

**HOW PROPOSITION 21 AMENDED WELFARE AND INSTITUTIONS  
CODE SECTION 777 AND CHANGED PROBATION VIOLATION  
PROCEDURES FOR JUVENILE WARDS**

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Updated January 2004**

Welfare and Institutions Code section 777 is the vehicle used by the probation officer or the district attorney to assert that a section 602 juvenile court ward has violated the terms of probation and to request modification of that minor's dispositional order – almost always to a more restrictive placement. Among the many things that it did, Proposition 21 amended section 777 to make it much easier to move a minor into a more restrictive placement for violations of probation.

***Juvenile Probation Violation Proceedings Under the Former Version of Section 777***

Under the former version of Section 777 – in effect prior to the changes made by Proposition 21 on March 8, 2000 – the probation officer or the district attorney had to meet strict requirements if they wished to violate a minor ward's probation for the purpose of moving that minor into a more restrictive dispositional placement (i.e. if they wished to do more than require the minor to spend 30 additional days in juvenile hall).

First, either the probation officer or the district attorney was required to file a noticed petition, called a supplemental petition, alleging a violation of probation **and** setting forth specific facts showing that the previous disposition had not been effective in the rehabilitation or protection of the minor.<sup>1</sup>

Then at the section 777 hearing, the prosecution had to prove the allegations of the supplemental petition beyond a reasonable doubt. (*In re Arthur N.* (1976) 16 Cal. 3d 226.) The minor was entitled to the full range of due process rights (e.g. representation by counsel, the right to present evidence, the right to cross-examine witnesses). Most significantly, hearsay was **not** admissible unless it fell under an established exception to the hearsay rule. (See *In re Antonio A.* (1990) 225 Cal. App.3d 700.)

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<sup>1</sup> If the alleged violation of probation was a crime, then the district attorney had to file and prosecute the section 777 supplemental petition. If the alleged violation was conduct not amounting to a crime, either the probation officer or the district attorney could file the supplemental petition.

Finally, before the court could sustain the section 777 petition and move the minor to a more restrictive placement, it had to find complete rehabilitative failure beyond a reasonable doubt – that the prior disposition was such a complete failure that future efforts to rehabilitate the minor in this setting would be futile. (See *In re Joe A* (1986) 183 Cal.App.3d 11; *In re Ronnie P* (1992) 10 Cal.App.4th 1079; *In re Jorge Q.* (1997) 54 Cal.App.4th 223.) It was often difficult to prove complete rehabilitative failure if the minor had committed a non-criminal probation violation.

If the alleged probation violation constituted a crime (e.g. escape or assault), the prosecutor often filed both a section 777 “supplemental” petition **and** a section 602 “subsequent” petition alleging the criminal conduct (or sometimes a combined unitary petition). If the allegations of the section 602 petition were also sustained, beyond a reasonable doubt, then the minor would have an additional crime on his record which could affect the dispositional choice. Time for that new offense would be included in any calculation of maximum confinement time. Most importantly, if the minor was sent to CYA, that additional crime might affect the calculation of the estimated parole date.

### ***Juvenile Probation Violation Proceedings Under New Section 777***

Proposition 21 was passed by the California voters on March 7, 2000; it went into effect the next day – March 8, 2000. The Proposition amended section 777, basically making it much easier to move a minor into a more restrictive level of disposition based on a violation of probation.

First, a formal supplemental petition is no longer required. In order to remove a juvenile court ward from the parental home or impose a more restrictive placement, the probation officer or district attorney need only give “notice” alleging “a violation of a condition of probation not amounting to a crime”. (Welf. & Inst. Code, § 777(a)(2))

Second, there is no longer any need to allege or prove that the previous order has been ineffective in rehabilitating the minor (let alone complete rehabilitative failure).

Third, the facts alleged in the notice (that the minor has violated a probation condition) need only be established by a preponderance of the evidence. Proof beyond a reasonable doubt is no longer required. The preponderance of the evidence standard is also used in adult probation revocation proceedings. (See *People v. Rodriguez* (1990) 51 Cal.3d 437.) In *In re Eddie M.* (2003) 31 Cal. 4<sup>th</sup> 480, 502-08, the Supreme Court held that application of the preponderance of the evidence standard to juvenile probation violation proceedings does not violate the due process guarantees of the federal and state constitutions.

***1. Hearsay Now Admissible in Juvenile Probation Violation Proceedings to the Same Extent as in Adult Revocation Proceedings/ Challenging Testimonial Hearsay***

As the fourth change rendered by Proposition 21, hearsay is now admissible at a juvenile probation violation hearing. The juvenile court is expressly permitted to “admit and consider reliable hearsay evidence at the hearing to the same extent that such evidence would be admissible in an adult probation revocation proceeding, pursuant to the decision in *People v. Brown* 215 Cal.App. 3d (1989) [sic] and any other relevant provision of law”. (Welf. & Inst. Code, sec. 777c.)

At juvenile probation violation hearings, the district attorney often calls the minor’s probation officer to testify about the alleged probation violations. If the minor committed his violations while he was in placement (e.g. violating the rules at the group home), the probation officer’s critical testimony is often hearsay. The probation officer will relate conversations she had with staff members at the group home who actually witnessed the minor’s alleged transgressions, or she will read from “ incident reports” prepared by group home staff. Is this evidence now admissible as “reliable hearsay” pursuant to section 777c?

As in adult probation revocation proceedings, if you can establish that the proffered hearsay qualifies as “testimonial hearsay” – offered in lieu of live testimony – then you can argue that it should have been excluded unless the prosecutor established good cause for not calling the percipient witness, the out-of-court declarant who witnessed the minor’s probation violations.

According to the one published case on this issue, *In re Kentron D.*, the rules that govern the admissibility of hearsay in adult probation revocation proceedings now apply to juvenile probation violation proceedings.<sup>2</sup> Thus, the admissibility of a specific piece of hearsay evidence at a section 777 hearing may depend on the threshold question of

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<sup>2</sup> The hearsay provision of new section 777 was not at issue in *In re Eddie M* (2003) 31 Cal.4th 480, the California Supreme Court case addressing juvenile probation procedures, as amended by Proposition 21. However, according to the Supreme Court the general intent of the Proposition 21 amendments to section 777 was to conform juvenile probation violation proceedings to adult revocation proceedings. The Court specifically implied that the hearsay rules applicable to adult revocation proceedings now apply at section 777 hearings. (*In re Eddie M.*, *supra.*, at 501-02.)

whether it is documentary or testimonial hearsay. (*In re Kentron D.* (2002) 101 Cal. App. 4<sup>th</sup> 1381.)<sup>3</sup>

As noted in *Kentron D.*, the rules governing the admissibility of hearsay at adult probation revocation hearings have been defined by the California Supreme Court in a series of cases. (*People v. Winson* (1981) 29 Cal. 3d 711; *People v. Maki* (1985) 39 Cal.3d 707; *People v. Arreola* (1994) 7 Cal. 4<sup>th</sup> 1144.)

Basically, the rules set forth in *Arreola* and reiterated in *Kentron D.* are as follows: There is a distinction between **documentary hearsay** evidence (documents such as lab reports, invoices or receipts prepared by someone other than the testifying witness) and **testimonial hearsay** (testimony which has as its source the live testimony of an adverse witness). When the witness on the stand relates statements made to her by an out-of-court percipient witness, this is testimonial hearsay. When the prosecutor seeks to admit a preliminary hearing transcript in lieu of live testimony, this is testimonial hearsay.

Such testimonial hearsay is not admissible at a probation revocation hearing without a showing of “good cause”. The 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 mental or emotional harm, to the declarant. (*People v. Arreola, supra.*, at 1160; *In re Kentron D., supra.*, at 1389-90, 1392.) This rule assures the probationer’s constitutional due process right to confront and cross-examine adverse witnesses, a right guaranteed to probationers in revocation proceedings by the United States Supreme

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<sup>3</sup> *Kentron D.* was filed by Division Two of the Second District Court of Appeal. No petition for review was filed in *Kentron D.*. Several unpublished cases (including one from Division Two of the First District) have adopted the reasoning of *Kentron D.* Filed on the same day as *Kentron D.*, by the same division, was *In re Oscar R.* (2002) 101 Cal. App. 4<sup>th</sup> 1370. In *Oscar R.*, the Court of Appeal adopted the same standards for the admission of hearsay at section 777 hearings as it did in *Kentron D.*. However, in *Oscar R.*, the court held that application of the new version of section 777 to the minor, who had committed his original offense before the effective date of Proposition 21, did not violate the ex post facto provisions of the federal and state constitutions. The identical ex post facto issue is pending before the California Supreme Court in *In re John L.* (S098158) Consequently, a petition for review was filed in *Oscar R.* and granted pending the court’s consideration and disposition of the related issue in *John L.*. The bottom line: *Oscar R.* can no longer be cited as authority.

Court. (See *People v. Arreola, supra.*, at 1157-58; *Kentron D., supra.*, at 1390-92.)

A different rule applies when the proponent introduces documentary hearsay. For documentary hearsay, whose source is not live testimony, the document may be admitted if there are sufficient indicia of reliability regarding the proffered material. (*People v. Maki, supra.*, 39 Cal. 3d at 709; *People v. Arreola, supra.*, at 1155-56). In *Maki*, the Court approved the admission of car rental receipt, bearing the defendant's verified signature, to prove that he had left the state in violation of probation terms. In *People v. Brown* (1989) 215 Cal. App. 3d 452, Division Two of the First District relied on *Maki* to approve the admission of a chemist's report of test results showing that a substance seized from the defendant's room tested positive for cocaine. The court held the tests results, conducted and recorded by the police laboratory in the regular course of business, were sufficiently reliable. The latest application of the *Maki* rule in a published case occurred just last year in *People v. O'Connell* (2003) 107 Cal. App. 4<sup>th</sup> 1062. In *O'Connell*, the Third District approved the trial court's admission of a written report prepared by a counseling program (showing that the defendant had attended 0/20 sessions) to prove that he had violated the mandatory counseling term of his deferred entry program. The court found the report was sufficiently reliable documentary hearsay as it was prepared in response to a referral from the court specifically for the termination (revocation) hearing, and it was corroborated by the defendant's admission that he had failed to attend counseling.

Based on these rules regarding the admission of hearsay at probation hearings, applied to juvenile section 777 hearings by *Kentron D.*, one can almost certainly challenge the hearsay statements of a probation officer who testified to conversations she had with staff members at the placement – those who had observed the minor's alleged rule violations. For example, let's say the probation officers testified that she talked to Mr. Smith, the group home director on the phone, and Mr. Smith told her that he saw the minor outside of his room past lights out, in violation of the group home rules. In order to rely on the probation officer's testimony, the prosecutor would have had to show that Mr. Smith was unavailable or establish other good cause.

But what if the prosecutor introduced a written report, prepared by Mr. Smith, detailing his observations of the minor's various transgressions (e.g. the minor was out of his room after lights out, the minor got into a fight with another resident, the minor was seen smoking cigarettes). Was this report documentary hearsay, prepared in the regular course of business, and thus admissible as "reliable" hearsay under *Maki, Brown, and O'Connell*? Or was this report, although technically in documentary form, offered in lieu of live testimony? Could you argue that this was really testimonial hearsay, and that the minor had the right to cross-examine Mr. Smith or any other group home staff members who witnessed his rule violations?

Based on *Kentron D.*, I think you would have a viable argument that the report was not admissible unless the prosecutor showed the percipient witness's unavailability or other good cause – even when the percipient witness put his observations into writing. This would be particularly true if the report included double hearsay – e.g. the probation officer prepared a written report based on conversations with Mr. Smith, or Mr. Smith related conversations he had with other group home staff members who personally witnessed the minor's violations.

The facts of *Kentron D.* are instructive: Kentron, a juvenile court ward on probation, was placed in camp. Pursuant to section 777, the probation officer filed a notice alleging that Kentron had violated probation by committing various acts of misconduct at camp. These acts included a verbal/physical altercation, the wearing of red shorts indicative of gang affiliation, and the possession of extra clothing. These rule violations resulted in Kentron's removal from camp. The details of the acts, witnessed by the various camp officers, were included in the notice of probation violation. At the hearing, the prosecutor submitted his case on this written notice. He did not call the camp officers to testify about what they saw, but indicated that they could be available for cross examination. The defense objected to the notice of probation violation (essentially a report of appellant's rule violations) as inadmissible hearsay. The juvenile court overruled the objection, but the Court of Appeal disagreed. After finding that *Arreola*, applied to juvenile section 777 hearings, the Court held that the notice of probation violation was "testimonial hearsay". It should not have been admitted unless the prosecutor showed good cause –that the camp officers who observed Kentron's misconduct were unavailable to testify. (*Kentron D., supra.*, 101 Cal. App. 4<sup>th</sup> at 1384-87, 1392-93)

Based on *Kentron D.*, if the prosecutor – at a section 777 hearing – presented a report by a probation officer relating conversations with placement staff or summarizing incident reports by placement staff, or presented the incident reports themselves, I would recommend arguing that this hearsay evidence was inadmissible under *Arreola*. The prosecutor should have been required to show that the placement staff members who observed the actual probation violations were unavailable or show other good cause. *O'Connell* could be distinguished as that case involved a report prepared by the program staff in response to a court referral. Also, the information in the report (the number of absences from counseling sessions) was objectively verifiable data.

Of course, the viability of this argument depends on whether the defense counsel made some sort of hearsay objection at the section 777 hearing. If defense counsel did not raise any objection, then you might have to raise the hearsay argument in the guise of an ineffective assistance of counsel claim.

## ***2. Can a Criminal Probation Violation be Adjudicated in Section 777 Proceedings? Yes, So Long as it is Not Formally Alleged as a Violation of a Criminal Statute***

You will note that new section 777 is limited by its express terms to an allegation that the ward has violated “a condition of probation not amounting to a crime”. (Welf & Inst. Code, § 777(a)(2).)<sup>4</sup> What does this language mean? After Proposition 21, what do the probation officer and district attorney need to do if a juvenile ward commits a violation of probation which also constitutes a crime (e.g. assault or escape from the juvenile ranch)?

Immediately following the passage of Proposition 21 and the amendment of section 777, the lower appellate courts divided on interpretation of this language. Two Court of Appeal decisions had held that criminal conduct violating probation could no longer be adjudicated in section 777 proceedings. (See *In re Marcus A.* (2001) 91 Cal.App.4th 423; *In re Emiliano M.* (2002) 99 Cal.App. 4<sup>th</sup> 304.) According to these cases, if the minor’s probation violation could be charged as a crime, it had be adjudicated in section 602 proceedings in which the prosecutor was obligated to prove the criminal allegation beyond a reasonable doubt without the use of hearsay evidence. However, another published Court of Appeal opinion disagreed with this reading of section 777(a)(2). According to *In re Eddie M.*, a section 777 notice of probation could be filed even when the ward’s violation of probation could also be charged as a crime, provided that no new criminal law violation is actually alleged. (*In re Eddie M.* (2002) 100 Cal.App.4th 1224. The Supreme Court granted review in *Eddie M.* and *Emiliano M.* to resolve this split in authority.

In *In re Eddie M.* (2003) 31 Cal. 4<sup>th</sup> 480, the Supreme Court held that all probation violations, including those that were inherently criminal in nature, could properly be initiated by the filing of a section 777 notice (by the probation officer or the prosecutor)

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<sup>4</sup> Section 777(a)(2) states that if the minor is a court ward or probationer under section 602, the notice of violation shall be made by the probation officer or the prosecuting attorney alleging “a violation of a condition of probation not amounting to a crime”. Under the former version of section 777(a)(2) – in effect since 1986 -- the prosecutor or the probation officer were authorized to file the formal supplemental petition alleging “a violation of condition of probation not amounting to a crime”. However, only the prosecutor was empowered to file a petition alleging “a violation of a condition of probation amounting to a crime”. New section 777 (a)(2) deleted the provision requiring prosecutors to allege criminal probation violations. In the new version, there is no reference whatsoever to violations of probation amounting to crimes.

and adjudicated at a section 777 hearing. This includes conduct violating a probation condition to “obey all laws” that could conceivably be charged as a crime in a section 602 petition, so long as the conduct is not formally charged as a crime. This brings juvenile probation violation proceedings into conformity with adult probation revocation proceedings. The Supreme Court based its interpretation of the critical language in section 777(a)(2) on a review of the statutory history of section 777 and on an examination of the voter intent behind Proposition 21. (*Eddie M.*, *supra.*, at 490-502.) The Supreme Court then reiterated and applied this same reasoning in the companion case of *In re Emiliano M.* (2003) 31 Cal.4th 510, 516-517.)

What does this mean in the practical sense? Let’s say the minor ward escapes from juvenile camp. Presumably, the prosecutor can file a section 777 notice alleging that the minor “escaped from camp” or “left camp without permission”. However, she cannot allege, in such a notice, that the minor “escaped from a juvenile facility in which he was confined, in violation of Welfare and Institutions Code section 871”. A formal charge of criminal escape – alleged as a crime and not as a mere probation violation -- would need to be made in a section 602 petition.

If the district attorney chooses to adjudicate the escape crime as a mere probation violation, she can use the more informal proceedings set forth in section 777 (e.g. proof by a preponderance of the evidence, admission of hearsay). However, the if the D.A. wants the minor to have an additional criminal adjudication on his record (which would increase maximum confinement time), the prosecutor must file a section 602 petition and prove the penal allegation (all elements the section 871 violation) beyond a reasonable doubt.<sup>5</sup>

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<sup>5</sup> When an adult probationer commits a new crime, the district attorney has the option of filing a Criminal Complaint, initiating a new case possibly leading to an additional criminal conviction, or filing a notice of probation violation. Now, when a juvenile ward commits a new crime, the prosecutor can either file a new section 602 petition (if the minor was under 18 when she committed the offense) or allege the criminal conduct as a probation violation in a section 777 notice. Of course, as in adult cases, the prosecutor can file both a section 602 petition (alleging a new crime) and a section 777 petition (alleging a probation violation). If the allegations of either petition is sustained, the minor can be moved into more restrictive custody.

### ***3. Still Pending Before the California Supreme Court – the Ex Post Facto Issue***

You will recall that the changes rendered by Proposition 21 went into effect on March 8, 2000. What if the juvenile ward committed the underlying crimes for which section 602 wardship was declared prior to that date. However, the conduct allegedly violating probation occurred after March 8, 2000. Which version of section 777 must be used when the state seeks to violate that ward's probation – the old version requiring proof beyond a reasonable doubt and a finding of complete rehabilitative failure, or the new version? Does it violate the Ex Post Facto Clause of the Constitution to apply the new version of section 777 with its relaxed rules of evidence?

In *In re Melvin J.* (2000) 81 Cal. App. 4<sup>th</sup> 742, Division Five of the Second District said yes. When the court conducts a section 777 probation violation hearing to impose a more restrictive disposition upon a minor previously adjudicated a ward of the court, the date of the conduct which resulted in the minor's original adjudication as a ward is controlling for Ex Post Facto analysis. If that underlying conduct occurred prior to March 8, 2000, the old version of section 777 should be applied. Use of the new version is proscribed by the Ex Post Facto Clause because the amendments to that section, promulgated by Proposition 21, altered the legal rules of evidence. The new version allows a commitment to more restrictive custody based on less or different evidence than required at the time the ward committed his original offense. (*In re Melvin J., supra.*, at 757-58.)<sup>6</sup>

Division One of the Fourth District disagreed. In three appeals consolidated in *John L. v. Superior Court* (2001) 88 Cal. App. 4<sup>th</sup> 715, the court held that the relevant date for Ex Post Facto analysis was the date on which the minor engaged in the conduct allegedly violating probation. If that conduct occurred after March 8, 2000, then the new version of section 777 applies in proceedings to prove the probation violation and impose a more restrictive disposition. The court emphasized that new section 777 did not add or increase any of the sanctions that were available to the court at the time the minor committed the underlying offense.

The California Supreme Court will soon resolve this dispute. On July 18, 2001, the Court granted review in *John L. v. Superior Court* (S098158). On October 27, 2003, the Court solicited supplemental briefing, asking the parties to discuss the effect of its ruling

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<sup>6</sup> In fact, in *Melvin J.*, both the underlying criminal conduct triggering the declaration of wardship and the conduct violating probation occurred prior to March 8, 2000 – the effective date of Proposition 21 and the new version of section 777.

*In re Eddie M.* In that case, the Court held: The new version of section 777 “does not inflict or increase punishment [for the underlying crime] by any appreciable due process measure. A juvenile probation violation cannot increase the maximum period of confinement for the crime previously adjudicated under section 602.” (*Eddie M., supra.*, 31 Cal. 4<sup>th</sup> at 506.)

My educated guess is that the Supreme Court will affirm the analysis of *John L.* and reject the analysis of *Melvin J.*. However, until the high court rules you can still argue that the old version of section 777 should apply in cases where the minor committed the underlying offense, for which he was declared a ward, prior to March 8, 2000. Nevertheless, you must acknowledge that the issue is pending before the California Supreme Court. Of course, you can still cite *Melvin J.* as authority. However, I know of no unpublished case that has followed *Melvin J.* and found an Ex Post Facto violation when the conduct violating probation occurred after the effective date of Proposition 21 and the new version of section 777.