IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

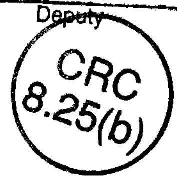
PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S192176
Plaintiff and Respondent,	)	
v.	)	
JOSE LEIVA,	)	
Defendant and Appellant.	)	

SUPREME COURT
FILED

FEB - 1 2012

Frederick K. Ohlrich Clerk

Deputy



Second District Court of Appeal, Division Four, Case No. B214397
Los Angeles County Superior Court Case No. PA035556
Honorable Barbara M. Scheper, Judge Presiding

DEFENDANT'S REPLY BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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DEFENDANT'S REPLY BRIEF ON THE MERITS

Defendant files the following Reply Brief on the Merits to Respondent's Brief on the Merits. The failure to respond to a particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects defendant's view that the issue was adequately addressed in Defendant's Opening Brief on the Merits.

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ARGUMENT

I

THE TRIAL COURT LACKED JURISDICTION TO REVOKE DEFENDANT'S PROBATION BASED ON ACTS COMMITTED IN 2007 AND 2009

Respondent effectively asks this Court to ignore the legislative history underlying Penal Code section 1203.2, and adopt the most extreme literal interpretation possible of that statute, even if doing so could produce absurd consequences that the Legislature did not or could not have intended. Defendant respectfully maintains this Court should not do any of the above.

For example, respondent contends that the "statutory language demonstrates a clear legislative intent that summary revocation tolls the probationary period for all purposes." (Resp. Brief p. 11.) The obvious flaw in this argument is that the statute does not state that summary revocation serves to toll the probationary period *for all purposes.* (Pen. Code § 1203.2)

Moreover, the Legislature is well aware of how to draft a statute so that something applies "for all purposes," and has in fact done so 11 different times just within the current California Penal Code. (See Pen. Code §§ 17, subd. (b); 17, subd. (c); 1016(3); 1203.1bc, subd. (b); 1203.1, subd. (f); 1389 Art. V(g); 1428; 2041; 7050, subd. (d); 11180 Art. IX, section A; 13103,

subd. (e).) Without going through every other California Code, defendant notes that the Legislature has in fact provided that something applies "for all purposes" 26 different times within the current Health and Safety Code (see Health & Safety Code §§ 1606, 1647, 4622, 4887.5, 4920, 4926, 4991, 6817, 8553, 25198.6, 25299.7, 33775, 37640, 37390, 39602, 43203.5, 44542, 51364, 52032, 55111, 102235, 103480, 116875, 127175, 127180, 127185), 12 different times within the current Welfare and Institutions Code (see Welf. & Inst. Code §§ 1400, 4105, 5118, 5667, 7203, 10966, 11466.34, 14087.31, 14087.9665, 14105.98, 14172, 18004), 14 different times within the current Civil Code (see Civ. Code §§ 9, 56.10, 882.030, 883.260, 885.060, 887.080, 1219, 1584.5, 1714.1, 1714.3, 2330, 2934a, 2952, 3130), 30 different times within the current Corporations Code (see Corp. Code §§ 209, 910, 1113, 1158, 5047, 5133, 5515, 5819, 7133, 7515, 7819, 9133, 9414, 12233, 12315, 12465, 12510, 15621, 15677.9, 15678.5, 15911.09, 15911.15, 16101, 16909, 16961, 17050, 17540.9, 17553, 25619, 31506), 70 different times within the current Government Code (see Govt. Code §§ 910.6, 5304, 5752, 5752, 5925, 6591, 8597, 8880.25.5, 11128.5, 12168.5, 14071.6, 14715, 14756, 15441, 16212, 16271, 16731, 16731.5, 16920, 17520, 19887.2, 20509, 20515, 20516, 20593, 20899, 22011, 22100, 22125, 20510, 26299.060, 26638.7, 27283, 29928, 30403, 31592.4, 31654, 31657, 34411, 36805, 43063, 50020,

50288, 50662, 50665.13, 51009, 53115.1, 53841, 54702.1, 54953, 54955, 58906, 63048.8, 63048.95, 63049.4, 63074, 64115, 65934, 67931, 67920, 67940, 68608, 68609, 71656, 74988, 77202, 91559, 92254, 99004, 99055), and 95 different times within the current Education Code [citations to the Education Code omitted].

As the above somewhat painstakingly demonstrates, the Legislature both knows how to draft a statute so that something applies "for all purposes," and has repeatedly done so when it has intended for something to apply for all purposes. The fact that the Legislature did not provide that the tolling provision in Penal Code section 1203.2 applies for all purposes belies respondent's contention that the provision clearly applies for all purposes.

In fact, if anything, the fact that the Legislature did not provide that the tolling provision applies for all purposes, but has consistently used that same phrase within other statutes that were intended to apply for all purposes, indicates that the Legislature did not intend for the tolling provision to apply for all purposes, and instead intended for the provision to be more limited. (See *Miklosy v. Regents of Univ. of California* (2008) 44 Cal.4th 876, 896 ["'[W]hen the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent.'"].)

At best for respondent, the statute states only that a summary revocation serves to toll the running of the probationary period, leaving open the question of, for what purpose? Is it tolled for the purpose of preserving jurisdiction to adjudicate the basis for the summary revocation, or is it tolled for all possible purposes?

The answer to that question lies in the legislative history underlying the enactment of the statute. As aptly stated by the dissenting Presiding Justice herein after reviewing the applicable legislative history, there is nothing in the legislative history to indicate that the tolling provision was intended to subject a probationer to possible revocation for conduct occurring after the conclusion of the probationary period. (Dis. Slip Opn. p. 4.) Rather, "[w]hat the Legislature intended, and what the *Tapia* court understood, is that when probation is summarily revoked, the probationary period is tolled so that the court can proceed with a formal revocation hearing even though the original period of probation has expired." (Dis. Slip Opn. p. 6.) Summary revocation is in the "nature of a placeholder by which the court retains jurisdiction to adjudicate a claim that the defendant had violated a term of probation." (*Ibid.*)

In asking this Court to reach a contrary conclusion, respondent cites to the Court of Appeal's decision in *DePaul.* (Resp. Brief pp. 13-14; *People v.*

DePaul (1982) 137 Cal.App.3d 409 ("*DePaul*").) However, *DePaul* did not consider the issue herein. Instead, in *DePaul*, the Court of Appeal rejected some arguments not made in this case and further concluded that "the interval between an order of revocation and an order reinstating probation should not count in calculating the expiration date of the probationary period." (*Id.* at pp. 413-415.) *Tapia* in fact expressly agreed with the *DePaul* decision that the period between summary revocation and reinstatement of probation can be tacked back onto the probationary period if probation is reinstated, but also correctly noted this rule does not apply to a case such as this one where there was no violation during the period of probation. (*People v. Tapia* (2001) 91 Cal.App.4th 738, 741.)

In other words, *DePaul* and *Tapia* both stand for the proposition that if a defendant is placed on three-years probation and has his probation summarily revoked after two years and nine months, the trial court has jurisdiction to hold a formal hearing on that allegation six months later and if that allegation is found true at the formal hearing, has the option of reinstating probation for another three months or imposing a prison term. Not only is this conclusion consistent with both Penal Code section 1203.2 and defendant Leiva's argument in this case that the summary revocation and tolling provision serve as a placeholder, it is entirely equitable.

In fact, in the course of reaching its conclusion, the Court of Appeal in *DePaul* chronicled at length a seemingly inequitable prior case applying the former rule in which a defendant's probation was summarily revoked, he was unaware of the summary revocation, fourteen years later after getting married, having children, and leading an otherwise law-abiding life, he was formally found in violation based on the prior allegation, and the trial court regrettably had no choice but to send the defendant to state prison because while the trial court had jurisdiction to impose sentence due to the prior summary revocation, the expiration of the probationary period deprived the court of jurisdiction to reinstate probation. (*People v. DePaul, supra,* 137 Cal.App.4th at pp. 412-413, citing *People v. Brown* (1952) 111 Cal.App.2d 406, 408.)

Applied to the case at bar, *DePaul* and *Tapia* both stand for the proposition that after defendant Leiva was arrested in 2007, the trial court had jurisdiction to hold a formal hearing on the allegation that was the basis for the summary revocation, and if that allegation was found true, had jurisdiction to either reinstate probation for the balance of the time from the summary revocation until April 11, 2003, or impose a prison sentence. However, as recognized by both *Tapia* and the dissenting Justice herein, because the prior allegation that formed the basis for the summary revocation

was not found true, the trial court did not then have jurisdiction to conduct a formal hearing on a different alleged violation occurring in 2007.

Respondent next argues, as the majority of the Court of Appeal did below, that if *Tapia* is correct, then the tolling provision should read: "The revocation, summary or otherwise, shall serve to toll the running of the probationary period, *if, and only if, it is proven that the probationer violated the terms of his or her probation during the period of the original probationary term.* If the Legislature intended to restrict the application of the tolling provision to violations that occurred during the original probationary term, it knows how to use language clearly expressing that intent."" (Resp. Brief p. 15, Slip Opn. pp. 7-8, emphasis in original.)

This analysis is misplaced for two reasons. First, as detailed above, the Legislature knows how to use language to make a particular statute apply for all purposes, and did not do so within Penal Code section 1203.2, suggesting it intended for the provision to be limited. At best, the statute is ambiguous on this point, and as also noted above, the Legislative history confirms that defendant's interpretation is correct.

Second, the proposed language that respondent contends is missing from the statute if *Tapia* is correct would in fact be a misstatement of the law. Properly interpreted, a summary revocation serves to toll the running of the

probationary period in order to hold a formal hearing on the allegation, whether or not that allegation is ultimately found true at the formal hearing. If it is proven true, then probation can be reinstated or a prison term can be imposed. If it is not proven true, and the probationary period has otherwise expired, probation has expired.

Respondent next contends that unreasonable consequences would not flow from its interpretation of the tolling statute. However, respondent does not offer any persuasive reason as to why this interpretation would not produce unreasonable consequences, and instead argues only that "hopefully" the dire consequences cited by the dissenting Justice herein would not come to fruition. (Resp. Brief pp. 18-19.) A statute should not be interpreted contrary to the Legislature's intent in the hopes that trial judges will save it from unfair and unwarranted application.

Respondent further contends that even if this Court considers the Legislative history underlying the enactment of the statute, it does not support defendant's argument. (Resp. Brief pp. 19-20.) Respondent argues that although the legislative history demonstrates that the Assembly Committee was concerned about losing jurisdiction over a case in which the formal revocation decision is reversed on appeal, it asked, "*Should this tolling language be limited to cases in which the revocation decision is appealed?*"

(Resp. Brief p. 20, emphasis in original.) From this, respondent posits that because the Legislature did not limit it to cases in which the revocation decision in appealed, "the Legislature apparently intended that there be no limitation in applying the tolling." (Resp. Brief p. 20.) This somewhat circuitous argument is unavailing.

The fact that the Legislature chose not to limit the tolling provision to cases that are reversed on appeal does not mean that the Legislature intended for there to be no limitations whatsoever on the scope of the tolling provision. Indeed, if the tolling provision had been limited to cases that are reversed on appeal, then the trial court in this case would have lost jurisdiction to conduct a hearing on the allegation underlying the summary revocation. As set forth in both the Legislative materials and by the dissenting Justice herein, the legislative materials make clear that the purpose of the tolling provision was to preserve jurisdiction in order to be able adjudicate a summary revocation allegation after the expiration of the original term of probation.

Finally, respondent suggests that interpreting the statute in the above manner would be unfair because it would "reward" deported prisoners. (Resp. Brief pp. 20-21.) As noted in Defendant's Opening Brief on the Merits, "[t]he courts have long recognized that the decision whether to grant probation to a deportable alien presents special issues." (*People v. Espinoza* (2003) 107

Cal.App.4th 1069, 1074.) As a result, "a defendant's status as an illegal alien is highly relevant to the issue of whether to grant probation because it bears directly on whether the defendant can comply with the terms of probation." (*People v. Sanchez* (1987) 190 Cal.App.3d 224, 230-231.) While imposing probation on deportable aliens does present special issues, deportation is hardly a reward. Given the option, many, if not the vast majority, would likely choose to remain in the United States and comply with every term of their probation rather than being forcibly deported.

In this case, the trial court chose to grant probation to defendant. The fact that defendant was predictably deported after serving his jail sentence, and therefore could not report to his probation officer after his release, should not be regarded as either a reward or a basis to impose a lifetime requirement of probation. Moreover, while difficulties certainly exist, and deported and non-deported probationers are necessarily not in identical positions, deported aliens who violate their probation during the original probationary period remain subject to having their probation revoked for any violations just like everyone else, and remain subject to prosecution for any future criminal offenses just like everyone else.

Interpreting the tolling statute as suggested by respondent would in fact create a further serious potential problem in the plea bargaining process

that further militates against this interpretation. Under the Due Process Clause, a defendant has a federal constitutional right to the benefit of his plea bargain. (*Santobello v. New York* (1971) 404 U.S. 257 [92 S.Ct. 495, 30 L.Ed.2d 427] ("*Santobello*"); *People v. Walker* (1991) 54 Cal.3d 1013, 1024 ("*Walker*"); U.S. Const. Amends. V, XIV.) Accordingly, "when a plea rests in any *significant degree* on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York, supra,* 404 U.S. at p. 262, emphasis added.) To be a violation of the defendant's due process rights, the variance must be "significant" in the context of the plea bargain as a whole. (*People v. Walker, supra,* 54 Cal.3d at p. 1024.)

In cases such as this, a deportable defendant accepts a plea bargain in exchange for a certain jail term and a certain number of years on probation. After such a defendant serves his jail term and is deported, he is through no fault of his own subject to having his probation summarily revoked for not reporting to probation following his release from jail. If that summary revocation is then interpreted to impose a never ending number of years of probation as advocated by respondent, rather than the number of years bargained for by the defendant, then every such plea bargain entered into under these circumstances would be potentially subject to a constitutional

challenge as a denial of the defendant's bargain under *Santobello* and *Walker.* This is one more reason why respondent's proposed interpretation of the statute should be rejected. (See *People v. Davis* (1968) 68 Cal.2d 481, 483-484 [statutes should be interpreted to avoid constitutional problems]; see also *In re Klor* (1966) 64 Cal.2d 816, 821.)

For all of the above reasons, as well as the additional reasons set forth in Defendant's Opening Brief on the Merits, this Court should hold that the tolling provision applies for the purpose of preserving jurisdiction to adjudicate the basis of the summary revocation allegation even though the original period of probation has expired, and does not apply for the purpose of conferring jurisdiction for the trial court to entertain a new allegation that a defendant is in violation of his probation based on a different act committed years after the expiration of the original probationary period.

II

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FEBRUARY 13, 2009 FINDING THAT DEFENDANT VIOLATED HIS PROBATION BY FAILING TO REPORT TO HIS PROBATION OFFICER UPON HIS 2007 REENTRY INTO THE UNITED STATES

Initially, it appears a brief discussion regarding the applicable standards of review is warranted. It has long and repeatedly been recognized that the ultimate decision whether or not to revoke probation is subject to

review for abuse of discretion. (See, e.g., *People v. Galvan* (2007) 155 Cal.App.4th 978, 981-982; *People v. Zaring* (1992) 8 Cal.App.4th 362, 378; *In re Coughlin* (1976) 16 Cal.3d 52, 56; *People v. Vanella* (1968) 265 Cal.App.2d 463, 469; *People v. Lipner* (1933) 219 Cal. 395, 400; *People v. Sanders* (1923) 64 Cal.App. 1, 3; see also Resp. Brief p. 24.)

Respondent further argues that factual findings underlying this decision are subject to review under the traditional sufficiency of the evidence standard. (Resp. Brief p. 24.) Defendant agrees this appears to be the appropriate test, but notes that none of the California Supreme Court cases cited by respondent in support of this proposition were probation revocation cases, and notes that it appears this Court has never so held. (See *People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681 [juvenile fitness proceeding under the Welfare and Institutions Code]; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [criminal trial].) In *Kurey,* the Court of Appeal did apply a traditional sufficiency of the evidence standard of review to a sufficiency challenge in a probation revocation case. (See *People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, cited on p. 24 of Respondent's Brief.)

Most recently, while at the same time observing that abuse of discretion review is appropriate, and in a case not involving a sufficiency of the evidence challenge, the Court of Appeal stated, "[w]e review a probation

revocation decision pursuant to the substantial evidence standard of review," and cited the same juvenile fitness proceeding in *Jones* cited by respondent. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

Defendant points out the above only to show that the case law does not appear as clear as respondent suggests, and because respondent on several subsequent occasions affirmatively argues that the trial court did not abuse its discretion in finding a violation. (See Resp. Brief pp. 25, 27, 28.) However, defendant ultimately agrees with the conceptual framework that respondent appears to be advocating, namely, that a challenge to a finding of fact made by the trial court, including a factual finding that a defendant willfully violated his probation, is subject to review under a sufficiency of the evidence standard, and the trial court's ultimate decision as to whether or not to revoke probation remains subject to review for abuse of discretion.

This approach is consistent with the approach taken by this Court in the juvenile fitness proceeding cited by respondent in *Jones*, and by the Court of Appeal in *Galvan*. (*People v. Superior Court* (*Jones*), *supra,* 18 Cal.4th at pp. 680-682 [applying the same approach, and observing that "a finding unsupported by substantial evidence is necessarily an abuse of discretion"]; *People v. Galvan, supra,* 155 Cal.App.4th at pp. 981-983 [observing that a

trial court abuses its discretion by revoking probation if its finding of a violation is not supported by the evidence].)

As to the sufficiency of the evidence, respondent first argues the evidence was sufficient to support a finding defendant willfully failed to report upon reentry into the United States in 2007 because defendant did not report after his reentry in 2007 and there was nothing preventing him from reporting at that point. (Resp. Brief p. 25.) Defendant disagrees. The fact that defendant did not report and physically could have reported are not sufficient to establish a willful violation. To be a willful violation, defendant necessarily had to have knowledge of his duty to report in 2007, and this is where the evidence is lacking.

Respondent argues that *Galvan* is distinguishable because *Galvan* found insufficient evidence to support a finding of a willful failure to report within 24 hours of release from custody because the defendant was deported after he was released from custody, whereas defendant Leiva could have reported following his reentry in 2007. (Resp. Brief pp. 26-27.) Respondent's argument misses the point, however, because defendant Leiva still needed to have knowledge of his duty to report in 2007.

As stated in *Galvan,* and applicable herein by analogy, "[w]e also believe a reasonable person in Galvan's position would have assumed that, in

these circumstances, the 24-hour reporting requirement would be excused." (*People v. Galvan, supra,* 155 Cal.App.4th at p. 985.) In this case, a reasonable person in defendant Leiva's position would have assumed that the reporting requirement had been excused by his deportation, and having committed no other violations, that his three-year term of probation had terminated in 2003, long before his reentry in 2007.

Respondent also argues that any separate due process claim was forfeited and should not be considered by this Court. (Resp. Brief p. 27.) However, defendant is not making a separate claim of a due process violation. Rather, he merely pointed out in his Opening Brief that principles of due process require that a probationer be informed in advance of what will constitute a violation of probation. (Opening Brief on the Merits p. 19.) The reason due process imposes this requirement is so that a defendant can have knowledge of what conduct will and will not violate his probation. In this case, it is defendant's lack of knowledge that he was required to report in 2007, via notice or otherwise, that is the reason his failure to report upon his reentry in 2007 was not a willful violation of the three-year term of probation imposed in 2000.

The finding that defendant willfully violated his probation after his reentry in 2007 was not supported by substantial evidence.

III

THE TRIAL COURT'S FEBRUARY 13, 2009 FINDING THAT DEFENDANT VIOLATED HIS PROBATION BY FAILING TO REPORT TO HIS PROBATION OFFICER UPON HIS 2007 REENTRY INTO THE UNITED STATES WAS BASED ON INADMISSIBLE HEARSAY AND RESULTED IN A VIOLATION OF HIS DUE PROCESS RIGHT TO CONFRONTATION

Respondent first argues that defendant's contention that the probation officer's report was inadmissible hearsay and the trial court's reliance upon it to find defendant in violation of his probation was a violation of due process has been forfeited because defendant's trial counsel failed to object on these grounds in the trial court and agreed that the trial court could appropriately consider the probation report under "the rules of evidence." (Resp. Brief pp. 29-32, 35; 2 R.T. pp. 1-5.)

Defendant notes that at the end of this brief hearing, trial counsel did make a general objection "to the court's finding in violation." (2 R.T. p. 5.) However, in fairness, defendant acknowledges this may well not have been a specific enough objection, particularly in light of trial counsel's previous statement that the trial court could appropriately consider the probation report. (See Evid. Code § 353, subd. (a); 2 R.T. p. 2.)

On the other hand, the Court of Appeal did consider the defendant's due process claim on the merits, and rejected it. (Slip Opn. pp. 11-12; see also

AOB pp. 15-17.) In addition, this Court has previously recognized that constitutional issues may be considered for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

Moreover, this Court has granted review on the issue of whether the trial court's finding was based on admissible evidence, and this is an important question of law not only in this case, but in potentially thousands of other cases.

Thus, for all the above reasons, defendant respectfully urges this Court should consider this issue on its merits for the guidance of future trial courts, even if defendant might not be entitled to relief in this particular case.[1]

On the merits, respondent contends that the probation report was admissible and there was no due process violation in the trial court's reliance upon it to find defendant in violation of his probation. (Resp. Brief pp. 32-35.) However, respondent either does not address, or only briefly addresses, the most pertinent line of authorities relating to this issue, from this Court's decisions in *Winson, Maki,* and *Arreola*, to the Court of Appeal's most recent

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[1] In fact, if this Court decides the jurisdictional issue in Argument I in defendant's favor, then the issues contained in both Arguments II and III are unnecessary to the resolution of this case, but could still be considered for the guidance of future trial courts.

decisions in *Kentron D.* and *Abrams*, which interpret and apply the above decisions from this Court.

As set forth at length in Defendant's Opening Brief on the Merits, defendant maintains that *Kentron D.* and *Abrams* correctly set forth the current state of the law, and consistent with those decisions, admission of the probation report in this case falls on the *Winson-Arreola* side of the line and constituted a violation of defendant's due process right to confrontation. (See *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1384-1387, 1393 [the juvenile court's reliance on the contents of a probation report to revoke the juvenile's probation violated the juvenile's due process right to confront and cross-examine witnesses]; *People v. Abrams* (2007) 158 Cal.App.4th 396, 405 ["Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely falls on the *Winson-Arreola* side of the line. [Citations.] We hold the rule is otherwise where the evidence involves more routine matters such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead upon the record of his or her own action.'"].)

Defendant asks this Court to affirm the rationale and reasoning of both *Kentron D.* and *Abrams*, and notes that respondent has not offered any persuasive reason not to follow or adopt the reasoning of those decisions.

Respondent does appear to attempt to distinguish *Abrams*, contending that the probation officer in this case was "not likely to have personal recollection" of the contents of his report and would likely "rely instead upon the record of his or her own action." (Resp. Brief p. 35, citing *People v. Abrams, supra,* 158 Cal.App.4th at p. 405.)

Respondent offers no factual basis for its assertion that the probation officer would not likely remember his interview with defendant. Moreover, respondent is taking the above portion of *Abrams* out of context. *Abrams* stands for the proposition that witness statements obtained during interviews and contained in a probation report are exactly the type of evidence that requires confrontation. (*People v. Abrams, supra,* 158 Cal.App.4th at p. 405.) The type of evidence that does not require confrontation includes more routine or ministerial matters, such as records of whether appointments were kept and restitution was paid. (*Ibid.*)

Respondent does not address *Kentron D.*, and as noted, that case offers further direct support for the conclusion that the admission of the probation officer's report in this case was a violation of due process, as it held that the

observations of probation officers contained in a probation officer's report were not merely documentary evidence, and required confrontation. (*In re Kentron D., supra,* at pp. 1387, 1391-1393.)

Respondent also argues that the defendant's statements were admissible hearsay under Evidence Code section 1220. (Resp. Brief p. 34.) Defendant agrees. However, the probation officer's recounting of those statements was double hearsay, and consistent with the above authorities, defendant was entitled for purposes of due process to confront the probation officer with respect to these statements.

Finally, respondent asserts that defendant could have testified, but did not. (Resp. Brief p. 34.) The right to testify is not a substitute for the right to confrontation.

CONCLUSION

For the foregoing reasons, the additional reasons set forth in Defendant's Opening Brief on the Merits, and in the interests of justice, defendant respectfully requests the judgment of the Court of Appeal affirming the violations of probation be reversed.

Dated: 1/30/12

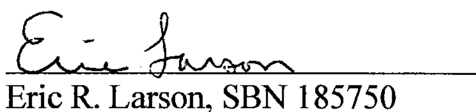
Respectfully submitted,

Eric R. Larson
Attorney for Defendant Leiva

CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520(c)(1), that according to the Microsoft Word Microsoft Word computer program used to prepare this document, Defendant's Reply Brief On The Merits contains a total of 4,905 words.

Executed this 30th day of January, 2012, in San Diego, California.



Eric R. Larson, SBN 185750

Eric R. Larson, #185750
330 J Street, # 609
San Diego, CA 92101

Supreme Court No.: S192176
Court of Appeal No.: B214397

DECLARATION OF SERVICE BY MAIL

I, Eric R. Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, # 609, San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 30th day of January, 2012, I caused to be served the following document(s):

DEFENDANT'S REPLY BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

California Appellate Project
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071

Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

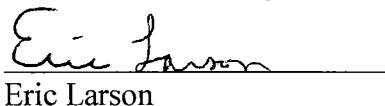
Mr. Jose Leiva
Leiva_001@yahoo.com.mx
(served via email as defendant resides in Mexico)

Office of the District Attorney
210 West Temple St.
Los Angeles, CA 90012

Second District Court of Appeal
Division Four
300 S. Spring St.
Floor 2, N. Tower
Los Angeles, CA 90013-1213

Los Angeles County Superior Court
San Fernando Courthouse
900 Third St.
San Fernando, CA 91340
(Attn: Hon. Barbara M. Scheper)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 30, 2012, at San Diego, California.



Eric Larson