

1996

Utah v. Hammer : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 960554-CA

STATE OF UTAH,)	
Plaintiff and Appellee,)	Case No. 960554-CA
vs.)	
DAX BRANT HAMMER,)	Priority No. 2
Defendant and Appellant.)	

APPEAL FROM A JUDGMENT OF CONVICTION ADJUDICATING DEFENDANT
GUILTY OF POSSESSION OF CONTROLLED SUBSTANCE, A 2ND DEGREE
FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 58-37-8(2)(a)(i) AND
-8(5)(v),(ix), AND ENTERED IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND
FOR WASHINGTON COUNTY, STATE OF UTAH
HONORABLE JAMES L. SHUMATE PRESIDING

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
Plaintiff and Appellee,)	Case No. 960554-CA
vs.)	
DAX BRANT HAMMER,)	Priority No. 2
Defendant and Appellant.)	

BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the court of appeals by provision of Utah Code Ann. §78-2a-3(2)(f).

ISSUES AND STANDARDS

1. What is the extent of a probationer's protection under the Fourth Amendment? R 259-64. This is a question of law, reviewed for correctness. State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993).

2. Can an offender be required, as a condition of his release on probation, to waive all protection which the Fourth Amendment extends to probationers? R 264. Question of law. Id.

3. Did defendant effectively and voluntarily waive the protection which the Fourth Amendment would have otherwise extended to him as a probationer? R 264. The

issue of the waiver of constitutional rights is arguably a mixed question of law and fact, but the courts indulge every reasonable presumption against such a waiver. See Wagstaff v. Barnes, 802 P.2d 774 (Utah App. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of the Fourth Amendment to the Constitution of the United States is set out in Addendum A.¹

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from a judgment, sentence, and probation order of the Fifth Judicial District Court, in and for Washington County, State of Utah, the Honorable James L. Shumate presiding, by which defendant was adjudged guilty of POSSESSION OF a CONTROLLED SUBSTANCE, a second degree felony, in violation of Utah Code Ann. §§58-37-8(2)(a)(I) and -8(5)(v),(ix).

Course of the Proceedings. Defendant was charged with possession of methamphetamine and drug paraphernalia (within 1000 feet of a public park), a second degree felony and class A misdemeanor, respectively. R 1-2. These charges arose out of the execution of a search warrant which purported to authorize the search of a certain residence and all persons present at the time of its execution. R 277-80.

¹The relevant Utah cases are decided under the Fourth Amendment and do not invoke any provision of the state constitution. Defendant is not prepared to argue that Article I, section 14, of the Utah Constitution extends any greater protection to probationers than does the Fourth Amendment.

Following preliminary hearing, defendant was ordered to answer the controlled substance charge. The paraphernalia charge was dismissed for lack of evidence. R 1-2.

Defendant had previously plead guilty to attempted burglary and was on supervised probation when he was searched by peace officers and charged in the instant proceedings. R 59-60, 251-52. His probation agreement included conditions requiring him to submit to warrantless, reasonable-suspicion searches at the request of probation officers. R 59-60, 267-69. The final pleadings in the attempted burglary case were not signed until after the incident which underlies this case. The written probation order included language requiring defendant to submit to searches of his person, possessions, and residence at the request of peace officers. R 59-60, 258.

Following his arraignment, defendant moved the district court to quash the search warrant and suppress the evidence obtained in the execution thereof. R 20-21. He contended that the police-officer affiant who applied for the search warrant had, in an attempt to bolster the credibility of his undisclosed informant, falsely described the informant as "a citizen with no motive to fabricate and nothing to gain from providing this information." R 63, 159. The undisclosed informant was one Kelly Moore. R 157. In fact, Moore then facing criminal charges in three separate proceedings, one of which was a felony charge which was pending preliminary hearing. R 160.

Defendant subpoenaed Moore to testify at the suppression hearing. R 28-29. When Moore failed to obey the subpoena, defendant proceeded as far as he could without

his testimony. R 247. The district court issued a bench warrant for Moore's arrest and continued the hearing. R 33-34, 202. Although the preliminary hearing was ultimately continued three times, defendant was never able to compel Moore's attendance as a witness. R 202.

Because defendant had not been able to secure pretrial release, defense counsel finally asked the court to rule on defendant's motion to suppress based upon the testimony which the court had already heard. R 266. Counsel asked that in the event the court sustained the search warrant, defendant be allowed to revisit the search issues when and if Moore's attendance could be compelled. R 214, 266.

After expressing concern about the application for the search warrant but without deciding whether or not the warrant had been properly issued, the district court denied defendant's motion to suppress on the grounds that (1) defendant had been previously convicted of attempted burglary and was on supervised probation; (2) under the terms of the order of probation, defendant was obliged to submit to search at the request of any peace officer; and (3) even if the search warrant was improperly issued, the supporting affidavit established "reasonable suspicion." R 267-69. The validity of the search warrant became academic in light of the district court's ruling that the search could have been conducted without a warrant.

Disposition at Trial Court. The case against defendant was tried to the bench and the evidence obtained during the execution of the search warrant was received over objection.

R 286-87. Defendant was found guilty of possession of a controlled substance, a second degree felony, and was sentenced according to statute. R 120-24, 373-74. The execution of his sentence was stayed, and the defendant was placed on probation subject to certain terms and conditions, including a directive that he submit to warrantless searches upon the request of any peace officer. R 374-75.

RELEVANT FACTS

In the early afternoon of April 18, 1995, St. George City police officers and Washington County Sheriff's deputies executed a search warrant at the residence of one Stanley Adams in Santa Clara, Utah. R 278-79. The warrant ordered peace officers to search the residence "as well as all persons present during execution of the search warrant." R 35-46. Because defendant was visiting friends at the Adams residence when police officers arrived, his person was searched purportedly by authority of the warrant. The state has not claimed that this was a probation search or that the agents of Adult Probation and Parole participated in the execution of the search warrant.

SUMMARY OF ARGUMENT

The Fourth Amendment extends its protection to probationers. However, the supervisory power which a probation officer exercises over his probationer necessarily places some legitimate limitations upon these rights. Nevertheless, a probationer cannot be required, as a term of his probation, to submit to warrantless searches by members of

the general law enforcement community.

Defendant did not waive any Fourth Amendment right by signing the probation agreement or by any other means. Even if the language of the probation agreement could be construed as a waiver of all Fourth Amendment rights, its execution did not constitute a knowing, intelligent, and voluntary waiver.

ARGUMENT

POINT I

THE FOURTH AMENDMENT EXTENDS ITS PROTECTION TO PROBATIONERS.

Probationers enjoy protection under the Fourth Amendment. See State v. Velasquez, 672 P.2d 1254 (Utah 1983).² However, the courts are not in agreement concerning the extent of that protection. These differences can be, at least in part, attributed to the theories that various jurisdictions have relied upon in withdrawing Fourth Amendment protection.

In the past, some courts, including the Utah Supreme Court, relied on a theory of "constructive custody" under which a probationer's Fourth Amendment rights were compared to those of a prisoner. See Reeves v. Turner, 28 Utah 2d 310, 510 P.2d 1212

²Velasquez involved the search of a parolee's residence. Counsel is not aware of any Utah cases specifically involving probation searches. However, probationers' and parolees' Fourth Amendment rights are arguably indistinguishable. See id. at 1258 n.2. See also State v. Blackwell, 809 P.2d 135, 137 n.2 (Utah App. 1991). "Probationer" will be used throughout this brief to refer to both probationers and parolees unless clarity or the context requires a distinction.

(1972). This theory has been discredited. Velasquez, 672 P.2d at 1258 (citing Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972)).

Other courts adopted an "act of grace" or "implied consent" theory which was based on the premise that since one who is convicted of a criminal offense has no right to have the execution of his sentence suspended, the state may attach whatever conditions it desires the extension of that "privilege." "[It is now clear beyond question" that a probationer's Fourth Amendment rights cannot be curtailed or extinguished by categorizing probation as a "privilege" rather than a "right." See 4 W. LaFave, Search and Seizure, §10.10(b) at 762 (3d ed. 1996).

Although it has been widely criticized, there is a theory of express "waiver" which still enjoys some support. Under this theory, the offender is required to expressly waive his Fourth Amendment rights at the time he is placed on probation. This implies that the probationer's Fourth Amendment rights are intact and must be expressly waived, thus inviting controversy concerning the fact, validity, and extent of the alleged waiver. See id. at 763-66.

While the "constructive custody," "act of grace," and "waiver" theories are all unsound, it does not necessarily follow that probationers enjoy the same protection under the Fourth Amendment as does the general public. In Velasquez, the Utah Supreme Court approved a warrantless search of a parolee's apartment supported only by "reasonable suspicion." The court adopted what it referred to as a "middle ground" approach: "[A]lthough a warrant based on probable cause is not generally required, a parole officer

must have reasonable grounds for investigating whether a parolee has violated the terms of his parole or committed a crime." Id. at 1260.³

In this approach, our supreme court has distanced itself from all the theories which have traditionally been used to justify or rationalize warrantless probation searches. The court concluded that signing the standard supervision agreement "cannot itself constitute a waiver of constitutional rights." Id. at 1260 n.4. The obligation to submit to search is not based upon a theory that the probationer has waived any right. Cf. State v. Blackwell, 809 P.2d at 138 n.4 (search upheld under a "reasonable suspicion" analysis, not on grounds of waiver).

Without characterizing it as such, Velasquez employs an "administrative search" theory under Fourth Amendment principles approved in Camara v. Municipal Court, 387 U.S. 523 (1967), and its progeny. See generally, LaFave, §10.10(c) at 766-75. Velasquez cites Camara, but it does so in such a manner that the reader does not immediately recognize the fact that he is leaving the familiarity of the law of criminal procedure, and drifting into strange channels of administrative law and regulatory inspection: building, fire, and job safety, disease control, etc. Velasquez never undertakes

³The court later amplified this "reasonable suspicion" standard stating:

[T]o constitute a valid warrantless search, there must be evidence (1) that the parole officer has a reasonable suspicion that the parolee has committed a parole violation or crime, and (2) that the search is reasonably related to the parole officer's duty.

State v. Johnson, 748 P.2d 1069, 1072 (Utah 1987).

a Camara-type analysis "balancing the need to search against the invasion which the search entails." 387 U.S. at 537. The opinion discusses the competing needs and interests in general terms. See 672 P.2d at 1258-59. The unstated conclusion: the search was not "unreasonable" under the circumstances even in the absence of a warrant.⁴

In State v. Cornwall, 810 P.2d 484 (Utah App. 1991), the court of appeals upheld an administrative search which had been conducted without a warrant. The search in that case was a routine security screening of all persons entering the courthouse. The procedure had been implemented by administrative order of Third District, Salt Lake County. The court of appeals concluded that administrative searches are constitutionally permissible without a warrant if the need to search justifies an intrusion 'consistent with satisfaction of the administrative need.'" Id. at 487 (citation omitted). Judge Orme's concurring opinion highlights the fact that the administrative procedure had legitimate objectives unrelated to criminal investigation and that no claim had been made that bailiffs were using the procedure to make selective, arbitrary searches for investigative purposes.

⁴In State v. Wasatch Metal & Salvage Co., 594 P.2d 894 (Utah 1979), the Utah Supreme Court had struck down a section of the Utah Occupational Safety and Health Act which purported to authorize warrantless administrative searches. Citing Camara and quoting from its progeny, the supreme court concluded that in the context of an administrative search: "The showing of probable cause necessary to secure a warrant may vary with the objection and obtrusiveness of the search, but the necessity of the warrant persists." Id. at 897 (quoting Michigan v. Tyler, 436 U.S. 499, 506 (1978), emphasis added). Velasquez cites Wasatch Metal without discussion. See 672 P.2d at 1260. This is the only time a Utah appellate court has cited Wasatch Metal for any purpose. This case may have been one reason why Velasquez seems to avoid the Camara "administrative search" nomenclature.

See id. at 489.

Defendant concedes the legitimacy of an administrative approach to probation searches. Although a probation violation may involve criminal conduct and notwithstanding the fact that a violation, criminal or not, may have penal ramifications, the state's "regulatory" interest is legitimate.

In Griffin v. Wisconsin, 483 U.S. 868 (1987), the United States Supreme Court dealt with a probation search that had been conducted pursuant to provisions of the Wisconsin Administrative Code which established specific standards and procedures regarding warrantless searches of probationers' homes upon "reasonable grounds." Griffin clearly relies upon a Camara-type analysis. The majority concluded that the state regulatory scheme satisfied the Fourth Amendment although the state administrative regulations did not require a warrant.

The Griffin majority concluded that "[a] warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires." Id. at 876. This language may mislead the casual reader in that it suggests that the probation officer can formulate his own standards of supervision. One must not lose sight of the fact that the underlying issue in Griffin was whether or not Wisconsin's administrative regulation established a satisfactory standard for determining the propriety of conducting a warrantless probation search. The Griffin majority held:

As his sentence for the commission of a crime, Griffin was committed to the legal custody of the Wisconsin State Department of Health and Social Services, and thereby made subject to that Department's rules and regulations. The search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles.

Id. at 872-73 (emphasis added). The probation officer's judgment must be exercised within the parameters of established policies and standards which satisfy the Fourth Amendment.

Griffin is arguably comparable to the approach which the Utah Supreme Court taken in Velasquez.⁵ Both cases deal with the Fourth Amendment rather than ignore it by invoking some insupportable waiver theory. The limits of the state's power and the probationer's rights are defined by the relationship between supervising officer and the probationer and their competing and legitimate interests in effective supervision and privacy. Velasquez, 672 P.2d at 1259; Griffin, 483 U.S. at 873-75. The dimensions of these rights are defined by Fourth Amendment principles, not by some "adhesion contract"

⁵An unresolved, or unaddressed, problem with Velasquez lies in the fact that Camara and its progeny "involved situations where the challenged search was, at least arguably, authorized by statute or ordinance." State v. Sims, 808 P.2d 141, 147 n.11 (Utah App. 1991). Cf. Cornwall, *supra* (warrantless search conducted pursuant to administrative order upheld). Velasquez did not discuss any statutory or administrative authority establishing policies or standards for parole searches. This is not to say that authoritative policies were not in place or did not establish appropriate standards. Velasquez simply fails to discuss these policies and, for that matter, fails to discuss this aspect of the administrative search criteria.

which purports to dispense with the Amendment altogether. See LaFave, at 761-62.⁶ Velasquez and Griffin give these rights dimension in the context of "reasonableness," the pole star of Fourth Amendment jurisprudence.

As a final word on the point, we emphasize the limited nature of the "reasonable suspicion" rule. Searches conducted on that basis by parole officers can be justified only "the extent actually necessitated by the legitimate demands of the operation of the parole process."

Velasquez, 672 P.2d at 1263 (quoting other authorities, emphasis added). These "demands" establish the parameters of legitimate supervisory policies and must embody explicit neutral limitations which deny the individual probation officer the power to formulate arbitrary levels of supervision based only on the officer's own judgment, or worse, his whim. These policies must be established by public officials who are "politically accountable" for them and their enforcement. See State v. Sims, 808 P.2d at 146-47 (noting "administrative" aspect of suspicion less investigatory roadblocks).

The need to supervise some probationers with more intensity than others is not disputable. The authority to establish supervisory policies and standards is, by statute, vested in the Department of Corrections and the Judicial Council. See Utah Code Ann. §77-18-1(3)(a). The departmental policies and standards are so framed as to accommodate these differing needs without shifting policy-making functions to the

⁶The United States Supreme Court has not yet decided a case where it has been asked to uphold a probation search on a "waiver" theory. Some courts continue to take the position the probationers can be required to waive all Fourth Amendment rights as a condition of probation. See e.g., State v. Josephson, 125 Idaho 119, 867 P.2d 993 (App. 1993).

individual probation officer. The standards vary with the character of the offense, the history of the offender, and how long he has been under supervision. See Addendum B.

POINT II

A PROBATIONER IS NOT REQUIRED, BY HIS STATUS, TO SUBMIT TO SEARCH BY PEACE OFFICERS.

In Velasquez, the defendant questioned the legality of the search of his apartment, contending that "the parole officers were acting as agents of the police in order to find incriminating evidence" of a specific crime which was under investigation. 672 P.2d at 1262. The Utah Supreme Court concluded that parole officers had conducted the search for their own purposes and in the furtherance of their obligation to provide supervision for parolees. See id. at 1263. In so doing, the court drew the distinction which should decide the instant case:

Although parolees have diminished Fourth Amendment rights as to searches by parole officers, that does not mean that police officers may engage in warrantless searches and seizures as to parolees on the same basis as parole officers.

Id. at 1262. Cf. Cornwall, 810 P.2d at 486-87. See generally, LaFave, §10.10(e). In their interaction with probationers, supervising agents sometimes "act in a manner that could not be tolerated if done by a policeman or other agent of the state with respect to an ordinary citizen." Velasquez, 672 P.2d at 1259.

In substance and effect, the probation orders entered in both this and the attempted burglary case would deny defendant any protection from unreasonable searches

and seizures. The Fourth Amendment provides protection against governmental intrusion only. In requiring defendant to submit to search by any peace officer, this condition of probation completely eclipses the Fourth Amendment. It cannot be reconciled with Velasquez. If for no other reason, a search by police cannot masquerade as an "administrative search" because, unlike probation officers, police are not operating under "a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime." Cornwall, 810 P.2d at 487. The police do not supervise the general public. They enforce the law.

Velasquez teaches us that a probationer enjoys a substantial measure of protection under the Fourth Amendment. He cannot be required, as a condition of obtaining a probationary status, to relinquish the constitutional rights which he is entitled to enjoy as a probationer. If these are indeed rights, they can be defended against the prerogative of the Fifth District Court, the Legislature, and any other governmental authority which thinks it has a better idea than the Fourth Amendment.

POINT III

DEFENDANT DID NOT WAIVE ANY FOURTH AMENDMENT PROTECTION.

The probation agreement which the defendant signed following his attempted burglary conviction did not indicate that he agreed to search by the police. Language concerning submission to search by peace officers does not surface until the final pleadings were signed and entered almost two months after the defendant was sentenced.

Even if the extent of defendant's Fourth Amendment rights is to be established by construction of the "contract" language, still defendant must prevail. It is the state's burden to establish any alleged waiver. It is a burden the state cannot carry.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that defendant was under no obligation to submit to warrantless searches by peace officers, the subject search cannot be sustained on that basis and the district court erred in overruling defendant's motion to suppress. The judgment of the lower court must be reversed and the case remanded for further proceedings. In the event the court should uphold the controlled substance conviction, that portion of the probation order purporting to require defendant to submit to warrantless searches by peace officers must be vacated and set aside as an infringement of the Fourth Amendment rights which defendant enjoys as a probationer.

RESPECTFULLY SUBMITTED this 9 day of June, 1997.

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Gary W. Pendleton
Attorney for Defendant and Appellant

MAILING CERTIFICATE

I do hereby certify that on this 9 day of June, 1997, I did personally mail two true and correct copies of the above and foregoing document to the Utah Attorney General at 236 State Capitol Building, Salt Lake City, Utah 84101.

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Gary W. Pendleton
Attorney for Appellant

ADDENDUM A

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

ADDENDUM B

STANDARD OF SUPERVISION "A"

A. Standard "A" applies to:

1. Probation/Parole Administrative cases;
2. Minimum/Medium Misdemeanor cases;
3. Appeals cases;
4. Residential/In-state Custody cases;
5. Compact Out cases;
6. Restitution Collection Only cases; and
7. Telephonic Supervision cases.

B. For cases listed above as Administrative, Misdemeanor, Appeals, and Telephonic, the supervising agent shall:

1. Conduct an initial interview with the offender;
2. Review and have the Probation Agreement and other agreements signed;
3. Write an opening summary, which shall include conditions of probation/parole, other pertinent information, and a payment contract for fines, restitution, and/or other fees;
4. Determine appropriateness of supervision via the telephonic reporting process;
5. Instruct the offender to report by mail/telephone monthly, as instructed;
6. Submit opening paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Probation Order or Board Parole Order;
7. Complete Presentence Investigation Reports or Addendums, as requested by the Court or Board;
8. Advise the Court/Board in the event of:
 - a. New criminal law violations; and
 - b. Failure to meet requirements of the Probation/Parole Agreement.

C. For Residential/In-state Custody cases, the supervising agent shall:

1. Develop release plans with the offender a minimum of 30 days prior to release, if release date is known;
2. Complete release plans during face-to-face contact with offender five days prior to release, if release date is known; and
3. As required, prepare Progress/Violation Reports, Affidavits and Order to Show Causes.

D. For Compact Out cases, the supervising agent shall:

1. Conduct an initial interview with the offender (if offender is available);
2. Write an opening summary, which shall include conditions of probation/parole

STANDARD OF SUPERVISION "A"

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- 3 Review and have Probation/Parole and Inter-State Compact Agreements signed,
- 4 Review and have Travel Permit signed,
- 5 Obtain offender's picture,
- 6 Initiate Inter-State Compact Request,
- 7 Advise the Court/Board in the event of
 - a New law violations, and
 - b. Failure to meet requirements of the Utah Probation/Parole Agreement or receiving state's agreement

E For Restitution/Collection Only cases, if the supervising agent/technician has not previously supervised the offender, the agent/technician shall

1. Conduct an initial interview with the offender;
2. Determine amount of restitution owing, if necessary,
3. Develop a payment contract for fines, fees, and/or restitution with the offender,
4. Complete an opening case entry,
5. Submit paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Order, when necessary; and
6. Contact victim by phone or letter to explain restitution process

F For cases listed in A above as Administrative, Misdemeanor, Appeals, and Telephonic, supervision should include

1. Review of the mailed-in report monthly or review of any changes noted in the telephonic reporting process, and
2. Case review of additional requirements, including fine, fee, and/or restitution payments, every 90 days

G For Residential/In-state Custody cases, supervision should include

1. One face-to-face contact when commitment begins,
2. Additional contacts as needed when the offender presents a problem for housing agency or as the Court requires, and
3. Face-to-face contact only when possible geographically Use a designee in other regions when travel is prohibitive

H For Compact Out cases, supervision should include

1. Monitoring of probation/parole requirements every 6 months and

STANDARD OF SUPERVISION "A"

Page Three

- I. For Restitution/Collection Only cases, supervision should include:
 1. Verifying restitution payments every 30 days;
 2. If no payments are received from the offender, send contact letter and attempt to contact by phone as follows:
 - a. First letter to be sent when payment is 30 days overdue, instructing offender to respond within two (2) weeks; and
 - b. Second letter to be sent if no response is received instructing offender if no response is received within two (2) weeks, contact with the court will be made.
 3. If no response is received after second request, submit Progress/Violation Report to the court outlining options available;
 4. If a change in an offender's address or telephone number occurs, the offender is required to notify the agent/technician within five (5) days;
 5. For offenders paying regularly, submit report to court for scheduled review dates and attend court when necessary; and
 6. Upon termination, prepare paperwork and file and submit to DTO/OS. Submit restitution paperwork to Accounting Technician or designee.
- J. File maintenance shall include at least:
 1. One case entry for each offender contact made/received, with a minimum of one entry every 90 days; Compact Out cases require an entry every six months.
- K. Reassessments shall be required:
 1. When a major change occurs; or
 2. At termination from Field Operations.

CUSTODY DEFINITION

— RESIDENTIAL/IN-STATE —

Offenders who do not qualify	Correct Category
1. Parolees in prison after parole violation report is submitted to the Board Of Pardons	No category, "N"
2. Offender in prisons or jails in other states or countries	Fugitive or compact depending on status
3. Offenders on the streets and CCC residents not in a treatment program	Supervision, ISP, Sex Offender, etc.
4. Offenders in Diagnostic	No category
Offenders who do qualify	Correct category
1. Offenders in jails for more than 30 days	Standard "A"
2. Offenders in CCC treatment programs for more than 90 days when approved by supervising agent (including sex offenders but excluding MIO)	Standard "A"
3. Offenders in residential treatment programs anticipated to be more than 90 days when approved by supervising agent	Standard "A"

STANDARD OF SUPERVISION "B"

A. Standard "B" applies to:

1. Minimum Felony cases;
2. Maximum Misdemeanor cases; and
3. Appeals cases.

B. The supervising agent shall:

1. Conduct an initial interview with the offender;
2. Review and have the Probation Agreement signed;
3. Write an opening summary, which shall include conditions of probation/parole, other pertinent information, and a payment contract for fines, restitution, and/or other fees;
4. Submit opening paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Probation Order;
5. Make any needed treatment referrals;
6. Complete Presentence Investigation Reports or Addendums, as requested by the Court;
7. Complete violation investigations and revocation procedures according to policy;
8. Check the jail booking sheets for new arrests;
9. Advise the Court in the event of:
 - a. New criminal law violations; and
 - b. Failure to meet requirements of the Probation Agreement.

C. Supervision should include:

1. Offender reporting to the office to submit written monthly report as directed in Probation Agreement;
2. A minimum of one face-to-face contact with an agent every 90 days; → *add: 1/1/11*
3. Case review of probation requirements every 90 days; and
4. Collateral contacts as needed.

D. File maintenance shall include at least:

1. One case entry every 90 days outlining problems or progress, all coll: information, fine and restitution payments; and
2. Filing of all written material every 30 days.

STANDARD OF SUPERVISION "B"

Page Two

E. Reassessments shall be required:

1. When a major change occurs, i.e., new offense arrest, new conviction, release agreement violation, commitment;
2. Every nine months when the status remains unchanged;
3. On minimum felony cases, only at termination from Field Operations if no major changes occur; and
4. At termination from Field Operations.

STANDARD OF SUPERVISION "C"

A. Standard "C" applies to:

1. Medium Felony cases;
2. Minimum Parole cases,
3. Sex Offender III cases; and
4. Appeals cases.

B. The supervising agent shall:

1. Conduct an initial interview with the offender;
2. Review and have the Probation/Parole Agreement signed;
3. Write an opening summary, which shall include conditions of probation/parole, other pertinent information, and a payment contract for fines, restitution, and/or other fees;
4. Submit opening paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Probation Order or 24 hours from parole;
5. Make any needed treatment referrals;
6. Complete Presentence Investigation Reports or Addendums, as requested by the Court/Board;
7. Complete violation investigations and revocation procedures according to policy;
8. Check the jail booking sheets for new arrests; and
9. Advise the Court/Board in the event of:
 - a. New criminal law violations; and
 - b. Failure to meet requirements of the Probation/Parole Agreement.

C. Supervision should include:

1. Offender reporting to the office to submit written monthly the Probation/Parole Agreement;
2. A minimum of one face-to-face contact every 60 days with office or the field;
3. A minimum of one field visit every 90 days by an agent;
4. Case review of probation/parole requirements monthly, with emphasis on residence, employment, treatment, fines, fees, restitution, and education; and
5. Collateral contacts as needed.

STANDARD OF SUPERVISION "C"
Page Two

- D. File maintenance shall include at least
 - 1. One case entry every 60 days, outlining problems or progress, all collateral information, fine and restitution payments, and
 - 2. Filing of all written material every 30 days
- E. Reassessments shall be required:
 - 1. When a major change occurs, i.e., new offense arrest, new conviction, release agreement violation, commitment;
 - 2. Every nine months when the status remains unchanged; (for minimum parole, if no changes occur, only at termination); and
 - 3. At termination from Field Operations.

STANDARD OF SUPERVISION "D"

A. Standard "D" applies to:

1. Maximum Felony cases;
2. Medium Parole cases;
3. Sex Offender II cases; and
4. Appeals cases.

B. The supervising agent shall:

1. Conduct an initial interview with the offender;
2. Review and have the Probation/Parole Agreement signed;
3. Write an opening summary, which shall include conditions of probation/parole, other pertinent information, and a payment contract for fines, restitution, and/or other fees;
4. Complete an opening case entry;
5. Submit opening paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Probation Order or within 24 hours from parole;
6. Make any needed treatment referrals;
7. Complete Presentence Investigation Reports or Addendums, as requested by the Court/Board;
8. Complete violation investigations and revocation procedures according to policy;
9. Check the jail booking sheets for new arrests;
10. Advise the Court/Board in the event of:
 - a. New criminal law violations; and
 - b. Failure to meet requirements of the Probation/Parole.

C. Supervision should include:

1. Offender reporting to the office to submit written monthly report as directed by the Probation/Parole Agreement;
2. A minimum of one field visit every 60 days by the supervising agent;
4. Case review of probation/parole requirements monthly, with emphasis on residence, employment, treatment, fines, fees, restitution and education;
5. Collateral contacts as needed.

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1.5.1

STANDARD OF SUPERVISION "D"

Page Two

D. File maintenance shall include at least:

1. One case entry every 30 days, outlining problems or progress, all collateral information, fine and restitution payments; and
2. Filing of all written material every 30 days.

E. Reassessments shall be required:

1. When a major change occurs, i e. new offense arrest, new conviction, release agreement violation, commitment;
2. Every nine months when the status remains unchanged; and
3. At termination from Field Operations.

STANDARD OF SUPERVISION "E"

A. Standard "E" applies to:

1. Maximum Parole cases,
2. Sex Offender I cases;
3. Special Needs Offender cases, and
4. Appeals cases.

B. The supervising agent shall

1. Conduct an initial interview with the offender,
2. Review and have the Probation/Parole Agreement signed;
3. Write an opening summary, which shall include conditions of probation/parole, other pertinent information, and a payment contract for fines, restitution, and/or other fees;
4. For sex offenders, review the Sex Offender Registration form to ensure accuracy, update as needed, or prepare a new form or original registration as needed;
5. Submit opening paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Probation Order or 24 hours from parole;
6. Make any needed treatment referrals;
7. Complete Presentence Investigation Reports or Addendums, as requested by the Court/Board;
8. Complete violation investigations and revocation procedures according to policy;
9. Check the jail booking sheets for new arrests;
10. Advise the Court/Board in the event of:
 - a. New criminal law violations; and
 - b. Failure to meet requirements of the Probation/Parole Agreement.

C. Supervision should include.

1. Offender reporting to the office to submit written monthly report as directed in the Probation/Parole Agreement;
2. A minimum of one field visit every 30 days by the supervising agent(s) → 7 x 24
3. Case review of probation/parole requirements monthly, with emphasis on residence, employment, treatment, fines, fees, restitution and education → 1 x 24
4. Collateral contacts as needed

STANDARD OF SUPERVISION "F"

Page Two

D. File maintenance shall include at least:

1. One case entry every 30 days, outlining problems or progress, all collateral information, fines and restitution payments; and
2. Filing of all written material every 30 days.

E. Reassessments shall be required:

1. When a major change occurs, i.e., new offense arrest, new conviction, release agreement violation, commitment;
2. Every nine months when the status remains unchanged; and
3. At termination from Field Operations.

STANDARD OF SUPERVISION

SEX OFFENDER II AND III ["C" and "D"] CRITERIA

- A. All Sex Offenders shall be supervised at Standard of Supervision "E" for the first nine (9) months of supervision.
- B. Supervision at Standard "D" may occur when the offender meets all of the following criteria:
 - 1. The offender has been under supervision for nine (9) months;
 - 2. The offender's reassessment places him at Medium or Minimum; and
 - 3. The offender has been involved in approved treatment for the entire probation/parole period and the agent has received positive progress reports or the offender has been successfully terminated from treatment;

OR

 - 4. The offender has successfully completed an approved inpatient treatment program and has been out for six (6) months, has continued in outpatient treatment and the agent has received positive progress reports; and
 - 5. With the approval of the agent's supervisor.
- C. Supervision at Standard "C" may occur when the offender meets all of the following criteria:
 - 1. The offender has been under supervision at Standard "D" for nine (9) months;
 - 2. The offender's reassessment places him at Medium or Minimum;
 - 3. The offender has been involved in approved treatment for the entire probation/parole period and the agent has received positive progress reports or the offender has been successfully terminated from treatment; and
 - 4. With the approval of the agent's supervisor.
- D. If the offender discontinues treatment without prior approval from his supervising agent and therapist or if reports from the therapist indicate problems, supervision shall be Standard "E".
- E. If the offender does not become involved in approved treatment, the supervision standard shall be Standard "E".
- F. If contacts with family members or associates indicate problems, the supervision standard shall be Standard "E".

CRITERIA FOR SPECIAL NEEDS OFFENDER CATEGORY

- A. All Special Needs offenders shall be supervised at Standard of Supervision "E".
- B. In order for an offender to be placed in the category Special Needs, an agent must receive a written diagnostic report, not older than three years, from a psychiatrist (MD), a psychologist (PhD) or a Social Worker (DSW or MSW); and
- C. The Special Needs offender must have been diagnosed with one or more of the following disorders:
 - 1. Schizophrenia (includes paranoid, indifferntiated, disorganized, catatonic);
 - 2. Delusional disorders, chronic in nature, not substance abuse related;
 - 3. Psychotic disorders not otherwise defined;
 - 4. Bipolar disorder (manic depressive illness); or
 - 5. Organic Brain Syndrome (OBS).
- D. The Special Needs offender category shall not be used for any offender not meeting the above criteria.

STANDARD OF SUPERVISION "F"

A Standard "F" applies to:

1. Fugitive cases.

B. Parole Fugitives.

1. The agent or designee shall continue efforts to locate the fugitive by

- a. Contacting family, friends, employers;
- b. Obtaining a current rap sheet to check for any new arrest and the geographic area in which they occurred;
- c. Use any other reasonable means to attempt to locate the parolee; and
- d. Provide local law enforcement with any relevant information to assist in the apprehension of the individual.

2. All attempts to locate shall be documented in the case history file.

3. Attempts to locate shall be done in accordance with the following schedule:

- a. Every six months for the first three years;
- b. Every twelve months from three to five years; and
- c. Every two years from five plus years.

4. The supervisor in charge of fugitives shall make a determination as to whether the Board of Pardons and Parole should be approached concerning recall of the warrant and termination of parole.

5. Cases which fall into the following areas shall not be brought back before the Board for consideration of warrant recall:

- a. Cases in which the crime for which the individual was paroled is of a violent nature or there is a history of violence;
- b. Cases which have pending criminal charges, unless those charges are of a minor or misdemeanor nature and are non-extraditable offenses;
- c. Cases in which there is substantial restitution balance and the victim(s) can be located; and/or
- d. Cases which are high profile cases of notoriety that cause concern within the community.

6. If the decision is made to maintain the case on fugitive status, the fugitive agent shall continue efforts to locate as previously described

STANDARD OF SUPERVISION "F"

Page Two

C. Felony Fugitives:

1. The fugitive agent or his designee shall continue efforts to locate the fugitive by:
 - a. Contacting family, friends, employers;
 - b. Obtaining a current rap sheet to check for any new arrests and to determine the geographical area in which they occurred,
 - c. Use any other reasonable means to attempt to locate the offender; and
 - d. Provide local law enforcement with any relevant information to assist in the apprehension of the offender.
2. All attempts to locate shall be documented in the case history file.
3. Attempts to locate shall be done in accordance with the following schedule:
 - a. Every six months for the first year; and
 - b. Every twelve months from one to three years.
4. The supervisor in charge of fugitives shall make a determination as to whether the Court should be approached concerning recall of the warrant and termination of probation.
5. Cases which fall into the following areas shall not be brought back before the Court for consideration:
 - a. Cases in which the crime for which the offender was placed on probation is of a violent nature or there is a history of violence;
 - b. Cases which have pending criminal charges unless those charges are of a minor or misdemeanor nature and are non-extraditable offenses;
 - c. Cases in which there is substantial restitution balance and the victim/victims can still be located; and/or
 - d. Cases which are high profile cases of notoriety that cause concern within the community.
6. If the decision is made to maintain the case on fugitive status, the fugitive agent shall continue efforts to locate as previously described.

STANDARD OF SUPERVISION "F"
Page Three

C. B. Stirling 6-30-93

All requirements should
be the same for attempts
to locate. Let agent &
supervisor decide when
to terminate - This
happens now anyway.

D. Misdemeanor Fugitives:

1. At the time a probationer discontinues report agent shall make reasonable attempts to locate two of the following:
 - a. Make a field visit or sending a contact to verify the living arrangements;
 - b. Contact the offender's family members and friends either by telephone or mail to obtain information as to his whereabouts;
 - c. Contact the most recent employer either by phone or mail to verify employment status;
 - d. If unemployed, contact the last known employer to determine the reason for termination and any forwarding address information if available;
 - e. Contact the therapist or other interested professionals for any information or contacts they may be able to provide; and
 - f. Take any other reasonable steps necessary or available to obtain the information.
2. All of the above attempts to locate shall be documented in the case history of the offender's file.
3. Notify the Court of the attempts made to locate the fugitive, request a warrant be issued, and close the file.
4. Cases which fall into the following areas shall not be brought back before the Court for consideration:
 - a. Cases in which the crime for which the offender was placed on probation is of a violent nature or there is a history of violent behavior;
 - b. Cases which have pending criminal charges unless those charges are of a minor nature or a misdemeanor offense and are non-extraditable offenses;
 - c. Cases in which there is substantial restitution balance and the victim/victims can be located; and/or
 - d. Cases which are high profile cases of notoriety that cause concern in the community.

STANDARD OF SUPERVISION "G"

A. Standard "G" applies to:

1. Intensive Supervision Parole;
2. Intensive Supervision Probation;
3. Intensive Drug Supervision Program (IDS); and
4. Appeals cases.

D. The supervising agent shall:

1. Screen and staff all incoming referrals, determine any special offender conditions, prepare documentation of acceptance of conditions, and send to referring agent;
2. Conduct initial interview and orientation with the offender;
3. Review and have the ISP/IDS Agreement and Probation/Parole Agreement signed, including any special conditions;
4. Write an opening summary, which shall include conditions of probation/parole, other pertinent information, and a payment contract for fines, restitution, and/or other fees;
5. Make any needed treatment referrals;
6. Obtain offender photographs;
7. Submit opening paperwork to the DTO/OS for processing within three (3) working days of receipt of Court Probation Order or within 24 hours from parole;
8. Complete Presentence Investigation Reports or Addendums, as requested by the Court/Board;
9. Check the jail booking sheets for new arrests; and
10. Advise the Court/Board in the event of:
 - a. New criminal law violations;
 - b. Failure to comply with the ISP/IDS Agreement; and
 - c. Failure to comply with the Probation/Parole Agreement.

C. Supervision should include

1. PHASE I
 - a. A minimum of four field visits per month by an agent for ISP cases, three per month for IDS cases (electronic monitoring may be used to satisfy one-half of the required field visits);
 - b. Three random drug screens per month for IDS cases;

STANDARD OF SUPERVISION "G"
Page Two

Handwritten notes in the left margin include:
"Add to d. off" with an arrow pointing to item d.
"Add to e. off" with an arrow pointing to item e.
"Add to f. off" with an arrow pointing to item f.
"Add to g. off" with an arrow pointing to item g.
"Add to h. off" with an arrow pointing to item h.
"Add to i. off" with an arrow pointing to item i.
"Add to j. off" with an arrow pointing to item j.
A large downward arrow is drawn at the bottom of the notes.

- d. If unemployed, one face-to-face contact Monday through Friday with an agent or ISP technician;
- e. Verification of employment two times per month;
- f. Surveillance when called for;
- g. Review of probation/parole/ISP/IDS requirements once per month, with emphasis on residence, employment, treatment, fines, fees, restitution and education;
- h. Collateral contacts as needed;
- i. Electronic monitoring as ordered; and
- j. Four police intelligence checks per month for IDS cases.

2. PHASE II

- a. A minimum of two face-to-face office visits per month with an agent or ISP technician for ISP cases, one per month for IDS cases;
- b. Two random drug screens per month for IDS cases;
- c. A minimum of two face-to-face field visits per month with an agent (electronic monitoring may be used to satisfy one-half of the required field visits);
- d. Review of probation/parole/ISP/IDS requirements once per month, with emphasis on residence, employment, treatment, fines, fees, restitution and education;
- e. Surveillance when called for;
- f. Electronic monitoring as ordered; and
- g. Two police intelligence checks per month for IDS cases.

D. File maintenance shall include:

- 1. One case entry for each transaction;
- 2. A monthly entry outlining progress or problems in the case plan, collateral information, fine and restitution payments; and
- 3. Filing of all written material bi-weekly.

E. Reassessments shall be required:

- 1. When a major change occurs, i.e. new offense arrest, new conviction, release agreement violation, commitment;
- 2. Every nine months when the status remains unchanged.

STATE OF UTAH
DEPARTMENT OF CORRECTIONS
PROBATION AGREEMENT

5th District Washington
Court County

951500040 00081991
Case # OBSCIS #

I, Dax Brant Hammer, agree to be directed and supervised by Agents of the Department of Corrections and to be accountable for my actions and conduct to the Department of Corrections and the Court.

I further agree to abide by all conditions of probation as ordered by the court and set forth in this Agreement, consistent with the laws of the state of Utah. I fully understand that violation of this agreement and/or any conditions thereof, or any new conviction for a crime, may result in action by the Court causing my probation to be revoked or my probation period to commence again.

1. VISITS: I will permit visits to my place of residence, my place of employment or elsewhere by Agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my Probation Agreement.
2. REPORTING REQUIREMENTS: I will not abscond from Probation Supervision.
- REPORTING: I will report as directed by the Department of Corrections.
- RESIDENCE: I will establish and reside at a residence of record and will not change my residence without first obtaining permission from my Probation Agent.
- LEAVING THE STATE: I will not leave the state of Utah, even briefly, or any other state to which I am released or transferred without prior written permission from my Probation Agent.

Reporting Instructions:

I will report with in the first five working days of each month and meet with my supervising agent in person as well as providing a written report.

3. CONDUCT: I will obey all State, Federal and Municipal laws. IF ARRESTED, CITED, or QUESTIONED by a peace officer, I will notify my Probation Agent within 48 hours.
4. WEAPONS: I will not possess, have under my control, in my custody or on the premises where I reside, any EXPLOSIVES, FIREARMS or DANGEROUS WEAPONS. (Dangerous weapon is defined as any item that in the manner of its use or intended use is capable of causing death or serious bodily injury.) Exceptions to this condition may be made by the supervising agent and must be in writing. This waiver will only apply to individuals on probation for a misdemeanor and who have never been convicted of a felony.
5. CHEMICAL ANALYSIS: I shall abstain from the illegal use, possession, control, delivery, production, manufacture or distribution of controlled substances (58-37-2 U.C.A.) and I will submit to tests of my BREATH or BODY FLUIDS to ensure compliance with my Probation Agreement.
6. SEARCHES: I will permit Agents of Adult Probation and Parole to search my PERSON, RESIDENCE, VEHICLE or any other property under my control, without a warrant, at any time, day or night, upon reasonable suspicion to ensure compliance with the conditions of my Probation Agreement.
7. ASSOCIATION: I will not knowingly associate with any person who is involved in CRIMINAL activity or who has been CONVICTED OF A FELONY without approval from my Probation Agent.
8. EMPLOYMENT: Unless otherwise authorized by my Probation Agent, I will SEEK, OBTAIN and MAINTAIN verifiable, lawful, full-time employment (32 hours per week minimum) as approved by my Probation Agent. I will notify my Probation Agent of any change in my employment within 48 hours of the change.
9. TRUTHFULNESS: I will be cooperative, compliant and truthful in all my dealings with Adult Probation & Parole.
10. SUPERVISION FEE: I agree to pay a supervision fee of \$30 per month unless granted a waiver by the Department under the provisions of Utah Statute 64-13-21.

11. SPECIAL CONDITIONS:

- A. Serve 66 days in jail with credit for time served.
- B. Maintain Full-Time Employment or Edu.
- C. Complete a Substance Abuse Evaluation with SWUMH A/D and follow all recommendations.
- D. Submit to random tests of breath or bodily fluids, and random searches of person and property.
- E. Not use or possess any alcohol or illegal drugs.
- F. Report all perscriptions to AP&P with in 24 hours is issue.
- G. Pay a fine in the amount of 1,157.00 directly to the 5th District Court.

I have read, understand and agree to be bound by this agreement. If I violate any of the conditions of this agreement, the Court may revoke my Probation or the Department of Corrections may take other appropriate action against me, and I hereby acknowledge receipt of a copy of this agreement.

Dated this 10th day of April, 19 95

Witnessed By:

Cennis Banks

Probationer

Dax Brant Hammer