IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MIKE NAKAMA DAIKICHY,
Defendant-Appellant.

SUPREME COURT NO. CR-05-0024-GA
SUPERIOR COURT NO. 05-0006

Cite as: 2007 MP 27

Decided November 28, 2007

Angela Marie Krueger, Assistant Public Defender, Commonwealth Public Defender's Office, for Appellant.
David Lochabay, Assistant Attorney General, Commonwealth Attorney General's Office, for Appellee.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

MANGLONA, J.:

¶ 1 Appellant Mike Nakama Daikichy ("Daikichy") appeals the trial court's order revoking his probation on the grounds that the Commonwealth failed to provide adequate notice of the basis for his probation revocation in violation of due process. Because the Commonwealth's charging petition, combined with its supporting affidavit, sufficiently referenced Daikichy's assault, we hold that Daikichy had proper notice regarding the basis of his probation revocation. Accordingly, we AFFIRM the trial court's decision.[1]

I

¶ 2 On May 5, 2005, Daikichy pled guilty to assault and battery and disturbing the peace. His sentence was suspended and he was placed on probation. The trial court imposed probation conditions on Daikichy, which included, among other conditions, that he: (1) have no further altercations with the victim; (2) obey all Commonwealth and federal laws; and (3) pay a $25 assessment fee as 6 CMC § 4119 requires.

¶ 3 On July 22, 2005, the Commonwealth filed a motion to revoke Daikichy's probation. In support of its motion, the Commonwealth accused Daikichy of violating all three probation conditions, stemming primarily from his second assault of the victim on July 4, 2005. The Commonwealth's motion, however, did not cite the specific criminal offense upon which the Commonwealth intended to proceed as the basis for Daikichy's probation violation. Nor did the motion cite any statute that Daikichy violated. Instead, the motion stated that Daikichy violated the terms of his suspended sentence when he failed to: (1) obey all Commonwealth laws; (2) have

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[1] Daikichy argues that the trial court erred when it relied on charges filed in another criminal case. In the trial court's order revoking Daikichy's probation, it stated that he was charged with certain offenses in another criminal case, and that these charges served as the basis for the Commonwealth's motion to revoke his probation. However, the trial court's amended order revoking Daikichy's probation provided that this statement was in error as Daikichy had no connection to the other criminal case. In the amended order, the trial court stated that Daikichy received the correct sentence despite the error and suffered no harm. Thus, Daikichy's argument is meritless.

Daikichy also maintains that his equal protection rights were violated when the Commonwealth provided an unredacted copy of a police report to his probation officer, but provided a redacted copy to Daikichy. Daikichy, however, failed to file the redacted and unredacted copies of the police report in his excerpts of record. It is counsel's responsibility to see that the record excerpts are sufficient for consideration and determination of issues on appeal and we are under no obligation to remedy any failure of counsel to fulfill that responsibility. *In re Estate of Deleon Castro*, 4 NMI 102, 108 (1994). Without the necessary excerpts of record, we are unable to review Daikichy's argument concerning the different versions of the police report. We, therefore, will not consider this issue. *See id.* (stating that failure to include all relevant evidence in the record on an issue warrants summary affirmance, dismissal, or non-consideration of that issue).

no further altercations with the victim; and (3) pay the court the $25 assessment fee. Daikichy moved to dismiss the motion for lack of notice, which the trial court denied.

¶ 4 At the revocation hearing, Daikichy's probation officer testified that he received a police report regarding Daikichy's July 4, 2005, assault of the victim. A police officer also testified that he spoke with the victim, who claimed that Daikichy pulled her hair, forced her into a car, and drove her away. The officer further testified that two witnesses saw Daikichy push the victim and pull her hair. As a result of the altercation, the trial court found that Daikichy violated his probation conditions and therefore granted the Commonwealth's motion to revoke probation. The trial court also found Daikichy in violation of his probation conditions for failure to pay his $25 court assessment fee.

II

¶ 5 Daikichy contends that the Commonwealth failed to provide adequate notice of the basis for his probation revocation as required under the United States Constitution, the Constitution of the Commonwealth of the Northern Mariana Islands ("CNMI Constitution"), and Com. R. Crim. P. 32.1.[2] We review issues implicating constitutional rights de novo. *Commonwealth v. Zhen*, 2002 MP 4 ¶ 10. A harmless error standard applies to allegations of insufficient notice in supervised release revocation proceedings. *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998).

¶ 6 "[C]onstitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation." *United States v. Jones*, 299 F.3d 103, 109 (2d Cir. 2002). Due process requires adequate notice in a proceeding to revoke probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *see Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (finding that due process requires that a parolee faced with revocation of parole is entitled to notice and a fair opportunity to be heard); *United States v. Chatelain*, 360 F.3d 114, 121 (2d Cir. 2004) ("Due process requires, *inter alia*, that a defendant charged with violating a condition of supervised release be afforded notice of the charges against him before the court may revoke his supervised release."); *see also People v. Rodriguez*, 795 P.2d 783, 785 (Cal. 1990) (requiring that trial courts provide a criminal defendant with certain minimum due process protections before probation or parole is revoked including written notice of alleged violations). Similarly, Fed. R. Crim. P. 32.1(b)(2)(A) incorporates these due process requirements when it requires written notice of the alleged violation, *United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993),

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[2] To the extent Daikichy relies on the original order revoking his probation, which found Daikichy had been charged with crimes actually committed by another individual, that error was corrected with the entry of the amended order revoking probation. This issue is, therefore, moot.

as does Com. R. Crim. P. 32.1(a)(2)(A),[3] the Commonwealth's counterpart to Fed. R. Crim. P. 32.1(b)(2)(A).

¶ 7 Under the United States Constitution, a probationer is entitled to certain procedural safeguards in a probation revocation proceeding, including written notice of the alleged probation violations, but the due process accorded in a revocation proceeding is flexible, informal, and does not require the full panoply of procedural protections of a criminal trial. *Black v. Romano*, 471 U.S. 606, 612-13 (1985). The question we must answer is what written notice requirements the Commonwealth must follow in a charging petition in order to satisfy the due process written notice requirements of the CNMI Constitution and Com. R. Crim. P. 32(a)(2)(A). We hold that when a probationer is accused of violating any term of probation, he is entitled to reasonable notice of the alleged violation. PL 15-46, § 7(d).[4] That is, "when a revocation petition alleges the commission of a new crime and the offense being charged is not evident from the condition of probation being violated, a defendant is entitled to receive notice of the specific statute he is charged with violating." *Havier*, 155 F.3d at 1093.

¶ 8 For instance, in *United States v. McNeil*, 415 F.3d 273, 275 (2d Cir. 2005), defendant pled to one count of possession of cocaine base with intent to distribute. While out of prison on supervised release, defendant was charged with various violations of his release, including possessing cocaine base. *Id.* The petition containing the conditions of parole provided that defendant not commit "the crime of Possession of Cocaine Base." *Id.* The petition also provided that defendant was in a vehicle in which police found cocaine baggies, and the house where the vehicle was seen was used in the drug trade. *Id.* The trial court found that defendant possessed cocaine base. *Id.*

¶ 9 Defendant argued on appeal that the charging petition violated Fed. R. Crim. P. 32.1(b)(2)(A) and due process because the petition afforded inadequate notice of the alleged violation of release. *Id.* at 275-76. Specifically, defendant maintained that because the petition did not cite the statute violated, he lacked adequate notice of the charges against him. *Id.* at 276. The Second Circuit held that, "despite the lack of citation to a statute in the charging document

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[3] Com. R. Crim. P. 32.1(a)(2)(A) mandates that a defendant be given "written notice of the alleged violation of probation[.]"

[4] On January 27, 2007, the Probation Reform Act of 2006 ("the Act") took effect. PL 15-46, § 12. The Act reforms the laws governing probation and suspended sentences in the Commonwealth. Under the Act, "[a] probationer accused of violating any term of probation shall be entitled to *reasonable notice* of the alleged violation . . . ." *Id.* § 7(d) (emphasis added). Prior to Section 7(d), Commonwealth law did not require reasonable notice of alleged probation violations. While Section 7(d) does not apply retroactively to the instant case, Section 7(d) merely brings Commonwealth law in line with the cases outlined in this opinion.

here, the phrase 'possession of cocaine base' gave adequate notice of the elements of the offense charged." *Id.* The court concluded that "the petition identified the offense ('crime of Possession of Cocaine Base') in terms sufficient to reflect its elements; so any possible error was harmless."[5] *Id.*

¶ 10 Similarly, in *United States v. Tham*, 884 F.2d 1262, 1265 (9th Cir. 1989), the petition notified defendant "that he violated 'Condition No. 2 of the conditions of probation by associating with a convicted felon.'" Since the petition specified the dates, location, and individuals involved, the Ninth Circuit found sufficient notice. *Id.* A statement of condition made defendant's charge evident that he violated his probation when he associated with a convicted felon. *Havier*, 155 F.3d at 1093 (citing *Tham*, 884 F.2d at 1265). The information about the date, location, and individuals involved, combined with the probation condition was sufficient for defendant to identify the specific offense he was charged with. *Id.* (citing *Tham*, 884 F.2d at 1265).

¶ 11 In contrast, in *Havier*, 155 F.3d at 1091, defendant pled guilty to assault and was discharged on supervised release. A few years later, the police arrived at an apartment where defendant was outside carrying a rifle. *Id.* He never pointed the rifle at anyone, never threatened anyone, or made threatening statements. *Id.* A petition to revoke defendant's supervised release described his conduct as a crime of violence. *Id.* At the evidentiary hearing, defendant argued over what offenses stemmed from his conduct. *Id.* at 1091-92. The trial court decided to let the parties research the offenses of failure to obey a police officer and reckless display of a weapon, a lesser included offense of aggravated assault. *Id.* at 1092. At the dispositional hearing, the failure to obey a police officer was found to be a traffic violation and not considered further. *Id.*

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[5] Two further cases also demonstrate reasonable notice of the new crime being charged. In *Chatelain*, 360 F.3d at 124, the supervised release condition provided that defendant "shall not commit another federal, state, or local crime." Defendant violated his supervised release when he threatened, harassed, and pushed the victim. *Id.* at 124-25. Defendant contended that he was denied due process, in that he was not given adequate notice of the supervised release violation charges against him and was left to speculate what crime he allegedly committed while on supervised release. *Id.* at 121. The Second Circuit held that the orders revoking his release gave express notice of both the conduct that the government contended violated the terms of supervised release and the provision of state law that defendant allegedly violated. *Id.* at 123. The specific acts that defendant allegedly performed were detailed in the attached orders. *Id.*

In *United States v. Kirtley*, 5 F.3d 1110, 1113 (7th Cir. 1993), the revocation petition alleged that defendant committed "another Federal, State, or local crime." The petition also identified defendant's crime as the "unauthorized practice of law, which is found in Chapter 38, Illinois Revised Statutes, Section 32-5 (1990)." *Id.* The Seventh Circuit found sufficient notice because the petition included "some basic facts regarding the violation, such as the specific statute and rule [defendant] disobeyed . . . ." *Id.* The court made it clear that "the notice [defendant] received represents the minimum acceptable notice." *Id.* at 1113 n.4.

Instead, the trial court found defendant engaged in disorderly conduct with a deadly weapon, and revoked defendant's supervised release. *Id.*

¶ 12 Defendant argued on appeal that the petition to revoke his supervised release did not provide adequate notice of the government's intent to charge him with aggravated assault with a deadly weapon or the lesser-included offense of disorderly conduct with a deadly weapon. *Id.* at 1091. The petition provided as follows: "You shall not commit another federal, state, or local crime during the term of supervision." *Id.*

¶ 13 The Ninth Circuit held that defendant received insufficient notice of the disorderly conduct with a deadly weapon charge, and vacated the trial court's decision. *Id.* at 1094. The Ninth Circuit reasoned that, unlike defendant's petition in *Tham*, the petition in *Havier* stated *only* that defendant violated "another federal, state, or local crime." *Id.* at 1093. "In this type of situation, it would be unrealistic to expect a defendant to predict the specific statute which the government intended to charge him with violating." *Id.* Thus, according to the Ninth Circuit, "when a revocation petition alleges the commission of a new crime and the offense being charged is not evident from the condition of probation being violated, a defendant is entitled to receive notice of the specific statute he is charged with violating." *Id.*

¶ 14 Daikichy relies exclusively on *Havier*, however, this reliance is misplaced. Just as *Tham* was slightly different from *Havier*, *Havier* is slightly different in one important aspect from the present case. In *Havier*, 155 F.3d at 1093, during defendant's hearing the trial court judge and defendant's counsel speculated about what state law violations could have been alleged in the revocation petition. Numerous offenses were proposed, including assault on a police officer, felon in possession of a firearm, reckless display of a weapon, and failure to obey a police officer. *Id.* Considering the confusion, defendant was not expected to predict the one statute, A.R.S. § 13-2904, under which he was ultimately charged. *Id.* Nor was he expected to defend against every possible charge. *Id.*

¶ 15 Just as the Second Circuit held that a charging document lacking a reference to a violation of a specific statute gave adequate notice of the elements of the offense charged when it included the phrase, "possession of cocaine base," *McNeil*, 415 F.3d at 276, the same is true in the instant case. Here, despite the lack of a citation to a statute in the charging document, the phrase "no further altercations with the victim" makes it clear assault was being charged when Daikichy attacked the victim on July 4, 2005. The motion to revoke, together with the notice of intent to revoke probation, specifically allege that Daikichy violated the terms of his suspended sentence when he failed to obey all Commonwealth laws, have no further altercations with the victim, and pay a $25 court assessment fee. The trial court found that the evidence presented

reasonably proved that Daikichy's conduct was not in conformity with his conditions of probation.

¶ 16 As a probationer, Daikichy is entitled to written notice of alleged probation violations. *Morrissey*, 408 U.S. at 489. The notice must be effective. *Havier*, 155 F.3d at 1093. Contrary to Daikichy's argument, the Commonwealth was not required to cite a specific statutory section. The notice needed only to ensure that he understood the nature of the alleged violation. *See United States v. Sesma-Hernandez*, 219 F.3d 859, 860 (9th Cir. 2000). Although the motion to revoke, and the notice of intent to revoke probation, do not state the specific statute Daikichy was charged with violating, the supporting affidavit specifically refers to assaulting the victim as the basis that Daikichy failed to obey all Commonwealth laws. In fact, when Daikichy asked the basis for finding such a violation, the trial court indicated that Daikichy violated his probation by failing to obey all Commonwealth laws, failing to have no further altercations with the victim, and failing to pay the $25 fee. When Daikichy further inquired about what law the trial court found he violated, the trial court responded that Daikichy violated Commonwealth law when he was charged with assault and battery.

¶ 17 Thus, unlike the defendant in *Havier*, Daikichy had adequate notice of the specific violation of Commonwealth law he was being charged with. It is difficult for us to see how Daikichy was not put on reasonable notice of the new charge he faced in the charging petition under such circumstances. Even assuming that a statement that defendant "fail[ed] to have no further altercations with the victim" is inadequate notice, the supporting affidavit referring to the assault on the victim does provide adequate notice. Daikichy had sufficient notice to make him aware of the specific charge he had to defend against. Accordingly, the failure to specifically identify the statute under which he was charged was harmless error.[6]

III

¶ 18 We find that when a probationer is accused of violating any term of probation, he or she is entitled to reasonable notice of the alleged violation. When a revocation petition alleges the commission of a new crime, and the alleged offense is not evident from the condition(s) of probation being violated, a probationer is entitled to receive reasonable notice of the specific statute he is charged with violating. Failure to do so breaches the requirements of the CNMI Constitution, Com. R. Crim. P. 32.1(a)(2), and the Probation Reform Act of 2006. However, in

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[6] Finally, Daikichy argues that the errors in the case cumulatively require reversal. "Cumulative error, in certain instances, may require reversal." *Commonwealth v. Saimon*, 3 NMI 365, 398 (1992). As we find no merit to any of Daikichy's individual arguments, we similarly find no merit in them cumulatively.

the present case, Daikichy had reasonable notice, and any error that may have occurred was harmless given the notice Daikichy received, and the overwhelming and undisputed evidence that he assaulted the victim.[7] We, therefore, AFFIRM the trial court's decision.

Concurring:
Demapan, C.J., Castro, J.

[7] "As a way to avoid close questions regarding adequate notice in the future, we encourage the [Commonwealth] generally to provide a defendant with notice of the specific statute violated." *Havier*, 155 F.3d at 1093 n.3.