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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY FLORES,

Defendant and Appellant.

E052078

(Super.Ct.Nos. INF064018,  
INF052391 & INF052121)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos, Judge. Affirmed in part and reversed in part with directions.

Esther K. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

At defendant's violation of probation hearing, the trial court found that defendant had used alcohol in violation of a term of his probation. The court further found that defendant was no longer amenable to probation and sentenced him to 28 months in prison.

On appeal, defendant's primary contentions are that the court erred by admitting into evidence an incriminating urinalysis report and that without the report the evidence is insufficient to support the court's finding that he violated the terms of his probation. He further contends the court erroneously failed to order a supplemental probation report, erred in imposing a \$30 facilities fee, and a \$30 court security fee must be reduced to \$20. Although we have significant concerns regarding the admissibility of the urinalysis report in this case, we conclude that the court did not abuse its discretion or deprive defendant of due process by allowing the document into evidence. Although the court failed to order a supplemental probation report, we hold that the error was harmless. Finally, we agree with defendant's arguments regarding the facilities fee and court security fee.

## II. FACTUAL SUMMARY AND PROCEDURAL HISTORY

### A. *Background*

Defendant's violation of probation hearing related to three underlying criminal cases. In the first case, defendant was charged in September 2005 in Riverside County case No. INF052121 with felony possession of methamphetamine (Health & Saf. Code,

§ 11377, subd. (a)) and misdemeanor possession of drug paraphernalia (*id.*, § 11364). He pled guilty to the felony charge and was granted probation for 36 months on various terms and conditions.

In October 2005, defendant was charged in the second case—Riverside County case No. INF052391—with felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and misdemeanor possession of drug paraphernalia (*id.*, § 11364). He was also charged with violating the terms of his probation in case No. INF052121. He pled guilty to the felony charge and admitted violating his probation. The court granted him 36 months' probation in both cases conditioned upon his participation in a substance abuse program, among other terms.

In November 2005, the court revoked defendant's probation in both cases for failing to provide proof of enrollment in a substance abuse program. He subsequently admitted he had violated his probation. The court reinstated probation on the same terms and conditions.

In March 2006, the court again revoked defendant's probation for failing to provide proof of enrollment in a substance abuse program. Defendant admitted the violation, and in November 2007, the court found he violated his probation. The court reinstated probation on the same terms and conditions.

In November 2008, defendant was charged in the third case—Riverside County case No. INF064018—with felony possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) His probation in case Nos. INF052121 and INF052391 was

revoked. He subsequently admitted he violated his probation and pled guilty to the charge.

The trial court sentenced defendant in all three cases to a term of two years four months in prison, but suspended the sentence and placed defendant on probation for 36 months on the condition that he participate in the Indio Recovery Opportunity Center (IROC) program and abstain from the use of alcoholic beverages, among other terms.

In April 2010, defendant admitted, and the court found, that he violated his probation for failing to provide a urine sample. Probation was reinstated.

In June 2010, defendant again admitted that he failed to test, and the court again reinstated probation.

At a drug court progress hearing on July 2, 2010, defendant's probation officer, Linda Lambert, observed that defendant appeared tired and had red, bloodshot eyes. Lambert directed defendant to go to a drug court site after the hearing and submit to alcohol and drug tests. She subsequently received a urinalysis report indicating positive results for the presence of ethylglucuronide and ethyl sulfate. Defendant was then charged with violating his probation by testing positive for alcohol.

#### *B. The Violation of Probation Hearing*

On September 20, 2010, defense counsel requested a continuance to obtain "a urine split."<sup>1</sup> The court denied the request, stating: "It appears that the violation was

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<sup>1</sup> The record does not indicate whether defense counsel made any argument or gave any reason for the request for a urine split, although a sidebar discussion was held "off the record."

filed in July of this year. This matter has been continued several times. It was set for formal hearing . . . a month ago. [¶] At this time, it appears that all the witnesses and everybody is prepared to proceed. So I'll deny the request.”

Lambert was the only witness who testified at the violation of probation hearing. Lambert has been a deputy probation officer for more than 10 years. She has been in the drug court program for three years, and currently oversees that program.

Lambert testified she saw defendant in drug court on July 2, 2010, when he appeared for a progress review hearing. According to Lambert, defendant “had blood red, like, bloodshot eyes.” Based on these observations, Lambert told defendant to have alcohol and drug tests after the hearing.

The court questioned Lambert regarding her observation of defendant, asking, “what else did you see? All I heard was you saw ‘red, watery eyes.’” Lambert replied: “He just—He appeared tired like he hadn't slept. He had red, watery eyes.” Upon cross-examination, Lambert agreed that if someone was tired or had a lack of sleep it would not be unusual for them to have bloodshot or red, watery eyes.

Although Lambert was trained in giving field sobriety tests, she did not ask defendant to perform one. She explained defendant was in court and around other people, and “it would just be easier for him to go back to the office and test.”

Lambert subsequently received a laboratory report from Redwood Toxicology Laboratory (Redwood). The Redwood report has an identification number of “LF-0725.” Lambert explained that the report pertains to defendant because “LF” refers to

defendant's initials and the four digit number refers to the last four digits of defendant's social security number.

She was not present when the sample was collected.<sup>2</sup> The Redwood report indicates that a urine sample was conducted by "J ROJAS" on July 2, 2010. Based upon this report, Lambert testified the sample was collected by Juan Rojas, "a community service aide for mental health." Rojas is one of the people at IROC who take urine samples in the course of their work. Lambert did not know how the urine sample got from the point of collection to the testing laboratory. "We have a company that comes and picks them up," she explained, but "sometimes with Redwood we'll put it in the mail also."

Defendant's counsel objected to Lambert's testimony regarding the taking of the sample based on lack of foundation. The court overruled the objection, stating that the admissibility of evidence at violation of probation hearings is governed by "a more relaxed standard," and the evidence was corroborated by Lambert's testimony "that she felt that the defendant . . . was under the influence, and because of that did refer him out to be tested."<sup>3</sup>

The Redwood report indicates that the sample was collected on July 2, 2010, received on July 9, 2010, and reported on July 13, 2010. It states the sample tested

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<sup>2</sup> Lambert agreed with defense counsel's statement that "men test men and women test women."

<sup>3</sup> Lambert did not actually testify that she felt defendant was under the influence, only that he appeared tired and had red, watery (or bloodshot) eyes.

positive for ethylglucuronide (1030 ng/mL) and ethyl sulfate (365 ng/mL). Below the results is the following note: “The results for this specimen have been tested in accordance with all Redwood Toxicology Laboratory standard operating procedures and have been reviewed by laboratory certifying scientists.” Below this is typed the title and name: “Chief Toxicologist: Wayne Ross, M.C.L.S.” It is unsigned.

Lambert did not know what ethylglucuronide or ethyl sulfate were. She did not know what a normal reading of ethylglucuronide was for someone who had not had alcohol, or whether ethylglucuronide or ethyl sulfate occur naturally in humans. Nevertheless, when asked about the result of the test, she said: “The results are positive. There is [*sic*] two substances here that check for alcohol, and it states it’s positive.” She further testified that she has received “thousands” of test results from Redwood in the course of her work and understood that the report reflects “a positive test for alcohol.” Although she believes the reports are reliable, she has never verified any of Redwood’s test results.

Defense counsel’s assertion of “continuing” “objections as to foundation[,] hearsay[,] and chain of custody issues” were overruled and the test results were admitted into evidence. The court explained: “[I]t’s a relaxed standard in the violation of probation hearing. And according to [*People v. Brown* (1989) 215 Cal.App.3d 452,] . . . the court ruled that corroborated drug test reports were admissible via probation revocation hearing . . . . [¶] And [in] the present case, I do find there is no [*sic*] corroboration in the fact that Ms. Lambert ordered the defendant to be tested. The report

came back with his initials. I believe she testified that she checked, and the social security, the last four digits matched. And . . . [t]here is also corroboration in that she testified that earlier in the day she saw him and he appeared to be under the influence, had what she believed—said he had ‘red, watery eyes’ and appeared very tired.”

The court concluded that defendant violated the term of his probation requiring him to abstain from the use of alcoholic beverages. It sentenced defendant to 28 months in prison, imposed and stayed a \$200 restitution fine, imposed a \$30 court facilities fee (Gov. Code, § 70373), and imposed a \$30 court security fee (Pen. Code, § 1465.8).

### III. ANALYSIS

#### A. *Admissibility of the Redwood Report*

Defendant contends the court abused its discretion and deprived him of his Fourteenth Amendment due process right to confrontation when it admitted the Redwood toxicology report into evidence. Before considering defendant’s arguments, we address the People’s contention that defendant waived this argument by failing to assert it below.

Although defendant objected to Lambert’s testimony regarding the urine test and the toxicology report on hearsay and foundation grounds, he did not assert a violation of due process or confrontation rights as grounds for excluding the evidence. As the People point out, generally, a defendant who fails to assert a ground for an objection in the trial court forfeits an argument based on that ground on appeal. (See, e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 546-547; Evid. Code, § 353, subd. (a).) However, when an asserted error in admitting evidence over an objection made below has “the additional

legal consequence of violating due process,” the reviewing court may consider the point. (*People v. Partida* (2005) 37 Cal.4th 428, 435-436.)

In *People v. Gomez* (2010) 181 Cal.App.4th 1028, the court addressed a forfeiture argument under circumstances similar to those before us. In *Gomez*, a probation report was offered into evidence at the defendant’s probation revocation hearing. (*Id.* at p. 1033.) The defendant objected to the report on hearsay and foundation grounds. (*Ibid.*) On appeal, the defendant argued that the admission of the report violated his due process right of confrontation. The People argued that he had forfeited this claim because he failed to object on that ground below. (*Ibid.*) The Court of Appeal rejected the forfeiture argument, stating: “The due process issue is inextricably entwined with the evidentiary problems presented by the report in this context. No unfairness to the parties or the court results from considering this claim on appeal.” (*Ibid.*) This language applies with equal force to the present case. We therefore reject the People’s forfeiture argument. We now turn to the merits of defendant’s due process argument.

Upon motion of a probation officer, a court may, in the interests of justice, modify, revoke, or terminate the probation of a probationer if “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 . . . .” (Pen. Code, § 1203.2, subds. (a), (b).) The trial court’s role and responsibility in a probation revocation proceeding “is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred and, if so, whether it would be

appropriate to allow the probationer to continue to retain his conditional liberty.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348; see also *People v. Ochoa* (2011) 191 Cal.App.4th 664, 670.) Probation can be revoked based upon facts proven by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.)

The trial court has “very broad discretion in determining whether a probationer has violated probation.” (*People v. Rodriguez, supra*, 51 Cal.3d at p. 443.) Accordingly, we will reverse a decision to revoke probation only upon a showing of an abuse of such discretion. (*Id.* at p. 442.) We apply the same standard in reviewing a trial court’s evidentiary rulings at a probation revocation hearing. (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197-1198.) However, when the claim implicates a defendant’s constitutional right to due process, we review the constitutional question de novo. (*People v. Stanphill, supra*, 170 Cal.App.4th at p. 78; cf. *U.S. v. Perez* (9th Cir. 2008) 526 F.3d 543.)

Because the revocation of probation is not part of a criminal prosecution, a probationer is not entitled to “the “full panoply of rights due a defendant [in a criminal prosecution]” . . . .” (*People v. Rodriguez, supra*, 51 Cal.3d at p. 441, quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 480 (*Morrissey*)). In particular, the Sixth Amendment right to confront adverse witnesses does not apply to probation revocation hearings. (*People v. Shepherd, supra*, 151 Cal.App.4th at p. 1199; *U.S. v. Hall* (9th Cir. 2005) 419 F.3d 980, 985-986.) Nevertheless, “both the People and the probationer or

parolee have a continued post-conviction interest in accurate fact-finding and the informed use of discretion by the trial court. The probationer or parolee's concern is 'to insure that his liberty is not unjustifiably taken away and the State[']s] to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.' [Citations.]" (*People v. Winson* (1981) 29 Cal.3d 711, 715 (*Winson*).

The United States Supreme Court set forth the minimum due process rights of a parolee at a parole revocation hearing in *Morrissey, supra*, 408 U.S. 471. These include: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) *the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)*; (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." (*Id.* at p. 489, italics added.) The court emphasized that the parole revocation "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Ibid.*)

The high court extended *Morrissey*'s due process requirements to state probation revocation hearings in *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781 and 782.<sup>4</sup> In response to the government's concern that the right to confront and cross-examine witnesses will be burdensome and expensive for the state when it needs to procure "witnesses from perhaps thousands of miles away," the court noted: "While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and *documentary evidence*." (*Gagnon v. Scarpelli, supra*, at p. 783, fn. 5, italics added.)

The admissibility of hearsay evidence at probation revocation hearings was addressed by our state Supreme Court in *Winson, supra*, 29 Cal.3d 711. At the defendant's probation revocation hearing in that case, the trial court allowed the prosecution to use a transcript of testimony from the preliminary hearing in the defendant's related criminal case. (*Id.* at p. 715.) Relying on *Morrissey* and *Gagnon*, the court held that the prior testimony could not be admitted at the hearing "in the absence of the declarant's unavailability or other good cause." (*Winson, supra*, at pp. 713-714, 717.)

Our state Supreme Court appeared to establish a different standard for the admission of "documentary evidence" in *People v. Maki* (1985) 39 Cal.3d 707 (*Maki*). In *Maki*, the defendant was subject to a probation condition that he obtain written

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<sup>4</sup> After *Morrissey* was decided and before *Gagnon*, the California Supreme Court extended *Morrissey*'s requirements to probationers in *People v. Vickers* (1972) 8 Cal.3d 451, 458.

permission from his probation officer before leaving the State of California. (*Id.* at p. 709.) The People alleged the defendant violated probation by traveling to Chicago, Illinois without permission. (*Ibid.*) At a probation revocation hearing, the court allowed into evidence a car rental invoice, signed by the defendant, and a hotel receipt that had been seized during a search of the defendant's home. (*Ibid.*) These documents supported the inference the defendant was in Chicago on the dates stated in the documents. (*Ibid.*) The Supreme Court held that the evidence could be admitted "if there are sufficient indicia of reliability regarding the proffered material . . . ." (*Ibid.*) The car rental invoice and hotel receipt satisfied this standard. (*Id.* at p. 717.) The car rental invoice, the court explained, was "an invoice of the type relied upon by parties for billing and payment of money" and was signed by the defendant; the hotel receipt corroborated the information in the car rental receipt indicating that the defendant was in Chicago at the relevant time. (*Ibid.*)

*Winson* was reaffirmed and *Maki* explained by our state Supreme Court in *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*). In *Arreola*, the court again considered whether the testimony by a police officer at a preliminary hearing could be introduced against a defendant at his probation revocation hearing. The officer observed the defendant driving erratically and failing to obey a stop sign, and then flee on foot when he was pulled over. (*Id.* at p. 1149.) When the defendant was apprehended, the officer detected signs of alcohol intoxication. (*Ibid.*) The Attorney General argued that under *Maki*, a finding of the declarant's unavailability or other good cause was not required so

long as the former testimony bore a sufficient indicia of reliability. (*Arreola, supra*, at p. 1156.) In rejecting this argument, the court drew a distinction between evidence that is offered “as a substitute for the *live testimony* of an adverse witness” and documentary evidence “that does not have, as its source, live testimony.” (*Id.* at pp. 1156-1157; see *People v. Abrams* (2007) 158 Cal.App.4th 396, 403; *In re Miller* (2006) 145 Cal.App.4th 1228, 1239 (*Miller*).) *Maki*, the court explained, clarified “the standard for the admission of *documentary* evidence at a revocation hearing . . . .” (*Arreola, supra*, at pp. 1156-1157.)

Because the preliminary hearing testimony at issue in *Arreola* was a substitute for live testimony, it could not be admitted at the probation revocation hearing without a showing of “good cause.” (*Arreola, supra*, 7 Cal.4th at p. 1159.) The court then defined good cause in terms of excuses for the declarant’s absence at the hearing: “The broad standard of ‘good cause’ is met (1) when the declarant is ‘unavailable’ under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant’s presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant.” (*Id.* at pp. 1159-1160.) The court further explained that the showing of good cause “must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant’s character); the significance

of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether, instead, the former testimony constitutes the sole evidence establishing a violation of probation.” (*Id.* at p. 1160.)

The *Arreola* court explained the distinction between the standards for testimonial and documentary evidence by stating that “the need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness’s demeanor. [Citation.]” (*Arreola, supra*, 7 Cal.4th at p. 1157.) By contrast, “the witness’s demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action.” (*Ibid.*, fn. omitted.)

This rationale suggests that the distinction between “testimonial” and “documentary” should not be applied mechanically according to whether the hearsay statement was originally asserted during “live” testimony versus written in a document; the underlying consideration is whether “the need for confrontation is particularly important.” (*Arreola, supra*, 7 Cal.4th at p. 1157.) There was, in the *Arreola* court’s

view, little to be gained from evaluating the demeanor of the car rental agency personnel needed to authenticate the car rental receipt in *Maki*, and therefore relatively little need to confront such personnel. By contrast, evaluating the demeanor of the police officer in *Arreola* could be critical to determining the veracity of his testimony, thereby increasing the need for confrontation and the necessity of showing good cause before denying confrontation.

Although *Arreola* focused on the importance of observing a witness's demeanor, the need for confrontation in a particular case may arise from a variety of considerations. As one court stated: “[W]here there are numerous questions raised by the evidence, the witness's demeanor is only one of the important factors that escapes evaluation by the finder of fact who relies on . . . hearsay testimony.” (*Miller, supra*, 145 Cal.App.4th at p. 1239.) Regarding the Redwood toxicology report, for example, the demeanor of the laboratory analyst may be relatively insignificant; however, cross-examination of the analyst may be helpful in clarifying the meaning of the report, establishing a chain of custody (or the lack thereof), understanding the methodology and integrity of the laboratory's procedures, evaluating the competency of the analyst, and determining the possibility of error in the result. As the Supreme Court has recently explained in the context of the Sixth Amendment, confrontation of one who performs scientific tests may expose manipulated, fraudulent, inaccurate, or incompetent testing. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, \_\_\_ [129 S.Ct. 2527, 2536-2538]; see also

*Bullcoming v. New Mexico* (2011) 564 U.S. \_\_\_, \_\_\_ [131 S.Ct. 2705, 2714] [the representations made in forensic laboratory reports are “meet for cross-examination”].) <sup>5</sup>

Nor is the distinction described in *Arreola* a bright line. As one court stated, the indicia of reliability standard and the good cause standard are not “wholly distinct. Rather, the good cause standard recognizes that a third party’s unsworn verbal statements are the least reliable type of hearsay, and thus require a greater showing to support use of such evidence in probation revocation hearings.” (*People v. Shepherd, supra*, 151 Cal.App.4th at p. 1201, fn. 4.) This is consistent with the policy of flexibility in revocation hearings emphasized in *Morrissey* and *Maki*. (See *Morrissey, supra*, 408 U.S. at p. 489; *Maki, supra*, 39 Cal.3d at p. 714.)

On the scale of reliability, there is a wide gap between the preliminary hearing testimony in *Winson* and *Arreola* (which were inadmissible in the absence of a showing of good cause) and the invoice and receipt in *Maki* (which required only sufficient indicia of reliability). The Redwood report in this case falls somewhere in this gap.

Although our state Supreme Court has not addressed the admissibility of forensic laboratory reports at probation revocation hearings, federal appellate courts that have considered the issue have applied a test that considers and balances the defendant’s

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<sup>5</sup> Although Sixth Amendment confrontation clause case law does not control questions concerning a probationer’s due process right to confrontation under the Fourteenth Amendment, they “may provide helpful examples in determining the scope” of that right. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1412 (*Johnson*); see also *People v. Shepherd, supra*, 151 Cal.App.4th at p. 1199; *U.S. v. Hall, supra*, 419 F.3d at pp. 985-986.)

interest in (or need for) confrontation and the government’s showing of good cause for denying confrontation. (See, e.g., *U.S. v. Minnitt* (5th Cir. 2010) 617 F.3d 327, 332-333; *U.S. v. Redd* (8th Cir. 2003) 318 F.3d 778, 784; *U.S. v. Martin* (9th Cir. 1993) 984 F.2d 308, 310-314; *U.S. v. McCormick* (5th Cir. 1995) 54 F.3d 214, 221-226; *U.S. v. Kindred* (5th Cir. 1990) 918 F.2d 485, 486; *U.S. v. Bell* (8th Cir. 1986) 785 F.2d 640, 642; *U.S. v. Penn* (11th Cir. 1983) 721 F.2d 762, 764.) The balancing test used by federal courts has been described by California Courts of Appeal as “nearly identical” to the standard articulated in *Arreola*. (See *People v. Stanphill, supra*, 170 Cal.App.4th at p. 79; *People v. Shepherd, supra*, 151 Cal.App.4th at pp. 1200-1201, fn. 3; *Miller, supra*, 145 Cal.App.4th at pp. 1236-1237.)

As described in *Miller*, this “balancing test hinges on the importance of the hearsay evidence to the finder of fact’s ultimate finding and the nature of the facts to be proven by the hearsay evidence. As the significance of the evidence to the ultimate finding increases, so does the importance of the parolee’s confrontation right. Similarly, ‘the more subject to question the accuracy and reliability of the proffered evidence, the greater the releasee’s interest in testing it by exercising his right to confrontation.’ [Citation.]” (*Miller, supra*, 145 Cal.App.4th at p. 1236, quoting *U.S. v. Comito* (9th Cir. 1999) 177 F.3d 1166, 1171.) Whether the government’s reasons for denying confrontation will constitute good cause vary depending upon “the strength of the reason in relation to the significance of the [probationer’s] right” to confrontation. (*U.S. v. Comito, supra*, at p. 1172.)

Before proceeding to consider these principles in this case, we address two California Courts of Appeal decisions that considered the use of hearsay evidence of drug test results in probation revocation hearings: *People v. Brown* (1989) 215 Cal.App.3d 452 (*Brown*), which the trial court expressly relied upon for its ruling, and *Johnson, supra*, 121 Cal.App.4th 1409, on which the People rely on appeal.

In *Brown*, police searched the defendant's hotel room and found two hypodermic needles, a razor blade, glass pipes of the type used to smoke cocaine, and what appeared to be cocaine. (*Brown, supra*, 215 Cal.App.3d at pp. 453-454.) A police officer took the apparent cocaine to the police department for analysis by a chemist. (*Id.* at p. 454.) At the defendant's parole revocation hearing, the officer testified to the chemist's findings that the substance tested positive for .84 grams of cocaine and "the customary uses of the confiscated cocaine paraphernalia." (*Id.* at pp. 454-456.) A "case evidence disposition sheet" on which the chemist purportedly recorded these results was also admitted into evidence. (*Ibid.*) On appeal, the defendant argued that the court abused its discretion in admitting the officer's testimony regarding the chemist's findings. The Court of Appeal disagreed.

The court stated that hearsay testimony that "bears a substantial degree of trustworthiness . . . may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of reliability.' [Citation.]" (*Brown, supra*, 215 Cal.App.3d at p. 454.) The court then rejected the defendant's argument, stating: "[The officer] testified that he

routinely passed the confiscated substances on to the police chemist who subsequently conducted the test. We have no reason to believe the test results were anything but trustworthy and reliable as it is the ‘regular business’ of the police laboratory to conduct such tests. Moreover, the evidence presented at appellant’s hearing was corroborated by both the articles of cocaine paraphernalia seized at his arrest and the chemist’s case evidence disposition sheet. Although [the testifying officer] was not able to read one of the words on the back of the test envelope, he clearly and definitely stated that the sample tested positive for .84 grams of cocaine. Appellant did not introduce any evidence tending to contradict this, the dispositive part of the officer’s testimony.” (*Id.* at pp. 455-456, fn. omitted.)

In *Johnson*, probation revocation proceedings were initiated after police observed the defendant selling cocaine on a city street. (*Johnson, supra*, 121 Cal.App.4th at p. 1410.) Over the defendant’s objection, the trial court admitted into evidence an unauthenticated report from the Alameda County Crime Laboratory regarding the cocaine. (*Ibid.*) On appeal, the defendant did not dispute that the report was admissible under California case law; instead, he argued that “a different rule applies under *Crawford* [*v. Washington* (2004) 541 U.S. 36 (*Crawford*)].” (*Johnson, supra*, at p. 1411, fn. omitted.) *Crawford* held that the admission at trial of out-of-court testimonial statements violates a criminal defendant’s right to confrontation under the Sixth Amendment unless the declarant of the statement is unavailable at trial and the defendant has had a prior opportunity to cross-examine him or her. (*Crawford, supra*, at pp. 42, 54,

68.) The *Johnson* court rejected defendant's reliance on *Crawford*, stating that “*Crawford*'s interpretation of the Sixth Amendment does not govern probation revocation proceedings.” (*Johnson, supra*, at p. 1411.) The court went on, however, to explain that, to the extent Sixth Amendment cases may be helpful in determining the scope of the confrontation rights of probationers under the due process clause, the laboratory report in that case “was not a substitute for live testimony . . . ; it was routine documentary evidence.” (*Id.* at p. 1412-1413.)

Although *Brown* and *Johnson* share some factual similarities with the present case, their precedential value is questionable. *Brown* was decided prior to *Arreola* and relied heavily on *Maki*. (See *Brown, supra*, 215 Cal.App.3d at pp. 454-455 & fn. 3.) Its continuing validity has therefore been questioned. (See *People v. Shepherd, supra*, 151 Cal.App.4th at p. 1203 [rejecting *Brown*'s application to testimonial evidence of alcohol test results because it is a pre-*Arreola* case].) Nor did the *Brown* court engage in the balancing of interests that federal courts and more recent California courts have conducted.

*Johnson* provides little guidance for two reasons. First, it appears the defendant limited his challenge to the admissibility of the laboratory report to a claim that the report should have been excluded under *Crawford*, a Sixth Amendment case. The court did not, therefore, consider or balance the competing interests relative to the due process right to confrontation under the Fourteenth Amendment. Second, to the extent that *Johnson* suggests that a laboratory report offered against a criminal defendant at trial is not

testimonial for purposes of the Sixth Amendment’s confrontation clause, it appears to conflict with the decisions in *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 305 [129 S.Ct. 2527] and *Bullcoming v. New Mexico*, *supra*, 564 U.S. \_\_\_\_ [131 S.Ct. 2705].

We now turn to the facts in the present case in light of the principles discussed above. Here, there is no dispute that the Redwood report was critical to the court’s ultimate substantive finding that defendant had violated his probation. Without that report, there was only Lambert’s testimony that defendant appeared tired and had red, watery eyes—evidence that is plainly insufficient by itself to establish the alleged probation violation.

As discussed above, the factual issues raised by the report are more significant than the mere authentication of the document. Indeed, the report itself raises more questions than it answers. Initially, we note there is little evidence of the nature of Redwood’s business or its qualifications for forensic chemical testing. It appears to be privately operated; there is no evidence that it is connected with any police department or governmental agency. Our record discloses nothing regarding the qualifications or competency of Redwood’s analysts. Nor is there any evidence that its facilities, equipment, methods, or procedures are adequate to assure the accuracy of the test results they report.<sup>6</sup>

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<sup>6</sup> We mean no disrespect toward Redwood. It may well be a state-of-the-art laboratory staffed with highly qualified analysts. *Based on our record*, however, we have no basis for distinguishing it from an individual operating a mail order specimen-testing business out of a garage—who has sent thousands of reports to Lambert.

Turning to the report itself, it states that the specimen tested positive for ethylglucuronide and ethyl sulfate, but does not provide any information as to what these chemicals are or how they reflect the presence of alcohol. As to ethylglucuronide, the report states, “Cutoff = 100 ng/mL,” and “Confirmed by LC/MS/MS,” but provides no indication as to what these messages mean. “Cutoff” probably refers to the level that distinguishes a positive from a negative result. But there is nothing to indicate why the cutoff is set at the level it is or how that level was determined. “LC/MS/MS” might refer to the initials of analysts; it might refer to acronyms of testing methods; it might have some other meaning. We are not told. Similar unexplained messages are set forth regarding ethyl sulfate. The report also states the results for ethylglucuronide and ethyl sulfate are “1030 ng/mL” and “365 ng/mL,” respectively; but other than indicating that they exceed the relative cutoff, there is no context to give these numbers an intelligible meaning.

Significantly, the report lacks anyone’s signature. The report does state that “[t]he results for this specimen have been tested in accordance with all Redwood Toxicology Laboratory standard operating procedures and have been reviewed by laboratory certifying scientists.” However, this appears to be a boilerplate statement, which does not identify the “certifying scientists” who reviewed the results. Nor is there any evidence of the nature of Redwood’s “standard operating procedures,” rendering the phrase effectively meaningless. Although the title and name of “Chief Toxicologist: Wayne Ross, M.C.L.S.” is printed on the report, it is not clear whether Ross was involved in the

testing of the specimen or simply has his name printed on the report because he is the “Chief Toxicologist” at Redwood. Perhaps most importantly, none of the statements on the report are made under penalty of perjury.

Lambert did little to clear up the questions raised by the report. For example, although she believed the tests were for alcohol, she did not know the nature of the chemicals identified in the report, whether such chemicals occur naturally in humans, what a normal level of such chemicals would be for someone who had not ingested alcohol, or what would be a high or low level of the chemicals. When Lambert was asked what a low reading for alcohol on the Redwood report would be, she replied: “You know, at this point—I mean, since there is not a ranking on here and I don’t know how high they go—[o]bviously, they start at zero, you know. It does appear to be low, but as a lab tech—[y]ou know, I’m not a lab tech so I don’t know exactly about the rating.” When asked whether taking vanilla or cough syrup would cause the results reported on the Redwood report, she said that, based on her “knowledge of just the labs and the tests, it . . . would not come back positive.” When questioned further, however, she said “[y]ou would have to talk to a lab tech. I don’t know the exact answer.” She noted the “cutoff” numbers stated in the report, but did not explain what they meant or to what they relate.

Notwithstanding the significant concerns we have regarding the report, there are some indicia of its reliability. The report does appear to pertain to defendant: Lambert testified that the identification number on the report, “LF-0275,” refers to defendant’s initials and matches the last four digits of defendant’s social security number. The report

states that the person who collected the urine sample is “J ROJAS”; Lambert testified that Juan Rojas is one of the people who collect samples in the IROC program. The report indicates that the urine sample was taken on the same day Lambert told defendant to submit to an alcohol test, and the positive test results were consistent with the symptoms Lambert observed on that date. Finally, Lambert testified that she has received thousands of Redwood reports without “any problems,” believes them to be reliable, and is unaware of any case in which urine samples had been inadvertently switched. Because of Lambert’s experience with, and oversight of, the drug court program, the court was entitled to give her testimony substantial weight.

In evaluating a defendant’s interest in confrontation, courts have considered the ability and efforts of the defendant to challenge the report by means other than cross-examining the laboratory analysis. (See, e.g., *U.S. v. McCormick*, *supra*, 54 F.3d at pp. 222-223; *U.S. v. Grandlund* (5th Cir. 1995) 71 F.3d 507, 511; *U.S. v. Pierre* (7th Cir. 1995) 47 F.3d 241, 242-243.) In *McCormick*, for example, the court stated: “[D]enying McCormick the right to cross-examine the laboratory technicians did not significantly deny him the opportunity to impeach or refute the government’s evidence of his possession. Innumerable avenues were available to McCormick to refute the government’s proof; he merely failed to pursue them. For example, had McCormick wanted to question the technicians who performed the analyses, or even [the] Director [of the laboratory], he could have sought a subpoena ordering their appearance. But this he did not do. McCormick could also have requested that his specimen be retested by [the

testing laboratory] or another laboratory. But this he did not do. He could have sought to obtain evidence impugning the reliability of the laboratory or its testing methods. But this he did not do. Perhaps the avenue most likely to help the argument he pursued during the revocation hearing, McCormick could have introduced evidence to support his unsupported conclusionary contention that the presence of Advil, Tylenol, or Ventolin in his system could cause his specimen to test positive for the presence of amphetamines and methamphetamines. But this too he did not do. In sum, McCormick had available a host of alternative ways to challenge the hearsay in the . . . urinalysis report, but he either did not seek or could not find the evidence to support those alternatives. In any event, however, the record makes clear that McCormick was not denied in any manner whatsoever the opportunity to rebut with his own proof the government's evidence of his possession and use of illegal narcotics." (*U.S. v. McCormick, supra*, at pp. 222-223, fns. omitted.)

Here, there is nothing in our record to suggest that defendant was deprived of his right to subpoena Redwood personnel or the production of Redwood's records pertaining to the report, or to offer other evidence that would rebut or disprove the allegations against him. Although defendant did request a continuance to obtain a "urine split," presumably to conduct a second test, the request came on the date set for the formal hearing and after several previous continuances. Defendant has not argued that the denial of the continuance itself was error. The belated request does not alter our conclusion

that, like the defendant in *McCormick*, defendant had innumerable avenues available to him to refute the government's proof, but failed to pursue them.

The importance of the evidence to the court's ultimate finding and the existence of significant unresolved issues concerning the meaning and reliability of the Redwood report weigh heavily in favor of defendant's right of confrontation. However, the failure of defendant to avail himself of his ability to subpoena Redwood or present other means of impeaching the report or refuting the prosecution's case against him weighs against his interest in confrontation.

In evaluating the government's reasons for denying confrontation, we take into consideration the unavailability of the declarant and the burden or expense of producing the declarant. (See *Arreola, supra*, 7 Cal.4th at pp. 1159-1160; *U.S. v. Comito, supra*, 177 F.3d at p. 1172.) Here, the prosecution made no explicit showing of such burden or expense. However, we note that, according to the Redwood report, Redwood's laboratory is located in Santa Rosa, California. There is no contrary evidence in the record. We take judicial notice of the fact that Santa Rosa is approximately 500 miles from the Indio courthouse where the subject hearing took place. (Evid. Code, §§ 452, subd. (h), 459, subd. (a).) Based on these facts, we can reasonably conclude that transporting the necessary laboratory analyst or analysts from Santa Rosa to Indio would be somewhat burdensome and expensive for the prosecution.

Although we have significant concerns regarding the absence of a foundation for, and the reliability of, the Redwood report, we conclude that the minimal indicia of

reliability identified above, combined with Lambert's corroborating testimony, defendant's failure to diligently pursue efforts to challenge the prosecution's evidence, and the People's burden and expense of producing Redwood analysts at the hearing, allowing the report into evidence does not constitute an abuse of the court's discretion or deprive defendant of his right to due process.

Defendant's argument that the evidence is insufficient to support the court's finding that he violated his probation is based upon the premise that the Redwood report was improperly admitted into evidence. Because we reject that premise, this argument fails.

*B. Failure to Order a Supplemental Probation Report*

Defendant contends the court was required, and failed, to order a supplemental probation report. The People do not dispute that the court failed to order a supplemental probation report. They contend, however, that any error was harmless. We agree.

Under Penal Code section 1203.2, subdivision (b), a court considering a petition for revocation of probation is required to refer the matter to the probation officer and "read and consider" the probation officer's report. Under rule 4.411(c) of the California Rules of Court, the "court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." In *People v. Dobbins* (2005) 127 Cal.App.4th 176 (*Dobbins*), the Court of Appeal held that the trial court erred in failing to order a

supplemental probation report when eight months had passed since the original report. (*Id.* at p. 181.)

As the People point out, it is not clear when, or if, an original probation report was prepared in this case because our record does not contain any probation report, original or supplemental. The People do not appear to dispute, however, that at least one year four months had elapsed between defendant's initial sentencing hearing and the sentencing hearing at issue in this appeal.

As *Dobbins* stated, the failure to order a supplemental probation report is subject to a harmless error analysis under the *Watson*<sup>7</sup> standard. (*Dobbins, supra*, 127 Cal.App.4th at p. 182.) Under this standard, "we shall not reverse unless there is a reasonable probability of a result more favorable to defendant if not for the error." (*Dobbins, supra*, at p. 182, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

In arguing that it is reasonably probable that the trial court would have reinstated defendant's probation if a supplemental probation report had been issued, defendant asserts that "the probation department left open the possibility that [defendant] receive continued treatment in a different facility." He further states that he "was making positive progress and was set to graduate from the IROC program before the violation at issue." His support for both assertions is an incident report that states that defendant was to graduate from the program on July 16, 2010, and that the probation department "requests for [defendant] to be remanded into custody. If the defendant is to continue

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<sup>7</sup> *People v. Watson* (1956) 46 Cal.2d 818, 836.

with IROC, Probation requests [defendant] to enter Residential Substance Abuse Treatment (RSAT) at the Banning Correctional Facility.” Even if we read this report as favorable to defendant as he does, it does not support defendant’s argument because the incident report he relies on is part of the trial court record and the court appears to have been aware of the report. At an initial hearing on the incident, on July 16, 2010, the court commented: “Unfortunately, sir, you won’t be able to make the graduation this afternoon, but we’ll just set the matter next week, and you will be remanded into custody at this time.” Thus, the court revoked defendant’s probation despite the department’s comment suggesting, as an alternative to custody, the possibility of further treatment. It is not likely that a supplemental probation report suggesting the same alternative would have made a difference in the court’s determination.

Defendant further asserts that he had “only three prior violations of probation, which were all minor and drug-related.” “Otherwise, [defendant] had been generally making positive progress.” The People, while acknowledging defendant’s positive progress, point out numerous reports and admissions of instances in which defendant violated his probation by drinking alcohol and using methamphetamine. The defendant’s history, good and bad, was well documented in the record and there is no reason to believe the court was unaware of it. It is thus unlikely that a supplemental probation report would have shed additional light on the issues concerning reinstatement of probation. Accordingly, we conclude that, if the court erred in failing to order a supplemental probation report, the error was harmless.

### *C. Facilities Fee and Court Security Fee*

In each of the three criminal cases, the court imposed on defendant a \$30 facilities fee pursuant to Government Code section 70373 and a court security fee of \$30 under Penal Code section 1465.8. Defendant contends the statute authorizing the facilities fee and the amendment of the statute that increased the amount of the court security fee from \$20 to \$30 took effect after defendant's convictions. He asserts that the facilities fee must therefore be reversed and the security fee reduced to \$20. The People agree.

Government Code section 70373, subdivision (a)(1), provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony and in the amount of thirty-five dollars (\$35) for each infraction." The effective date of the statute is January 1, 2009. (Stats. 2008, ch. 311, § 6.5, p. 2113; Cal. Const., art. IV, § 8, subd. (c)(1).) A person is convicted for purposes of this statute "upon the return of a guilty verdict by the jury or by the entry of a plea admitting guilt." (*People v. Davis* (2010) 185 Cal.App.4th 998, 1001.)

Defendant entered his guilty pleas on September 29, 2005 (case No. INF052121), October 19, 2005 (case No. INF052391), and December 8, 2008 (case No. INF064018). Each of these dates occurred before Government Code section 70373 went into effect. Therefore, the \$30 facilities fee must be reversed. (See *People v. Davis, supra*, 185 Cal.App.4th at pp. 1001-1002.)

The same analysis applies to the \$30 court security fee under section 1465.8 of the Penal Code. From 2003 until July 28, 2009—covering the span of defendant’s convictions—that statute provided for the imposition of a \$20 fee “[t]o ensure and maintain adequate funding for court security.” (Former Pen. Code, § 1465.8; see Stats. 2003, ch. 159 § 25, p. 1513; Stats. 2007, ch. 302, § 18, pp. 2459-2460.) Like Government Code section 70373, the fee is “imposed on every conviction for a criminal offense . . . .” (Pen. Code, § 1465.8.) The statute was amended in 2009 to increase the fee from \$20 to \$30. (Stats. 2009, 4th Ex. Sess. 2009-2010, ch. 22, § 29, p. 5346.) Because defendant’s convictions occurred prior to the effective date of the 2009 amendment, the court should have imposed a \$20 fee, not a \$30 fee. We will modify the orders to correct the error.

#### IV. DISPOSITION

The orders revoking defendant’s probation are affirmed. The orders imposing a \$30 facilities fee pursuant to Government Code section 70373 are reversed. The orders imposing a \$30 court security fee pursuant to Penal Code section 1465.8 are modified such that the amounts of \$30 are reduced to \$20; as modified, those orders are affirmed. The trial court is directed to amend the minute orders and the abstracts of judgment to reflect the reversal of the facilities fee and the modification of the court security fee,

and to forward a certified copy of the amended abstracts to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

RAMIREZ  
P.J.

CODRINGTON  
J.