

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re VINCENT MARQUEZ,  
  
on Habeas Corpus.

H029580  
(Santa Cruz County  
Super. Ct. No. F11816)

ORDER MODIFYING OPINION  
AND DENYING PETITION FOR  
REHEARING

BY THE COURT:

It is ordered that the opinion filed herein on July 10, 2007, be modified in the following particulars:

On page 3, first full paragraph, add the following footnote number three at the end of the paragraph that reads "...was represented by attorney John Larsen":

In its petition for rehearing, respondent asks us to correct the name of the attorney whom respondent stated in its return was appointed to represent petitioner at the probable cause hearing. Respondent attaches as Exhibit B to its petition for rehearing a report of the probable cause hearing which was not part of the original record. This report lists "John Larsen" as the hearing officer and petitioner's appointed attorney as "Holden Green." We grant respondent's motion to augment the record. (Cal. Rules of Court, rule 8.155(a).) Further references to petitioner's probable cause hearing attorney will be to "Holden Green."

On page 4, the last paragraph, the last two sentences that begin with "The Board stated that attorney . . ." insert the name Holden Green in place of John H. Larsen. The sentence shall read:

The Board stated that attorney Holden Green was present and represented petitioner and that Green rejected an offer to settle the matter if petitioner accepted 12 months of incarceration with the ability to earn credits. There is no allegation in the return or factual statement in the record that petitioner met Green or any other attorney before this hearing.

On page 5, the last paragraph, in the referenced footnote, replace the name Larsen with Green. The footnote shall read:

The Board's various hearing forms show that petitioner was represented at the probable cause hearing which he did not attend by Green, whom he never met; at the August 19 revocation hearing which was continued and in regard to which petitioner denied waiving time by Martin; and finally by Kilhy(?).

On page 6, the second full paragraph, last sentence, last word, replace the name Larsen with Green. The sentence shall read:

However, the documents petitioner was supposed to have received, the BPT 1073 and the BPT 1100(b), do not appear in the record and petitioner disputed that he ever received them or the reports and other information he was supposed to have received from Green.

On page 7, the second paragraph, last sentence, replace John Larsen with Holden Green. The sentence shall read:

He claimed that he was denied effective assistance of counsel because he "never met attorney [Holden Green] to this date [(November (illegible, 7 or 8?), 2005)]," and that Green did not provide him with any documentation about the location, date, time, findings, and name of the commissioner who conducted the hearing.

On page 13, the first full paragraph, second sentence, replace the name John Larsen with Holden Green. The sentence shall read:

The record of the purported probable cause hearing the Board produced showed that petitioner was represented by attorney Holden Green.

On page 14, third paragraph and page 15, first paragraph, replace those paragraphs beginning with "Petitioner has shown prejudice. . . ." replace with the following two paragraphs:

Petitioner has shown prejudice. Specifically, petitioner was prejudiced as found by the trial court, which finding was supported by substantial evidence in the record. (1) petitioner was denied a timely probable cause hearing and, indeed, any probable cause hearing at all. When the probable cause hearing was supposedly held, petitioner was not present, although available. Furthermore, (2) the lawyer who supposedly represented petitioner at the probable cause hearing held in his absence had never met him, had not advised him, had not communicated any offer to him or received any information from him to present in mitigation or as a partial or complete defense to the charges or the proposed disposition at the probable cause hearing. Thus appointed counsel was unable

to perform the functions of counsel at the probable cause hearing. (3) The record supports petitioner’s complaint that he did not receive notice of the charges and evidence against him. The Board’s bare assertion that petitioner received documents containing this information, without producing copies of the documents, or affidavits from the attorney whose duty it was to give him that information, did not disprove his claim.

(4) The trial court stated that the revocation hearing the Board claimed to have held was also not timely. As to that hearing, it was unrefuted that petitioner was not represented at the revocation hearing by knowledgeable counsel, and (5) there was no documentation showing that his requested witnesses were notified of or subpoenaed to the hearing. In his traverse, petitioner made an offer of proof of the testimony of prospective witness Yolanda Fernandez, which was material and, if believed, could have impeached testimony regarding petitioner’s intent in regard to the charged vehicle theft.

On page 15, third paragraph, starting with “Here, the process due . . .” replace with the following paragraph:

Here, the process due petitioner under the terms of *Valdivia* was a revocation hearing with due process protections within 35 days of the parole hold. As we have stated, the due process protections which petitioner was deprived of were timely hearings, disclosure of evidence against petitioner, opportunity to be heard in person and to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses. (See *Morrissey, supra*, 408 U.S. at p. 489.) Thus, petitioner received neither a revocation hearing with due process protections within 35 days, or a revocation hearing with due process protections within a reasonable time beyond the 35 days. The trial court was correct in granting the writ and discharging petitioner.

There is no change in judgment. The petition for rehearing is denied.

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Premo, J.

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Rushing, P.J.

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Elia, J.