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3
4 Attorneys for Defendant Mr. Rogers

5 **SUPERIOR COURT OF CALIFORNIA**
6 **COUNTY OF ALAMEDA**

7
8 PEOPLE OF THE STATE OF CALIFORNIA,)

9 Plaintiff,)

10 vs.)

11 MR. ROGERS,)

12 Defendants.)

Court No.:

13)
14) **DEFENDANT MR. ROGERS’S BRIEF IN**
15) **OPPOSITION TO PEOPLE’S PETITION TO**
16) **REVOKE PROBATION**

17) Date:

18) Time:

19) Department:

20 **STATEMENT OF THE CASE**

21 The Superior Court for California, County of Alameda sentenced defendant Mr. Rogers (“Mr.
22 Rogers”) on or about May 10, 2005 to five (5) years probation based on his conviction under California
23 Health and Safety Code section 11352(a). One of the terms of probation is that Mr. Rogers live a law-
24 abiding lifestyle and to obey all laws. On July 3, 2009 Mr. Rogers was taken into custody by Oakland
25 Police Department based on alleged violation of California Penal Code section 166(a)(4). On or about
26 July 8, 2009 the Alameda District Attorney filed a Petition to revoke Mr. Rogers’s probation based on
27 the allegation contained in Oakland Police Department police report number 09-45266. On or about
28 July 14, 2009 Mr. Rogers, before the court and in-custody, was served with the Petition to Revoke
Probation and Mr. Rogers remained in-custody on the matter until his next hearing, on or about
September 3, 2009, to Set Hearing After Revocation of Probation (“SHARP”) and Appointment of

1 Counsel (“APCSL”). On or about September 3, 2009 Mr. Harbin waived his right to a Revocation
2 hearing and the Court found the allegation supporting Petitioner’s Petition sufficient to Revoke Mr.
3 Harbin’s probation. Mr. Harbin waived time for sentencing and was sentenced to time served in-
4 custody, sixty-three actual days, plus 30 days, for a total of 93 days. Additionally, Mr. Harbin was
5 released from custody and his probation was reinstated. Mr. Harbin's address prior to July 3, 2009 and
6 after September 3, 2009 remained at the same location.

7 On or about November 4, 2009 the Alameda county District Attorney’s office filed a Petition to
8 Revoke Mr. Harbin’s probation based on an alleged incident that occurred on or about October 13,
9 2008, documented in an October 15, 2008 Oakland Police Department report number, 08-076685. On
10 or about November 10, 2009 the Court found Mr. Harbin failed to appear and the Court issued a no-bail
11 bench warrant for Mr. Harbin’s arrest. The record is unclear as to how, or whether, Mr. Harbin was
12 served with the Petition. On or about October 7, 2010 Mr. Harbin, out of custody, appeared in before
13 the Honorable Judge Thomas Reardon who recalled the Bench Warrant. The Petition to Revoke Mr.
14 Harbin’s Probation was the subject of an objection based on Due Process, the Petition’s timeliness, and
15 Mr. Harbin’s loss of the opportunity to a concurrent sentence because Mr. Harbin’s sentence’s
16 probation would have expired in May of 2010 but for the Petition’s tolling effect on his sentence.
17 Judge Reardon Ordered Mr. Harbin to appear on October 19, 2010 at 9:00am in Department 11 for
18 SHARP. Also, Mr. Harbin was not taken into custody.

19 On October 19, 2010 Mr. Harbin appeared in Department 11 at 9:00am where the matter was
20 transferred to the Honorable Judge Joseph Hurley’s courtroom for SHARP. Question was raised as to
21 why Mr. Harbin was not taken into custody at his previous hearing and the Court was informed that
22 arguments based on Due Process, the Petition’s timeliness, and Mr. Harbin’s loss of the opportunity to
23 a concurrent sentence had been made to Judge Reardon and the Court exercised its discretion to allow
24 Mr. Harbin to remain out of custody. At the October 19th hearing, a request was made that Mr. Harbin
25 be taken into custody pending a future court date; the request was denied. Judge Hurley invited counsel
26 to file a brief in opposition and support of the Petition to Revoke Mr. Harbin’s Probation that would be
27 heard on November 23, 2010 in Department 11. Additionally, a SHARP and review of Bail status are
28 set for November 23, 2010.

1 This Brief is filed in opposition to the Petition to Revoke Mr. Harbin's Probation.

2 **ARGUMENT**

3 THE COURT SHOULD DENY THE PETITION TO REVOKE PROBATION AS A MATTER OF
4 JUDICIAL AND LEGISLATIVE POLICY NOT DEPRIVE DEFENDANT OF BENEFIT OF
5 SECTIONS 1203.2 AND 669 OF THE CALIFORNIA PENAL CODE.

6 The issue at bar is whether the prejudicial effect of denying Mr. Harbin's rights accorded under
7 California Penal Code sections 1203.2 and 669 are sufficient to support a Due Process remedy.
8 California jurisprudence has found "[t]he purpose of section 1203.2a is to prevent inadvertent
9 consecutive sentences which would deprive defendant of the benefit of section 669, providing that
10 sentences shall be concurrent unless the court expressly orders otherwise." *People v. Young* (1991) 228
11 Cal. App. 3d 171, 175 (citation omitted.) In this instance, Mr. Harbin's probation was set to expire in
12 May of 2010 at the time he was sentenced, the Petition to Revoke probation is based on a 2008
13 allegation, and Mr. Harbin was in the Custody of Alameda County from July of 2009 to September of
14 2009, totaling 63 days. The Petition was filed in November of 2009, and the record is unclear as to
15 how or whether service was executed, but the Petition was personally served on Mr. Harbin on October
16 7, 2010. Mr. Harbin shall suffer substantial prejudice if the Petition to Revoke not be dismissed
17 because the basis of the Petition was known to the People at the time of Mr. Harbin's incarceration in
18 2009 and he has lost the opportunity to serve concurrent time. Moreover, the loss of Mr. Harbin's loss
19 of the ability to serve concurrent time has not only prejudiced Mr. Harbin personally, likewise, the
20 prejudice has adversely affected State, fiscally and temporally, and the judiciary has lost economy over
21 a matter.

22 The prejudicial effect of the Petition to Revoke Mr. Harbin's probation based on known
23 allegations, or should have been known, to the State, especially after revoking Mr. Harbin's probation
24 on an allegation subsequent thereto, should place a burden on the state to justify the delay. Prior to Mr.
25 Harbin's incarceration in July of 2009 and after September 2009, Mr. Harbin's place of residence did
26 not change; hence, law enforcement likely had constructive knowledge of Mr. Harbin's whereabouts
27 and "[i]t has been held that where the prisoner is not promptly notified of the pending charges, and the
28 state did not meet its burden of justifying the delay, the violation of the defendant's Sixth Amendment
right to a speedy trial requires dismissal of the action." *People v. Young* (1991) 228 Cal. App. 3d 171,

1 175; (citation omitted.) The burden to justify the delay in filing a Petition based on a 2008 allegation in
2 November of 2009 and personal serve in October of 2010, months after his sentence was due to expire
3 should be reasonably founded. The justification should be more than *it got lost in the shuffle* or *Mr.*
4 *Harbin's whereabouts were unknown* or *there was insufficient information contained within the police*
5 *report*. The imposition of a burden is necessary when considering the timing of the petition to revoke,
6 the time the probation sentence was to expire, and "section 1203.2a allows only 30 days from the time
7 the demand is made for the court to act.... Due to the delay in notifying... [Mr. Harbin] of the pending
8 probation revocation proceedings, he was deprived of the opportunity to request that his sentence run
9 concurrently." *People v. Young* (1991) 228 Cal. App. 3d 171, 180-181. Should the Petition to Revoke
10 not be dismissed, Mr. Harbin will suffer substantial prejudice by a delay that has cost him rights under
11 California Penal Code section 1203.2, cost the State, and cost judiciary loss of economy.

12 **CONCLUSION**

13 For the foregoing reasons, Mr. Harbin respectfully requests the court dismiss the Petition to
14 Revoke Probation based on arguments contained in this brief and any arguments made in support
15 thereof.

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17 Dated: September 09, 2010

Respectfully submitted,

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MR. ROGERS
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