SUPREME COURT OF ARIZONA

SEAN WAYNE BOTKIN, Petitioner/Appellee, v. STATE OF ARIZONA, Respondent/Appellant.	)	Supreme Court No. CR 08-0299-PR Court of Appeals No. 1 CA-CR 07-0083 Maricopa County Superior Court No. CR2000-016781

PETITIONER/APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION AND OVERVIEW

A.R.S. § 13-917(A) expressly grants a trial court the authority "*at any time*" to transfer a person from intensive to standard probation. Notwithstanding section 917(A)'s plain language and the unambiguous legislative intent, a Majority of the Court of Appeals incorrectly held that, because of the mandatory sentencing provisions of section 917(B), the filing of a petition to revoke intensive probation precludes a court from moving a probationer from intensive to standard probation under section 917(A).

In this case, the superior court, citing Petitioner Sean Botkin's exemplary conduct, moved him from intensive to standard probation, thereby taking his case outside the mandatory sentencing provisions of section 917(B). This Court should affirm the trial court's transfer of Botkin and reverse the Majority's holding that a court may only exercise its section 917(A) authority "sometime" rather than "at any time."

OVERVIEW OF PERTINENT PROCEDURAL BACKGROUND

On April 13, 2001, Botkin began serving a seven-year term of intensive probation for a 2000 offense (the "2000 Case").[1] In September 2004, while still on

[1] For the Court's convenience, copies of pertinent statutes are attached hereto, and record materials are included in Petitioner's Separate Appendix to Supplemental Brief ("App"). Citations to the Clerk's record in CR2000-16781 are indicated with "CR" followed by the index number, and citations to the Clerk's record in CR2004-042577 are indicated with "CR2" followed by the index number.

intensive probation on the 2000 Case, Botkin gave an insomniac classmate four Zyprexa, a non-controlled prescription sleep aid. The Adult Probation Department filed a petition to revoke intensive probation in the 2000 Case, alleging that Botkin had "commit[ed] the crime of Sale of a Controlled Drug."[2] One week later, Botkin was charged with "transfer[ing]," without authorization, a prescription-only drug, a class 6 felony in violation of A.R.S. § 13-3406(A)(7) (the "2004 Case").[3]

In December 2004, Botkin pled guilty to one count of violating section 13-3406(A)(7).[4] Botkin stipulated as part of that plea that he would serve a term in the Arizona Department of Corrections ("ADOC") and the State agreed to dismiss its allegations of prior felony convictions and that the offense had been committed while Botkin was on probation.[5] The probation department filed its sentencing/disposition report in January 2005, recommending that Botkin receive a mitigated sentence on the 2004 charges and that he be reinstated on standard probation on the 2000 Case, effectively repudiating the petition to revoke probation filed four months earlier.[6]

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[2] App. Tab 1 (Petition to Revoke Probation Warrantless Arrest).

[3] CR2 1 (October 1, 2004 Direct Complaint).

[4] App. Tab 2 (Plea Agreement); CR2 18.

[5] App. Tab 2.

[6] App. Tab 3 (January 10, 2005 Probation Violation Report) at 3-5.

At sentencing, the State argued that A.R.S. § 13-917(B) required the court to revoke Botkin's probation because the 2004 offense occurred while he was on intensive probation.[7] Rejecting the State's argument, the court (1) sentenced Botkin to the presumptive term of one year in prison on the 2004 Case, and (2) followed the recommendation of the probation department, reinstating standard probation on the 2000 Case.[8] Botkin was released from ADOC in August 2005.[9]

While Botkin was serving his sentence on the 2004 Case, the State appealed the superior court's decision not to revoke probation. The Court of Appeals reversed the trial court's failure to apply the mandatory sentencing provisions of section 917(B), remanding the action.[10]

On remand, the trial court allowed Botkin to withdraw from his plea, reinstating both the 2004 charges and intensive probation in the 2000 Case.[11] Botkin then moved to modify his level of probation supervision from intensive to standard under A.R.S. § 13-917(A).[12] Citing the probation department's January

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[7] App. Tab 9 (January 14, 2005 Sentencing Transcript) at 45-49.

[8] *Id.* at 56-61.

[9] App. Tab 5 (December 14, 2006 Probation Violation Report) at 1.

[10] App. Tab 7 (*State v. Botkin*, February 28, 2006 Memorandum Decision).

[11] App. Tab 10 (December 4, 2006 Change of Plea Transcript) at 4-5.

[12] *Id.* at 5.

2005 recommendation that Botkin be reinstated on standard probation and his outstanding performance on standard probation for the prior 18 months, the trial court granted this request.[13]

The parties then presented the trial court with a plea agreement on the 2004 Case,[14] the acceptance of which the court deferred until sentencing so that it could consider the probation department's recommendation. In its sentencing/disposition report, the probation department described Botkin's "full compliance with the conditions of his supervised probation," including completing 150 hours of community service, passing all drug screening, and maintaining a full college class schedule.[15] But for the current charges, the department informed the court, it would have recommended an early termination of probation.[16] Limited by the terms of the plea, the department instead recommended reinstatement on standard probation.[17] Significantly, the department did not file a petition to revoke intensive probation, nor did it suggest that its September 2004 petition was still

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[13] *Id.* at 5-6.

[14] App. Tab 4 (December 4, 2006 Plea Agreement). Notwithstanding that the Botkin's conduct over the prior 23 months had been exemplary, the State refused as part of this new plea to drop the prior conviction allegation, as it had done in January 2005. (*Compare* App. Tab 4 *with* App. Tab 2.)

[15] App. Tab 5 at 3.

[16] *Id.*

[17] *Id.*

effective, or that the court was otherwise obligated to revoke probation and send Botkin to prison. To the contrary, as it had in January 2005, the department repudiated its September 2004 petition.

At sentencing, the trial court affirmed its prior modification of Botkin's probation supervision level, again citing to the probation department's January 2005 recommendation of reinstatement on standard probation, the length of time already served in prison, Botkin's full-time pursuit of a college degree, and his full compliance with the terms of his probation.[18]

After accepting the plea on the 2004 Case, the court imposed a mitigated sentence (to time served), pointing to Botkin's effort to do "everything that he could possibly do since his release from prison in August of 2005 to live a law abiding and productive life" and that he had "already been amply punished for this particular offense that occurred back in 2004."[19] The court reinstated Botkin on standard probation on the 2000 Case.[20] The State appealed.[21]

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[18] App. Tab 11 (February 15, 2007 Sentencing Transcript) at 11-12.

[19] *Id.* at 12-13.

[20] *Id.* at 13.

[21] CR 194; CR 2 50.

On April 13, 2008, while the appeal was pending, Botkin's probationary period expired, and he was accordingly discharged from probation entirely.[22]

On July 31, 2008, a majority of the Court of Appeals reversed and remanded, with Judge Kessler dissenting. The Majority held, inter alia, that A.R.S. § 13-917(B) requires a trial court to revoke from intensive probation any person (1) against whom a petition to revoke intensive probation is filed, and (2) whom the trial court finds committed a new felony offense, regardless of whether the person is on intensive probation at the time of sentencing/disposition.[23] Judge Kessler, in his dissent, argued that section 917(B) does not apply to someone, like Botkin, who is not on intensive probation at the time the trial court finds the commission of a new felony offense.[24]

ANALYSIS

Arizona's sentencing scheme vests great discretion in sentencing courts. Included among the discretionary powers are those to impose, modify or revoke probation. *See Green v. Super. Ct.*, 132 Ariz. 468, 471, 647 P.2d 166, 169 (1982). A.R.S. § 13-917(A) expressly grants trial courts discretion to "at any time modify the level of supervision of a person granted intensive probation." *See also* Ariz. R.

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[22] App. Tab 6 (Supplemental Brief re Jurisdiction and Mootness) at Ex. 1.

[23] App. Tab 8 (July 31, 2008 Court of Appeals Opinion) at 9 ¶ 16.

[24] *Id.* at 22-27 ¶¶ 38-44.

Crim. P. 27.4 (court may, after notifying prosecutor, terminate probation and discharge probationer absolutely); Ariz. R. Crim. P. 27.3 (court may modify any condition imposed after notice to prosecutor and defendant). The trial court properly exercised its discretion in this case when it transferred Botkin from intensive to standard probation, thereby removing him from any application of section 917(B). This Court should affirm that decision.

This Court should further reverse the decision of the Majority of the Court of Appeals that the filing of a petition to revoke intensive probation under section 917(B) bars a court from exercising its discretion -- including its discretion to transfer someone from intensive to standard probation -- under section 917(A).

I. The Trial Court Appropriately Exercised Its Discretion Under A.R.S. § 13-917(A) to Modify Botkin's Probation Supervision Level

A.R.S. § 13-917(A) grants courts the discretion to "at any time modify the level of supervision of a person granted intensive probation," including the power to transfer the probationer to standard probation or to terminate probation.

The trial court below appropriately exercised its discretion under section 917(A), granting Botkin's motion to modify his probation supervision. Among the reasons relied on by the trial court were that, following his 326-day incarceration, Botkin spent eighteen months fully complying with every condition of standard probation, including completing community service hours, paying his fine in full, remaining drug and alcohol free, and abiding by the law. In addition, as the trial

court observed, Botkin pursued his education by attending college full time. In short, as the trial court recognized, Botkin did "everything that he could possibly do ... to live a law abiding and productive life."[25]

There is no suggestion, nor could there be, that the trial court abused its discretion in modifying Botkin's probation supervision level. This Court should affirm that decision.

II. Section 917 Allows a Court to Modify the Probation Terms of a Person Against Whom Has Been Filed a Petition to Revoke Intensive Probation

Although no published case has ever limited the trial court's power under section 917(A), the Majority held that the filing of a petition to revoke intensive probation alleging a new felony requires a court to "revoke probation and impose a term of imprisonment if the probationer is found to have committed the new offense," whether or not the defendant is on intensive probation at the time of this finding.[26] This Court should reverse the Majority's interpretation of the statute as it ignores both the clear language of and legislative intent behind section 917.

A. Section 917(A) Expressly Affords a Court the Power to Modify a Term of Probation "At Any Time"

A.R.S. § 13-917(A) provides that a court "may *at any time* modify the level of supervision of a person granted intensive probation, or may transfer the person

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[25] App. Tab 10 at 4-5; App. Tab 12 at 12-13.

[26] App. Tab 8 at 9 ¶16; *id.* at 12-13 ¶ 21.

to supervised probation or terminate the period of intensive probation pursuant to section 13-901, subsection E." (Emphasis added). The plain meaning of this language and the legislative intent could not be more clear -- a trial court retains *at all times* the authority to move someone from intensive to standard probation (or to remove them from probation altogether). *State v. Ontiveros*, 206 Ariz. 539, 541 ¶ 8, 81 P.3d 330, 332 (App. 2003) (holding that the statute's language is the best and most reliable indicator of its meaning). There is no temporal limitation on that authority, including following the filing of a petition to revoke intensive probation. Because the meaning of these words is clear, no further application of the rules of statutory construction is required to reverse the Majority's holding that a court's power under section 917(A) does not exist "at any time." *Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, 500 ¶¶ 24-27, 88 P.3d 565, 570 (App. 2004).

B. Section 917(B) Applies Only to Persons on Intensive Probation at the Time the Court Finds the Commission of a New Felony Offense

1. Section 917(B) Does not Limit a Court's Power to Remove a Person From Intensive Probation

Section 917(B) requires both (1) the filing of a petition to revoke intensive probation and (2) the finding of the commission of an additional felony offense.[27]

[27] Section 917(B) further requires the revocation of intensive probation for persons who "violated a condition of intensive probation which poses a serious threat or danger to the community." That provision of the statute is not at issue in this case.

There is no question that the former must take place when a person is on intensive probation.[28] Indeed, as the Majority recognizes, the "potential application of § 13-917(B) is triggered when a petition to revoke intensive probation is filed alleging the commission of a felony."[29] Once that trigger is pulled, the Majority holds, no court can remove someone from intensive probation if to do so would "avoid the mandatory sentencing requirement of [section 917(B)]."[30] In other words, once a petition is filed, if a trial court finds an additional felony offense, it must do so before transferring that person to standard protection or terminating probation altogether.

Of course, there is no such express requirement or limitation in section 917(A) which allows the court to amend a term of probation "at any time." There is further no such limitation -- including no temporal or situational limitation -- under the plain terms of section 917(B), the only mandatory provisions of which relate to what a court must do *after* it makes this finding. Were the Majority correct, section 917(B) would expressly proscribe in some way the court's powers following the filing of a petition to revoke intensive probation. Among other things, the statute could require that the court (1) not remove a person from

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[28] As described below, we do not believe such a petition was still outstanding at the time of Botkin's sentencing/disposition.

[29] *Id.* at 14 ¶ 23.

[30] *Id.*

intensive probation before making a finding on the allegation of the commission of an additional felony offense, (2) make as soon as practicable a determination whether the person has committed an additional felony, or even (3) make a determination whether the person has committed an additional felony.

As written, however, the statute places no such obligation or restriction on the court. Rather, section 917(B) makes clear that both the filing of the petition *and* the judicial finding of an additional felony offense must occur before its mandatory provisions regarding sentencing (i.e., the court "shall revoke the period of intensive probation and impose a term of imprisonment") arise.

The trial court accepted Botkin's plea on the 2004 Case after it had removed him from intensive probation. As such, there was never any judicial finding of an additional felony as required under section 917(B).

2. Section 917(B) Allows for the Revocation Only of a Term of Intensive Probation

As Judge Kessler argues in his dissent, "a court cannot revoke an intensive probation which no longer exists."[31] Were the Majority correct that a defendant's intensive probation must be revoked even if he is no longer on intensive probation, section 917(B) would require the court to "revoke the period of ~~intensive~~ probation

[31] *Id.* at 24 ¶ 40.

and impose a term of imprisonment."[32] That is not, however, what the statute says. Rather, by its express terms, it requires only that a court revoke a term of *intensive* probation, which, of course, requires that a defendant be on intensive probation when the court has finds the commission of a new felony.

The Majority's interpretation requires that the second use of "intensive" be read out of section 917(B), in clear violation of the principles governing statutory interpretation. *See, e.g., In re Maricopa County Super. Ct. No. MN 2001-001139*, 203 Ariz. 351, 354 ¶ 17, 54 P.3d 380, 383 (App. 2002) ("A cardinal rule of statutory interpretation is to avoid, if possible, an interpretation which renders superfluous any portion of a statute.") (citation omitted). For "intensive" to have any meaning, this Court must reverse the Majority and find that section 917(B) applies only to those persons still on intensive probation when a finding of a new felony offense is made. *Pinal Vista Props., L.L.C. v. Turnbull*, 208 Ariz. 188, 190 ¶ 10, 91 P.3d 1031, 1033 (App. 2004) ("[E]ach word or phrase of a statute must be given meaning so that no part is rendered void, superfluous, contradictory or insignificant.") (citation omitted).

[32] This still leaves unanswered how to deal with the person whose probation is terminated prior to finding of a felony commission.

3. The Legislature Intended Section 917(B) to Apply Only to Those Persons Who Are Still on Intensive Probation at the Time the Court Finds the Commission of an Additional Felony Offense

In enacting section 917(B) it was not, as the Majority incorrectly concludes, the legislature's intention "that a person who commits a felony while on intensive probation forfeits the opportunity to remain on probation and must be sentenced to a term of imprisonment."[33] Were that what the legislature intended to do it would have passed a statute that, without exception and without further action by any other person or entity, mandated prison for a person charged with a felony offense committed while on intensive probation, based solely on the person's status at the time of the offense. Indeed, the legislature knows perfectly well how to write laws that punish persons based solely on their status at the time of the offensive conduct. *See, e.g.*, A.R.S. § 13-708 (enhancing punishment for persons who commit new felony(ies) while on probation).

That, of course, is not what the legislature did here. Indeed, it included in section 917(B) two distinct acts that must precede a revocation of intensive probation and return to prison -- the filing of a petition to revoke and the judicial finding that a new felony has been committed. The inclusion of those predicate

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[33] App. Tab 8 at 9 ¶ 16; *id.* at 9-10 ¶ 17 (holding that, for felony violations of intensive probation, "the legislature has mandated that probation must be revoked and the defendant must be sentenced to a term of imprisonment").

acts necessarily creates at least four situations in which felonies committed while on intensive probation fall outside the mandatory sentencing provisions of section 917(B): (1) felonies for which the probation department declines to file a petition to revoke intensive probation; (2) where a petition to revoke has been filed but no court finds the commission of a new felony; (3) felonies charged after the probationer is transferred to standard probation; and (4) felonies charged after the person is removed from probation altogether.

As is evident by these four scenarios, the legislature did not intend section 917(B) to apply to all persons who committed felonies while on intensive probation. Rather, in enacting section 917, the legislature vested discretion in law enforcement, the probation department and the court as to when the statute applies. Law enforcement decides when and whether to investigate and charge a person for a felony committed while on intensive probation. If law enforcement decides not to charge, or to charge after a person is no longer on intensive probation, section 917(B) does not apply.

Likewise, the probation department can elect not to file a petition to revoke intensive probation, thereby keeping a case out from under section 917(B). *See State v. Taylor*, 187 Ariz. 567, 570, 931 P.2d 1077, 1080 (App. 1996) (noting that the probation department "still [has] discretion whether, in the first instance, to file a petition for revocation"). We assume the State would not disagree that law

enforcement and the probation department have such discretion under section 917(B). Nor do we believe the State would disagree that the trial court has discretion under 917(B) whether to find the commission of a new felony offense. There is thus no disagreement that the legislature vested substantial discretion in those entities in enacting section 917.

The only disagreement is whether that discretion includes the trial court's authority to remove a person from intensive probation under section 917(A) after a petition to revoke intensive probation has been filed. There is no basis -- either in the express terms of section 917 or elsewhere -- to suggest the legislature intended the trial court to be so stripped of this authority. To the contrary, by specifically providing (1) that the trial court may terminate intensive probation "at any time" and (2) limiting the mandatory provisions of section 917(B) to require the revocation of intensive probation, the legislature's manifest intent was that the trial court retain the discretion to do precisely what was done here. The exercise of that discretion -- as with any discretionary decision -- remains subject to the check of appellate review. As described above, no one suggests that there is any basis on which to find that the trial court below abused its discretion in this regard.

In any event, this Court should find that the legislature intended that such discretion be available under section 917.

III. Alternatively, This Court Can Reverse the Majority's Holding by Finding that the Probation Department Repudiated its Petition to Revoke Intensive Probation

As described above, section 917(B) requires the filing of a petition to revoke intensive probation, an act that is entirely within the discretion of the probation department. A.R.S. § 917(B). Here, the probation department in September 2004, one week before Botkin was charged, filed a one-page petition to revoke intensive probation in which it alleged, inter alia, that Botkin violated his probation by committing "the crime of Sale of a Controlled Drug."[34] Presumably, that petition reflected the probation department's view at the time that, if Botkin had sold a controlled substance, his probation should be revoked and he should be returned to prison.

Four months later, after it had an opportunity to review information showing that the new charge was not for sale of a controlled substance but for transferring four prescription-only pills, the probation department recommended to the court that Botkin not have his probation revoked, effectively withdrawing its September 2004 petition.[35] Two years later, after this case was remanded by the Court of Appeals based on the superior court's failure to apply the mandatory sentencing

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[34] App. Tab 1.

[35] App. Tab 3 at 3 (recommending "reinstatement to standard probation on the probation offenses").

provisions of section 917(B), the probation department again declined to recommend revocation.[36] Indeed, the probation department indicated that, but for the current charges, it would have recommended an early termination of Botkin's standard probation.[37] By arguing in at least two subsequent filings that Botkin should not have his probation revoked and be returned to prison, the probation department, for all intents and purposes, repudiated its original petition to revoke. *See, e.g., Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 892 P.2d 1365 (App. 1994) (holding that party can repudiate earlier invocation of arbitration provision through conduct showing an intent not to arbitrate).

This Court should find that, because no petition to revoke intensive probation was pending, the mandatory provisions of section 917(B) do not apply to Botkin.[38]

CONCLUSION

A.R.S. § 13-917(A) expressly gives the trial court discretion to "at any time modify the level of supervision of a person granted intensive probation." This Court should affirm the decision of the superior court to transfer Botkin to standard

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[36] App. Tab 4 at 2-4 (recommending that Botkin be continued on standard probation).

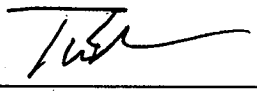
[37] *Id.* at 3.

[38] The State's October 13, 2004 Notice of Intent to Allege 13-917(B) (CR 152) is not an effective petition to revoke under either section 917(B) or Ariz. R. Crim. P. 27.6(a).

probation, thereby rendering inapplicable the mandatory sentencing provisions of section 917(B). The Court should further reverse the Majority's holding that the filing of a petition of intensive probation divests the superior court of its powers to modify the terms of a person's probation under section 917(A). Finally, this court should find that no Petition to Revoke intensive probation was in effect, as required by section 917(B).

Respectfully submitted this 2nd day of March, 2009.

OSBORN MALEDON, P.A.

By 

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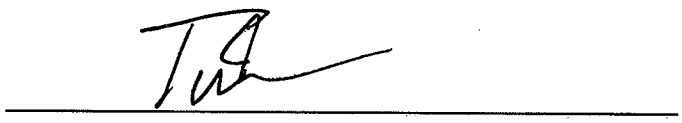
CERTIFICATE OF COMPLIANCE

Pursuant to the Court's Order dated February 10, 2009, granting review, I certify that the attached Supplemental Brief of Sean Wayne Botkin, does not exceed 20 pages.

Dated this 2nd day of March, 2009.



CERTIFICATE OF SERVICE

The undersigned has filed the original and seven copies of Petitioner/Appellee's Supplemental Brief and the original and two copies of Petitioner/Appellee's Separate Appendix to Supplemental Brief this 2nd day of March, 2009 with:

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The undersigned has mailed via U. S. Mail, one copy of Petitioner/Appellee's Supplemental Brief and Petitioner/Appellee's Separate Appendix to Supplemental Brief this 2nd day of March, 2009, to:

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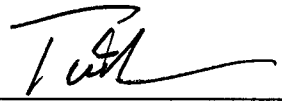

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Arizona Revised Statutes
A.R.S. § 13-917

13-917. Modification of supervision

A. The adult probation officer shall periodically examine the needs of each person granted intensive probation and the risks of modifying the level of supervision of the person. The court may at any time modify the level of supervision of a person granted intensive probation, or may transfer the person to supervised probation or terminate the period of intensive probation pursuant to section 13-901, subsection E.

B. The court may issue a warrant for the arrest of a person granted intensive probation. If the person commits an additional offense or violates a condition of probation, the court may revoke intensive probation at any time before the expiration or termination of the period of intensive probation. If a petition to revoke the period of intensive probation is filed and the court finds that the person has committed an additional felony offense or has violated a condition of intensive probation which poses a serious threat or danger to the community, the court shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law. If the court finds that the person has violated any other condition of intensive probation, it shall modify the conditions of intensive probation as appropriate or shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law.

C. The court shall notify the prosecuting attorney, and the victim on request, of any proposed modification of a person's intensive probation if that modification will substantially affect the person's contact with or safety of the victim or if the modification involves restitution or incarceration status.