Filed 5/22/02 Modified and certified for publication 6/12/02 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re EMILIANO M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. EMILIANO M., Defendant and Appellant.	G027919 (Super. Ct. No. J164204-008) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James R. Odriozola, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Juvenile court order reversed in part and affirmed in part.

Lynne G. McGinnis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janelle Boustany and Vincent L. Rabago, Deputy Attorneys General, for Plaintiff and Respondent.

Emiliano M. appeals from the juvenile court order, continuing him on probation after he violated a previous grant of probation by failing to pay restitution and fines and by possessing air pistols, live ammunition and gang paraphernalia. As a

condition to the new grant of probation, the court ordered him to register as a gang member of the Central Myrtle Street (CMS) gang pursuant to the newly enacted section 186.30 of the Penal Code.[1] Emiliano contends this registration provision is unconstitutional; even if valid, his condition to register must be stricken as the statute is inapplicable to him. Because the statutory authority for such registration fails to include probation violations not charged as "crimes," and the one allegation constituting a crime must be stricken, that term of the disposition order requiring registration is reversed and dismissed; the remainder of the order is affirmed.

FACTS

Nineteen-year-old Emiliano M. is presently facing attempted murder charges in adult court for a drive-by shooting which occurred while he was on probation to the juvenile court for a variety of offenses. In this instance, the juvenile court found him in violation of juvenile probation, originally granted five years ago for carrying a concealed loaded weapon in a car. Over the course of the last five years, there have been five separate violations of probation sustained against Emiliano, the present one comprising the sixth. This probation revocation involved his failure to pay fines and restitution in his earlier cases, and the possession of air pistols and live ammunition,[2] which violated conditions in his prior probation. These items were found during a search of his residence pursuant to a warrant issued in connection with the attempted murder investigation. He admitted the allegation that he failed to pay the restitution and fines, and submitted the issue of the contraband possession on the introduction of a police report. Emiliano waived his rights to present any defense to the allegations and to have a probation report prepared. The juvenile court read the police report and sustained the petition alleging a probation violation. The court then granted probation (again) on the condition Emiliano spend a year in custody. It also ordered him to register with law

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1 All further section references are to the Penal Code, unless otherwise noted.

2 The parties include, as part of the contraband allegation, that Emiliano was found with gang paraphernalia, specifically, papers with gang graffiti, hats, shirts, photographs and magazines. However, these materials were never charged against him in the two petitions in question. The juvenile court considered the evidence of the gang paraphernalia in its disposition, but not as a charge.

enforcement agencies as a gang member pursuant to section 186.30, a part of the initiative known as the Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21), passed in March 2000.

DISCUSSION

I

Emiliano contends sections 186.30 and 186.32, authorizing gang registration, are vague and overbroad. Emiliano argues that the registration requirements fail to give fair and adequate notice of prohibited conduct, encourage arbitrary and discriminatory enforcement and reach constitutionally protected conduct. We need not resolve these issues as we agree with Emiliano in his alternative argument that he did not qualify under section 186.30, subdivision (b)(3) that mandates such registration.

Section 186.30, subdivision (b) mandates gang registration of "any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses: [¶][¶] (3) Any *crime* that the court finds is gang related at the time of sentencing or disposition." (Emphasis added.) Emiliano's registration order was not the result of a petition sustained in a juvenile court for any *crime*. Section 15 defines a crime as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: [¶] 1. Death. [¶] 2. Imprisonment. [¶] 3. Fine. [¶] 4. Removal from office; or, [¶] 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State." Emiliano was charged with violating certain conditions of his previous grants of probation, but none of those violations were charged as crimes, only as noncompliance with probationary conditions.[3] Moreover, only one of those acts of misconduct could comprise a crime. (See Discussion B, *post*.)

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[3] The Attorney General, as a preliminary matter, argues that Emiliano's appeal raises only hypothetical claims as any negative impact on him from the registration condition has not accrued. We note that in other attacks on registration statutes, it was insufficient that the complaining parties had merely been ordered to register by the court. It required that an individual was, at the least, *charged* with the failure to register before the attack on the statute's constitutionality was ripe. (See *Lambert v. California* (1957) 355 U.S. 225, 229; see also *People v. Franklin* (1999) 20 Cal.4th 249, 253.) However, due to the expanded terms listed in section 186.32, if registration is ordered under section 186.30, the negative impact of the registration requirement affects the

A. Crimes versus Probation Violations

Neither the allegations of nonpayment of fines nor the possession of air pistols and ammunition were brought or charged as crimes.[4] Although the record is quite confused, all the parties proceeded on the assumption that all the charges were probation violations, not separate crimes supporting a modification of the wardship. The initial petition alleging the nonpayment of the fines was entitled, "Notice of Hearing[,] Probation Violation." The proof of service attached to that notice asserted that the "minor comes within Section 602 of the Welfare and Institutions Code" but denotes the hearing as a probation violation arraignment. Similarly, the petition charging him with the contraband possession was also entitled, "Notice of Hearing [-] Probation Violation" with the similar references on the proof of service. The probation department also approached the matter as strictly a probation violation proceeding, referring to this case in all of its reports as the seventh and ninth petition of probation violation under Welfare and Institutions Code section 777. Finally, the juvenile court referred to this case in all minute orders and on the record as strictly a probation violation proceeding; never was the hearing referred to, or conducted as, a jurisdictional hearing under Welfare and Institutions Code section 602.[5]

The distinction is no longer insignificant. Under the changes wrought by the passage of Proposition 21, proceedings to revoke probation and modify previous

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probationer immediately, and long before any criminal charges are lodged for failure to register. Indeed, upon registering, the juvenile probationer must "appear at the law enforcement agency with a parent or guardian [¶] [at which time the] law enforcement agency shall serve the juvenile and the parent with a [street terrorism act] notification which shall include, where applicable, that the juvenile belongs to a gang whose members engage in or have engaged in a pattern of criminal gang activity . . . . [¶] [Additionally, a] written statement signed by the juvenile, giving any information that may be required by the law enforcement agency, shall be submitted by the law enforcement agency. [¶][Finally, the] fingerprints and current photograph of the juvenile shall be submitted to the law enforcement agency." (§ 186.32, subd. (a)(1).) As Emiliano's attack on the registration requirement focuses at least in part on his fear of having to submit such a written statement as required by this type of registration, his challenge is appropriate at this juncture.

[4] We acknowledge that minors can commit crimes, although they cannot be *convicted* of such acts. (See Welf. & Inst. Code, § 203; *Shortridge v. Municipal Court* (1984) 151 Cal.App.3d 611, 617-618.) Nor do we mean to imply by anything that we say in this opinion that the juvenile court must conduct its proceedings identically with the adult criminal court to comply with due process, federal or state.

[5] Welfare and Institutions Code section 602 states that "Any person who is under the age of 18 years when he [] violates any law of this state or of the United States or any ordinance of any city or county of this

orders under Welfare and Institutions Code section 777 are exclusively for charges *not* amounting to crimes. (See *In re Marcus A.* (2001) 91 Cal.App.4th 423, 427.) Prior to those changes, Welfare and Institutions Code section 777 "outlined two categories of misconduct [which could warrant revocation of probation and increased restrictions], that which amounted to a crime and that which did not." (*Id.* at p. 426.) By amending that code section, certain procedural rights are no longer secured to wards undergoing a revocation hearing under Welfare and Institutions Code section 777. For instance, the juvenile court need only find the allegations in a supplemental petition under Welfare and Institutions Code section 777 true by a preponderance of the evidence, not beyond a reasonable doubt as was the case prior to the passage of Proposition 21 and is required for proof of a crime. (See *In re Winship* (1970) 397 U.S. 358, 364-368 [a minor cannot be made a ward of the court due to commission of a crime unless a charge is proved beyond a reasonable doubt].) Likewise, hearsay evidence may be used in the hearings to prove these probation violation allegations (*In re Marcus A.*, *supra,* 91 Cal.App.4th at p. 427), but not to prove criminal charges. Based on these dynamic changes, the court in *Marcus* held that *crimes* charged as the basis to revoke juvenile probation must be brought under Welfare and Institutions Code section 602, not section 777. (*Ibid.*)

In *Marcus A.*, a petition filed under Welfare and Institutions Code section 777 alleged that Marcus, a ward of the court, had violated his probation by disobeying the dress code of his placement facility and by possessing cigarettes. The juvenile court held a hearing and found the dress code had never been clearly written. Thus, Marcus's disobedience was not a willful violation of his probation. However, the court also found he possessed cigarettes and modified the wardship order by sending Marcus to the California Youth Authority. (*In re Marcus A., supra,* 91 Cal.App.4th at p. 426.)

On appeal, this finding and the subsequent order were reversed because a minor in possession of cigarettes comprises a crime. (See § 308, subd. (b).) As this misconduct occurred after the passage of Proposition 21, "it should not have been

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state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

pursued in proceedings initiated under the amended version of Welfare and Institutions Code section 777." (*In re Marcus A., supra,* 91 Cal.App.4th at p. 427.)

Thus, assuming Emiliano's hearing was conducted as a probation violation hearing under Welfare and Institutions Code section 777, any charge comprising an independent crime must be reversed. The Attorney General responds that the record does not conclusively prove that the matter was decided under the abridged procedures of Welfare and Institutions Code section 777, but might have been properly conducted as a Welfare and Institutions Code section 602 trial. Additionally, he argues that, notwithstanding the changes to Welfare and Institutions Code section 777, a probation revocation may still be based on charges of either actual crimes or noncriminal misconduct. He attempts to distinguish the *Marcus A.* opinion by noting Marcus was appealing his commitment to CYA following a single finding of criminal conduct brought under the Welfare and Institutions Code section 777 procedure. Moreover, the juvenile court error was *conceded* in Marcus's case. In contrast, Emiliano was found to have committed *both* criminal and noncriminal misconduct, and he was not sent to CYA.

We are not persuaded that these factual differences undermine the basic rule of law laid down in *Marcus A.*: A probation violation which constitutes a separate crime must be brought under the procedures of a Welfare and Institutions Code section 602 jurisdictional hearing. And, as persuasively argued by the Attorney General, a crime is a crime, irrespective of the nomenclature of probation violation attached to it by the state.

B. Proof of Misconduct

Marcus admitted he had failed to pay the restitution and fines. Such acts are noncriminal offenses and support the probation revocation, but not the mandatory registration condition. As to the contraband possession, a police report was admitted—with Emiliano's agreement—to prove the allegations. In it, the police officer wrote he found a "Crossman model 38T air pistol" in the bedroom *not* belonging to Emiliano. In the garage, three "boxes of 7.62 ammo, [one] box of .38 [caliber] round-nose bullets []

with 14 rounds missing" and a "Crossman .45 [caliber] air pistol 1008 repeat air" [*sic*] were found.

The Attorney General emphasizes that Emiliano was in possession of two handguns and live ammunition. It *is* a crime for a minor[6] to possess live ammunition (§ 12101, subd. (b)(1)), but only if his or her parents do not give the minor permission to possess it or *are not present*. (§ 12101, subd. (b)(2)(A)-(B).) Based on the police report of the search, Emiliano's mother was present during the search that revealed the ammunition. However, Emiliano was no longer a minor at the time of the search, having already celebrated his 19th birthday.

An adult's possession of ammunition is not a crime. However, the Attorney General notes Emiliano was previously ordered not to possess "weapons and ammunition[.]" Under section 12316, subdivision (b)(1)-(3), it is a "wobbler"[7] offense to possess ammunition if, "as an express condition of probation, [the person was] prohibited or restricted from owning, possessing, [or] controlling," any firearm. (§ 12021, subd. (d).) As Emiliano was expressly ordered not to possess any weapons as a condition of his earlier probation, his possession of the ammunition was at least arguably a violation of section 12316, subdivision (b), although not charged as that in the petition. As this allegation comprised an independent crime, it was required to be charged and proved under Welfare and Institutions Code section 602, not Welfare and Institutions Code section 777. (See Discussion A, *infra*.) Thus, the finding on the ammunition allegation must be reversed.

As to the second part of the contraband allegation, the "weapons" found in Emiliano's possession were not firearms as defined by section 12001. The allegation charged Emiliano with possessing "a weapon (2 REPLICA HANDGUNS/AIR

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[6] We are aware that Emiliano, although a ward of the court and referred to both parties as a minor, was actually an adult at the time of the search, assuming the probation department and prosecution were correct in reciting his birthdate as being in 1981.

[7] See *People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 355 which defines a wobbler offense as one of those "special class of felony-misdemeanor offenses" in which the range of punishment for the offense is stated but not its categorization as either felony or misdemeanor.

PISTOLS[.]" The police report submitted to prove that allegation refers to both items as air pistols, not handguns. Section 12001 defines a firearm as "any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion." (§ 12001, subd. (b).) The same statute later defines a "BB device"—which is *not* prohibited—as "any instrument that expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, [carbon dioxide] pressure, or spring action, or any spot marker gun." (§ 12001, subd. (g).) Nothing in the submitted police report characterizes the items as firearms. To the contrary, each reference is to an air pistol which would fall under the general description of a BB device, not a firearm as prohibited by section 12021. Thus, Emiliano's possession of the air pistols violated his terms of probation but did not comprise a separate crime.

On the other hand, the Attorney General contends Emiliano committed the crime of contempt of court by his willful violation of a court order. (Cf. Welf. & Inst. Code, § 213.) His contempt, however, can only be alleged under Welfare and Institutions Code section 213 and not under the general contempt statute found in section 166. (See *In re Ricardo A.* (1995) 32 Cal.App.4th 1190, 1195 [Legislature intended the specific statute to preempt general contempt statute in juvenile court proceedings for status probation violations].) This distinction is important: Welfare and Institutions Code section 213 provides no specialized punishment for its contempt and can be assessed as either civil or criminal, although seemingly criminal in nature in this situation. (*Id*. at p. 1195 & pp. 1199-1200.)

As detailed in *In re Ricardo A., supra*, 32 Cal.App.4th 1190, contempt charges cannot be brought under the general statute when the basis of the contempt is disobedience of a juvenile court's probation order, "and not separate crimes." (*Id.* at p. 1199.) By the very language of *Ricardo A.*, violations of probation conditions are status offenses, *not* crimes.

C. Mandatory Registration

Section 186.30, subdivision (b)(3) mandates registration for a juvenile against whom a petition has been sustained for "[a]ny crime that the court finds is gang related at the time of . . . disposition." Emiliano notes that no guidance is given to define a crime that is gang related. Thus, it not only fails to give adequate notice of what conduct is criminal, but also places undue discretion on individual judges to define or apply it. Such laws, he maintains, violate the rule requiring statutes to describe conduct with sufficient particularity for a reasonable person to comprehend its criminality in advance and to discourage arbitrary enforcement. (See *Kolender v. Lawson* (1983) 461 U.S. 352, 357.)[8]

The test for vagueness is whether the law fails to provide notice such that a person of ordinary intelligence can determine what conduct is prohibited (see *People v. Franklin, supra,* 20 Cal.4th at pp. 253-254), or whether it permits arbitrary and discriminatory application by law enforcement or officials. (See *Kolender v. Lawson, supra,* 461 U.S. at p. 357.) "Only a *reasonable* degree of certainty is required, however." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107 [emphasis added].) On the other hand, noncompliance constitutes a criminal offense, albeit a misdemeanor. (§ 186.33, subd. (a).) "That being so, the statute must be construed as favorably to the defendant as its language and the circumstances of its application reasonably may permit." (*People v. Franklin, supra,* 20 Cal.4th at p. 253.)

In the case at bar, the law has been unreasonably *mis*interpreted when it was applied to Emiliano. As the single act of misconduct which could comprise a crime must be stricken, Emiliano was never found to have committed a crime *at all*, much less one that was gang related, however that was defined. He was only found to have violated conditions of his previous orders of probation, which originated in 1996 for joyriding and carrying a concealed weapon.

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[8] The issue of the constitutionality of section 186.30 is presently pending before the California Supreme Court in the case of *In re Walter S.* (2001) 89 Cal.App.4th 946 (rev. gr. Sept. 19, 2001; S099120).

A probation violation need not comprise a crime. "The court may revoke the 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, ...'" (3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment § 577, pp. 768-769.) And a proceeding under Welfare and Institutions Code section 777 *cannot* be based on charges of a crime. (See *In re Marcus A., supra,* 91 Cal.App.4th at p. 427.) However, for gang registration to be ordered under section 186.30, a *crime* must be found to have been committed. It was not here.

D. Relation Back Theory

The Attorney General contends that, even if the acts constituting the present probation violation are not crimes, the original crime for which Emiliano was placed on probation in 1995 *was* a crime, and the registration condition was technically ordered for rehabilitation on *that* crime. Therefore, the registration condition related back to the original wardship six years ago, which was based on the finding that he committed the crimes of joyriding and carrying a concealed firearm. That original finding was based on evidence that Emiliano was a member of the criminal street gang, named Thugs Gone Krazy. Five years (and six probation violation petitions) later, Emiliano was still an active gang member and a failure on probation. Relying on language found in *Antonio G. v. Superior Court* (1993) 14 Cal.App.4th 422, the Attorney General invites us to support the juvenile court order with the original findings from 1995.

Antonio G. addressed a minor's right to challenge a judge from hearing a new petition under Welfare and Institutions Code section 777 subsequent to that judge having taken action in the case. Not only did it not address the issue before us, but the case involved the proceedings under that statute prior to the passage of Proposition 21. Due to these important distinctions, we are most reticent to broaden the application of the statute, particularly when the statute did not exist when Emiliano committed that earlier offense or when he was originally placed on probation. (Cf. *Collins v. Youngblood* (1990) 497 U.S. 37, 50.)

E. Discretionary Registration

The Attorney General argues in the alternative that section 186.30 mandates the imposition of the registration condition upon the conviction of a crime, but *permits* the imposition of such a condition whenever the juvenile court determines its need and appropriateness. (See § 186.32, subd. (e); see also Welf. & Inst. Code, § 730, subd. (b) [juvenile court has authority to order any condition deemed "fitting and proper to the end that justice may be done . . . ."] .)[9] However, this juvenile court stated, in ordering the registration condition, that when Emiliano was "released from custody . . . *if it is still the law, it may not be by then because I know that [it is] up*, he's to register within [10] days with the police department . . . as someone who is on gang terms and conditions of probation. . . ." (Emphasis added.) The defense then objected to the registration condition, and the court replied, "That issue is reserved. I think it's up. . . . So obviously we should at some time get some guidance as to the constitutionality as to that provision. But right now it is the state of the law. . . . If an appellate court changes by opinion *that requirement* then obviously by operation of law that condition of probation would drop off. . . ." (Emphasis added.)

By the court's own language, it was not imposing the registration provision as a discretionary condition of probation which it deemed helpful to the rehabilitation of this juvenile probationer[10] or necessary for the safety of the community. (See *In re Lawanda L.* (1986) 178 Cal.App.3d 423, 433 [rehabilitation of a minor and protection of the public are the purposes of the juvenile court system].) On the contrary, by stating it

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[9] Section 186.32, subdivision (e) states that "Nothing in this section or Section 186.30 or 186.31 shall preclude a court in its discretion from imposing the registration requirements as set forth in those sections in a gang-related crime."

[10] No one could possibly look at Emiliano's record and his present status and contend the court was hopeful of his rehabilitation. He had failed to comply with *any* of the terms of his probation, and he was facing charges in adult court in a serious attempted murder case. He remained in custody for both this probation violation *and* the pending charges. His original grant of probation indicated he was involved with the Thugs Gone Krazy gang, and through the years of his probation, he had progressed to membership in the CMS gang. Finally, his probation with the juvenile court was ordered to be terminated in April 2002 on Emiliano's 21st birthday as an *unsuccessful* term of probation.

was a requirement, the court deemed the registration condition a statutory mandate. Without that mandate, the condition would cease to exist, according to the juvenile court.

The finding of the juvenile court that Emiliano possessed ammunition must be reversed and the subsequent condition of probation requiring registration as a gang member under section 186.30 is stricken. In all other ways, the juvenile court order is affirmed.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

Filed 6/12/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Emiliano M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. Emiliano M., Defendant and Appellant.	G027919 (Super. Ct. No. J164204-008) Order Granting Request for Publication, Directing Publication and Modifying Opinion; No Change in Judgment

Pursuant to California Rules of Court, rule 978, appellant's request for publication, in which the Appellate Defenders Inc. has joined, of this opinion filed on May 22, 2002, is GRANTED.

The opinion is ordered published in the Official Reports. In addition, the opinion is hereby ordered modified as follows:

On the first page, the very first line of the first heading should be replaced with "CERTIFIED FOR PUBLICATION," in bold and capitalized letters. The next three lines contained within boxed lines should be deleted.

On the second page of the opinion, in the introductory paragraph, the last sentence should be deleted and replaced with the following: "One allegation constituting a crime must be stricken as the prosecution failed to properly charge it under the applicable procedural and jurisdictional statute. Because the statutory authority for the gang registration fails to include probation violations not charged as crimes, the registration condition is reversed. The remainder of the order is affirmed."

In the second paragraph, the second sentence should be modified by replacing the first three words with the words, "In the case before us[.]" In the third sentence of that paragraph, the word "separate" should be replaced with the word, "previous."

On the second page, in footnote two, the first sentence should be modified by replacing the word, "include," with the word, "assume," and the word, "specifically," with the words, "such as[.]"

On the third page, in the fifth line of the page, the word, "any," should be replaced with the article, "a[.]" The sentence that commences in line seven and continues to line eight, should be replaced with the following sentence: "The court then readmitted Emiliano to probation on the condition he serve a year in custody."

On the third page, the first sentence of the first paragraph of the Discussion should be replaced with "Emiliano contends the statutory authority for gang registration, sections 186.30 and 186.32, is vague and overbroad." In the last sentence of that first paragraph, the phrase, "for a registration condition," should be added after the word, "qualify" and before the word, "under[.]" Footnote three, now presently inserted on the fourth page at the end of the first full sentence, should be deleted from page four and inserted at the end of the first paragraph of the Discussion on page three.

On page six, a parenthetical that reads, "(CYA)[,]"should be added at the end of the last full sentence.

On page six, in the third paragraph, a clause should be added to the ending of the first sentence, that reads as follows: "as it was not prosecuted as a crime with the attendant procedural protections afforded hearings under Welfare and Institutions Code section 602."

In the first sentence of the first full paragraph on page seven, the word, "had," should be deleted. In the second sentence of that paragraph, the comma should be deleted.

On page eight, in the parenthetical in the fifth line of the page, the word, "*infra*" should be replaced with the word, "*ante*[.]

In the first line of page nine, the word, "and," should be replaced with the word, "which[.]"

In the first line of the first full paragraph on page nine, the word, "detailed," should be replaced with the word, "explained[.]"

In the last partial paragraph on page nine, the paragraph should end with the parenthetical citation of *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107 [emphasis added.] The next sentence should commence a new paragraph.

In the first line of the first full paragraph on page 10, the words, "has been," should be replaced with the word, "was[.]"

On page 12, in the last paragraph of the opinion, a comma should be inserted after the word, "reversed[.]" In footnote 10 on that page, the word,

"realistically," should be inserted in the first sentence immediately before the word, "hopeful[.]"

This modification does not effect a change in the judgment.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.