admissibility of the supplemental probation report, and that there was sufficient evidence of his violating the terms and conditions of his probation. The dissent, however, argued that the trial court lacked jurisdiction over the case except to find a probation violation outside the initially imposed period of probation.

STATEMENT OF THE CASE

On March 28, 2000, appellant entered a plea agreement with the Los Angeles County District Attorney's Office, pursuant to which he pleaded nolo contendere to three counts of burglary, in violation of Penal Code section 459.[1] (1CT 9.) On April 11, 2000, imposition of sentence was suspended, and appellant was placed on formal probation for a period of three years. Several terms and conditions for probation were imposed including that appellant report to the probation officer within one business day after being released from Los Angeles County Jail, and that if appellant were to leave the United States voluntarily or by deportation, he was to not return to the United States unless legally entitled to do so. (1CT 21-22.)

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[1]The instant case arises from consolidated California Court of Appeal case numbers B214397 and B220540. Herein, respondent will use the terms "1CT" and "1RT" for the clerk's and reporter's transcripts prepared for case number B214397. Respondent will use the terms "2CT" and "2RT" for the clerk's and reporter's transcripts prepared for case number B220540.

On September 21, 2001, appellant's probation was summarily revoked because he failed to report to the probation department since he was placed on probation on April 11, 2000. (1CT 24.) On November 10, 2008, appellant was remanded to custody. (1CT 25-26.) On December 1, 2008, while appellant remained in custody, a supplemental probation report[2] was ordered to address the following questions:

> (1) when [appellant] was released from custody following being put on probation and (2) his immigration status. Did [appellant] fail to report to probation because he was deported directly from jail? If so, did he return illegally? Or, was he released from jail and return [sic] to Mexico voluntarily?

(1CT 31.) The supplemental probation report was prepared on December 12, 2008. (1CT 33-35.)

The supplemental probation report indicates the following regarding a statement made by appellant to the probation officer:

> [Appellant] was operating a vehicle while talking on a cell phone when officers initiated a traffic stop. A want and warrant check [sic] was conducted and it was revealed that [appellant] had an outstanding bench warrant.
>
> [¶]
>
> [¶]
>
> [Appellant] stated he was released from county jail to the Department of Immigrations [sic]. Subsequently he was deported to El Salvador and resided there from

[2]The first probation report was prepared when appellant entered the plea agreement in 2000. (1CT 10-20.)

> 2001-2007. In February 2007, [appellant] illegally returned via bus to the United States. His citizenship is illegal.

(1CT 34.) The supplemental probation report also included the following "Evaluation":

> Federal Bureau of Investigations [sic] records confirms [sic] the fact that [appellant] was deported and was unable to report for probation supervision. Furthermore, the Los Angeles County Booking records reflect that [appellant] has an immigration hold on his release status. It appears [appellant] attempted to gain re-entry into the United States in 2005 but was denied. [Appellant] is in violation of probation due to him failing to report for probation supervision once he re-entered the United States. It appears that [appellant] remains suitable for probation.

(1CT 35.) Probation department records showed that appellant never reported following his grant of probation in April of 2000. (1CT 33-34.)

A probation revocation hearing was held on February 13, 2009. At the hearing, the parties agreed that the trial court could rely on appellant's statement, as found in the supplemental probation report, that he illegally returned to the United States in February of 2007, and never reported to the probation department following his return. (1RT 2-3; see 1CT 34, 41-42.) Appellant's trial attorney conceded that the statement was admissible. Appellant contended that the statement was insufficient, by itself, to establish that he willfully violated a term of probation. The statement in the supplemental probation report only established that there was a failure to report to the probation department, not a willful failure. (1RT 2-3.) The prosecution argued

that the evidence was sufficient, by itself, to establish that appellant violated the terms of his probation by reentering the United States illegally. (1RT 3.)

The trial court found as follows:

> The court is going to find that [appellant] is in violation of probation for failure 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.
>
> He was, according to probation, talking on a cell phone when he was stopped for [sic] the police by [sic] a traffic stop, and that is what brought him back to the attention of the court.

(1RT 4.) The trial court reimposed probation and ordered that appellant's new probation expiration date was June 6, 2011. (1CT 41-42.) On February 19, 2009, appellant filed a notice of appeal from the trial court's judgment finding him in violation of probation. (1CT 43.)

On May 14, 2009, the trial court ordered preparation of a supplemental probation report. (2CT 3.) On June 9, 2009, the trial court was informed that appellant had again been deported. Probation was revoked and a bench warrant was issued for appellant's arrest. (2CT 4.) On September 17, 2009, appellant was "picked up or surrendered on bench warrant." The trial court ordered preparation of a second supplemental probation report. (2CT 5.)

On October 9, 2009, a probation revocation hearing was conducted. Terrence Rachel, a deportation officer for United States Immigration and Customs Enforcement (hereinafter "ICE"), produced

copies of documents from ICE's Electronic Data Management System regarding appellant. These documents were eventually admitted into evidence as People's Exhibits 1 through 4. (2RT B7, B9–B10.)

People's Exhibit 1 was an Immigration Judge's order of removal of appellant issued on September 23, 2005. (2RT B10-B15, B17.)

People's Exhibit 2 was another warrant of removal[3] or deportation dated September 23, 2005. (2RT B14-B15, B28.) According to this warrant, on October 26, 2005, appellant left the United States on a flight from Chandler, Arizona, and was taken to El Salvador. (2RT B17-B18.)

People's Exhibit 3 was a document entitled "Notice of Intent, Decision to Reinstate a Prior Order of Removal." (2RT B19.) The notice was generated on February 19, 2009, which meant that appellant was ordered to be removed or deported on that date. (2RT B19, B21, B30.) The notice indicated that appellant had reentered the United States on February 12, 2007. (2RT B23, B31-B33.)

People's Exhibit 4 was another warrant of removal for deportation. (2RT B24.) The warrant indicated that appellant left the United States from Chandler, Arizona, on March 18, 2009. (2RT B25.)

Mr. Rachel said that ICE had no records indicating appellant was given permission to lawfully reenter the United States. (2RT B25-B26.) An alien who has been deported is not allowed to reenter the United States for 20 years following the alien's first criminal

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[3]"Removal" is another term that means deportation. (2RT B15.)

offense that led to the deportation. After the alien's second offense, the alien is not allowed to reenter the United States at all. (2RT B27.)

The trial court found appellant in violation of probation for reentering the United States illegally. (2CT 8.) The trial court imposed a sentence of two years in state prison. (2CT 11-13.) On November 9, 2009, appellant filed a notice of appeal from the judgment of October 9, 2009. (2CT 16,)

On March 1, 2011, the California Court of Appeal affirmed the judgment in the consolidated appeal. The court noted that the trial court had summarily revoked appellant's probation in 2001, during the initially imposed period of probation. Upon the summary revocation of probation, the period of probation of was tolled pursuant to Penal Code section 1203.2, subdivision (a). Consequently, the trial court had jurisdiction to revoke appellant's probation in 2009, because the period of probation, as tolled, had not yet expired. The court also found that there was sufficient admissible evidence in support of the finding that appellant violated probation. (*People v. Leiva* (Mar. 11, 2011, B214397) at pp. 5-13 ("Opn.").[4]) Writing in dissent, Presiding Justice Epstein argued that the trial court lacked jurisdiction to revoke appellant's probation in 2009 because the tolling provided for in Penal Code section 1203.2, subdivision (a) only allows the trial court the limited jurisdiction to find a probation violation that occurred during the initially imposed period of probation. (Opn. at pp. 14-20 (dis. opn. of Epstein, P.J.).)

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[4]The Court of Appeal's decision was previously published at 193 Cal.App.4th 114, and 122 Cal.Rptr.3d 250.

On April 12, 2011, appellant filed a petition for review in this Court. On June 15, 2011, this Court granted the petition for review.

SUMMARY OF ARGUMENT

Appellant challenges the revocation of his probation on February 13, 2009, and on October 9, 2009.[5] Respondent submits that the trial court properly revoked appellant's probation on both occasions.

First, the trial court had jurisdiction to find appellant in violation of probation for conduct that occurred after the period of probation, as it was initially imposed, from April 11, 2000, to April 11, 2003. Pursuant to Penal Code section 1203.2, subdivision (a), the running of the probation term was tolled from September 21, 2001, when the trial court summarily revoked appellant's probation, until February 13, 2009, when the trial court formally revoked appellant's probation. The tolling provision of Penal Code section 1203.2, subdivision (a) is unambiguous. Consequently, under this Court's well settled rules of statutory construction, it is inappropriate to examine the legislative history of the tolling provision to glean whether tolling was unwarranted in this case. In any event, the legislative history for this section does not call into question the application of the plain meaning of the statute.

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[5]Appellant's only challenge to the probation revocation that occurred on October 9, 2009, is that the trial court lacked jurisdiction to find a violation of the terms and conditions of probation for conduct that occurred after the period of probation, as initially imposed, expired. (Defendant's Opening Brief On The Merits [hereinafter "DOBM"] 32.)

Second, sufficient evidence supports the trial court's finding on February 13, 2009, that appellant willfully violated the terms and conditions of his probation by willfully failing to report to his probation officer upon his return to the United States in 2007, following his deportation. Appellant, by his own admission, reentered the United States in 2007, and had not reported to his probation officer as of the time of his arrest on November 7, 2008, for driving while using a cell phone. No evidence was presented that appellant was being prevented from reporting to his probation officer during that time. Appellant argues that a reasonable person would not have believed reporting to the probation officer was required following expiration of the initial probation term. Making such an inference, however, would run afoul of the substantial evidence test because it would fail to construe the evidence in the light most favorable to the trial court's judgment. The prosecution does not have a burden to satisfy a "reasonable belief" requirement. Thus, the evidence was sufficient to establish that appellant's failure to report to his probation officer was willful.

Third, appellant forfeited any claims of error regarding admission of evidence at the probation violation hearing that occurred on February 13, 2009. Appellant expressly conceded that the trial court could rely on the supplemental probation report, in which was appellant's admission to a probation officer that he reentered the United States in 2007. Even if not forfeited, appellant has failed to demonstrate that any of the rights to which he is entitled during a probation violation hearing were violated. Although appellant's statement in the supplemental probation report was hearsay, its

admission was proper due to the reliability of probation report and because the statement in it clearly satisfied the hearsay exception for admission of a party opponent. Appellant was given the opportunity to confront the evidence against him at the hearing conducted on February 13, 2009, but chose not to do so. There also was little, if anything, that would have been gained from the testimony of the probation officer to whom appellant gave the statement. Accordingly, the trial court properly admitted the supplemental probation report into evidence, and properly relied upon the report in finding that appellant willfully failed to report to his probation officer.

ARGUMENT

I. THE TRIAL COURT HAD JURISDICTION TO FIND APPELLANT IN VIOLATION OF PROBATION AT THE FEBRUARY 13, 2009 PROBATION REVOCATION HEARING AND AT THE OCTOBER 9, 2009 PROBATION REVOCATION HEARING

The first issue presented is whether the trial court lacked jurisdiction to revoke appellant's probation at the February 13, 2009 hearing and the October 9, 2009 hearing because there was insufficient evidence appellant had violated a term of probation during the probation period. Appellant contends that although Penal Code section 1203.2, subdivision (a),[6] specifically states that "[t]he

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[6]In its entirety, Penal Code section 1203.2, subdivision (a) states:

> 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

(continued...)

revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period," the legislative history underlying this subsection requires a finding of tolling only if a probation violation during the initially imposed term is found. (DOBM 2-17.) Appellant contends that his position is supported by the "better" argument of the dissent below. (DOBM 11; see Opn. at pp. 14-20 (dis. opn. of Epstein, P.J.) Respondent disagrees because unambiguous statutory language demonstrates a clear legislative intent that summary revocation tolls the probationary period for all purposes.

(...continued)

> 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.*
> (Emphasis added.)

This issue regarding the trial court's jurisdiction involves a straightforward construction of Penal Code section 1203.2, subdivision (a), which provides that "[t]he revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period." It is well settled that "'[i]f the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.'" (*Caitlin v. Superior Court* (2011) 51 Cal.4th 300, 304, quoting *People v. King* (2006) 38 Cal.4th 617, 622.) In construing a statute, the reviewing court seeks to determine and give effect to the intent of the legislature. (*Caitlin v. Superior Court*, *supra*, 51 Cal.4th at p. 304.) The reviewing court first examines the words of the statute "'because the statutory language is generally the most reliable indicator of legislative intent.'" (*Ibid.*, quoting *People v. King*, *supra*, 38 Cal.4th at p. 622.) "'The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.'" (*Ibid.*, quoting *People v. King*, *supra*, 38 Cal.4th at p. 622.)

Here, Penal Code section 1203.2, subdivision (a) is unambiguous. It states that "[t]he revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period." Upon the summary revocation of appellant's probation on September 21, 2001, the "running of the probationary period" was tolled. (1CT 24.) Accordingly, appellant's failure to report to his probation officer in 2007, following his return to the United States, and his illegal re-entry to the United States following his deportation, occurred within the period of probation, as tolled.

The Court of Appeal followed these well settled principles in construing the meaning of Penal Code section 1203.2, subdivision (a). (Opn. at p. 8.) The court found that "[i]n 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." (*Ibid.*) The court found support for its finding in *People v. DePaul* (1982) 137 Cal.App.3d 409. (Opn. at p. 6.)

In *DePaul*, the trial court placed the defendant on probation for two years starting on December 28, 1978. On August 14, 1980, probation was summarily revoked, and then reinstated on November 13, 1980, on the same terms and conditions. On January 16, 1981, the prosecution filed a petition to revoke the defendant's probation, alleging that he committed a new criminal offense on December 30, 1980. Probation was summarily revoked on the day the petition was filed. The defendant argued that the trial court lacked jurisdiction to revoke his probation because his initially imposed period of probation expired on December 28, 1980. (*People v. DePaul*, *supra*, 137 Cal.App.3d at p. 411.)

The *DePaul* court undertook an exhaustive review of probation cases and found that the 1977 amendments to Penal Code section 1203.2 changed the previous rule, which allowed the initial probationary period to expire even though a summary revocation had occurred. (*People v. DePaul*, *supra*, 137 Cal.App.3d at pp. 413-414.) Following its review, the court found that the tolling provision of Penal Code section 1203.2, subdivision (a) was unambiguous. Due to the summary revocation that occurred on August 14, 1980, the running of the probationary period was tolled until November 13,

1980, when probation was reinstated. Consequently, the expiration date of the defendant's probation was extended due to the tolling. (*Id.* at p. 415 ["The interpretation we adopt is 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"].) The court further held that "[i]f a trial court wishes to void or cancel the tolling effect of the revocation it must do so expressly. If the record is silent, however, as it is here, then the statutory tolling provision must be given effect." (*Ibid.*, footnote omitted.)

The Court of Appeal also soundly rejected the decision in *People v. Tapia* (2001) 91 Cal.App.4th 738. (Opn. at pp. 5-8.) In *Tapia*, as in the present case, the only probation violation found by the trial court occurred outside the initially imposed period of probation. (*People v. Tapia*, *supra*, 91 Cal.App.4th at pp. 739-742.). In addition, both in *Tapia* and the present case, probation was summarily revoked. (*Ibid.*) In *Tapia*, the court held that summary revocation tolled the probation period only to allow the trial court the opportunity to determine if a probation violation occurred during the initially imposed period of probation. (*Id.* at pp. 740-742.) Because no probation violation was found to have occurred during the initially imposed period of probation, the court in *Tapia* held that the trial court was without jurisdiction to have imposed probation. (*Id.* at pp. 741-742.)

The Court of Appeal correctly found that *Tapia* was wrongly decided because the tolling provision of Penal Code section 1203.2, subdivision (a) was unambiguous, and because the holding improperly

rewrote the statute to "add[] language to the statute that is simply not there." (Opn. at p. 7.) The court aptly reasoned that the Legislature court have, but declined to, insert this language into the statute:

> 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, 28 Cal.Rptr.3d 136.)

(Opn. at pp. 7-8, fn. omitted, emphasis in original.)

Until *Tapia*, courts had consistently held that a summary revocation of probation pursuant to Penal Code section 1203.2, subdivision (a) tolls the defendant's probationary term and grants the court continued jurisdiction over the defendant until he is brought before the court for a violation hearing. "It has always been clear also that an order revoking probation, made during the probationary period, preserves the court's jurisdiction over the defendant." (*People v. DePaul, supra*, 137 Cal.App.3d at p. 412.) The use of summary revocation to preserve jurisdiction is proper, even if the formal revocation and sentencing all occur after the initial period of probation has been completed. (*People v. Vickers* (1973) 8 Cal.3d 451, 460-461; *People v. Journey* (1972) 58 Cal.App.3d 24, 27; *People v. Ham* (1975) 44 Cal.App.3d 288, 293-294; *People v. Youngs* (1972) 23 Cal.App.3d 180, 185, overruled on other grounds in *People v. Vickers, supra*, 8 Cal.3d at p. 453, fn. 2; see also *In re Winn* (1975) 13 Cal.3d

694, 699 [dealing with parole revocation, but following *People v. Vickers* in holding that summary revocation is a permissible way of preserving jurisdiction];.)

Courts have also consistently recognized that the trial courts have broad powers over probationers. (*People v. Banks* (1959) 53 Cal.2d 370, 384 ["The powers of the court, over the defendant and the cause, when it retains jurisdiction a provided by Penal Code, section 1203 through 1203.4, 1207, 1213, and 1215, are well nigh plenary in character . . ."]; *People v. Lewis* (1992) 7 Cal.App.4th 1949, 1954). These powers include the ability to enforce the conditions of probation even during the tolling period pursuant to summary revocation. (*People v. Lewis*, *supra*, 7 Cal.App.4th at pp. 1954-1955.)

Similarly, the *Tapia* court, on the other hand, held that the jurisdiction granted by the tolling mechanism of Penal Code section 1203.2, subdivision (a) is limited, and that the trial court only has jurisdiction to find violations that occur during the initial probationary term. (*People v. Tapia*, *supra*, 91 Cal.App.4th at p. 741.) Citing *People v. Hawkins* (1975) 44 Cal.App.3d 958, 966, the *Tapia* court correctly pointed out that the summary revocation proceeding is designed to give courts a way to bring violating probationers before the court to determine the truth of the alleged violations. (*People v. Tapia*, *supra*, 91 Cal.App.4th at p. 741.) *Hawkins*, however, merely held that the summary revocation proceeding comports with the standards of due process set out by the United States Supreme Court. (*People v. Hawkins*, *supra*, 44 Cal.App.3d at pp. 966-967.) *Hawkins* did not address the tolling feature of summary revocation, and

certainly did not state that the trial court was only given limited jurisdiction due to the tolling.

The *Tapia* court also cited *People v. Lewis*, *supra*, 7 Cal.App.4th 1949, for the correct proposition that summary revocation is a device by which violating defendants are brought before the court. (*People v. Tapia*, *supra*, 91 Cal.App.4th at p. 741.) But nothing in *Lewis* states that the tolling contemplated by Penal Code section 1203.2, subdivision (a) is limited only to finding violations during the original probationary period. In fact, the decision confirms that the terms and conditions of probation are enforceable during the tolling period. (*People v. Lewis*, *supra*, 7 Cal.App.4th at p. 1955.) Additionally, *Lewis* reinforces that the trial court has broad authority over defendants who willfully accept probation as an alternative to incarceration. "The powers of the court, when the defendant is granted probation are almost absolute in character." (*Id.* at p. 1954.) Consequently, nothing in *Lewis* narrows the jurisdiction of the courts over probationers during the tolling period after a summary revocation.

The main flaw in appellant's position is that he has failed to articulate how the tolling provision of Penal Code section 1203.2, subdivision (a) is ambiguous. (DOBM 11-17.) Instead, he contends that the tolling provision is unambiguous, but that there is a limitation on the tolling provision that does not appear in the text. (DOBM 17 ["if the current statutory scheme is deemed ambiguous, which [he] asserts it is not, then it should be construed in [his] favor"].) Consequently, appellant has offered no basis for having this court take the next step of statutory construction to refer to other materials that

may bear on the Legislature's intent. It is well settled that reference to "'extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute'" is only allowed when the "'statutory language may reasonably be given more than one interpretation.'" (*Caitlin v. Superior Court*, *supra*, 51 Cal.4th at p. 304, quoting *People v. King*, *supra*, 38 Cal.4th at p. 622.) Here, as explained above, the plain meaning of the tolling provision is unambiguous and may reasonably only be given one interpretation. (*Ibid.*) Thus, reference to other legislative materials is not warranted in this case.

The dissent below also failed to articulate how the tolling provision is ambiguous. Nonetheless, the dissent found that reference to other legislative materials was necessary because "[u]nreasonable consequences would flow from" the majority's interpretation of the tolling provision." (Opn. at p. 17 (dis. opn. of Epstein, P.J.), citing *In re J.W.* (2002) 29 Cal.4th 200, 210.) The dissent below posits the following example of an "unreasonable consequence":

> 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.

(*Ibid.*)

While the hypothetical posed by the dissent is dire, the dissent did not cite any similar instance authority where a probationer committed a minor violation decades after summary revocation, the basis for the summary revocation was unfounded, yet the trial court formally revoked probation for the infraction and imposed a previously-suspended state prison sentence. Hopefully, such a probationer would be allowed to "demonstrate [that] 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" decades after the summary revocation due to an unfounded allegation of probation violation. (*People v. Feyrer* (2010) 48 Cal.4th 426, 439.)

Additionally, as to the legislative materials referred to by the dissent below, the Court of Appeal below explained that the statutory language reflected its broad intent, and that the Committee analysis did not relate to the issue at hand in any event:

> 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. [Citation.] It states the Assembly Committee on Criminal Justice's analysis of the 1977 amendment informs us of the Legislature's intent. [Citation.] 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.

(Opn. at p. 8, fn. 3.)

Furthermore, the comments from the Assembly Committee on Criminal Justice directed the Legislature's attention to the possibility of limiting the scope of the tolling provision. In Comment 3, it states as follows:

> 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 on 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. *Should this tolling language be limited to cases in which the revocation decision is appealed?*

(Appendix A to Defendant's Motion to Take Judicial Notice of Legislative Materials, emphasis added.) Due to the absence of any limitation in the tolling provision of Penal Code section 1203.2, subdivision (a), the Legislature apparently intended that there be no limitation in applying the tolling.

Similar to the dissent, appellant offers theoretical "flaw[s]" in the majority's interpretation, which appear to call for some reward for: (1) a probationer who, like himself, is deported, but chooses to re-enter the United States illegally after the probation term, without

tolling, has expired; and/or (2) commits a probation violation that is not immediately discovered by law enforcement. (DOBM 15-16.) These alleged "flaws" do not withstand logic. Tolling of the initially imposed probation term is all the more appropriate for the hypothetical probationers in appellant's examples because they have not demonstrated reformation. Their failure to report to probation was due to deportation, which shows no reformation at all. Their illegal return to the United States or their newly committed crimes also shows no reformation. (*People v. Feyrer*, *supra*, 48 Cal.4th at p. 439.)

In fact, as explained by the Court of Appeal, it is appellant's view from which unreasonable consequences would flow:

> [I]f probation were to expire absent proof of a violation during the original probationary term, a probationer, such as [appellant], 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 [appellant], 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. [Appellant], 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.

(Opn. at p. 10.)

Respondent submits that the Court of Appeal, as well as the trial court, correctly applied the plain meaning of the tolling provision of Penal Code section 1203.2, subdivision (a). There is no need to further explore legislative materials in determining the legislative intent. (*In re C.H.* (S183737, Dec. 12, 2011) ___ Cal.4th ___ [2011 WL 6142779] [because Welfare and Institutions Code sections 731 and 733 contain unambiguous language with a plain meaning, "it is inappropriate to resort to the legislative history of sections 731(a)(4) and 733(c) to consider whether an otherwise undisclosed legislative intent my be reflected"].)

There is also no support for *Tapia*'s conclusion that a summary revocation only grants the trial court the limited jurisdiction to determine if a probationer violated probation during his initial probation term. Instead, after a summary revocation, a probationer is subject to all terms and conditions of his probation during the tolling period, and his probation term cannot expire until he has appeared before the trial court to defend himself against the probation violation charge. (*People v. Lewis*, *supra*, 7 Cal.App.4th at pp. 1954-1955; *People v. DePaul*, *supra*, 137 Cal.App.3d at pp. 413-414.) As appellant's probation had been tolled due to the summary revocation of his probation, his probation term never expired, and the trial court had jurisdiction to find the violation of his probation terms that he admitted in open court, even though the admitted violation occurred after expiration of the initially imposed term of probation.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING THAT APPELLANT VIOLATED THE CONDITIONS OF HIS PROBATION

The second issue presented is whether sufficient evidence supports the trial court's finding that appellant either failed to report to his probation officer or reentered the country illegally.[7] Appellant contends that there is insufficient evidence that he willfully failed to report to his probation officer upon his return to the United States in 2007 because a reasonable person in his position would not have believed he was still subject to the terms and conditions of probation that were initially imposed in 2000 and were scheduled to expire in 2003.[8] (DOBM 17-20.) Respondent submits that there was sufficient evidence that appellant willfully failed to report to his probation officer following his reentry to the United States in 2007. The probation report reflects appellant's admission that he illegally returned to the United States by bus after being deported. Furthermore, a reasonable person in appellant's position would have believed that his failure to report during the originally imposed period would have prevented his probation from terminating.

Pursuant to Penal Code section 1203.2, subdivision (a), a court may revoke and terminate probation if the following is established:

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[7]The trial court did not find that appellant's reentry was illegal because it found there was not enough information provided to make that determination. (1RT 4.)

[8]Appellant concedes that, if the trial court had jurisdiction to find appellant's illegal reentry into the United States in 2009 violated the conditions of his probation, there was sufficient, admissible evidence to support the trial court's finding. (DOBM 32; 2CT 3-16; 2RT B7-B27.)

> [I]f 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 . . . .

"[P]roof of facts supporting the revocation of probation pursuant to [Penal Code] section 1203.2, subdivision (a) may be made by a preponderance of the evidence." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447, fn. omitted.) "Revocation of probation lies within the broad discretion of the trial court. Absent abuse of that discretion, an appellate court will not disturb the trial court's findings." (*People v. Self* (1991) 233 Cal.App.3d 414, 417, citations omitted.)

A trial court's findings of fact are reviewed under the substantial evidence test. (See *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681 [applying the substantial evidence test to review whether the burden of preponderance of the evidence was met].) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination." (*Ibid.*, citation and quotation omitted.) The reviewing court must construe the record in the light most favorable to upholding the lower court's decision. Findings regarding the credibility of witnesses are solely within the purview of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) On review, all conflicting evidence in the record will be resolved in favor of the trial court's decision. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849.)

Here, the probation violation found by the trial court at the hearing conducted on February 13, 2009 was that appellant willfully failed to report to the probation department following his illegal reentry to the United States in February 2007. (1RT 4.) The evidence presented at the hearing was that appellant admitted to a probation officer that he illegally returned to the United States in February of 2007. (1CT 34.) On November 7, 2008, he was arrested for operating a vehicle while talking on a cell phone. (1CT 30, 34.) Probation department records showed that appellant never reported following his grant of probation in April of 2000. (1CT 33-34.)

Thus, this evidence clearly shows that appellant did not report to the probation department since being granted probation in April of 2000, and that despite having reentered the United States in February of 2007, there did not appear to be anything preventing him from reporting at the time of his arrest more than a year later in November of 2007. Accordingly, the trial court did not abuse its discretion in finding that appellant's probation violation was established by a preponderance of the evidence.[9] (See Opn. at pp. 11-12.)

Appellant contends that there was insufficient evidence that he willfully failed to report to his probation officer because a reasonable person would have assumed that the reporting requirement, initially imposed in April of 2000, no longer applied in February of 2007. (DOBM 17-18.) In support of his contention, appellant mistakenly relies on *People v. Galvan* (2007) 155 Cal.App.4th 978.

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[9]The dissent did not address whether there was sufficient evidence of appellant's probation violation. (See Opn. at pp. 14-20 (dis. opn. of Epstein, P.J.).)

In *Galvan*, the Court of Appeal found insufficient evidence that the probationer willfully failed to report to his probation officer within 24 hours after his sentence because the federal government immediately deported him following his sentence. (*People v. Galvan, supra*, 155 Cal.App.4th at pp. 983, 985.) The Court of Appeal found that the deportation "obviously prevented [the probationer] from reporting in person" and that a "reasonable person" in his position "would have assumed that, in these circumstances, the 24-hour reporting requirement would be excused." (*Ibid.*) Thus, the failure to report within the 24-hour period 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." (*Ibid.*, citation and quotations omitted.)

Here, appellant was ordered to "report to the probation officer within 1 business day after release from custody." (1CT 22.) Following the hearing, appellant's custody status was "on probation/remanded." (1CT 23.) Appellant's deportation made it impossible for him to report to the probation department at least physically before the end of April 12, 2000, the "1 day" immediately following his sentencing hearing that was conducted on April 11, 2000. (1CT 21-22.) Any failure to report, therefore, could conceivably have been found not willful while he was being deported.

However, this failure-to-report period certainly turned from "non-willful" to "willful" upon appellant's reentry into the United States in February of 2007. A reasonable person certainly would have taken the first possible opportunity to explain to the appropriate probation officials why he did not report, as ordered, by the end of

April 12, 2000. At the moment of appellant's reentry into the United States in February of 2007, until his arrest on November 7, 2008, appellant's failure to report to the probation department was the result of "irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court." (*People v. Galvan*, *supra*, 155 Cal.App.4th at p. 985, citation and quotations omitted.) Hence, unlike in *Galvan*, the trial court did not abuse its discretion in finding that appellant's failure to report to the probation department following his reentry to the United States in February of 2007 was willful.

Appellant also contends that he was denied due process because he was not informed in advance that his conduct was a violation of the conditions of his probation. (DOBM 19, citing *In re Victor L.* (2010) 182 Cal.App.4th 902, 913.) In *Victor L.*, the Court of Appeal found that a condition of probation that the defendant "not remain in any building, vehicle or in the presence of any person where dangerous or deadly weapons or firearms or ammunition exist" failed to provide notice that the probationer must have knowledge of the existence of such weapons, firearms, or ammunitions. (*In re Victor L.*, *supra*, 182 Cal.App.4th at pp. 912-913.)

Preliminarily, this Court should not consider appellant's "due process" contention as it was not, but certainly could have been, timely raised in the briefs before the Court of Appeal. In fact, appellant did not even raise this contention in the petition for review. (See Cal. Rules of Court, rule 8.500(c)(1); *People v. Bland* (2002) 28 Cal.4th 313, 336.)

Even if appellant's "due process" contention has been preserved, however, it is meritless. There is nothing vague or

ambiguous regarding the condition that appellant "report to the probation officer within 1 business day after release from custody." (1CT 22.) Appellant has repeatedly argued that he was unable to comply within those first twenty-four hours due to his having been deported. Implicit in appellant's argument is that he would have complied with the reporting requirement but for his deportation. Once that impediment was removed upon appellant's illegal reentry into the United States, nothing but his own "irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court" (*People v. Galvan*, *supra*, 155 Cal.App.4th at p. 985, citation and quotations omitted), prevented him from reporting to the probation department.

Accordingly, there was substantial evidence that appellant willfully failed to report to the probation department following his reentry to the United States in February of 2007. The trial court did not abuse its discretion in finding appellant violated the terms of his probation.[10]

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[10]Respondent submits that because appellant's probation was tolled from September 21, 2001, when it was summarily revoked, until November 10, 2008, when he was remanded to custody, the new end date for appellant's initial period of probation became February 9, 2010. Appellant has conceded there was sufficient evidence of his violation of probation at the September 17, 2009 hearing. (See fn. 11, *infra*; DOBM 32; 2CT 3-16; 2RT B7-B27.) Thus, even if there were insufficient evidence of appellant's violation of probation at the February 19, 2009 hearing, he was properly found in violation of probation for conduct that occurred during the period of probation, as tolled. Accordingly, relief is not warranted even if this Court finds there was insufficient evidence in support of the probation violation found at the February 19, 2009 hearing.

III. APPELLANT FORFEITED HIS CLAIMS AS TO THE ADMISSIBILITY OF EVIDENCE AT THE FEBRUARY 13, 2009 PROBATION VIOLATION HEARING; MOREOVER, THE TRIAL COURT RELIED UPON ADMISSIBLE EVIDENCE

The third and final issue is whether, at the probation violation hearing on February 13, 2009, the trial court relied upon admissible evidence in finding that appellant violated the terms and conditions of his probation. The Court of Appeal found that appellant did not object to the admissibility of the supplemental probation report (Opn. at p. 11), and appellant does not offer any explanation for why the issue should be addressed despite his failure to interpose the required objection at the probation violation hearing. Appellant contends that the supplemental probation report relied upon by the trial court was inadmissible hearsay and that reliance denied him his constitutional rights to due process and confrontation.[11] (DOBM 20-32.) Respondent submits that appellant forfeited all claims of the admissibility of the supplemental probation report at the probation violation hearing conducted on February 13, 2009. Even if appellant's claims of admissibility are not forfeited, his claims are meritless.

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[11] As set forth in Footnote 5, *supra*, appellant concedes that, if the trial court had jurisdiction to find his illegal reentry into the United States in 2009 violated the conditions of his probation, there was sufficient, admissible evidence to support the trial court's finding at the September 17, 2009 hearing. (DOBM 32; 2CT 3-16; 2RT B7-B27.)

A. Appellant Forfeited Any Claim Regarding Admissibility Of The Supplemental Probation Report At The Probation Violation Hearing Conducted On February 13, 2009

It is well settled that "[a]n objection to evidence must generally be preserved by specific objection at the time the evidence is introduced." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Evidence Code section 353, subdivision (a) allows a judgment to be reversed because of erroneous admission of evidence only if an objection to the evidence or a motion to strike it was "timely made and so stated as to make clear the specific ground of the objection." (See *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 22.)

At the probation violation hearing conducted on February 13, 2009, the trial court relied upon the following portion of appellant's supplemental probation report, regarding a statement appellant made to the probation officer:

> [Appellant] stated he was released from county jail to the Department of Immigrations [sic]. Subsequently he was deported to El Salvador and resided there from 2001-2007. In February 2007, [appellant] illegally returned via bus to the United States. His citizenship is illegal.

(1CT 34.)

At the probation revocation hearing, the trial court asked the parties their position or whether the court could rely on appellant's statement in determining whether he violated the terms and conditions of probation. Appellant's trial attorney conceded that it would be

appropriate to consider the statement.[12] (1RT 2-3.) Appellant's trial attorney did not argue at the hearing on February 13, 2009, as he does herein, that the statement in the supplemental probation report was inadmissible hearsay, or that its admission violated his constitutional rights to due process and confrontation. (1RT 1-5.) The Court of Appeal found that appellant "did not challenge the admissibility of the information in that [supplemental probation] report during the hearing and [did] not do so on appeal."[13] (Opn. at p. 11.)

This Court has found that an objection on grounds of hearsay, violation of due process, or denial of confrontation is necessary to preserve such issues on appeal. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1189 [failure to object on grounds of violation of right to confrontation results in forfeiture of issue on appeal]; *People v. Jennings* (2010) 50 Cal.4th 616, 654 [failure to object on grounds of inadmissible hearsay results in forfeiture of issue on appeal]; *People v. Riggs* (2008) 44 Cal.4th 248, 304 [failure to object on grounds of violation of due process results in forfeiture of issue on appeal].) Thus, appellant has forfeited these claims due to his failure to assert

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[12]The trial court asked the parties as follows:

> Well, let me ask counsel's thoughts on whether it is appropriate for the court to consider [appellant's] statement as reflected in the [supplemental] probation report. According to that report, [appellant] admitted returning illegally in 2007, February 2007, and never reported and we only have it before court because he was picked up on the warrant issued way back when.

(1RT 2.) Appellant's trial attorney replied, "I think the rules of evidence says [sic] it is appropriate to consider it." (1RT 2.)

[13]The dissent did not address the issue of forfeiture. (Opn. at pp. 14-20 (dis. opn. of Epstein, P.J.).)

these objections at the probation violation hearing conducted on February 13, 2009.

B. Moreover, The Trial Court Properly Admitted Into Evidence Appellant's Statement To The Probation Officer As Contained In The Supplemental Probation Report

"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, citation omitted; see e.g., *Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 33 L.Ed.2d 484] [parole revocation]; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782 [93 S.Ct. 1756; 36 L.Ed.2d 656] [same].) In *Morrissey v. Brewer*, the United States Supreme Court set forth minimum requirements for conducting parole revocation hearings, i.e., notice, discovery, counsel, presence, opportunity to present defense, neutral hearing officer, and reasons for the revocation. (*Morrissey v. Brewer*, *supra*, 408 U.S. at p. 489; see also *Black v. Romano* (1985) 471 U.S. 606, 612 [105 S.Ct. 2254; 85 L.Ed.2d 636]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1152-1153; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422.)

A due process standard is used to determine whether hearsay evidence admitted during revocation proceedings violates a defendant's rights. (*Morrissey v. Brewer*, *supra*, 408 U.S. at p. 482.) Reliable hearsay is admissible in probation revocation proceedings. In appropriate circumstances, witnesses may give evidence by document, affidavit, or deposition. (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1156; *People v. Maki* (1985) 39 Cal.3d 707, 710.) "As long as hearsay testimony bears a substantial degree of

trustworthiness it may legitimately be used at a probation revocation proceeding. In general, the court will find hearsay evidence trustworthy when there are sufficient indicia of reliability. Such a determination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066, citations and internal quotations omitted; see *People v. Maki*, *supra*, 39 Cal.3d at pp. 715-717.)

Here, there is sufficient reliability with respect to appellant's statements in the supplemental probation report in that the statements were his own. While it is true that there was no live testimony from the probation officer who interviewed appellant, it certainly was possible for appellant to have personally challenged the statements at the probation violation hearing. For example, appellant could have testified that his statements were incorrectly translated. Moreover, appellant offered nothing to controvert the statements or cast any doubt on them. Consequently, the record shows that appellant had entered the United States illegally in February 2007, and that he had not reported to the probation department. (1CT 34.)

Appellant has cited and discussed several decisions of this Court, the California Court of Appeal, and the United States Supreme Court discussing the limits of a probationer's rights to due process and confrontation at a probation violation hearing. (DOBM 20-32, citing cases.) He claims that this line of cases supports his claim that there was insufficient reliability for admission of the supplemental probation report, that there was no showing by the prosecution that the probation officer who took appellant's statement was unavailable, and

that appellant was not afforded the opportunity to confront the evidence against him. (DOBM 20-32.) He is mistaken because there was sufficient reliability of the information contained in the supplemental probation report.

As appellant concedes, his statement in the supplemental probation report would be sufficiently reliable evidence on its own because it is an admission of a party opponent. (DOBM 31, citing Evid. Code, § 1220.) Also, probation reports such as that at issue herein are inherently reliable. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 755; *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021-1022.) The probation officer's written statement identifies the declarant as appellant. Moreover, there is no evidence that the written statement of appellant admitting reentry to the United States was based on any information other than appellant's own statement to the probation officer. Consequently, the information has sufficient reliability and the hearsay rule would not bar admission of the statement at the probation violation hearing. (See *People v. Reed* (1996) 13 Cal.4th 217, 230-231 [probation officer's written narrative of crime in probation report is inadmissible hearsay when the statement fails to identify the declarants who provided information, and there was no showing that the defendant provided the information to the probation officer].)

As the Court of Appeal found, appellant had the opportunity to confront this evidence, but chose to not do so. (Opn. at pp. 11-12.) Appellant could have testified as to his version of events regarding his reentry into the United States or the circumstances surrounding his interview with the probation officer, but he did not do so.

It is true that the probation officer did not testify, and apparently due to the concession of the parties that the supplemental probation report was admissible, there was no finding that the probation officer was unavailable to testify. Nonetheless, there is little that the probation officer would have added at the hearing. The content of appellant's statement would have simply been a record of an event "'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.'" (DOBM 30, quoting *People v. Abrams* (2007) 158 Cal.App.4th 396, 405.) The probation officer was simply recording a statement made by appellant rather than narrating the results of an investigation into when appellant returned to the United States, without regard to appellant's own statements.

Thus, the record shows that appellant forfeited any claims regarding admissibility of the supplemental probation report at the probation violation hearing conducted on February 13, 2009. Even if not forfeited, appellant's claims fail as his rights to due process and confrontation were honored. The layer of hearsay in the supplemental probation report was appellant's own statement, and appellant had an opportunity to confront this evidence. Accordingly, his claim fails.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment revoking appellant's probation.

Dated: December 19, 2011

Respectfully submitted,

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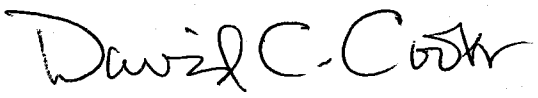

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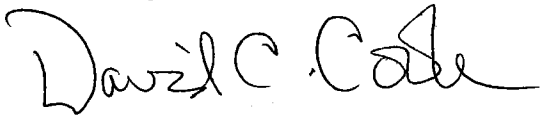
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,442 words.

Dated: December 19, 2011

KAMALA D. HARRIS
Attorney General of California



DAVID C. COOK
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DECLARATION OF SERVICE

Case Name: **People v. Jose Leiva** Case No.: **S192176**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 20, 2011, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On December 20, 2011, I caused four (4) copies of the **Respondent's Brief on the Merits** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102** by **US Mail**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 20, 2011, at Los Angeles, California.

Linda Greenfield
Declarant

Linda Greenfield
Signature

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