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APPELLATE DIVISION OF THE SUPERIOR COURT  
STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

THE PEOPLE OF THE STATE OF )  
CALIFORNIA, )

Plaintiff/Respondent )

vs. )

KEITH HENSON, )

Defendant/Appellant )  
\_\_\_\_\_ )

APPELLATE DIVISION CASE NO.:  
APP004184

TRIAL CASE NO.:  
HEM014371

**PETITION FOR REHEARING AND  
REQUEST FOR CERTIFICATION**

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| KEITH HENSON,                          | ) | <b>REQUEST FOR CERTIFICATION</b>  |
|  | ) |                                   |
| Defendant/Appellant.                   | ) |                                   |
| _____                                  | ) |                                   |

Appellant, Keith Henson, by and through his attorney of record, The Law Offices of Mark J. Werksman, hereby requests rehearing in the instant case. If rehearing is denied, Appellant respectfully requests that this Court certify this case to the Court of Appeal.

**I.**  
**REHEARING IS WARRANTED BECAUSE THIS COURT'S  
JUDGMENT IS UNSUPPORTED BY THE RECORD**

Pursuant to California Rules of Court 8.889, a party can request rehearing of any order that is not final. (See Rules of Court, Rule 8.889.) In the instant case, rehearing is warranted because this Court's judgment is unsupported by the record.

Appellant brought an appeal which addressed several errors, including 1) that he was convicted without sufficient evidence, 2) that he was denied his right to present evidence in his defense, 3) that he was improperly prohibited from cross-examining witnesses, 4) that Respondent entered irrelevant, prejudicial evidence, and 5) that the government committed misconduct in closing argument.

In its Order, this Court does not address the substantive issues raised by the appeal. (See Order, attached as Exhibit A.) Instead, this Court's Opinion states that "[b]oth the transcript of the July 20, 2001 sentencing hearing and the minute order clearly state the court sentenced [Appellant] to jail for 365 (sic), but that the sentence was suspended on condition that he complete probation. To the extent [Appellant] did not wish to comply with the conditions of probation, he had a choice of merely serving his jail term, but there is no question that a suspended sentence and a valid grant of probation

were entered that day.” (Exhibit A at 3, fn.2.) This Court concludes that Appellant was sentenced in 2001; thus, he could only address issues directly resulting from the 2007 sentencing in the instant appeal.

However, this Court’s finding that Appellant was sentenced in 2001 is unsupported by the record. The lower court’s July 20, 2001 order states that when Appellant returned to court, he could decide between 365 days in jail suspended, with 180 days in jail and three years probation, or 365 days straight jail time, with no probation. (CT, Vol. II, 000318.)<sup>1</sup> The court did not actually impose either sentence in 2001; instead, it issued a warrant, and left the issue of what judgment to impose for Appellant’s future appearance.<sup>2</sup>

Also, if this Court’s interpretation of the facts were correct, and Appellant was placed on probation in 2001, then probation would

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<sup>1</sup> Appellant references the record on appeal.

<sup>2</sup> This Court’s Opinion suggests that Appellant was arguing that the 2001 hearing was not a final judgement because the lower court stated that it would allow for a suspended sentence. (Exhibit A at 6-7.) However, that was not Appellant’s argument. Instead, Appellant argued that the 2001 “sentencing” was not a final order because the lower court left open the sentence for Appellant to choose. A decision ordinarily is not “final,” for purposes of appeal, unless it ends the litigation on the merits and leaves nothing for the court to do but execute judgment. (See *Cunningham v. Hamilton County, Ohio* (1999) 527 U.S. 198.) Because Appellant still had to decide which sentence to take, the lower court’s 2001 statement was not a final order.

have terminated in 2004.<sup>3</sup> The only way to toll a probation period is for the court to revoke probation. (See Pen. Code, §§ 1203.1-1203.3; see also, *People v. Tapia* (2001) 91 Cal.App.4th 738.) However, probation must be revoked before it expires. (Pen. Code, §1203.3(a.) Issuing a warrant is insufficient to toll the period of probation. (*People v. Broadway* (1981) 123 Cal.App.3d Supp. 19.) In the absence of an order revoking probation, probation expires on the last day of the probation period, after which the court has no jurisdiction over the probationer. (*People v. White* (1982) 133 Cal.App.3d 677.)

In the instant case, there is no record that the lower court ever revoked probation. Thus, if this Court's Order were correct and Appellant was sentenced to probation in 2001, then that probation terminated in 2004, and in 2007 the lower court would have been without jurisdiction to take any action against Appellant concerning Count Three.

Yet, the record shows that the lower court did take action on Count Three in 2007. When Appellant was brought back to Riverside, Counts One and Two were dismissed in the interest of justice, and Appellant was sentenced on Counts Three and Four (Failure to Appear). (CT, Vol.II, 00025-00026.) This Court's

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<sup>3</sup> With a few exceptions not relevant to the instant case, misdemeanor probation can only last up to three years. (See Pen. Code, §1203a.)

Opinion fails to explain how Appellant could have been “sentenced” on Count Three in 2001, had probation run on that charge in 2004, then be “sentenced” again on the exact same charge in 2007. As such, rehearing is necessary.

**II.**  
**IF THIS COURT DOES NOT GRANT REHEARING, IT**  
**SHOULD CERTIFY THIS CASE TO THE COURT OF**  
**APPEAL**

A party can move to have his case certified to the Court of Appeal. (Rules of Court, Rule 8.1005.) Certification is warranted where transfer is necessary to secure uniformity of decision or settle an important question of law. (Rules of Court, Rule 8.100.) This case presents a matter in which a determination by a court of statewide jurisdiction is not merely appropriate but necessary to provide uniformity of law and settle an important question of law.

This Court’s Opinion leaves open a serious question of how a defendant can be “sentenced” and placed on probation, have that probation run, then be “sentenced” again on the same count six years later. This Opinion further conflicts with the rules of probation set forth in Penal Code §§1203.1-1203.3 and the cases cited above.

Accordingly, if this Court denies rehearing, then Appellant urges this Court to certify its Opinion to the Court of Appeal in order to resolve the question and secure uniformity.

**III.  
CONCLUSION**

For the reasons stated above, this Court should grant rehearing. If rehearing is denied, this Court should certify all issues presented by this case for determination by the Court of Appeal.

April 24, 2009

Respectfully submitted,

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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Kelly C. Quinn  
Attorneys for Appellant

## CERTIFICATE OF COUNSEL

Pursuant to California Rule of Court 8.883(b)(1), the undersigned certifies that this brief contains 1,419 words, according to the WordPerfect word count program. The word count includes footnotes but excludes the table of contents, table of authorities, and proof of service.

Dated: April 24, 2009

Respectfully Submitted,

By:



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