

COURT OF APPEALS,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Appeal; Adams District Court; Honorable Tomee
Crespin; and Case Number 2014CR1158

Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
CYNTHIA MARIE VIGIL

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REPLY BRIEF

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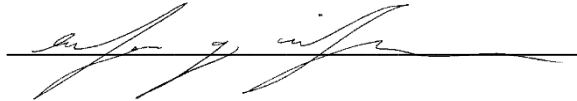
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In response to matters raised in the Attorney General’s Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

- 1. The district court violated Vigil’s due process rights by revoking her deferred sentence without finding the violation was “based on an informed exercise of discretion” or was “substantial,” where the record reflects her revocation was based on a misunderstanding of the law regarding medical marijuana and an over-two-year-old alleged positive alcohol test.**

A. Due process requires an informed exercise of a probation officer’s or district attorney’s discretion when petitioning for the revocation of a deferred sentence or a substantial probation violation. Reversal is required because such due process was absent here.

As argued in Vigil’s Opening Brief, her State and Federal rights to due process, as interpreted in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *People v. Loveall*, 231 P.3d 408, 416 (Colo. 2010), require probation officers and district attorneys to make an informed exercise of their discretion when petitioning for the revocation of a deferred sentence or, relatedly, that the violations underlying a revocation must be substantial. (See Opening Brief, pp 6-27). She further explained that, here, neither her probation officer nor the district attorney exercised their discretion in an informed manner and the violations which supported her revocation were both insubstantial and improperly considered. Specifically, because the record shows that Vigil’s probation officer and the district attorneys’ office improperly

considered her medical marijuana use in exercising their discretion to request the revocation of her deferred sentence, such an exercise of their discretion was clearly uninformed, in violation of Vigil's right to due process. (*See id.*). Because the remaining violations were technical violations that suffered from other infirmities, reversal of Ms. Vigil's conviction and a remand is required. (*Id.*).

The State responds primarily by downplaying the role of Vigil's medical marijuana use in the probation officer's and district attorney's exercise of their discretion to request the revocation of Vigil's deferred sentence. But, as the Opening Brief details, the record belies the truth of the matter: that Vigil's medical marijuana use was the primary motivating factor behind the revocation and was intertwined with her missed UAs. (*See CF*, p 357). And though the State suggests that the "probation officer waited to seek revocation until [Vigil] had committed so many violations that it was apparent that she would not be able to successfully complete the deferred sentence," it only cites the revocation complaint for this proposition. The revocation complaint provides no such explanation and, to the contrary, the Special Report attached to the complaint clearly stated, "Medical Marijuana seems to be the pressing issue and probation is respectfully seeking direction from the court in this matter." (*CF*, p 357.)

The State also rejects Vigil’s argument that, in order to satisfy the rigors of due process, the reasoning of *Morrissey* and *Loveall* suggest an “informed exercise” test for reviewing the exercise of a probation officer’s discretion or a “substantial violation” test for reviewing violations of deferred sentence revocations, see OB, p 17, and argues that this Court should not adopt this rule. The State’s position is unpersuasive.

First, the State argues that “such a rule would be wholly inconsistent with the rule in Colorado, [section 18-1.3-102(2), C.R.S.], that a district court must revoke a deferred sentence for any violation.” AB, p 7. The State explains that its construction of section 18-1.3-102(2), which deprives courts of all discretion in revoking a deferred sentence, remains appropriate since the defendant is the primary beneficiary of the deferred sentence. AB, p 7. These arguments are irrelevant to a due process analysis. First, even assuming it is true that the defendant is the primary beneficiary of a deferred sentence,¹ it is not clear how depriving the court of all discretion in the revocation of that beneficial process is related to that benefit and

¹ As argued in the Opening Brief, a deferred sentence also benefits society by allowing the accused to retain her societal bonds without the costs of incarceration. See OB, p 18 (citing *Morrissey*, 408 U.S. at 477).

the State provides no further explanation. Second, it is axiomatic that the constitution trumps any state rule, and thus to resolve this issue, this Court must first analyze what process is required to satisfy due process. Vigil thus maintains that the reasoning in *Morrissey* and *Loveall* presupposes an informed exercise or substantial violation test. OB, pp 20-22.

As explained in the Opening Brief, determining what procedures due process may require “must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Morrissey*, 408 U.S. at 481 (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)); accord *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (“[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”); *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (“Under the *Mathews* balancing test, a court evaluates (A) the private interest

affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.”).

First, as was explained in the Opening Brief, the private interest here is that recognized in *Morrissey*: the defendant’s conditional liberty that the State seeks to revoke implicates the core values of unqualified liberty and inflicts a “grievous loss.” *Morrissey*, 408 U.S. at 482 (discussing due process for parole violation revocations). The State does not appear to contest this interest.

Second, in deferred sentence revocation proceedings, there is a significant risk that, under the current procedures, there may be an erroneous deprivation of a liberty interest or, at the very least, procedural infirmities, such as those realized here, which make the revocation process appear arbitrary. *See Mathews*, 424 U.S. at 334–35; *see also* OB, pp 20, 22, 24-25. Specifically, to allow probation officers to hold purported technical violations in abeyance and then to use those older technical violations to bolster a subsequent alleged substantial violation, which lacks sufficient proof, undermines the goals of fundamental fairness and notice in the revocation process. As explained in the Opening Brief, absent this rule, discretion in the deferred sentence context is lodged entirely with district attorneys and probation officers. OB, pp 18-19. This discretion is checked by statute only at the time the deferred sentence agreement is entered into. Without an “informed

exercise” or “substantial violation” test, this exercise of executive branch discretion would be left virtually unfettered and creates the risk of erroneous revocation or, at least, a revocation process that suggests the revocation was arbitrarily based on technical violations despite a substantial violation, which is found to lack substance. Both risks were realized in this case.

The State responds by contending that the district court must necessarily find that an informed exercise of the probation’s officer’s discretion supports the petition for revocation any time it finds a violation of the deferred sentence agreement. AB, p 8. This is not so, as this case illustrates. As explained in the Opening Brief, here the revocation complaint and its attachments reveal that the probation officer’s primary motivation for filing the revocation complaint was the ongoing confusion regarding whether Vigil was authorized to use medical marijuana under the terms of her deferred judgment agreement. (CF, p 357). Thus, the Court’s findings on the technical violations in Vigil’s case did *not* find, much less ensure, that her probation officer had properly exercised their discretion in light of the fact that Vigil was permitted to use medical marijuana. Nor is the outcome in Vigil’s case an anomaly. As was just mentioned, such an outcome is likely to recur anytime technical violations are alleged along with an unfounded substantial violation, even though

the substantial violation was the primary motivator in the exercise of the probation officer's discretionary decision to request a revocation.

The State next suggests that any rule that limits probation officers' (and presumably district attorneys') discretion would be contrary to the broad discretion afforded to probation officers. AB, p 8. However, if, as the State suggests, it is true that probation officers ordinarily do not request revocation unless violations are sufficiently "serious and continuing" then this limited oversight is unlikely to hinder that discretion. *Morrissey*, 408 U.S. at 479.

The State finally contends that *Loveall* does not support the proposition that revocation based on a technical violation is fundamentally unfair. AB, p 9. While it is true that the *Loveall* Court recognized that a single violation can be enough, as the State also recognizes, the *Loveall* Court also held it was "substantially less clear whether the probation officer *would* exercise his or her discretion to seek revocation" absent the substantial violation that was overturned on appeal. 231 P.3d 416. There, the Court looked to the record to confirm that the defendant's termination from treatment due to his contact with his baby was the substantial violation that appeared to motivate the revocation, and not his inability to obtain employment. *Id.* at 416-417. Given that the Court found the prosecution's proof of the substantial probation violations violated the defendant's right to due process, and that the record did not

clearly indicate that the court or the probation officer would have requested revocation or revoked probation without consideration of the improper factors, the Court remanded the case so the revocation court could make an informed exercise of their discretion in light of the remaining violations. *Id.* at 417.

While the *Loveall* Court also noted in a footnote that, ordinarily, it would remand solely for further findings, but did not do so in that case because a new judge was presiding, it also explicitly adopted the rule from the Arizona Supreme Court case *State v. Ojeda*, 159 Ariz. 560, 769 P.2d 1006, 1008 (1989): “We should affirm without remand only where the record clearly shows the trial court would have reached the same result even without consideration of the improper factors.” *Loveall*, 231 P.3d at 416 (quoting *Ojeda*, 769 P.2d at 1008).

Pursuant to that rule, the rest of the reasoning in *Loveall*, and the principles of due process, and contrary to the State’s contentions, the reversal of the court’s revocation order and a vacation of Ms. Vigil’s conviction is required. This Court should remand this case to give Vigil’s probation officer and the district attorney the opportunity to withdraw their misinformed petitions for revocation and to reinstate Vigil’s deferred sentence. Alternatively, at the very least, on remand the district court should be required to make the findings necessary for its ruling to comport

with due process under with the informed exercise or substantial violation test. *See also* OB, pp 23-27.

B. The district court also violated Vigil's right to due process when it revoked Vigil's deferred sentence based on a two-year-old positive alcohol test.

Vigil also explained in her Opening Brief that by revoking her deferred sentence by relying on isolated, more-than-two-year old positive test for alcohol, the district court violated principles of fundamental fairness and due process because the claim was too stale. OB, pp 27-30. In support of this argument, she relied on *People v. Silcott*, 494 P.2d 835, 837, 177 Colo. 451, 453–54 (1972), *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003), *United States v. Hamilton*, 708 F.2d 1412, 1414 (9th Cir. 1983), and *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979).

The State makes two claims in response. First, the State claims the revocation may be upheld simply because other violations support the revocation of Vigil's deferred sentence and, failing that, the State next attempts to distinguish the case law supporting Vigil's staleness claim. *See* AB, pp 10-12. Neither claim succeeds.

As to the State's first claim—that even ignoring the positive alcohol test, the other missed UAs alleged were also insufficient to justify the revocation—that claim fails, as explained in the Opening Brief and below. The revocation court could not

properly rely on these other alleged violations because Vigil received insufficient notice as to several of those alleged violations. *See* OB, pp 30-33.

The State's second claim fares no better in seeking to distinguish *Silcott* and *Manzanares*. According to the State, in both cases, the court explicitly limited the holding to the facts in those cases and, in any event, any delay in seeking revocation tends to benefit defendants. AB, pp 10-12.

While it is true the Court in *Silcott* did not lay down stringent guidelines to analyze future cases, its reasoning continues to provide guidance in this case. *See* F. Schauer, *Precedent*, in *Routledge Companion to Philosophy of Law* 129 (A. Marmor ed. 2012) (“[T]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case”); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020); *id.* at 1404 n.12 (quoting Schauer and other sources). Specifically, while it is true that, in *Silcott*, the probation department had agreed not to revoke probation based on earlier violations of failure to make support payments as long as the defendant made payments for an agreed-upon amount for the next four months, that agreement was not the entire basis for the Court's ruling. 494 P.2d at 836. Rather, the Court not only recognized that relying on violations over five months old violated the probation department's agreement with the defendant, but it also

recognized that the probation department's decision to revoke the defendant immediately upon a final incomplete payment was "precipitous and arbitrary." *Id.* at 837.

The situation was much the same here. Not only was the alcohol violation so old as to have likely induced reliance by Vigil that she would not have her deferred sentence revoked on that ground (and left her unprepared to defend against the violation after so much time had passed), but the more recent grounds for pursuing the revocation were arbitrarily based on her legal medical marijuana use. In seeking to revoke Vigil's deferred sentence on the latter ground, the probation department failed to follow the law.

Similarly, in *Manzanares*, though there was an explicit agreement to extend the deferred judgment in reliance on the dismissal of a complaint, the division nonetheless recognized that "a decision not to pursue revocation at a given time may bar subsequent revocation for an *earlier* violation." 85 P.3d at 607 (emphasis in original). However, the division continued, at least such was the case there, because "(1) the earlier decision not to pursue revocation [was] evidenced by a dismissal of a revocation complaint *after* the probation department knew of the purported violation and (2) the defendant ha[d] agreed to extend the period of deferred [sentence] in reliance on the dismissal of the complaint." *Id.* at 607–08.

Though Vigil's case lacks the case-specific facts recognized in *Manzanares*, the broad rule remains applicable and demonstrates the stale alcohol violation here cannot support Vigil's deferred sentence revocation. Specifically, as explained in the Opening Brief, the decision not to pursue the alcohol violation for over two years should bar a subsequent revocation based on that stale violation.

Moreover, these cases and the federal cases Vigil relied on in her Opening Brief make clear that fundamental fairness is the ultimate arbiter of this issue. *See* OB, pp 29-30. Revoking Vigil's deferred sentence based on a one-time violation that was over two years old was fundamentally unfair. *See Hamilton*, 708 F.2d at 1415 ("Revocation of probation after unreasonable delay or under circumstances inherently misleading to the probationer is an abuse of discretion."); *Tyler*, 605 F.2d at 853 ("An unreasonable delay in bringing charges of violations or a piecemeal approach in seeking revocation will rarely, if ever, serve the interests of either [society or the probationer]."). Should this Court apply the informed exercise or substantial violation test, this claim would also fail on those due process grounds. Further, the State appears to rest on its claim that no error occurred and thus does not contend this error was not plain. This unfairness was obvious and substantial and necessitates reversal and remand for the reasons explained in the Opening Brief. OB, pp 29-30.

2. The district court violated Vigil's right to due process when it revoked her deferred sentence without adequate notice that the court would rely on missed drug tests outside the dates of October 18, 2017 through September 26, 2018.

As explained in the Opening Brief, the State's failure to provide Vigil with notice of all of the specific violation dates that the court relied on in revoking her deferred sentence was an obvious and substantial error. OB, pp 32-33. Specifically, the error was substantial because it may have influenced Ms. Vigil's defense. OB, p 33.

The State impliedly responds that because Vigil was provided with adequate notice for fourteen of the missed UAs, any error was harmless. *See* AB, pp 12-13. However, due process requires written notice of *all* grounds that the court relies on for revocation.

Thus, in *People v. McKitchens*, albeit a probation revocation case, reversal was required even though the defendant had oral notice for one of the two grounds the district court relied on to revoke his probation, and written notice of the other. 655 P.2d 858, 859 (Colo. App. 1982) ("Our holding is unaffected by the fact that defendant had written notice of one of the two charges because the revocation of defendant's probation was based on both charges.") While deferred sentence revocations differ from probation revocations, as the State points out, in both contexts, notice of the specific charges is necessary to permit the accused to mount

a defense. *See Morrissey*, 408 U.S. at 487 (explaining that the parolee must be given notice of a revocation hearing and its purpose so that, at the hearing, “the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer”); *see also People v. Robles*, 209 P.3d 1173, 1175 (Colo. App. 2009) (recognizing that “the central function of [notice is] informing the probationer of the alleged basis for revocation.”). As explained in the Opening Brief, because Vigil lacked this notice, she was unable to assess the best defense strategy or present a defense as to the unnoticed dates, and her counsel may have changed her strategy in light of this additional information. *Cf. Robles*, 209 P.3d at 1175 (finding notice was constitutionally sufficient in part because the defendant did not claim that the form of notice compromised his ability to present a defense at the revocation hearing). Thus, as set forth in the Opening Brief, this lack of notice was obvious and substantial. *See OB*, pp 32-33.

Accordingly, for these reasons and those stated in the Opening Brief, the Court could not properly rely on the missed UAs. Without the missed UAs, Vigil’s revocation is unsupported and reversal is required. *See People v. Calderon*, 2014 COA 144, ¶ 31 (“Failure to provide written notice is a violation of due process that requires reversal.”); *accord McKitchens*, 655 P.2d at 860.

3. The district court violated Vigil’s right to due process when it revoked her deferred sentence based on her missed drug tests since the record does not reflect a willful violation but rather an inability to pay.

As argued in the Opening Brief, due process and equal protection requires that when a defendant asserts she lacks the financial means to comply with a nonpayment condition of probation, the district court cannot revoke probation and impose imprisonment without first determining whether she failed to comply with probation willfully or failed to make sufficient bona fide efforts to acquire resources to comply with probation. *Sharrow v. People*, 2019 CO 25, ¶ 42; U.S. Const. amends. V, XIV; Colo. Const. art. II, §§16, 25; *see also Bearden v. Georgia*, 461 U.S. 660, 667-668 (1983).

The State responds that Vigil failed to carry her burden of putting her inability to pay at issue at the revocation hearing. The State claims that, to the contrary, Vigil introduced evidence of her *ability* to pay by eliciting testimony that Vigil had consistently made other required payments, such as payments towards her restitution. (TR 1/28/19, pp 13:18-20 (discussing restitution payments), 15:23-24 (restitution payments), 16:6-7 (referring to “payments” generally), 18:2-3 (“payments” generally), 18:18-19 (“payments” generally)). This does not follow.

Simply because the record reflects that Vigil may have been prioritizing her restitution payments or other probation-related payments, that does not negate the

possibility that all of her discretionary income was going to those other payments and, therefore, her missed UAs were nonetheless due to her inability to pay. See *Sharrow*, ¶ 48 (“[T]he burden to prove a violation of a nonpayment condition of probation ultimately rests with the prosecution.”). Indeed, this was more than a possibility: Vigil’s precarious finances were raised in the Special Report. Because the court took judicial notice of the “Special Report,” which noted that Vigil had received vouchers for her drug testing and that she had “struggled financially,” the court was on notice of Vigil’s financial struggles at the time of the probation hearing. See *Williams v. People*, 2019 CO 101, ¶ 48 (finding cross-examination during the revocation hearing, eliciting the defendant’s debts and attempts to sell her belongings, was sufficient to require findings from the court regarding ability to pay without undue hardship.). (See TR 1/28/19, pp 5:2-6; 33-24 (the court explaining it took judicial notice of the court file); CF, pp 354-357 (the revocation documents bearing a “DATE FILED” date of September 28, 2018, well before the hearing)).

Accordingly, the district court obviously and substantially contravened the rule in *Sharrow* when it failed to make any findings regarding whether Vigil willfully violated this condition of her deferred sentence, as explained in detail in the Opening Brief. 2019 CO 25, ¶ 42. OB, pp 37-38.

The State does not appear to contest that if there was an error, it was plain. Thus, for the reasons stated above, as well as those stated in the Opening Brief, reversal and a remand for additional findings regarding Vigil’s financial status is required. OB, pp 37-38. A remand is also required to permit the State to knowingly exercise their discretion in determining whether to request the revocation of Vigil’s deferred sentence in light of any remaining valid alleged violations. *See Loveall*, 231 P.3d at 416; *see also* Part 4, below.

4. A remand is necessary if this Court finds one ground for revocation is invalid, but the remaining one is affirmed.

As argued in the Opening Brief, the Colorado Supreme Court recognized in *Loveall* that where one or more grounds for revoking probation are set aside on appeal, it becomes unclear whether “the **probation officer** *would* exercise his or her discretion to seek revocation—or, for that matter, whether the district court would remain willing to revoke—based solely on the remaining violation.” *Id.* at 416 (italic emphasis in original, bold emphasis added). Thus, pursuant to *Loveall*, a remand is required in Vigil’s case if any ground the district court relied on to revoke her deferred sentence is found to be invalid. *Id.*

The State, however, disagrees. The State claims that (1) the record does not *affirmatively* show that the probation officer would not have sought revocation for the missed UAs and alcohol violation alone, and (2) that *Loveall* is not controlling

because it address a probation revocation, in which the court retains discretion, once a violation has been found, to continue probation despite a violation, whereas in the deferred sentence context, once a violation is found, the district court is required to revoke the deferred sentence and enter a conviction. AB, pp 13-14. Neither argument is persuasive.

First, the State inverts the burden for reversal. The rule adopted in *Loveall* requires remand *unless* “the record clearly shows the trial court would have reached the same result even without consideration of the improper factors.” 231 P.3d at 416. Here, the record fails to clearly make the required showing. If anything, the record shows the trial court would not have even received a revocation complaint had Vigil’s probation officer not improperly considered her medical marijuana use. The Special Report focused primarily on the fraught history regarding Vigil’s medical marijuana use during her deferred sentence and explicitly stated, “Medical Marijuana seems to be the pressing issue and probation is respectfully seeking direction from the court in this matter.” (CF, p 357.) Thus, even under the State’s proposed test, the record *does* affirmatively show that the probation officer would not have sought revocation for the missed UAs and alcohol violation alone.

Second, even though *Loveall* addressed a probation revocation, its reasoning focused on the *probation officer’s* exercise of discretion as well as the court’s. *Id.*

at 416. The need for the probation officer to exercise their discretion knowingly and intelligently is even stronger in the deferred sentence context, since the probation officer's exercise of discretion prevents the case from ever reaching the court.

Thus, here, where it appears that the probation officer exercised their discretion based on a misunderstanding about the legality of Vigil's medical marijuana use, for the reasons stated above and in the Opening Brief, remand is required under *Loveall* if this Court finds any ground the district court relied on to be invalid. See OB, pp 38-39.

5. The case should be remanded for a correction of the mittimus because the district court mistakenly entered judgment of conviction on reckless manslaughter, a class 4 felony, instead of criminal attempt to commit manslaughter, a class 5 felony.

The State agrees this clerical error should be corrected, but explains that remand is no longer required because Vigil's discharge of her sentence has mooted the need for a remand for resentencing since resentencing will have no practical effect. Vigil agrees that, should this Court uphold her revocation, remand for resentencing is no longer required for this reason, and because her original direct sentence to community corrections was within the legal range. See *People v. Reeves*, 252 P.3d 1137, 1142 (Colo. App. 2010). However, she maintains that remand is required for her mittimus to be corrected. See *People v. Smalley*, 2015 COA 140, ¶¶

88-90 (remanding for correction of the mittimus to reflect the correct felony classification).

CONCLUSION

For the reasons expressed in Parts 1 through 3, here and in the Opening Brief, this Court should reverse the district court's order revoking Vigil's deferred sentence and sentence and vacate Vigil's conviction. If this Court reverses some but not all of the grounds for revocation, for the reasons expressed in Part 4, it should nonetheless reverse and remand this case to permit probation and the district attorney to make an informed exercise of their discretion in persisting with the revocation or for the court to hold a new revocation hearing to determine whether the State would exercise its discretion to seek revocation on the remaining grounds or whether any substantial violations remain. Finally, as explained in Part 5, if this Court finds no other reversible error, remand is required for Vigil's mittimus to be corrected to reflect a conviction for "attempt to commit manslaughter," a class 5 felony.

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CERTIFICATE OF SERVICE

I certify that, on March 1, 2021, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Lisa K. Michaels of the Attorney General's office.

