

2011

# Jamis M. Johnson v. State of Utah: Brief of Appellant

Utah Court of Appeals

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Case No. 20110428-CA

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IN THE  
UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff/ Appellee,

vs.

Jamis M. Johnson,  
Defendant/ Appellant.

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Brief of Appellee

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Appeal from an Order and Judgment revoking probation following a conviction for one count of securities fraud, a second degree felony, in violation of Utah Code Ann. §§ 61-1-1 and 61-1-21 (2000), in the Fourth Judicial District Court of Utah, Millard County, the Honorable James Brady presiding.

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Oral Argument Not Requested

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State of Utah,  
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Defendant/ Appellant.

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Brief of Appellee

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STATEMENT OF JURISDICTION

Defendant Johnson appeals an Order and Judgment revoking probation following a conviction for one count of securities fraud. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2011).

STATEMENT OF THE ISSUES

1. Should Defendant's brief be disregarded because it is inadequate?

*Standard of Review.* "Briefs that do not comply with rule 24 'may be disregarded or stricken, on motion or sua sponte by the court.' Utah R. App. P. 24(j)." *State v. Gamblin*, 2000 UT 44, ¶ 8, 1 P.3d 1108.

2. Did the trial court have jurisdiction to revoke Defendant's probation?

*Standard of Review.* This Court reviews jurisdictional questions as a matter of law. *See State v. Kragh*, 2011 UT App 108, ¶ 9, 255 P.3d 685.



3. Did the trial court clearly err when it found that Defendant had violated probation by failing to report to Adult Probation and Parole and by committing a federal crime?

*Standard of Review.* An appellate court reviews the "evidence of a probation violation in a light most favorable to the trial court's findings," and substitutes its own judgment "only if the evidence is so deficient as to render the court's action an abuse of discretion." *State v. Maestas*, 2000 UT App 22, ¶ 12, 997 P.2d 314

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. Section 77-18-1(11) & (12) (West 2007) is attached as addendum A.

## STATEMENT OF THE CASE

A jury convicted Defendant of one count of securities fraud (R1451). On June 6, 2007, Defendant was sentenced to one-to-fifteen years in prison (R1677-80). The sentence was suspended and Defendant was placed on probation for 36 months based on certain conditions, including that he be supervised by Adult Probation & Parole (AP&P), that he have no new violations of the law, and that he report to the court whenever ordered to do so. *Id.* Defendant was also ordered to pay \$125,000 in restitution, jointly and severally with his co-defendant, Paul Schwenke (R1677-80). Defendant's conviction and sentence were affirmed on appeal, but remanded

for further proceedings to determine restitution. *State v. Johnson*, 2009 UT App 382, 224 P.3d 720 (addendum B).

Defendant signed a probation agreement, in which he agreed to “[r]eport as directed by the Department of Corrections,” to “[o]bey all state, federal and municipal laws,” and to “report to the court whenever ordered to do so.” (R2184-85, addendum C).

Numerous probation progress/violation reports and orders to show cause were subsequently filed. Relevant to this appeal, on October 10, 2007, Defendant’s probation was revoked and reinstated for 36 months.<sup>1</sup>

Additional probation violation reports were filed, and hearings were held, but apparently none of the conditions of probation were changed again until August 30, 2010. At an evidentiary hearing on August 30, 2010, the trial court found that Defendant had violated his probation by not maintaining verifiable full-time employment (R2550:49; R2395-96; 2435-36). The court again revoked and reinstated probation for 36 months with the additional condition that Defendant serve 60 days in jail (R2435; R2550:52, addendum D). Defendant timely appealed that order

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<sup>1</sup> Defendant failed to provide the entire record on appeal. Only volumes 10 and 11 of the court file in case no. 051700056 were sent to the Court of Appeals. However, Defendant concedes that probation was revoked and reinstated for 36 months on October 10, 2007 (Aplt. br. at 4). In addition, the court docket in case no. 051700056 shows when probation progress/violation reports were filed, and the hearings that followed.

(R2414). A certificate of probable cause and order of release was signed November 3, 2010 (R2468-2469, addendum E). The sentence was stayed pending appeal and Defendant was released from jail (R2470-72, addendum F). The district court's decision was affirmed on appeal. *State v. Johnson*, 2012 UT App 118, \_\_\_ P.3d \_\_\_ (addendum G).

From November 12, 2010 through March 29, 2011, numerous additional probation violation reports were filed (*see* docket). A probation violation report filed on March 29, 2011 alleged that Defendant had violated probation by not reporting to AP&P (R2567, addendum H). It also alleged that Defendant had violated probation based on criminal convictions in federal court. *Id.* at 2568.

Following an evidentiary hearing on April 27, 2011, Defendant was found to have violated probation by failing to report to AP&P as required (R2974:43, addendum I; *see also* R2627-28, addendum J). Following an evidentiary hearing on May 17, 2011, Defendant was found to have violated probation based on federal criminal convictions (R2975:65-66, addendum K). The trial court revoked probation and imposed the original sentence of one to fifteen years in the Utah State prison (R2975:72, addendum K and *see* R2909, addendum L).

Defendant timely appealed the April 27 and May 17<sup>th</sup> rulings by filing notices of appeal on May 17, 2011 and May 20, 2011 (R2629, 2642). But on June 17, 2011, the trial court entered an Order purporting to amend its order revoking probation

(R2896-2900, addendum M). The State filed a motion to vacate, arguing that the court lacked jurisdiction because the case was on appeal (2904-06, 2927-2934). On July 27, 2011, the court entered a memorandum decision, but did not grant or deny the State's motion (R2964-2967). The decision states that the "court is inclined to grant" the State's motion, but then questions whether it has jurisdiction to do so, since it lost jurisdiction when Defendant appealed. *Id.* Although Defendant refers to them, these decisions and issues are not specifically part of this appeal.

### SUMMARY OF FACTS

*The Underlying Criminal Case.* In the summer of 2000, two dairymen held a family dairy farm as the sole members of a limited liability company. *Johnson*, 2009 UT App 382 ¶ 2 (addendum B). The dairymen had a series of meetings with Defendant and his co-defendant Schwenke to discuss a proposed investment in American-Dairy.com, a company that Schwenke had recently incorporated. *Id.* at ¶¶ 2-3. Schwenke said that he would obtain financing by selling stock in a public offering. Defendant explained how stocks would work in the public offering. *Id.* at ¶¶ 3-4. But Defendant did not disclose that he was the subject of ongoing disciplinary proceedings by the Utah State Bar for misappropriating client funds, that he was subject to three tax liens totaling \$1,669,562.89, or that he had a Small Business Administration judgment against him. Defendant also did not tell the dairymen that Schwenke was an attorney who had been disbarred for

misappropriating client funds or that he was pursuing legal action against Schwenke over a failed business deal. *Johnson*, 2009 UT App 382, ¶ 2.

The dairymen signed an agreement transferring all of the farm's assets to American-Dairy, in exchange for stock in the company. *Id.* at ¶ 5. But no other stocks were ever issued, making the two dairymen the sole shareholders. *Id.* at ¶ 6. The dairymen never received any financing out of the transaction (R1999:152, 178,231). And, having transferred their deed to American-Dairy, they were no longer able to get financing from a bank (R1999:173). Within months of the transaction, creditors foreclosed, the dairymen lost their farm and farm equipment, and forfeited a \$70,000 certificate of deposit, which had previously been used as collateral for a loan to purchase cattle. *Johnson*, 2009 UT App 382 ¶ 8.

*The Probation Revocation Proceedings.* On June 18, 2007, Defendant signed a probation agreement, in which he agreed to "[r]eport as directed by the Department of Corrections," to "[o]bey all state, federal and municipal laws," to "report to the court whenever ordered to do so," and "to abide by all conditions of probation as ordered by the court." (R2184-85, addendum C).

**Evidentiary hearing on April 27, 2011.** The evidentiary hearing on April 27, 2011 was held on an order to show cause against Defendant alleging violations of his probation (R2974:4, addendum I). Several violations were alleged, including that Defendant had been convicted of federal crimes and had failed to report to

AP&P as required. *Id.* at 7. The issue concerning federal convictions was continued to a hearing in May. So the April hearing specifically addressed the issue of Defendant failing to report to AP&P.

At the hearing, AP&P agent Troy Staker testified that Defendant was under his personal supervision (R2974:10-11, addendum I). Agent Staker testified that he received an e-mail from the jail saying that Defendant was going to be released on October 13, 2010. So Agent Staker called the home telephone number provided by Defendant, but Defendant's home number had been disconnected (R2974:12-13).

Agent Staker then called Defendant's mobile phone and left a message, letting him know that he was aware that Defendant was going to be released from jail. *Id.* His message reminded Defendant that he needed to report in person to AP&P the next business day following his release from jail. *Id.* at 14. But Defendant did not report to AP&P and did not call or leave a message as to why he did not report. *Id.*

Defendant's previous schedule required him to report to Agent Staker on the third Thursday of every month. *Id.* at 14-15. But Defendant also did not report on October 21st, the third Thursday of October, and did not call or leave a message as to why he did not report. *Id.*

Defendant testified that he received Agent Staker's telephone message, but he did not respond to Agent Staker. *Id.* at 26-27, 29. In response to the phone message,

Defendant said he instead called his attorney and checked the court docket. *Id.* at 27, 29.

Prior to the April evidentiary hearing, Defendant's probation had been revoked and then reinstated with the additional condition that he serve 60 days in jail (R2435; 2550-52, addendum D). Defendant did not serve all of the jail time because a certificate of probable cause and order of release was signed pending appeal (R2468-69, addendum E). The certificate of probable cause required Defendant to "continue[] to report on a regular basis to the Court by the 15<sup>th</sup> day of each month." *Id.*

At the evidentiary hearing, Defendant testified that it was his understanding that probation had been shifted to the court during the appeal. *Id.* at 29. He testified that the remedy he had asked for in his motion to stay was that his probation be converted to court probation and that the sentence of probation also be stayed pending appeal. *Id.* at 30. Defendant testified that the advice of his counsel was that it was unnecessary for him to report to AP&P, but that he had to report to the court. *Id.* at 30-31.

Defense counsel acknowledged that the certificate of probable cause was dated November 3, 2010 (R2974:37, and see addenda E and F), but he argued that the order should be considered nunc pro tunc, dating back to October 13, 2010 (R2974:37). Defendant's position was that after October 13, 2010, he did not have to

report to AP&P, but only had to report to the court. Defense counsel also argued that it could not be said that Defendant willfully violated probation when he was relying on the advice of counsel and the certificate of probable cause saying that he was to report to the court. *Id.* at 38.

But the prosecutor pointed out that the certificate of probable cause and the court's order did not say that Defendant could stop reporting to AP&P. *Id.* at 40. The prosecutor also asked the court to take judicial notice of its own record, to find that Defendant had also failed to report to the court. *Id.* at 33-34.

The court determined that Defendant had violated probation by failing to report:

I don't believe I ever ruled from the Bench that his probation had terminated. I think that's an assumption that he arrived at either on his own or with the help of counsel, but having been contacted by probation and being told that he needed to report, he then made the decision to walk the tight rope of not reporting and relying upon his belief that probation may have been terminated by my oral statements from the Bench.

In the order that was prepared based on those oral statements it also does not say that he's relieved from probation or that his probation is terminated.

(R2974:46-47, addendum I).

The court also stated that he had "not laid eyes on Mr. Johnson since our October meeting. And I do not know that he's reported on the 15th of each month even under that order." *Id.* at 42-43.



The court concluded that Defendant was under the jurisdiction of AP&P, and was still controlled by the terms and conditions of his probation agreement. *Id.* The Court then found that Defendant willingly violated probation by not reporting to AP&P. *Id.* at 43. Discussions about sanctions for the violation were postponed until May 17, 2011. *Id.*

The Court also warned that from that point forward, Defendant was to report and abide by the terms of the AP&P agreement. *Id.* at 49. The Court noted that Defendant “had that responsibility since [he] began that agreement and that it has not terminated as of today.” 54-55.

The Court also noted that it had “issued a stay on [Defendant’s] jail term and the imposition of the sanction that was issued by Judge Eyre pending an appeal and outcome, but I have not terminated his probation.” *Id.* at 50. “The stay was not addressing probation.” It was addressing the sentence and that was stayed. *Id.* at 55. The Court also pointed out that “simply the filing of the order to show cause tolls the probationary period.” *Id.* at 51, 53.<sup>2</sup>

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<sup>2</sup> On appeal, Johnson argues that the trial court lacked jurisdiction to revoke his probation. This issue was never specifically raised below. However, in his application for certificate of probable cause and motion for a stay pending appeal, Johnson did argue that the probationary period could not toll under Utah Code Ann. § 77-18-1 if probation had been revoked (R2660, 2777).

**Evidentiary hearing on May 17, 2011:** One of the purposes of the May evidentiary hearing was to address the allegations that Defendant had “been convicted of a crime in federal court in violation of a term of his probation.” (R2975:3, addendum K). Copies of the indictment and verdict form from federal case no. 2:09-CR-00133 CW were provided. *Id.*

Defendant was charged in federal court with ten counts of mail fraud (1-10), twelve counts of wire fraud (11-22), one count of conspiracy (23), and fourteen counts of money laundering (24-37) (R2858-2876, addendum N). He was convicted of counts 1-2, 4-7, 9, 11-16, 18-19, 21, 23, 27-33, 35, and 37-38 (R2877-2878, addendum O).<sup>3</sup>

Defendant argued that all of the federal crimes for which he had been convicted occurred before he was placed on probation in State court (R2975:13-14, addendum K). Defendant pointed out that although counts 10 and 22 included allegations for dates after imposition of probation, both those counts had been dismissed. *Id.* Defendant argued that crimes committed before imposition of probation could not be the basis for a probation violation. *Id.*

The prosecutor responded that some of the criminal activity was committed after the State conviction. *Id.* at 15. The conspiracy charge (count 23) of which

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<sup>3</sup> From the documents provided in this case, it unclear why the federal indictment only has 37 charges, but the verdict form includes count 38.

Defendant was convicted, alleged that the crime of conspiracy was committed “[b]eginning in or about mid 2005 to around August 2007,” which was after probation was imposed and Defendant signed the probation agreement (R2975:44, addendum K; R2872-73, addendum N).

The court noted that Defendant had been sentenced on June 6, 2007, and it would be “very hesitant to find any actions taken by the defendant prior to June 6th to be violations of probation (R2975:18, addendum K). But the court noted that it appeared that Defendant “may have been involved in a series of conduct over a period of several years interrupted by his conviction in this court, but in which he continued to participate even following his conviction.” *Id.* at 47. The court then found that Defendant violated his probation as shown by his federal convictions of aiding and abetting or willfully causing another to commit a crime; the trial court specifically referred to the convictions on counts 18, 19, 21, 23, 27 and 28. *Id.* at 65-66. The court also specifically found that Defendant was “in violation of probation by having a conviction of conspiracy which, again, is Count 23.” *Id.* at 66.

In deciding what sanction to impose, the Court said: “it appears the defendant was involved in a continuing, ongoing criminal process that took a number of years to commit various frauds. In the middle of which he was convicted in state court . . . And yet that didn’t have an impact on his behavior.” *Id.* 71. “He didn’t cease. He didn’t stop. He didn’t try to undue [sic]. He took the benefit of and continued to

encourage others to take the benefit of his criminal activities. Some of those activities occurred before he was sentenced, some occurred before he was on probation, some after." *Id.*

Finally, the court addressed its previous finding at the April hearing that Defendant had violated probation by not reporting to AP&P, and said: "I also don't believe that he was on court probation, but if he understood it that way, he didn't comply." *Id.* at 70.

The Court revoked Defendant's probation and executed the original statutory prison term. *Id.* at 72.

### SUMMARY OF ARGUMENT

**Inadequate brief.** Defendant's brief should be disregarded because it is inadequate.

**The trial court had jurisdiction to rule on the alleged probation violations.** Defendant's probation was revoked and reinstated for 36 months on August 30, 2010, which meant that his probation would not expire until August 30, 2013. This decision was affirmed on appeal. *State v. Johnson*, 2012 UP App 118 (addendum G). The trial court thus clearly had jurisdiction to rule on any alleged probation violations.

The certificate of probable cause issued while Defendant's prior appeal was pending, did not excuse Defendant from reporting to AP&P. Defendant was found to have violated probation by failing to report to AP&P as required. He argues that the certificate of probable cause the trial court issued while he appealed this finding excused him from reporting to AP&P because it required him to report to the court. But his probation agreement clearly stated that he was to report to AP&P *and* "report to the court whenever ordered to do so." (R2184-85, addendum C). The fact that the certificate of probable cause required him to report to the court did not excuse him from reporting to AP&P. And, even if Defendant were excused from reporting to AP&P, he still violated probation by not reporting to the trial court.

Defendant was convicted of a federal crime that he committed after he was placed on probation. Defendant alleges that his federal convictions could not have constituted a violation of probation because they were all based on conduct committed before sentencing and imposition of probation. But Defendant is mistaken. He was found guilty of conspiracy, "[b]eginning in or about mid 2005 to around August 2007." (R2872-73, 2878, addenda N & O). He was sentenced on June 6, 2007. Defendant's federal conviction for conspiracy thus alleged conduct that took place after he was placed on probation.

## ARGUMENT

### I.

**THIS COURT SHOULD REJECT DEFENDANT'S CLAIMS BECAUSE HIS BRIEF IS INADEQUATE AND BECAUSE HE DOES NOT MARSHAL THE EVIDENCE.**

#### **A. Defendant's brief fails to follow the requirements of Rule 24.**

Rule 24(a)(5)(A), Utah Rules of Appellate Procedure, requires that for each issue, an appellant must include a "citation to the record showing that the issue was preserved." Section (a)(7) requires an appellant to include a statement of the facts, supported by citations to the record. Defendant fails to cite to the record, showing where his issues were preserved. *See* Aplt. br. at 2-3. He also fails to include a statement of the facts. Although some of the facts are included in his "CASE STATEMENT," he includes no record citations. Defendant also fails to include a summary of arguments, as required by section (a)(8). *See* Aplt. br. at 9.

Rule 24 (a)(9) also requires an appellant to include his "contentions and reasons . . . with respect to the issues presented," including "citations to the authorities, statutes and parts of the record relied on." In arguments II and III of his brief, Defendant includes no citations to any authorities, statutes, or the record. *See* Aplt. br. at 14-17.

This Court has repeatedly declined to address inadequately briefed issues. *See State v. Gomez*, 2002 UT 120, ¶ 29, 63 P.3d 72 (refusing to consider inadequately

briefed argument); *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998) (same); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (same). "'A reviewing court is entitled to have the issues clearly defined with pertinent authority cited.'" *State v. Snyder*, 932 P.2d 120, 130 (Utah App. 1997) (citing *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)), see also *Wareham*, 772 P.2d at 966 (holding that brief "must contain some support for each contention"). Because Defendant has not adequately briefed any of his claims, this Court should simply affirm.

**B. Defendant's brief fails to marshal all the evidence in support of the trial court's findings.**

Defendant also fails to marshal all the evidence in support of the trial court's findings that he violated probation. It is well-settled that although a court of appeals will review the trial court's conclusions of law for correctness, it will disturb findings of fact only if they are "clearly erroneous." *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992). A court's findings are "clearly erroneous only if they 'are against the clear weight of the evidence'" or if the reviewing court "'reaches a definite and firm conviction that a mistake has been made.'" *Id.* (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). The appellant has the burden to marshal all the evidence that supports the trial court's findings and then demonstrate that the marshaled evidence does not support those findings. *State v. Alvarez*, 872 P.2d 450, 460-61 (Utah 1994).

When an appellant fails “to properly marshal the evidence in support of the trial court’s findings of fact, we do not consider those findings properly challenged and, therefore, assume the evidence supports them.” *Chen v. Stewart*, 2004 UT 82, ¶ 3, 100 P.3d 1177. Because Defendant has not marshaled the evidence, this Court may, and should, “accept the trial court’s findings as stated in its ruling.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999).

## II.

### THE TRIAL COURT HAD JURISDICTION TO REVOKE DEFENDANT’S PROBATION

As explained, Defendant’s probation was revoked and reinstated on October 10, 2007, for 36 months. Defendant argues that his probation expired on October 10, 2010, and that the trial court did not have jurisdiction to entertain any allegations of probation violations filed after that date. (Aplt. br. at 6).

Defendant acknowledges that before that date his probation was again revoked and reinstated for 36 months on August 30, 2010, which meant that his probation would not expire until August 30, 2013. He argues, however, that because he appealed that decision, and because the trial court granted a certificate of probable cause and his motion to stay pending appeal, that the August 30, 2010 findings did not extend the term of probation (Aplt. br. at 5-6).

But Defendant also asserts that the trial court did not have jurisdiction to entertain allegations of probation violations “after October 10, 2010, unless and until



[his] appeal of the August 30, 2010 findings fails and the stay is lifted.” (Aplt. br. at 6). Defendant’s appeal has failed. On April 19, 2012, this Court affirmed the trial court’s decision to revoke and reinstate probation. *State v. Johnson*, 2012 UT App 118 (addendum G). Therefore, Defendant’s argument that the trial court did not have jurisdiction to entertain the allegations of probation violations fails.<sup>4</sup>

### III.

#### THE TRIAL COURT DID NOT CLEARLY ERR IN FINDING THAT DEFENDANT HAD VIOLATED PROBATION AND DID NOT ABUSE ITS DISCRETION WHEN IT REVOKED PROBATION

Even if this Court excuses Defendant’s failures to adequately brief his claims and marshal the evidence, Defendant’s claims fail on their merits. Probation may not be revoked or modified except upon a hearing in court, unless waived by the defendant. Utah Code Ann. § 77-18-1(12)(a) (Addendum A). If a defendant denies an alleged violation, evidence is presented at a hearing. The defendant may call witnesses and present evidence in his own behalf. After the hearing, the court makes findings of fact. *Id.*

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<sup>4</sup> Even if this Court had not yet issued its decision, Defendant’s jurisdiction claim would still fail. The fact that the trial court granted a certificate of probable cause, ordered a stay of the sentence, and released Defendant from jail pending appeal, does not mean that the August 30, 2010 decision did not extend probation. The order revoking and reinstating probation remained valid unless overturned on appeal. Therefore, Defendant’s term of probation was extended until August 30, 2013, and the trial court had jurisdiction to rule on any alleged probation violations filed before that date.

That is exactly what happened in this case. Hearings were held on April 27th and May 17, 2011 (addenda I & K). The prosecution presented evidence and then Defendant presented evidence, including testifying in his own behalf. Only then did the Court find that Defendant had violated probation (R2974:43 & 2975:66).

“[I]n the trial court, the State must prove to the satisfaction of the trial judge that it is more likely than not, i.e., by a preponderance, that defendant violated his probation.” *State v. Martinez*, 811 P.2d 205, 208 n.4 (Utah App. 1991)(emphasis in original, referring to *State v. Hodges*, 798 P.2d 270, 278 (Utah App. 1990)). An appellate court then applies “a clearly erroneous standard of review to the trial court’s factual findings.” *State v. Orr*, 2005 UT 92, ¶ 8, 127 P.3d 1213 (addressing probation extensions).

A “‘finding of fact by a trial court is ‘clearly erroneous’ only if it is against the clear weight of the evidence.’” *Martinez*, 811 P.2d at 209, quoting *Turnbaugh v. Anderson*, 793 P.2d 989, 941 (Utah App. 1990)). In determining whether a fact finding is clearly erroneous, the appellate court reviews the “evidence of a probation violation in a light most favorable to the trial court’s findings.” *State v. Maestas*, 2000 UT App 22, ¶ 12, 997 P.2d 314.

“‘The first step in a revocation decision . . . involves a wholly retrospective factual question: whether the [probationer or] parolee has in fact acted in violation of one or more of the conditions of his [probation or] parole.’” *Gagnon v. Scarpelli*,

411 U.S. 778, 784 (1973) (addressing probation revocations) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972) (addressing parole revocations)). A review of the transcripts of the evidentiary hearings establishes that Defendant did in fact violate the conditions of his probation.

**A. The trial court did not clearly err in finding that defendant violated his probation by failing to report.**

**1. The probable cause certificate did not excuse Defendant from the requirement that he report to AP&P.**

The trial court found that Defendant violated probation when he failed to report to AP&P as required by his probation agreement (R2974:43). Defendant argues that the trial court erred in finding that he had violated probation by failing to report to AP&P, because the certificate of probable cause required only that he report to the court. He thus argues that the probable cause certificate excused him from reporting to AP&P (Aplt. br. at 7, 14).

It is true that the certificate of probable cause states that the Defendant was to “continue[] to report on a regular basis to the Court by the 15th day of each month.” (R2469, addendum E). But neither the certificate of probable cause nor the Court’s Order said that Defendant no longer had to report to AP&P.

Indeed, at the evidentiary hearing, the Court said: “I don’t believe I ever ruled from the Bench that his probation had terminated.” R2974:46, addendum I).

The Court also noted that the order “does not say that he’s relieved from probation or that his probation is terminated.” *Id.*

In addition, Defendant’s probation agreement clearly states that he is to report to AP&P *and* “to the court whenever ordered to do so.” (addendum C) (emphasis added). The fact that the certificate of probable cause required Defendant to report to the court did not excuse him from reporting to AP&P, either implicitly or explicitly.

**2. The certificate of probable cause was not signed until November 3, 2010.**

Even if the certificate of probable cause excused Defendant from reporting to AP&P, the certificate of probable cause and the trial court’s order were not signed until November 3, 2010, more than two weeks after October 13, 2010, when Defendant was released from jail (R2974:12, addenda E, F, and I). Plus, the telephone message from his AP&P agent advised Defendant that he needed to report in person to AP&P the day after his release (R2974:14). But Defendant did not report the day after his release. *Id.* Nor did he report on his next regular date for reporting to AP&P - the third Thursday of every month, which would have been October 21, 2010. *Id.* at 14-15.

Because Defendant was not excused from reporting to AP&P until the certificate of probable cause was signed on November 3, 2010, Defendant violated the terms of his probation by not reporting to AP&P in October as required.

**3. Even if Defendant were excused from reporting to AP&P, he still violated probation by failing to report to the trial court.**

But even if Defendant were excused from reporting to AP&P, he still violated probation by failing to report directly to the trial court. As stated, Defendant's probation agreement required him to "report to the court whenever ordered to do so." (R2185, addendum C). The certificate of probable cause ordered Defendant to report to the court by the 15th of each month (R2464, addendum E). There is no testimony or evidence in the record that Defendant reported to the court on October 15, 2010. Indeed, the trial court found otherwise. The trial court said: Defendant "claims that he reported to the Court on a monthly basis. And I appreciate the argument, but it's not persuasive. I don't believe I ever met with Mr. Johnson. I don't think he's ever provided me any information regarding his housing, his employment, his income, his opportunities or his efforts to make restitution. . . . I also don't believe that he was on court probation, but if he understood it that way, he didn't comply." (R2975:70, addendum K).

In sum, Defendant has not established that the trial court's finding that he violated probation by failing to report was "against the clear weight of the

evidence.” *Martinez*, 811 P.2d at 209. When viewed in the light most favorable to the trial court’s findings, the finding was not clearly erroneous, and should therefore be upheld. *See Maestas*, 2000 UT App 22 at ¶ 12.

**B. The trial court did not clearly err in finding that Defendant had violated probation by committing further law violations.**

As stated, Defendant was sentenced and probation was imposed on June 6, 2007. As one of the terms of his probation agreement, Defendant agreed to “[o]bey all state, federal and municipal laws.” (R2184-85, addendum C). The trial court found that Defendant had violated his probation based on his federal criminal convictions (R2975:66).

Defendant argues that all his federal convictions were based on conduct he committed before he was sentenced and placed on probation. Defendant is mistaken. It is true that many of the federal convictions were crimes alleged to have been committed before the order of probation. But not all of them were. As the trial court said: “Some of those activities occurred before he was sentenced, some occurred before he was on probation, some after.” R2975:72, addendum K).

Most specifically, count 23 of the federal indictment charged Defendant with conspiracy “[b]eginning in or about mid 2005 to around August 2007.” (R2872-73, addendum N). Therefore, the conspiracy was alleged to have continued even after

probation was imposed in June of 2007. Defendant was convicted of the conspiracy charge in count 23 (R2878, addendum O).

In ruling on whether Defendant had violated probation based on his convictions in federal court, the trial court specifically found that Defendant was "in violation of probation by having a conviction of conspiracy which, again, is Count 23." (R2975:66, addendum K).

Defendant has failed to establish that the trial court's determination that he violated probation based on his federal conviction was clearly erroneous. The trial court decision should therefore be affirmed.<sup>5</sup>

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<sup>5</sup> Although not entirely clear from his brief, Defendant may be attempting to argue that the trial court's decision was clearly erroneous based on the trial court's subsequent attempt to amend its decision on June 17, 2011 (R2896-2900, addendum M). There are several problems with this argument. First, it is inadequately briefed.

Second, because Defendant had already filed his notice of appeal, the trial court had no jurisdiction to amend its decision and the June 17, 2011 order is therefore without affect. A trial court is divested of jurisdiction while a case is under advisement on appeal. *See Williams v. Bench*, 2008 UT App 306, ¶16, 193 P.3d 640; *White v. State*, 795 P.2d 648, 650 (Utah 1990).

Third, the trial court states in its June 17, 2011 order that its previous conclusion that Defendant had violated probation was made in error, because "the dates of these offenses predate Defendant's sentencing in the present case." (R2897, addendum M). But that conclusion is erroneous. As addressed above, probation was imposed on June 7, 2007, and Defendant was convicted of count 23 of the federal indictment, which alleged a conspiracy that continued until August 2007. Therefore the conspiracy offense did not predate Defendant's sentencing and probation in the State case.

**C. The trial court did not err in revoking probation.**

A preponderance of the evidence, especially when viewed in a light most favorable to the trial court's findings, establishes that Defendant violated the terms of his probation by failing to report to AP&P or to the court, and by being convicted of a federal crime. Once a determination has been made that a defendant violated probation, the court must then exercise its discretion to determine whether to modify or revoke probation. See *Orr*, 2005 UT 92, ¶ 9 (quoting *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990)) (stating that "the district court has discretion 'to grant, modify, or revoke probation'").

On appeal, Defendant challenges the trial court's findings that probation was violated, but he never challenges revocation of probation based on those findings. For that reason alone, the revocation should be upheld.

In addition, an appellate court will not reverse a trial court's decision to revoke probation unless it determines "that the evidence of a probation violation, viewed in a light most favorable to the trial court's findings, is so deficient that the trial court abused its discretion in revoking [or modifying appellant's] probation." *Id.* (alteration in *Orr*) (quoting *Jameson*, 800 P.2d at 804). There is no indication that the trial court abused its discretion in revoking probation in this case. Therefore, the decision of the trial court should be affirmed.

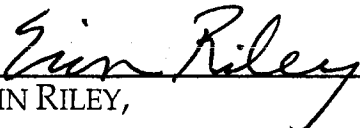


## CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted April 25, 2012.

MARK L. SHURTLEFF  
Utah Attorney General

  
ERIN RILEY,  
Assistant Attorney General  
Counsel for Appellee

## CERTIFICATE OF SERVICE

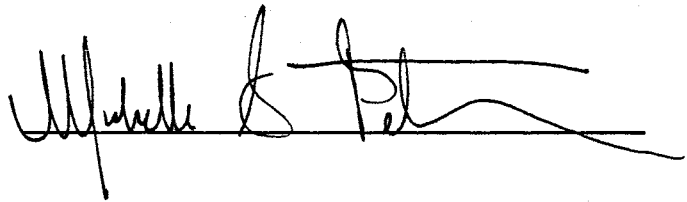
I certify that on April 25, 2012, two copies of the foregoing brief were ☒ mailed

☐ hand-delivered to:

Tate W. Bennett  
Millard County Public Defender  
P.O. Box 272  
Fillmore, Utah 84631

Counsel for Defendant/ Appellant Jamis M. Johnson

A digital copy of the brief was also included: ☒ Yes ☐ No

A handwritten signature in black ink, appearing to read "Tate W. Bennett", is written over a horizontal line.

## INDEX OF ADDENDA

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- ADDENDUM E: Certificate of Probable Cause and Order of Release,  
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- ADDENDUM G: *State v. Johnson*, 2012 UT App 118, \_\_\_ P.3d \_\_\_
- ADDENDUM H: Amended Affidavit in Support of Order to Show Cause;  
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- ADDENDUM I: Transcript of Hearing, 27 April 2011
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- ADDENDUM O: Verdict, U.S. District Court Case No. 2:09CR133

# Addenda

# Addendum A

U.C.A. 1953 § 77-18-1

West's Utah Code Annotated Currentness

Title 77. Utah Code of Criminal Procedure

Chapter 18. The Judgment

**§ 77-18-1. Suspension of sentence—Pleas held in abeyance—Probation—Supervision—Presentence investigation—Standards—Confidentiality—Terms and conditions—Termination, revocation, modification, or extension—Hearings—Electronic monitoring**

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2)(a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

- (i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;
  - (ii) on probation with an agency of local government or with a private organization; or
  - (iii) on bench probation under the jurisdiction of the sentencing court.
- (b)(i) The legal custody of all probationers under the supervision of the department is with the department.
- (ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.
- (iii) The court has continuing jurisdiction over all probationers.

(3)(a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

- (i) the type of offense;
  - (ii) the demand for services;
  - (iii) the availability of agency resources;
  - (iv) the public safety; and
  - (v) other criteria established by the department to determine what level of services shall be provided.
- (b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.
- (c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.
- (d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.
- (e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5)(a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family.

(c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act.

(d) The presentence investigation report shall include:

(i) findings from any screening and any assessment of the offender conducted under Section 77-18-1.1; and

(ii) recommendations for treatment of the offender.

(e) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6)(a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs, including any treatment program in which the defendant is currently participating, if the program is acceptable to the court;

(v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

- (ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and
- (x) comply with other terms and conditions the court considers appropriate; and
- (b) if convicted on or after May 5, 1997:
  - (i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or
  - (ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:
    - (A) a diagnosed learning disability; or
    - (B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

- (a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and
- (b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10)(a)(i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

- (ii)(A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.
- (B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.
- (iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.
- (b)(i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.
- (ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11)(a)(i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

- (ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.
- (b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12)(a)(i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

- (ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.



(b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e)(i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) The court may order the defendant to commit himself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative; or

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(15)(a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

(16)(a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

- (i) the defendant to wear an electronic monitoring device at all times; and
- (ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

- (i) place the defendant on probation under the supervision of the Department of Corrections;
- (ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and
- (iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

Laws 1980, c. 15, § 2; Laws 1981, c. 59, § 2; Laws 1982, c. 9, § 1; Laws 1983, c. 47, § 1; Laws 1983, c. 68, § 1; Laws 1983, c. 85, § 2; Laws 1984, c. 20, § 1; Laws 1985, c. 212, § 17; Laws 1985, c. 229, § 1; Laws 1987, c. 114, § 1; Laws 1989, c. 226, § 1; Laws 1990, c. 134, § 2; Laws 1991, c. 66, § 5; Laws 1991, c. 206, § 6; Laws 1992, c. 14, § 3; Laws 1993, c. 82, § 7; Laws 1993, c. 220, § 3; Laws 1994, c. 13, § 24; Laws 1994, c. 198, § 1; Laws 1994, c. 230, § 1; Laws 1995, c. 20, § 146, eff. May 1, 1995; Laws 1995, c. 117, § 2, eff. May 1, 1995; Laws 1995, c. 184, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 3, eff. May 1, 1995; Laws 1995, c. 337, § 11, eff. May 1, 1995; Laws 1995, c. 352, § 6, eff. May 1, 1995; Laws 1996, c. 79, § 103, eff. April 29, 1996; Laws 1997, c. 390, § 2, eff. May 5, 1997; Laws 1998, c. 94, § 10, eff. May 4, 1998; Laws 1999, c. 279, § 8, eff. May 3, 1999; Laws 1999, c. 287, § 7, eff. May 3, 1999; Laws 2001, c. 137, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 7, eff. May 6, 2002; Laws 2002, 5th Sp.Sess., c. 8, § 137, eff. Sept. 8, 2002; Laws 2003, c. 290, § 3, eff. May 5, 2003; Laws 2005, 1st Sp.Sess., c. 14, § 3, eff. July 1, 2005; Laws 2007, c. 218, § 3, eff. July 1, 2007.

# Addendum B

224 P.3d 720, Blue Sky L. Rep. P 74,808, 645 Utah Adv. Rep. 44, 2009 UT App 382  
(Cite as: 224 P.3d 720)

H

Court of Appeals of Utah.  
STATE of Utah, Plaintiff and Appellee,  
v.  
Jamis M. JOHNSON, Defendant and Appellant.

No. 20070909-CA.  
Dec. 17, 2009.

**Background:** Defendant was convicted in the Fourth District Court, Fillmore Department, Donald J. Eyre Jr., J., of securities fraud, and defendant appealed.

**Holdings:** The Court of Appeals, McHugh, J., held that:

- (1) defendant was not required to file second appeal pertaining to trial court's final restitution order;
- (2) defendant's action in transferring stock certificates for assets of limited liability company (LLC) was a sale for value;
- (3) evidence was sufficient to support finding that property had a value of at least \$10,000, as required to support charge of second degree securities fraud;
- (4) any error in allowing testimony of state's expert was not prejudicial;
- (5) statute making it unlawful to omit to state a material fact necessary to make statement not misleading was not unconstitutionally vague as applied to defendant;
- (6) state was not required to prove individual investor believed defendant's statements to be true; and
- (7) damages incurred by investors flowed from fraudulent securities transaction and were properly charged against defendant.

Affirmed in part, reversed in part, and remanded in part.

West Headnotes

[1] Criminal Law 110 ⇨ 1144.13(2.1)

110 Criminal Law  
110XXIV Review  
110XXIV(M) Presumptions  
110k1144 Facts or Proceedings Not  
Shown by Record  
110k1144.13 Sufficiency of Evidence  
110k1144.13(2) Construction of  
Evidence  
110k1144.13(2.1) k. In general.  
Most Cited Cases

**Criminal Law 110 ⇨ 1144.13(5)**

110 Criminal Law  
110XXIV Review  
110XXIV(M) Presumptions  
110k1144 Facts or Proceedings Not  
Shown by Record  
110k1144.13 Sufficiency of Evidence  
110k1144.13(5) k. Inferences or deductions from evidence. Most Cited Cases

In reviewing an appeal from a jury verdict, the Court of Appeals views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict.

[2] Criminal Law 110 ⇨ 1134.28

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)4 Scope of Inquiry  
110k1134.28 k. Statutory issues in  
general. Most Cited Cases

The correct interpretation of a statute is a question of law and is reviewed for correctness.

[3] Criminal Law 110 ⇨ 469.2

110 Criminal Law  
110XVII Evidence  
110XVII(R) Opinion Evidence  
110k468 Subjects of Expert Testimony  
110k469.2 k. Discretion. Most Cited  
Cases

224 P.3d 720, Blue Sky L. Rep. P 74,808, 645 Utah Adv. Rep. 44, 2009 UT App 382  
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# **Criminal Law 110 1153.12(3)**

## **110 Criminal Law**

### **110XXIV Review**

#### **110XXIV(N) Discretion of Lower Court**

#### **110k1153 Reception and Admissibility of Evidence**

##### **110k1153.12 Opinion Evidence**

##### **110k1153.12(3) k. Admissibility.**

#### **Most Cited Cases**

It is within the discretion of the trial court to determine the suitability of expert testimony in a particular case, and the Court of Appeals will not reverse that determination on appeal in the absence of a clear showing of abuse.

## **[4] Constitutional Law 92 990**

### **92 Constitutional Law**

#### **92VI Enforcement of Constitutional Provisions**

#### **92VI(C) Determination of Constitutional Questions**

#### **92VI(C)3 Presumptions and Construction as to Constitutionality**

##### **92k990 k. In general. Most Cited Cases**

When reviewing the constitutionality of a statute, the Court of Appeals presumes that the statute is constitutional.

## **[5] Constitutional Law 92 1004**

### **92 Constitutional Law**

#### **92VI Enforcement of Constitutional Provisions**

#### **92VI(C) Determination of Constitutional Questions**

#### **92VI(C)3 Presumptions and Construction as to Constitutionality**

##### **92k1001 Doubt**

92k1004 k. Proof beyond a reasonable doubt. Most Cited Cases

## **Constitutional Law 92 1030**

### **92 Constitutional Law**

#### **92VI Enforcement of Constitutional Provisions**

#### **92VI(C) Determination of Constitutional**

## **Questions**

### **92VI(C)4 Burden of Proof**

#### **92k1030 k. In general. Most Cited**

The challenger bears the burden of demonstrating the unconstitutionality of a statute; furthermore, unconstitutionality of a statute must be shown beyond a reasonable doubt.

## **[6] Constitutional Law 92 976**

### **92 Constitutional Law**

#### **92VI Enforcement of Constitutional Provisions**

#### **92VI(C) Determination of Constitutional Questions**

#### **92VI(C)2 Necessity of Determination**

92k976 k. Resolution of non-constitutional questions before constitutional questions. Most Cited Cases

## **Criminal Law 110 1134.29**

### **110 Criminal Law**

#### **110XXIV Review**

#### **110XXIV(L) Scope of Review in General**

#### **110XXIV(L)4 Scope of Inquiry**

110k1134.29 k. Constitutional issues in general. Most Cited Cases

Appellate courts review constitutional challenges for correctness; however, courts should avoid reaching constitutional issues if the case can be decided on other grounds.

## **[7] Criminal Law 110 1134.83**

### **110 Criminal Law**

#### **110XXIV Review**

#### **110XXIV(L) Scope of Review in General**

#### **110XXIV(L)8 Sentencing**

110k1134.83 k. Restitution. Most Cited Cases

## **Criminal Law 110 1156.9**

### **110 Criminal Law**

#### **110XXIV Review**

#### **110XXIV(N) Discretion of Lower Court**

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110k1156.1 Sentencing

110k1156.9 k. Restitution. Most Cited

Cases

The Court of Appeals will not disturb a trial court's order of restitution unless the trial court exceeds the authority prescribed by law or abuses its discretion; furthermore, whether a restitution award is proper depends solely upon interpretation of the governing statute, and the trial court's interpretation of a statute presents a question of law, which the Court of Appeals reviews for correctness.

[8] Criminal Law 110 ⚡1081(1)

110 Criminal Law

110XXIV Review

110XXIV(F) Proceedings, Generally

110k1081 Notice of Appeal

110k1081(1) k. In general. Most Cited

Cases

Defendant was not required to file second notice of appeal pertaining to trial court's final restitution order, and its denial of defendant's renewed motion for a new trial on charges of securities fraud; issues raised in second appeal had been properly raised in defendant's original appeal, which was timely filed, and second appeal differed from original appeal only in that second appeal included date of trial court's denial of defendant's renewed motion for new trial.

[9] Securities Regulation 349B ⚡278

349B Securities Regulation

349BII State Regulation

349BII(A) In General

349Bk278 k. Fraudulent or other prohibited practices. Most Cited Cases

Defendant's actions in transferring stock certificates in newly formed dairy company for assets of limited liability company (LLC) was a sale for value, pursuant to securities, "fraud unlawful" statute; newly formed company received indirect benefits from the distribution of stock because the transfer enhanced dairy company's ability to borrow. U.C.A.1953, 61-1-13(22)(a) (2004).

[10] Statutes 361 ⚡188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In general. Most Cited

In interpreting a statute, the Court of Appeals looks to its plain language, unless it is ambiguous.

[11] Securities Regulation 349B ⚡246

349B Securities Regulation

349BII State Regulation

349BII(A) In General

349Bk243 Statutory Provisions

349Bk246 k. Construction and operation in general. Most Cited Cases

Where any statutory ambiguities exist, the Court of Appeals broadly and liberally construes securities laws to give effect to the legislative purpose of preventing fraud.

[12] Securities Regulation 349B ⚡328

349B Securities Regulation

349BII State Regulation

349BII(C) Offenses and Prosecutions

349Bk325 Criminal Prosecutions

349Bk328 k. Weight and sufficiency of evidence. Most Cited Cases

Evidence that assets of limited liability company obtained by newly formed dairy company through a transfer of stock certificates included farm equipment worth more than \$150,000, recital in transfer agreement that property had a value of \$200,000, and \$50,000 loan co-defendant obtained by recording trust deed against assets, was sufficient to support jury finding that property had a value of at least \$10,000, as required to support charge of second degree felony securities fraud against defendant. West's U.C.A. § 61-1-21(2)(b)(i).

[13] Criminal Law 110 ⚡1169.9



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110 Criminal Law  
110XXIV Review  
110XXIV(Q) Harmless and Reversible Error  
110k1169 Admission of Evidence  
110k1169.9 k. Opinion evidence. Most  
Cited Cases

Any error in trial court's allowance of testimony of state's expert witness at defendant's trial for securities fraud, in which expert allegedly gave impermissible legal conclusions, and incorrectly testified as to the law related to securities, was not prejudicial; shortly after expert began his testimony, trial court admonished jury as to relative roles of expert testimony and opinion evidence, and gave careful instructions regarding the relevant legal definitions, defendant was able to cross-examine expert at length, and to call his own expert to rebut state expert's testimony. West's U.C.A. § 61-1-1.

[14] Criminal Law 110 ⚡ 469.3

110 Criminal Law  
110XVII Evidence  
110XVII(R) Opinion Evidence  
110k468 Subjects of Expert Testimony  
110k469.3 k. Questions of law. Most  
Cited Cases

There are limits on an expert's license to testify as to the legal meaning of a statute; where the witness's legal conclusions blur the separate and distinct responsibilities of the judge, jury and witness, or there is danger that a juror may turn to the witness's legal conclusion rather than the judge for guidance on the applicable law, the expert has exceeded those limits.

[15] Constitutional Law 92 ⚡ 4509(12)

92 Constitutional Law  
92XXVII Due Process  
92XXVII(H) Criminal Law  
92XXVII(H)2 Nature and Elements of  
Crime  
92k4502 Creation and Definition of  
Offense  
92k4509 Particular Offenses

92k4509(12) k. False pretenses  
and fraud. Most Cited Cases

Securities Regulation 349B ⚡ 244

349B Securities Regulation  
349BII State Regulation  
349BII(A) In General  
349Bk243 Statutory Provisions  
349Bk244 k. Validity. Most Cited

Jury instruction that permitted jury to find defendant guilty of securities fraud only if it found defendant had made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make statements made not misleading, left jury free to find defendant guilty in the absence of a predicate statement, and thus, statute was not unconstitutionally vague as applied to defendant; had defendant disclosed tenuous state of his membership in state bar, and reasons for order of disbarment, it would almost certainly have undermined false statements made by co-defendant as to defendant's securities expertise. U.S.C.A. Const.Amend. 14; West's U.C.A. Const. Art. 1, § 7; West's U.C.A. § 61-1-1(2).

[16] Criminal Law 110 ⚡ 13.1

110 Criminal Law  
110I Nature and Elements of Crime  
110k12 Statutory Provisions  
110k13.1 k. Certainty and definiteness.  
Most Cited Cases

A law is unconstitutional and void for vagueness if its prohibitions are not clearly defined so as to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. U.S.C.A. Const.Amend. 14 ; West's U.C.A. Const. Art. 1, § 7.

[17] Securities Regulation 349B ⚡ 323

349B Securities Regulation  
349BII State Regulation  
349BII(C) Offenses and Prosecutions

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349Bk323 k. Fraud or misrepresentation.  
Most Cited Cases

State was not required to prove individual investor believed defendant's statements to be true, nor that investor relied on defendant's statements in his decision making process, so long as statements made were such that a reasonable person in similar circumstances would have relied upon statements in making an investment decision. West's U.C.A. § 61-1-1(2).

**[18] Sentencing and Punishment 350H ⚡2148**

350H Sentencing and Punishment

350HXI Restitution

350Hk2148 (D) Compensable Losses

350Hk2148 k. Monetary, pecuniary, or economic loss. Most Cited Cases

Damages incurred by dairymen related to foreclosure of trust deed and care and feeding of additional cows brought to farm at direction of co-defendant, flowed from fraudulent securities transaction and were properly charged against defendant as restitution, even though defendant was not convicted of any crime related to extra expenses, and co-defendant obtained loan which burdened dairymen with additional cows; defendant's securities fraud gave dairymen a false sense of security about transaction, which resulted in them entering into agreement.

**[19] Criminal Law 110 ⚡1181.5(8)**

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1181.5 Remand in General; Vacation

110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters

110k1181.5(8) k. Sentence. Most Cited Cases

**Sentencing and Punishment 350H ⚡2200**

350H Sentencing and Punishment

350HXI Restitution

350HXI(F) Proceedings

350Hk2196 Order

350Hk2200 k. Construction and operation. Most Cited Cases

Trial court's restitution order in the amount of \$120,000, based on \$50,000 loan obtained by co-defendant, and \$70,000 in expenses dairymen incurred to care for additional cows brought to farm, and which flowed out of defendant's securities fraud, required remand, even though there was a sufficient nexus between defendant's crime and damages, where order did not address whether credits issued to dairymen in the amounts of \$11,523.54 and \$12,500 should be applied to offset amount of restitution order.

\*722 Rodney G. Snow, Walter A. Romney Jr., and Aaron D. Lebenta, Salt Lake City, for Appellant.

Mark L. Shurtleff, Atty. Gen. and Karen A. Klucznik, Asst. Atty. Gen., Salt Lake City, for Appellee.

Before Judges THORNE, ORME, and McHUGH.

**OPINION**

McHUGH, Judge:

¶ 1 Jamis M. Johnson appeals his criminal conviction for securities fraud, a violation of the Utah Uniform Securities Act (the Securities Act), *see* Utah Code Ann. §§ 61-1-1 to -30 (2006 & Supp.2009),<sup>FN1</sup> and the accompanying restitution order entered by the trial court. We affirm in part and reverse and remand in part.

FN1. Unless otherwise noted, we cite to the current Utah Code as a convenience to the reader because the relevant sections are substantively unchanged from the version in effect at the time of Johnson's crime.

**BACKGROUND <sup>FN2</sup>**

FN2. In reviewing an appeal from a jury



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verdict, "we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. We recite the facts accordingly." *State v. Shepherd*, 1999 UT App 305, ¶ 2, 989 P.2d 503 (internal quotation marks omitted).

#### *The Transaction*

[1] ¶ 2 In the summer of 2000, two dairymen held a family dairy farm as the sole members of a limited liability company (the LLC). In July 2000, the dairymen learned that A. Paul Schwenke "was interested in meeting some dairy farmers to talk about some investment." During July and August 2000, the dairymen had a series of meetings with Schwenke, Johnson, and several other individuals to discuss the proposed investment. Before attending the first meeting, Johnson did not know the details of Schwenke's plan.<sup>FN3</sup> Schwenke introduced Johnson as "a high powered lawyer" and a "security expert from out of New York," which one of the dairymen said "lent a great deal of credibility" to Schwenke's presentation. Neither Schwenke nor Johnson disclosed that Johnson was the subject of ongoing disciplinary proceedings by the Utah State Bar for misappropriating client funds.<sup>FN4</sup> Johnson was also subject to three tax liens, totaling \$1,669,562.89, against his property, \*723 and had a Small Business Administration judgment against him. Johnson did not disclose these facts at the meeting. Nor did Johnson tell the dairymen that Schwenke was an attorney who had been disbarred for misappropriating client funds and that Johnson was pursuing legal action against Schwenke over a failed business deal.

FN3. Johnson was invited to attend the meeting to settle a debt related to Johnson's losses in a previous business deal with Schwenke.

FN4. On September 14, 1999, the district court entered an order and judgment of disbarment against Johnson for misappropriating client funds. At the time of the meetings with the dairymen, that judgment was

stayed, pending appeal. The Utah Supreme Court affirmed the judgment of disbarment in December 2001, *see In re Johnson*, 2001 UT 110, 48 P.3d 881, more than a year after the transaction at issue in this case.

¶ 3 At the meetings, Schwenke proposed that the dairymen invest in American-Dairy.com, Inc. (American-Dairy), a company that Schwenke had recently incorporated. Schwenke said his plan was to obtain 10,000 to 15,000 cows, "go online" with the company, and "show investors their cows over the internet." Schwenke also indicated that he would obtain financing by selling stock in an initial public offering. Johnson explained how stocks would work in the public company. Schwenke and Johnson told the dairymen that there were some risks associated with any stock transaction, but they did not elaborate. The dairymen described the farm, including the number of cows, the need to expand to become profitable, and the need to refinance a "substantial loan" against the dairy to complete the transaction.

¶ 4 At a second meeting on August 2, 2000, Johnson reviewed a draft of a stock purchase/trade agreement with the dairymen.<sup>FN5</sup> At the request of one of the dairymen, Johnson again explained how the public offering would work, stating that the share prices in an initial public offering would start at a minimum of \$4 per share and might be as high as \$8 per share.

FN5. Johnson did not draft the agreement, and he claims that Schwenke presented it to the dairymen. However, one of the dairymen testified that it was Johnson who presented the agreement.

¶ 5 Following the August 2 meeting, the dairymen's personal attorney reviewed the draft agreement and added a provision voiding the transaction if American-Dairy had not registered its stock for a public offering within two years. On August 9, 2000, the dairymen returned to Schwenke's office and signed the revised agreement (the Agreement),

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thereby transferring all the farm's assets, including the real estate, equipment, and livestock associated with the farm, to American-Dairy in exchange for stock in the company.

¶ 6 Johnson signed the Agreement on behalf of American-Dairy as the company's CEO and signed stock certificates issuing 200,000 shares to the dairymen. Although the Agreement recites that American-Dairy had issued "10,000,000 shares of .001 cents par value common stock," no other shares were issued, making the dairymen the sole shareholders. The dairymen also signed proxy agreements naming Schwenke as their "attorney and agent," which empowered Schwenke to vote their shares at all shareholder meetings "for the transaction of any business."

¶ 7 Following the execution of the Agreement and the transfer of assets, Johnson had no additional direct contact with the dairymen. The parties never discussed whether Johnson would remain as American-Dairy's CEO, although the record reflects that Johnson continued to have some involvement in that capacity, as evidenced by his signature on American-Dairy's bankruptcy petition and his preparation of a temporary restraining order on behalf of the company.

¶ 8 For the most part, the dairymen continued to manage the day-to-day operations of the farm. However, because the warranty deed had been transferred to American-Dairy, they could not obtain any bank financing. The dairymen also testified that Schwenke moved an additional 200 to 250 cows onto the farm, refused to allow the dairymen to lease out an unused portion of the farm, and obtained a \$50,000 loan against the farm on which he never made any payments.<sup>FN6</sup> Eventually, creditors foreclosed on the farm and its equipment. As part of the foreclosure proceedings, one of the dairymen also forfeited a \$70,000 certificate of deposit, \*724 which had previously been used as collateral for a loan to purchase cattle.

FN6. Johnson's brief states that as sole

shareholders, the dairymen had the authority to fire or hire any officers or directors of American-Dairy if they were unhappy with how the company was managed. Although the dairymen might have removed Johnson under normal circumstances, the proxy agreement gave Schwenke the right to vote their shares. Moreover, Schwenke could not be removed because he did not have a formal position with American-Dairy.

#### *The Trial*

¶ 9 On October 24, 2005, Johnson and Schwenke were charged as co-defendants with one count each of securities fraud, a second degree felony, *see* Utah Code Ann. § 61-1-1 (2006); *id.* § 61-1-21(2)(b) (Supp.2009), and theft by deception, a second degree felony, *see* Utah Code Ann. §§ 76-6-405, -412 (2008). The trial court later severed Johnson's and Schwenke's cases, and granted the State's motion to dismiss the theft by deception charge against Johnson. After several defense attorneys withdrew, Johnson represented himself at trial.

FN7

FN7. Appellate counsel, Rodney G. Snow, Walter A. Romney Jr., and Aaron D. Lebenta of Clyde Snow Sessions & Swenson were not involved in the trial proceedings until Johnson's sentencing and they have generously donated their professional services by handling this appeal on a pro bono basis. We commend them for their efforts.

¶ 10 The State called Michael Hines, the Director of Enforcement for the Utah Division of Securities, to testify as an expert witness. After the trial court qualified Hines as an expert, *see generally* Utah R. Evid. 702 ("[A] witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion ...."), the State questioned Hines about various topics related to securities transactions. Hines testified that the purposes of securities laws are to

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prevent fraud and to protect investors. Hines also testified that, unlike other sales, the securities market is a "seller beware" market, meaning "the seller has to make sure ... [he or she] disclose[s] all material facts to an investor." Hines defined the kind of material facts that must be disclosed under section 61-1-1 of the Securities Act as those that "a reasonable prudent investor ... would want to know," adding that officers of a corporation have a specific duty to disclose material facts about their backgrounds. Hines further testified to the hypothetical types of statements and omissions that would violate section 61-1-1, and to the meaning of a direct or indirect connection to the sale of a security under the Securities Act.

¶ 11 Johnson repeatedly objected to Hines's testimony on the grounds that Hines was misstating the law and impermissibly stating legal conclusions as to what the law is. In response, the trial court allowed Johnson to cross-examine Hines regarding the alleged misstatements, and orally instructed the jury that

the court is going to indicate to the jury that at some point in this trial the court is going to give you instructions with respect to ... issues of law that will govern your deliberations. And ... at that time ..., the court will instruct you as to what the law is.

¶ 12 Johnson conducted a thorough cross-examination of Hines, questioning him about the meaning of section 61-1-1, how the statute would be applied in different hypothetical situations, including what additional disclosures a person like Johnson would be required to make before completing a transaction similar to the one at issue. To rebut Hines's testimony, Johnson called Nathan Dredge, a securities attorney and former securities analyst, as an expert witness. Dredge also testified to the purpose of state securities laws, the definition of a security, what constituted material facts, and whether Johnson had an affirmative duty to disclose certain facts in this case. Dredge's interpretation of those issues differed from the interpretation in

Hines's testimony. In addition to Dredge's testimony, Johnson testified on his own behalf and called Schwenke as a defense witness.

#### *Post-Trial Proceedings and Motions*

¶ 13 On March 7, 2007, after deliberating for six hours, the jury found Johnson guilty of securities fraud. On June 6, 2007, the trial court sentenced Johnson to a suspended prison term of one to fifteen years, thirty-six months of supervised probation, six months in the Millard County Jail, and an additional six months of electronically monitored home confinement. The trial court further imposed a \$5000 fine and "set [c]ourt ordered restitution ... at \$125,000, the same as [the court] ordered for ... Schwenke," to be paid \*725 jointly and severally by Johnson and Schwenke.

¶ 14 On June 15, 2007, Johnson filed a timely objection to the restitution order and requested a hearing on the issue. Johnson filed a timely motion for a new trial on June 20, 2007. The trial court entered final judgment on July 2, 2007, and denied Johnson's motion for new trial on October 10, 2007. The trial court held a restitution hearing on October 10 and 24, 2007, and entered its final restitution order on December 5, 2007, ordering \$120,000 in restitution, to be paid jointly and severally by Johnson and Schwenke.

¶ 15 On November 8, 2007, after the restitution hearing but before entry of the final restitution order, Johnson filed a timely notice of appeal (Original Appeal) in the trial court. Johnson filed a renewed motion for new trial on November 14, 2007, alleging that new evidence obtained at the restitution hearing demonstrated that the farm property was not worth \$10,000, as required to obtain a second degree felony securities fraud conviction under section 61-1-21(2)(b)(i). See Utah Code Ann. § 61-1-21(2)(b)(i) (Supp.2009) ("A person who willfully violates Section 61-1-1 ... is guilty of a second degree felony if: ... at the time the crime was committed, the property ... unlawfully obtained ... was worth \$10,000 or more...."). The trial court denied Johnson's renewed motion for new trial on

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August 12, 2008, and Johnson filed an amended notice of appeal (Second Appeal) with this court, but not the trial court, on August 19, 2008. Johnson now appeals from his conviction, the restitution order, and the denials of his motions for new trial.

#### ISSUES AND STANDARDS OF REVIEW

[2] ¶ 16 On appeal, Johnson contends that section 61-1-1 does not apply to his case because the transfer of the LLC assets to American-Dairy merely “constituted a change in the form of ownership” and, therefore, the “transaction did not involve an ‘offer’ or ‘sale’ of a security for value.” Similarly, Johnson argues that the transfer was not “for value” because the property that the dairymen transferred was “so encumbered as to be valueless.” Whether the change in ownership constitutes a sale for value under the statute is a question of statutory interpretation. “The correct interpretation of a statute is a question of law and is reviewed for correctness.” *State v. Wallace*, 2005 UT App 434, ¶ 7, 124 P.3d 259 (internal quotation marks omitted), *aff’d*, 2006 UT 86, 150 P.3d 540. The question of whether the property in fact had any value is a factual question that was submitted to the jury, and we will not overturn the jury’s finding unless “the evidence and its inferences are so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt.... Thus, so long as some evidence and reasonable inferences support the jury’s findings, we will not disturb them.” *Id.* ¶ 16 (citation and internal quotation marks omitted).

[3] ¶ 17 Johnson next claims that Hines impermissibly gave legal conclusions and incorrectly testified as to the law related to securities, which prejudiced Johnson. “It is within the discretion of the trial court to determine the suitability of expert testimony in a particular case, and we will not reverse that determination on appeal in the absence of a clear showing of abuse.” *State v. Larsen*, 828 P.2d 487, 492 (Utah Ct.App.1992) (citation and internal quotation marks omitted), *aff’d*, 865 P.2d 1355 (Utah 1993).

[4][5][6] ¶ 18 Johnson further alleges that the

Securities Act, as applied to his case, resulted in such a vague definition of the crime that it violated his rights under the Due Process Clause of the Utah Constitution, *see* Utah Const. art. I, § 7. Johnson also maintains that Hines’s testimony violated the Utah Constitution’s Separation of Powers Clause, *see id.* art. V, § 1. “When reviewing the constitutionality of a statute, we ... presume that the statute is constitutional. The challenger bears the burden of demonstrating the unconstitutionality of a statute. Furthermore, unconstitutionality of a statute must be shown beyond a reasonable doubt. Appellate courts review constitutional challenges for correctness.” *State v. Shepherd*, 1999 UT App 305, ¶ 8, 989 P.2d 503 (citations and internal quotation marks omitted). However, “courts should avoid reaching constitutional\*726 issues if the case can be decided on other grounds.” *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994).

[7] ¶ 19 Finally, Johnson challenges the trial court’s restitution award. This court

will not disturb a trial court’s order of restitution unless the trial court exceeds the authority prescribed by law or abuses its discretion. Furthermore, [w]hether a restitution [award] is proper ... depends solely upon interpretation of the governing statute, and the trial court’s interpretation of a statute presents a question of law, which we review for correctness.

*State v. Miller*, 2007 UT App 332, ¶ 6, 170 P.3d 1141 (alterations and omission in original) (citation and internal quotation marks omitted).

#### ANALYSIS

##### I. The Timeliness of Johnson’s Second Notice of Appeal

¶ 20 As a threshold matter, the State argues that this court lacks jurisdiction to hear the issues raised by Johnson in his Second Appeal, which pertain to the trial court’s final restitution order and its denial of Johnson’s Renewed Motion for New Trial. <sup>FNB</sup> *See generally* Utah R.App. P. 4(a) (“[N]otice of appeal ... shall be filed with the clerk of the trial



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court within 30 days after the date of entry of the judgment or order appealed from.”); *State v. Houskeeper*, 2002 UT 118, ¶ 23, 62 P.3d 444 (“[A defendant’s] failure to timely file [an appeal] deprives an appellate court of jurisdiction over the appeal.”). Johnson responds that his Second Appeal was timely because it was filed with this court less than thirty days after the trial court entered its order denying Johnson’s Renewed Motion for New Trial and that, in any event, the Original Appeal gives this court jurisdiction to hear the issues Johnson raises with respect to the trial court’s restitution order.

FN8. The State concedes that Johnson’s Original Appeal, filed twenty-nine days after the trial court denied Johnson’s first Motion for New Trial, was timely.

#### A. Johnson’s Second Appeal Was Not Necessary.

[8] ¶ 21 In support of its argument that the Second Appeal was ineffective to confer jurisdiction on this court, the State notes that a notice of appeal must be “filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order.” Utah R.App. P. 4(a) (emphasis added). If a defendant files a motion for new trial under rule 24 of the Utah Rules of Criminal Procedure, “the time ... to appeal from the judgment runs from the entry of the order disposing of the motion.” See *id.* R. 4(b)(1). Therefore, the State contends that to appeal the trial court’s denial of his Renewed Motion for New Trial, Johnson was required to file his appeal of that decision with the trial court within thirty days of the trial court denying that motion. In response, Johnson relies on the fact that rule 4 does not expressly state that an amended notice of appeal must also be filed in the trial court. While Johnson is correct, there is also nothing in the rule that provides different filing requirements for appeals based on orders entered by the trial court after the appellant has filed an appeal from a prior final judgment in the same case. See generally *id.* R. 4 (specifying the requirements for filing an appeal). In this case, however, the Second

Appeal was unnecessary because the issues raised by it had been properly raised in his Original Appeal, which the State concedes was timely filed.

¶ 22 Both notices of appeal stated that Johnson was appealing from the trial court’s orders concerning sentence, judgment, commitment, restitution, FN9 and the denial of Johnson’s first Motion for New Trial. The Second Appeal only differed from the Original Appeal in that the Second Appeal included the date of the trial court’s restitution order and stated that Johnson was appealing the trial court’s denial of his Renewed Motion for New Trial. In substance, the legal arguments contained in Johnson’s initial and renewed motions for new trial were identical, and the motions only differed in the evidence \*727 cited by Johnson in support of his argument. Because the same issues were already raised by the Original Appeal, Johnson was not required to file a second notice of appeal for this court to have jurisdiction to address those issues.

FN9. We address the timeliness of Johnson’s appeal of the final restitution order in the next section.

#### B. The Original Appeal Included Restitution.

¶ 23 The State argues that Johnson did not perfect his appeal of the trial court’s December 5, 2007 restitution order because he filed the Original Appeal on November 8, 2007, almost a month before the trial court entered the order. FN10 Relying on *State v. Garner*, 2005 UT 6, 106 P.3d 729, the State asserts that Johnson was required to perfect an appeal of the final restitution order by submitting a new notice of appeal within thirty days of its entry. Johnson disagrees, claiming both that the State’s interpretation of *Garner* is incorrect and that the restitution order was part of the underlying judgment.

FN10. The trial court set restitution in the amount of \$125,000 when Johnson was initially sentenced on June 6, 2007, and modified the restitution amount to \$120,000 in the December 5, 2007 order.

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¶ 24 The Utah Rules of Appellate Procedure require that the judgment or order appealed from be final. *See* Utah R.App. P. 4(a). In *Garner*, the Utah Supreme Court considered the effect of a subsequent restitution hearing on the finality of a prior judgment. *See* 2005 UT 6, ¶¶ 11-16, 106 P.3d 729. There, the trial court entered judgment, sentencing Garner to prison and ordering him to pay restitution in an amount not yet quantified. *See id.* ¶ 2. Garner did not file a timely appeal of that judgment. *See id.* Subsequently, the trial court clarified its judgment to indicate that Garner's guilty plea was conditional. *See id.* Although Garner attempted to appeal his underlying conviction from the date of that clarification, this court rejected his appeal as untimely. *See id.* ¶ 5. Before the order from this court dismissing Garner's first appeal was entered, the trial court "re-entered the judgment, noting that the State had satisfied the conditions of the plea and setting the amount of restitution." *Id.* ¶ 3. In response, Garner filed a second notice of appeal, claiming that the trial court's reentry of the judgment "created a new final judgment for purposes of appeal" and that he was entitled to a new thirty days to appeal the underlying conviction. *Id.* ¶ 4. This court disagreed, dismissing the second appeal of the underlying conviction as untimely. *See id.* ¶ 6.

¶ 25 On certiorari review, the supreme court affirmed, stating, "Entering a restitution amount is more like a clarification of a judgment than a material modification because the inclusion does not change the substance or character of the judgment." *Id.* ¶ 17 (internal quotation marks omitted). The supreme court upheld our dismissal of Garner's second appeal, holding "that where orders for restitution remain open to be decided at a later date, the subsequent entry of the amount of restitution is not a new and final judgment for purposes of appealing the underlying merits of a criminal conviction." *Id.* (emphasis added).

¶ 26 Unlike in *Garner*, the issue here is not whether an appeal filed after entry of the restitution amount could give the defendant an additional

thirty days to appeal the underlying conviction. Rather, this case raises the question of whether a defendant must file a new appeal where a trial court initially enters a restitution amount at sentencing and subsequently modifies that amount after holding a restitution hearing. In its original judgment, the trial court set restitution at \$125,000, which the court said was "the same [amount] as [it] ordered for ... Schwenke." Johnson filed his Original Appeal on November 8, 2007, expressly challenging "the Court's ruling concerning Full Restitution." After Johnson filed the Original Appeal, the trial court modified the restitution amount to \$120,000 to be paid jointly and severally by Johnson and Schwenke.

¶ 27 The State correctly contends that under *Garner*, a criminal proceeding may result in several final orders. *See id.* ¶¶ 15-16 (distinguishing finality in criminal and civil cases). Applying that possibility here, the State argues that the change in the restitution amount was a material modification of the judgment, necessitating a new notice of \*728 appeal. Johnson disagrees. Under the unique facts of this case, we agree with Johnson that a new notice of appeal was not required.

¶ 28 Before entering the original judgment in Johnson's case, the trial court held a restitution hearing in Schwenke's case and set Schwenke's restitution at \$120,000.<sup>FN11</sup> Then, in entering judgment in Johnson's case, the trial court stated that it was ordering restitution at \$125,000, which the trial court said was "the same as [it] ordered for ... Schwenke," and which Johnson and Schwenke were to pay jointly and severally. These statements establish that the trial court intended Johnson and Schwenke to pay the same amount of restitution, which the trial court had previously set at \$120,000 in Schwenke's case. When the trial court changed the amount of Johnson's restitution to \$120,000 after the restitution hearing, it merely changed the amount to correct an error it made when entering the original judgment.<sup>FN12</sup> Because that correction did not constitute a material modification of the tri-

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al court's original judgment, Johnson was not required to file a new notice of appeal. See generally *Gittins v. Smithfield City*, 2008 UT App 171, ¶ 6, 185 P.3d 1133 (mem.) (stating that "only material modifications of or amendments to a judgment ... affect the finality of an earlier court order," and that "clerical matters" that correct or amend a judgment do not materially modify the original judgment); see also *State v. Garner*, 2005 UT 6, ¶ 11, 106 P.3d 729 ("[W]here a belated entry merely constitutes an amendment or modification not changing the substance or character of the judgment, such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered ....") (alteration in original) (internal quotation marks omitted). Consequently, we have subject matter jurisdiction over the restitution award pursuant to the Original Appeal. We now address the merits of Johnson's arguments on appeal.

FN11. In a jury trial presided over by the same trial judge who presided over Johnson's case, Schwenke was convicted of securities fraud for his involvement in the transaction with the dairymen.

FN12. At the sentencing hearing, the prosecutor incorrectly stated, "I understand that the restitution in the Schwenke case is \$125,000. I'm certainly appreciative of [defense counsel's] concession that that was a number that he can live with and [Johnson] can live with."

## II. Whether the Sale Was For Value.

[9][10][11] ¶ 29 We first address Johnson's argument that section 61-1-1 does not apply because the transfer of assets was not for value. The determination of whether the transfer of assets meets the statutory definition of a sale for value under Utah Code sections 61-1-1 and -13 is a question of statutory construction. See *Gohler v. Wood*, 919 P.2d 561, 562 (Utah 1996). In interpreting a statute, we look to its plain language, unless it is ambiguous. See *id.* at 562-63. Where any statutory ambiguities exist, this court "broadly and liberally construe[s]

securities laws] to give effect to the legislative purpose" of "prevent[ing] fraud." *Technomedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320, 322 (Utah Ct.App.1987) (internal quotation marks omitted).

¶ 30 Under the plain language of the statute, section 61-1-1 applies only if Johnson's actions were "in connection with the offer, sale, or purchase of any security, directly or indirectly." *Id.* (emphasis added). Section 61-1-13 defines "sale" as "every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value," Utah Code Ann. § 61-1-13(22)(a) (2000), and "offer" as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value," *id.* § 61-1-13(22)(b). Thus, to prove a violation of the statute, the State had to prove that the transfer of American-Dairy stock was "for value." Johnson argues that the transfer of assets from the LLC to American-Dairy was not a sale for value because it was simply "a change in the form of ownership" of the farm assets and because the farm assets were "so encumbered as to be valueless."

### A. The Transfer of Assets Was a Sale for Value.

¶ 31 The Securities Act does not specifically define the term "for value," but in the \*729 section defining a "sale" for value, the legislature provided several examples of the types of transfers that are governed by the statute, including

the issuance of a security under a merger, consolidation, reorganization, recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the security issued as well as the offer to buy or the purchase of any security surrendered in connection therewith, unless the sole purpose of the transaction is to change the issuer's domicile.

*Id.* § 61-1-13(22)(c)(vii). Thus, the legislature expressly intended that section 61-1-1 apply to a transfer of assets like that from the LLC to American-Dairy.

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¶ 32 Johnson nevertheless argues that our previous decision in *Capital General Corp. v. Utah Department of Business Regulation*, 777 P.2d 494 (Utah Ct.App.1989), supports his position that the transfer of assets was not for value.<sup>FN13</sup> We disagree. In *Capital General*, a corporation acquired 100 million shares in another company and subsequently distributed 90,000 of those shares as gifts to its clients. *See id.* at 495. We rejected the argument that the gifts did not constitute a "sale for value," stating, "[V]alue' can include enhanced abilities to borrow, raise capital, and other general benefits associated with publicly held companies.... [T]hese economic benefits render the disposition 'for value' under [the Securities Act], even though those benefits flowed indirectly from the marketplace rather than directly from the transferees." *Id.* at 497. Thus, we concluded that because the corporation received indirect benefits from the distribution, the transfer was "for value" under the Securities Act. *See id.*

FN13. Johnson also relies on *Premier Van Schaack Realty, Inc. v. Sieg*, 2002 UT App 173, 51 P.3d 24. Because that decision interpreted the term "value" in the context of a contractual provision rather than the Securities Act, *see id.* ¶ 13, it is not helpful to our analysis.

¶ 33 Like the transfer in *Capital General*, the acquisition of the LLC assets "enhanced [American-Dairy's] ability to borrow," *see id.*, as evidenced by the \$50,000 loan Schwenke obtained by using the farm assets as collateral. Indeed, American-Dairy received indirect benefits "from the marketplace," *see id.*, because the company now had operational assets, including land, cattle, and equipment that would have increased the value of any stock it subsequently sold. Based on our holding in *Capital General* and the plain language of the Securities Act, we hold that the definition of a sale for value under Utah Code section 61-1-13 (22)(a) was met here because the transfer of the farm assets from the LLC to American-Dairy con-

ferred indirect benefits that, among other things, included an enhanced ability to borrow and raise capital. *See generally id.*

B. The Evidence Supports that the Farm Was Worth at Least \$10,000.

[12] ¶ 34 Johnson next contends that the property was so heavily encumbered that its value was less than \$10,000 and that, in fact, it had no value. *See generally* Utah Code Ann. § 61-1-21(2)(b)(i) (Supp.2009) (stating that, to support a charge of second degree felony securities fraud, the State must show that "the property ... unlawfully obtained or sought to be obtained was worth \$10,000 or more"). Accordingly, we review the record to determine whether there was evidence from which the jury could conclude that the property had a value of at least \$10,000.

¶ 35 We agree with the trial court that the jury had sufficient evidence before it from which it could find beyond a reasonable doubt that the property had a value of at least \$10,000. The State's evidence of the property's value included the dairyman's testimony that the farm equipment was worth between \$150,000 and \$200,000, the recital in the Agreement stating that the property had a value of \$200,000, and the \$50,000 loan that Schwenke obtained by recording a trust deed against the farm. Where there was evidence in the record from which the jury could find the property had a value of at least \$10,000, as required by Utah Code section 61-1-21(2)(b)(i), we will not disturb the jury's decision on that point. *See State v. Wallace*, 2005 UT App 434, ¶ 16, 124 P.3d 259 ("[S]o long as some evidence and reasonable inferences support the jury's findings, we will not \*730 disturb them." (internal quotation marks omitted)).

### III. The Expert Testimony

[13] ¶ 36 We next address Johnson's argument that the trial court committed reversible error by allowing Hines, the State's expert witness, to give testimony that "was riddled with impermissible legal conclusions" and "[i]ncorrect [i]nterpretation[s] of the [l]aw." In response, the State argues that the



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witness's testimony was admissible, and that even if it were not, Johnson was not prejudiced by the testimony.

[14] ¶ 37 To prevail on appeal, Johnson must show that the testimony was both (1) admitted in error and (2) prejudicial. See *State v. Larsen*, 865 P.2d 1355, 1363 (Utah 1993); *State v. Davis*, 2007 UT App 13, ¶¶ 15-21, 155 P.3d 909; *State v. Tenney*, 913 P.2d 750, 756 (Utah Ct.App.1996). Because we conclude that Johnson was not prejudiced by the expert's testimony, we need not decide whether it was admitted in error.<sup>FN14</sup>

FN14. Nevertheless, we caution that there are limits on an expert's license to testify as to the legal meaning of a statute. Where the witness's legal conclusions "blur the separate and distinct responsibilities of the judge, jury and witness," or there is "danger that a juror may turn to the [witness's legal conclusion] rather than the judge for guidance on the applicable law," the expert has exceeded those limits. *State v. Davis*, 2007 UT App 13, ¶ 15, 155 P.3d 909 (alteration in original).

¶ 38 Johnson cannot meet his burden to show that he was prejudiced by Hines's testimony because the trial court correctly and promptly instructed the jury. In *Larsen*, the defendant appealed the trial court's admission of testimony from a securities expert regarding the materiality of the defendant's statements. See *Larsen*, 865 P.2d at 1357. The supreme court held both that the testimony was not improper and that the defendant was not prejudiced by the testimony. See *id.* at 1363. In reaching its conclusion that the defendant had not been prejudiced, the *Larsen* court noted that the trial court "correctly admonished the jury as to the relative roles of expert testimony and opinion evidence," and "gave careful instructions regarding the [relevant] legal definition." *Id.*

¶ 39 Here, shortly after Hines began his testimony, the trial court admonished the jury that "at

some point in this trial the court is going to give you instructions with respect to ..., issues of law that ... will govern your deliberations. And ... at that time ..., the court will instruct you as to what the law is." Prior to deliberations, the trial court instructed the jury, "If an expert witness has expressed an opinion of the law which is in conflict with these instructions, you are to disregard the opinion of the expert witness." The trial court also accurately instructed the jury as to the law regarding the requirements of section 61-1-1 and the definitions of "sale," "material fact," "fraud," and "willful." As in *Larsen*, the trial court here "substantially reduced whatever slight risk of confusion [Hines's testimony] might have engendered in the jury." *Id.* Moreover, Johnson was able to cross-examine Hines at length regarding the alleged misstatements of the law and its application, and he called his own securities expert to rebut Hines's testimony. Those actions, combined with the trial court's prompt and correct instructions to the jury, alleviated any potentially prejudicial effects of Hines's testimony. Accordingly, we hold that any error in the admission of Hines's testimony was not prejudicial.<sup>FN15</sup>

FN15. Because the jury instructions adequately explained that it was the trial court, not Hines, who would instruct the jury as to the meaning and requirements of section 61-1-1, we do not reach Johnson's claim that Hines's testimony violated the Separation of Powers Clause of the Utah Constitution. See *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994) ("[C]ourts should avoid reaching constitutional issues if the case can be decided on other grounds.").

#### IV. Johnson's Due Process Claim

[15][16] ¶ 40 We next address Johnson's claim that section 61-1-1, as applied in Johnson's case, is unconstitutionally vague under the Due Process Clause of the Utah Constitution, see Utah Const. art. I, § 7 ("No person shall be deprived of life,

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liberty or property, without due process of law.”). A law is unconstitutional and “void for vagueness if its prohibitions are not clearly defined .... [so as to give] the person of ordinary intelligence \*731 a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *West Valley City v. Streeter*, 849 P.2d 613, 615 (Utah Ct.App.1993) (internal quotation marks omitted). Johnson argues that the statute is unconstitutionally vague as applied to him for two reasons: First, because the State and its expert witness improperly stated the requirements of section 61-1-1(2) as it relates to omissions, and second, because the jury was incorrectly instructed that the State was not required to prove the dairymen relied on Johnson's statements or omissions in making their investment decision.

#### A. The Trial Court Properly Applied the Statute.

¶ 41 Johnson maintains that, contrary to the assertions of the prosecutor and the State's expert witness, section 61-1-1(2) does not impose an affirmative duty to disclose all material facts. Johnson argues that the statute instead “requires proof of a material omission that renders a predicate statement misleading, in light of the circumstances in which it is made.” Johnson further contends that, because no such predicate statements were proved, his conviction must have been based on some vague obligation to disclose. Such an undefined basis for conviction, he argues, violates his due process rights. We need not reach that issue, however, because we conclude that the instructions required the jury to find that a predicate statement was made and that the record supports the jury's finding that such predicate statements were made.

¶ 42 The jury instructions permitted the jury to find Johnson guilty only if it found that he “made an untrue statement of a material fact or *omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.*” (Emphasis added.) This instruction is consistent with the plain language of section 61-1-1(2) and makes no mention of an affirmative duty to disclose

in the absence of a prior statement. We presume the jury followed this instruction. *See State v. Harmon*, 956 P.2d 262, 273 (Utah 1998). Because the jury was not free to find Johnson guilty in the absence of a predicate statement, the statute was not unconstitutionally vague as applied to Johnson.<sup>FN16</sup>

FN16. We also reject Johnson's argument that section 61-1-1(2) requires that the person who omits a material fact also be the person who made the predicate statement. To conclude otherwise would inject language not found in the statute and allow a person to evade criminal liability by remaining silent while others make gross misstatements about the person's background, skills, experience, or other qualities. *See generally Dungan v. Smith*, 76 N.M. 424, 415 P.2d 549, 551 (1966) (upholding a finding of liability where one majority shareholder remained silent about the fact that the other majority shareholder had “demonstrated a capacity for misappropriation of funds”).

¶ 43 Schwenke's statements regarding Johnson's background and experience were designed to create confidence in the transaction. Indeed, the dairymen testified that Johnson's qualifications “lent a great deal of credibility” to Schwenke's presentation, giving the dairymen a “false sense of security.” The statements that Johnson was a “high powered lawyer” and a “security expert from out of New York” were misleading in light of the pending disciplinary proceedings against Johnson for misappropriation of client funds. Had Johnson disclosed the tenuous state of his membership in the Utah Bar and the reasons for the order of disbarment that had been entered but stayed pending appeal, it almost certainly would have undermined the false confidence created by Schwenke's statements. Thus, the jury could have reasonably found that predicate statements were made and that Johnson omitted to state a material fact necessary to make those statements not misleading.

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#### B. The Jury Was Properly Instructed on Reliance.

[17] ¶ 44 We next address Johnson's contention that the jury instruction regarding reliance was incorrect. At trial, the jury was instructed that

it is not necessary for the State to prove that the individual investor believed the statements to be true, nor that he relied upon the statements in his decision-making process, so long as the statements made \*732 were such that a reasonable person in similar circumstances would have relied upon the statements in making an investment decision.

Johnson argues that this instruction is unconstitutional because it "invites the jury to ignore the [dairymen's] testimony and instead substitute its own judgment of what information is important." We disagree. The supreme court, in *Gohler v. Wood*, 919 P.2d 561 (Utah 1996), held that section 61-1-1(2) does not contain a subjective reliance element. *See id.* at 563-64. The jury instruction here was correct. In addition, there was evidence of actual reliance in the form of the dairymen's testimony that Johnson's status as an attorney "lent a great deal of credibility" to Schwenke's presentation and gave the dairymen a "false sense of security" about the transaction.

#### V. Restitution

¶ 45 Finally, we address Johnson's claim that the trial court's restitution order was erroneous both as to any award of restitution and as to the specific amount of restitution awarded. The trial court awarded restitution in the amount of \$120,000, based on the \$50,000 loan obtained by Schwenke and the extra \$70,000 in expenses that the dairymen incurred to care for the additional cows Schwenke brought onto the farm. Johnson challenges the award of restitution because he was not convicted of theft in connection with the \$50,000 loan that Schwenke obtained and secured by a trust deed on the farm. Likewise, Johnson argues that he was not convicted of any crimes related to the extra expenses incurred for the care and feeding of the additional cows. Finally, Johnson contends that the trial court failed to

account for two payments that the dairymen received following foreclosure.

¶ 46 "When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims...." Utah Code Ann. § 76-3-201(4) (2008). "Criminal activities" are defined as "any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct." Utah Code Ann. § 77-38a-102(2) (2008). "Pecuniary damages" are defined as "all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed." *Id.* § 77-38a-102(6). Interpreting these statutory provisions, this court requires a "sufficient nexus" between the defendant's criminal conduct and the pecuniary damages suffered by the victim. *See State v. Mast*, 2001 UT App 402, ¶ 13, 40 P.3d 1143. "Utah has adopted a modified but for test to determine whether pecuniary damages actually arise out of criminal activities," which test requires a showing "that (1) the damages would not have occurred but for the conduct underlying the ... [defendant's] conviction and (2) the causal nexus between the [criminal] conduct and the loss ... is not too attenuated (either factually or temporally)." *State v. Brown*, 2009 UT App 285, ¶ 11, 221 P.3d 273 (alterations and omissions in original) (internal quotation marks omitted).

[18] ¶ 47 Johnson claims that Schwenke caused the dairymen's pecuniary loss, independently of Johnson's fraud. We do not agree. Johnson's securities fraud gave the dairymen a "false sense of security" about the transaction, which resulted in them entering into the Agreement. That Agreement allowed Schwenke to obtain the \$50,000 loan and burden the dairymen with the additional cows.<sup>FN17</sup>

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# Addendum C

Jon M. Huntsman, Jr.  
Governor



# STATE OF UTAH

Department of Corrections

## PROBATION AGREEMENT

Name: JOHNSON, JAMIS M

Offender # 178175

USP #

Court: 4TH DIST JUVENILE, FILICounty: MILLARD

Case: 051700056

I, JOHNSON, JAMIS M, 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 convictions 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: Permit visits to my place of residence, my place of employment or elsewhere by officers of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of the Probation Agreement. I will not interfere with this requirement by having vicious dogs, perimeter security doors, refusing to open the door, etc.
2. REPORTING: Not abscond from probation supervision. A-Reporting: Report as directed by the Department of Corrections. B-Residence: Establish and reside at a residence of record and not change residence without first obtaining permission from the AP&P Officer. C-Leaving the State: Not leave the state of Utah, even briefly, or any other state to which I am released or transferred without prior written permission from the AP&P Officer.
3. CONDUCT: Obey all state, federal and municipal laws.
4. WEAPONS: Not possess, have under control, have in my custody or on the premises where residing 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: Abstain from the illegal use, possession, control, delivery, production, manufacture or distribution of controlled substances (58-37-2 U.C.A.) and submit to tests of breath or body fluids to ensure compliance with the Probation Agreement.
6. SEARCHES: Permit officers 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 the Probation Agreement.
- ASSOCIATION: Not knowingly associate with any person who is involved in criminal activity or who has been convicted of a felony without approval from the AP&P Officer.
- EMPLOYMENT: Unless otherwise authorized by the AP&P Officer; seek, obtain and maintain verifiable, lawful, full-time employment (32 hours per week minimum) as approved by the AP&P Officer. Notify the AP&P Officer of any change in my employment within 48 hours of the change.
- TRUTHFULNESS: Be cooperative, compliant and truthful in all dealings with Adult Probation and Parole. If arrested, cited or questioned by a peace officer; notify the AP&P Officer within 48 hours.
7. SUPERVISION FEE: Agree to pay a supervision fee of \$30 per month unless granted a waiver by the Department of Corrections under the provisions of Utah Statute 64-13-21.



## 11. DNA

Comply with Utah Code Annotated Section 53-10-403-406 by submitting an adequate DNA specimen, and, unless determination is made that there is no ability to pay, pay the required fee specified by statute.

12. SPECIAL  
CONDITIONS:

1. COURT Defendant is to keep a current address on file with the court. Defendant is to report to the court whenever ordered to do so. Service by mail is deemed adequate notice.
2. FINES/FEES Pay fines and fees in the amount of \$5,000.00, plus interest.
3. JAIL Serve 365 days in the Millard County Jail commencing 07/02/2007. Defendant to serve the first 6 months, the remaining 6 months he may be on home confinement with electronic monitoring. Defendant may be on work release if the Sheriff approves it.
4. NO CONTACT Have no contact with Mr. Myers or Mr. Young.
5. NO FUDICIARY EMPLOYMENT Not be employed in a fudiciary position. Not to represent or handle third party money.
6. RESTITUTION Pay restitution in the amount of \$125,000.00, plus interest, jointly and severally with Mr. Schwenkie. Court notes this is not the full restitution, either side may request a restitution hearing.

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 a copy of this agreement.

Dated this 18 day of June, 2007

Witnessed By Troy L. H. R.

Probationer: [Signature]

# Addendum D



2010 SEP -2 AM 10:01

MARK BAER, Bar No. 5440  
Assistant Attorney General  
MARK L. SHURTLEFF, Bar No. 4666  
Utah Attorney General  
160 East 300 South  
Salt Lake City, Utah 84114  
Telephone: (801) 366-0199  
Facsimile: (801) 366-0268  
Attorneys for Plaintiff

FILED BY es

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
MILLARD COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	ORDER
Plaintiff,	:	
	:	
vs.	:	
	:	Case No. 051700056
JAMIS M. JOHNSON,	:	
Defendant.	:	Judge Donald Eyre

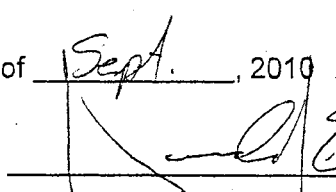
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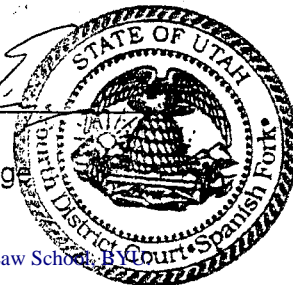
The Court received evidence and heard testimony on an Order to Show Cause (OSC) on Aug 30, 2010 in the above cited case and based upon the evidence presented, and with good cause appearing, this Court finds that the defendant has violated the term of probation in that the defendant has not obtained independent, verifiable employment and hereby Orders that the defendant's probation is hereby revoked and reinstated with the following conditions:

1. The defendant's probationary period is reinstated for 36 months beginning August 30, 2010.
2. The defendant is to serve 60 days in the Millard County Jail.
3. The defendant and is to report to the Millard County Jail by no later than 5pm on Friday, September 3, 2010; to the Millard County Sheriff; The defendant is remanded to your custody for confinement, *as modified by subsequent Order. RC*
4. All other conditions or probation previously ordered in this case shall remain in effect.

SO ORDERED this 3<sup>rd</sup> day of Sept., 2010

By:

  
Judge Donald J. Eyre  
Fourth District Court Judge



### CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of Sept., 2010, I caused a true and correct copy of the foregoing **Order** to be served by regular mail (or as otherwise noted) upon the following:

Jamis Johnson, *Pro Se*  
1408 Military Way  
SLC, Utah 84103

Jamis Johnson  
c/o Millard County Jail  
765 So. Highway #99  
Fillmore, Utah 84631

Mark Baer / Charlene Barlow  
Office of the Attorney General  
160 East 300 South 5<sup>th</sup> Floor  
Salt Lake City, Utah 84111

A. Brown  
Deputy Court Clerk

☒ United States Mail, postage prepaid  
☐ Overnight Express Mail  
☐ Via Facsimile  
☐ Via Messenger

# Addendum E

Jamis M. Johnson  
c/o Millard County Jail  
765 So. Hwy 99  
Fillmore, UT 84631  
Tel. 801-530-0100

2010 NOV -4 PM 3: 25

FILED BY \_\_\_\_\_

Defendant Pro Se

IN THE FOURTH JUDICIAL DISTRICT COURT  
MILLARD COUNTY, STATE OF UTAH

STATE OF UTAH

Plaintiff

Vs.

JAMIS M. JOHNSON

Defendant

**CERTIFICATE OF PROBABLE CAUSE  
AND ORDER OF RELEASE**

Case No. 051700056

Judge James Brady

Defendant Jamis Johnson's Notice of Appeal and Application for Certificate of Probable Cause came regularly before the Court, the Honorable James Brady, Fourth District Court Judge presiding. The Court after having reviewed the pleadings on file and for good cause appearing now finds and certifies as follows:

1. The appeal is not being taken for the purpose of delay.
2. The appeal raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.

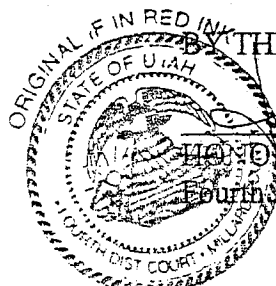
IT IS FURTHER HEREBY ORDERED:

The Court determines defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community and is released pending appeal upon the following

least restrictive conditions that the court has determined will reasonably assure the appearance of the person as required and the safety of persons and property in the community:

- a. not commit a federal, state or local crime during the period of release;
- b. abide by specified restrictions on personal associations with any other person engaged in any criminal activity, remain residing at his usual place of abode, and engage in no travel outside the State without further order of the Court;
- c. avoid all conduct with the victim or victims of the crime(s), any witness who might testify concerning the offenses if the appeal results in a reversal or an order for a new trial;
- d. continues to report on a regular basis to the Court by the 15<sup>th</sup> day of each month;
- e. refrain from possessing a firearm, destructive device or other dangerous weapon;
- f. except as prescribed by a licensed medical practitioner, refrain from possessing or using any narcotic drug or other controlled substance.

DATED this 3 day of November, 2010



BY THE COURT:

HONORABLE JAMES BRADY  
Fourth District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on 9-17-10, 2010 I mailed a true and correct copy of the foregoing Certificate of Probable Cause to Mark W. Baer, Assistant Attorney General at 160 So. 300 East, Salt Lake City, UT 84114.

# Addendum F

IN THE FOURTH DISTRICT COURT  
MILLARD COUNTY, STATE OF UTAH

2010 NOV -4 PM 3: 25

FILED BY

STATE OF UTAH,  
Plaintiff,

vs.

JAMIS M. JOHNSON,  
Defendant.

ORDER

Case No. 051700056

Judge James Brady

Defendant, Jamis Johnson's Motion To Stay Sentence Pending Appeal, ("Motion to Stay") and Application For Certificate of Probable Cause, ("Application") came before the Court at a regularly scheduled and duly noticed hearing at 9:00 a.m., October 13, 2010. Defendant Johnson was present, and also Tate Bennett, who, upon affidavit of indigence, was duly appointed Mr. Johnson's public defender for the purpose of handling the appeal in this matter. No representative from the State was present and no responsive pleadings were on file from the State. The Court continued the hearing until the afternoon so that counsel for the State could be contacted. The matter was reconsidered at 3:00 p.m. Present were Mr. Johnson and counsel Tate Bennett. The Court Clerk reported that since the morning continuance, she had contacted Assistant Attorney General Mark Baer and that he stated that he did not receive notice of the hearing and would not be available in person or telephonically for argument on this matter this day nor for the next ensuing two weeks. The Court Clerk affirmed that notice of this hearing was duly sent to Assistant Attorney General Mark Baer and to Defendant Johnson on October 4, 2010. The Court had read

the pleadings of Defendant and had reviewed the file and record in this matter. It was determined that Defendant Johnson had mailed copies of all pleadings to Assistant Attorney General Baer on September 7, 2010 but that the form of the Certificate of Probable Cause did not bear a signed mailing certificate and, the Court thus sent all parties a notice of an ex parte communication as to the form of Certificate of Probable Cause. A copy of the Certificate of Probable Cause was then further mailed by Defendant Johnson to Assistant Attorney General Mark Baer on September 21, 2010 and all pleadings hand delivered on October 22, 2010 per letter in the record of Defendant. The record reflects that the Court Clerk duly sent notice of the hearing to Assistant Attorney General Mark Baer. The State has not filed any response to Defendant's Motion To Stay or to the Application, and has not appeared in the matter, and, although reached by the Court Clerk, Assistant Attorney General Baer declined to appear in person or telephonically or have other Assistant Attorneys General appear in behalf of the State.

The Court duly and fully reviewed Defendant Johnson's Motion to Stay Sentence Pending Appeal, and the Application For A Probable Cause Certificate, and all related pleadings, and the same were also reviewed by Defendant's Public Defender Tate Bennett, who was appointed as appellate counsel for the purposes of the Appeal. Defendant Johnson represented himself for argument on the pending Motion To Stay and the Application before the Court.

The Court, having reviewed the pleadings, having ascertained that the State had due notice and has not filed a responsive pleading, and the time for



response having passed, and the State declined to appear, and there appearing good cause in support of the motion and the application of Defendant,

IT IS HEREBY ORDERED that Defendant's Motion For Stay of Sentence Pending Appeal is granted as follows:

1. The sentence entered August 30, 2010 revoking the probation of Defendant Johnson and reinstating it for a further 36 months is hereby *Stayed* ~~suspended~~ pending the appeal of this sentence; and
2. Defendant Johnson is released from incarceration in the Millard County Jail with credit for time served.

DATED this 3 day of *November* ~~October~~, 2010.

ORIGINAL IF IN REPLY BY THE Court  
STATE OF UTAH  
*James Brady*  
James Brady  
Fourth District Judge



# Addendum G

--- P.3d ---, 2012 WL 1356488 (Utah App.), 2012 UT App 118  
(Cite as: 2012 WL 1356488 (Utah App.))

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Utah.  
STATE of Utah, Plaintiff and Appellee,

v.

Jamis M. JOHNSON, Defendant and Appellant.

No. 20100734-CA.  
April 19, 2012.

**Background:** State petitioned for revocation of probation. The Fourth District Court, Fillmore Department, Donald J. Eyre Jr., J., granted petition, revoking and reinstating terms of probation. Probationer appealed.

**Holdings:** The Court of Appeals, Davis, J., held that: (1) court's determination that probationer's employment did not constitute full-time employment was not clearly erroneous or against clear weight of the evidence, and (2) evidence was sufficient to support finding that probationer did not make bona fide efforts to meet conditions of his probation.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚔0

110 Criminal Law

Trial court's determination that probationer's employment did not constitute full-time employment required as condition of his probation was not clearly erroneous or against clear weight of the evidence, where determination rested on assessment of credibility; probationer submitted affidavits from

attorney for whom he claimed to work as paralegal, but attorney's responses to interrogatories and other testimony raised questions as to whether probationer remained employed with attorney and whether affidavits were legitimate, and probationer did not take other available steps to establish his employment status.

[2] Criminal Law 110 ⚔0

110 Criminal Law

Assuming that revocation court was required to make willfulness determination in connection with revocation and reinstatement of probation, evidence was sufficient to support finding that probationer did not make bona fide efforts to meet conditions of his probation; probationer avoided repeated requests from agent to verify employment he was required to maintain as condition of his probation, maintaining that order of clarification issued by court entitled him to rely solely on affidavit originally provided by his employer, making no effort to seek clarification from agent or court in response to agent's repeated requests.

Fourth District, Fillmore Department, 051700056; The Honorable Donald J. Eyre Jr. Tate W. Bennett, Fillmore, for Appellant.

Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee.

Before Judges ORME, DAVIS, and ROTH.

MEMORANDUM DECISION

DAVIS, Judge:

\*1 ¶ 1 Jamis M. Johnson appeals the trial court's order revoking and reinstating the terms of his probation. *See generally* Utah Code Ann. § 77-18-1 (Supp.2011). We affirm.

¶ 2 "The decision to grant, modify, or revoke

--- P.3d ---, 2012 WL 1356488 (Utah App.), 2012 UT App 118  
(Cite as: 2012 WL 1356488 (Utah App.))

probation is in the discretion of the trial court.” *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). “[A] trial court’s finding of a probation violation is a factual one and therefore must be given deference on appeal unless the finding is clearly erroneous.” *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct.App.1994); see also *State v. Maestas*, 2000 UT App 22, ¶ 12, 997 P.2d 314 (“The trial court’s determinations underlying its conclusion that defendant violated his probation are findings of fact we will not disturb unless clearly erroneous, i.e., against the clear weight of the evidence.”). In challenging the trial court’s decision to revoke and reinstate his probation, Johnson “must show that the evidence of a probation violation, viewed in a light most favorable to the trial court’s findings, is so deficient that the trial court abused its discretion in revoking [his] probation.” See *Jameson*, 800 P.2d at 804 (footnote omitted).

¶ 3 Johnson was required to maintain verifiable full-time employment as a condition of his probation for a March 2007 conviction of securities fraud. In an October 2008 Order of Clarification, the trial court approved Johnson’s employment as a part-time legal assistant with attorney Joseph R. Goodman as being in compliance with the terms of his probation. The court based its determination primarily on an affidavit from Goodman (the verification affidavit), which described Johnson as “a 1099 employee” that is paid “on a contract basis” at a rate of “\$15 per hour” for “approximately 20–30 hours per week.” In the Order of Clarification, the trial court also noted that “Goodman (or any other attorney for whom Mr. Johnson finds employment) shall verify Mr. Johnson’s work as [Adult Probation and Parole (AP & P)] periodically inquires.” Dissatisfied with the employment verification Johnson provided, AP & P filed several probation progress/verification reports, one of which resulted in an order to show cause hearing held on August 30, 2010 (the August 2010 hearing). During the August 2010 hearing, the trial court determined that Johnson was “in violation of the terms of his probation” for failing “to provide verifi[cation of] full-time employ-

ment.” This determination was based on the testimony of three witnesses—an agent from AP & P (the agent), a volunteer with the Utah State Bar’s Unauthorized Practice of Law Committee (the volunteer), and Johnson himself.

¶ 4 The agent testified that he repeatedly requested that Johnson provide documentation to verify his employment status and that Johnson was consistently unable to provide the agent with a paycheck stub, a 1099 tax form, an employment contract, or any other similar documentation. The agent testified that he “even brainstormed with Mr. Johnson on thing[s] that [Johnson] could provide” to help AP & P verify his employment, but ultimately “Johnson felt that the only way to verify employment for him was by an affidavit.” Additionally, the agent testified that Johnson had fallen behind on his restitution payments, also a violation of the terms of his probation, which prompted the agent to send “a request to the court for a writ of garnishment, and [that,] as part of that writ of garnishment[,] ... interrogatories ... were sent to Mr. Goodman.” Goodman’s answers indicated that he was not “indebted to” Johnson; that Johnson had no interest in “any property or money” in Goodman’s “possession,” “charge,” or “control”; and that Goodman knew of no debts that might be owed to Johnson or property owned or controlled by Johnson. The agent testified that Goodman’s answers to the interrogatories implied that “there was really no nexus ... between [Goodman] and Mr. Johnson.”

\*2 ¶ 5 Next, the volunteer testified that in May 2010, he investigated Johnson for the unauthorized practice of law in conjunction with a business called Homeowners Legal Defense. The volunteer discovered that Goodman was listed as the agent for Homeowners Legal Defense. The volunteer contacted Goodman to ask if he “was aware or familiar with” Johnson; Goodman responded that “he was not involved at all with ... Johnson ..., and he only agreed to be the [ ] agent for this company.”

¶ 6 Johnson then testified, contending that the agent never asked him for a pay stub and explaining

--- P.3d ---, 2012 WL 1356488 (Utah App.), 2012 UT App 118  
(Cite as: 2012 WL 1356488 (Utah App.))

that his "2009 tax information [had] not [been] prepared yet," so he could not provide it to the agent to verify his employment. Johnson testified that he "consistently ... work[s] with" Goodman, that Goodman submitted the verification affidavit in 2008 upon which the court approved Johnson's work arrangement with Goodman as in compliance with the terms of his probation, *see supra* ¶ 3, and that Goodman filed another affidavit with the trial court in May 2010 to verify that "Johnson continue[d] to work with [him] on law matters per the Court's authorization" in its October 2008 Order of Clarification. Johnson further testified that "the cases that [he] worked on [were] contingency cases ... and [he] didn't have income most of 2008." Noting a disparity between Johnson's testimony that he worked on a contingency basis and Goodman's verification affidavit, which stated that Johnson was paid \$15 an hour, the trial court asked Johnson for clarification. Johnson responded,

Mr. Goodman did not say he was going to hire me full time at \$15 an hour. What happens is—if someone comes in on a case, I am attributed \$15 an hour.

...

[H]e doesn't pay me unless money comes in from clients and then hopefully we get more than that if I get bonused as a staff member from a contingency, but he doesn't pay me \$15 an hour for work I do automatically. We've got to get payment in on his cases, and then I get paid at the rate of \$15 an hour.... [I]f we are victorious, I get \$15 an hour for everything I did on a case plus if he's successful he will bonus me more than that amount....

¶ 7 At the conclusion of the hearing, the trial court determined that Johnson's description of his employment did not constitute "full-time employment," and that the terms of his probation require that he both retain full-time employment and provide verification of that employment. Consequently, the trial court "revoke[d Johnson's] pro-

bation" and "reinstate[d] it under the same terms and conditions as previously ordered with the additional provision that [Johnson] serve 60 days in ... jail."

[1] ¶ 8 We conclude that the trial court's determination was not "clearly erroneous" or "against the clear weight of the evidence," *State v. Maestas*, 2000 UT App 22, ¶ 12, 997 P.2d 314. In this case, the trial court's determination boiled down to a matter of credibility, pitting the testimony of the agent and the volunteer against that of Johnson; such credibility determinations are distinctly within the province of the trial court, *see State v. Pena*, 869 P.2d 932, 936 (Utah 1994) (noting that the trial court is "in the best position to assess the credibility of witnesses"). Here, the agent testified that he repeatedly asked Johnson for documentation to verify his employment and that Johnson insisted that an affidavit from Goodman was the only verification he could provide. Although Goodman submitted a subsequent affidavit verifying Johnson's ongoing employment in May 2010, Goodman's responses to the interrogatories and the volunteer's testimony raise doubts as to whether Johnson remained employed with Goodman and whether one or both of Goodman's affidavits were legitimate. Johnson pointed out during the hearing that the agent could have spoken with Goodman to confirm Johnson's status as his employee; however, the agent's failure to do so does not render the trial court's determination clearly erroneous. Johnson testified that he was not paid in a traditional manner, implying that he did not receive pay stubs or sign an employment contract, and that his tax documents were not yet ready because he was still working on filing them. However, as the trial court aptly observed, Johnson's "problems personally filing his own income tax return" should "not prevent Mr. Goodman from issuing a 1099 to" Johnson that Johnson could then show the agent to verify his employment.

\*3 [2] ¶ 9 Johnson also argues that the trial court's revocation and reinstatement of his probation was arbitrary and capricious because Johnson's

--- P.3d ---, 2012 WL 1356488 (Utah App.), 2012 UT App 118  
(Cite as: 2012 WL 1356488 (Utah App.))

violation was not willful, nor did it threaten the safety of society. We agree that “as a general rule, in order to revoke probation for the violation of a condition of probation not involving the payment of money, the violation must be willful or, if not willful, must presently threaten the safety of society.” *State v. Hodges*, 798 P.2d 270, 277 (Utah Ct.App.1990). The court must determine willfulness “by a preponderance of the evidence.” *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct.App.1994). Assuming, without deciding, that a willfulness determination is necessary here where probation was revoked and reinstated rather than just revoked, *cf. State v. Orr*, 2005 UT 92, ¶ 35, 127 P.3d 1213 (“It is not clear whether the willfulness requirement applies to the mere extension of probation for failure to pay restitution.”), “a finding of willfulness ‘merely requires a finding that the probationer did not make bona fide efforts to meet the conditions of his probation,’ “ *Peterson*, 869 P.2d at 991 (emphasis omitted) (quoting *State v. Archuleta*, 812 P.2d 80, 84 (Utah Ct.App.1991)). Additionally, “the word ‘willful’ should not be equated with the word ‘intentional.’ “ *Id.*

¶ 10 Johnson argues that the trial court could not conclude that he willfully violated a term of his probation because he “was reasonable in his reliance on the November 12, 2008 Order [of Clarification,] which outlined the manner in which [his] employment was to be verified, wherein it stated that ‘Attorney Goodman (or any other attorney for whom Mr. Johnson finds employment) shall verify Mr. Johnson’s work as AP & P periodically inquires.’ “ This argument is unavailing. Although Johnson was permitted to rely on the November 2008 order as confirmation that the employment arrangement with Goodman, as it was described in Goodman’s verification affidavit, satisfied the terms of his probation, the order did not permit Johnson to duck the probation agent’s requests that Johnson verify his employment status himself. Assuming Johnson truly believed that the November 2008 Order of Clarification placed the employment verification responsibility entirely on Goodman, then the

agent’s repeated requests of Johnson to verify his employment surely should have prompted Johnson to seek clarification from the agent or trial court in light of this otherwise obvious misunderstanding. There is no evidence that Johnson did any such thing. Moreover, Johnson failed to present this argument during the August 2010 hearing from which he appeals, lending weight to the inference that Johnson was not confused about his responsibilities under the November 2008 Order of Clarification but that he was simply avoiding the agent’s requests. Such behavior does not demonstrate “bona fide efforts to meet the conditions of his probation.” *Peterson*, 869 P.2d at 991 (emphasis omitted).

\*4 ¶ 11 Accordingly, the trial court’s determination that Johnson violated a term of his probation was not clearly erroneous, and its decision to revoke and reinstate his probation was not an abuse of discretion. Affirmed.

¶ 12 WE CONCUR: GREGORY K. ORME, and STEPHEN L. ROTH, Judges.

Utah App., 2012.

*State v. Johnson*

--- P.3d ---, 2012 WL 1356488 (Utah App.), 2012 UT App 118

END OF DOCUMENT

# Addendum H





IN THE FOURTH DISTRICT COURT-FILLMORE COURT OF MILLARD COUNTY

IN AND FOR THE STATE OF UTAH

OF THE DISTRICT COURT

MAR 29 2011

MILLARD COUNTY

CLERK

DEPUTY

THE STATE OF UTAH

: AMENDED

Plaintiff,

:AFFIDAVIT IN SUPPORT OF

VS

:ORDER TO SHOW CAUSE

JOHNSON, Jamis M

:COURT CASE NO. 051700056

Defendant,

:JUDGE: JAMES BRADY

:DEF ATTY: TATE W. BENNETT

STATE OF UTAH

)

):ss

COUNTY OF MILLARD

)

TROY STAKER, being duly sworn upon an oath deposes and says that: He is a Probation Officer for the Utah State Department of Corrections; that on the 7th day of March, 2007, the above-named defendant was adjudged guilty of the crime of Securities Fraud, a Second Degree Felony, in the above-entitled Court and on the 6th day of June, 2007, was sentenced to serve a term of One to Fifteen Years in the Utah State Prison; that the execution of the imposed sentence was stayed and the defendant was placed on probation under the supervision of the Department of Corrections; that the above-entitled defendant did violate the terms and conditions of the defendant's probation as follows, to-wit:

2564

RE: JOHNSON, Jamis M

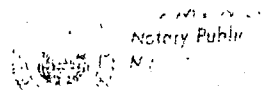
-2-

1. By having failed to establish residence of record or changed residence without permission, on or about October 21, 2010, in violation of a standard condition of the Probation Agreement.
2. By having failed to report as directed, on or about October 21, 2010, in violation of a standard condition of the Probation Agreement.
3. By having been convicted of the offense of Aiding and Abetting; Willfully Causing another to Commit a Crime (18 USCA 1349 (2)(a) and (b)), on or about March 18, 2011, in violation of condition number three of the Probation Agreement.
4. By having committed or by having been convicted of the offense of Conspiracy (18 USCA 1349), on or about March 18, 2011, in violation of condition number three of the Probation Agreement.
5. By having committed or by having been convicted of the offense of Mail Fraud (18 USCA 1341), on or about June 27, 2007, in violation of condition number three of the Probation Agreement.
6. By having committed or by having been convicted of the offense of Wire Fraud (18 USCA 1343), on or about March 18, 2011, in violation of condition number three of the Probation Agreement.

WHEREFORE, your affiant prays that an Order from the Court issue directing and requiring the above-named defendant to be and appear before said Court to show cause, if any he has, why the aforesaid period of probation should not be revoked, and why said defendant should not be forthwith committed to the Utah State Prison.

Troy Staker  
TROY STAKER, PROBATION OFFICER

Subscribed and sworn to before me this 22 day of March, 2011.



on:

Amy Mannon

NOTARY PUBLIC

Residing: Salt Lake, Utah

Commission expires: 9-15-2011

STATE OF UTAH  
ADULT PROBATION AND PAROLE

PROTECTED  
PROGRESS/VIOLATION REPORT

COUNTY CLERK & EX-OFFICE CLERK OF THE DISTRICT COURT	
MAR 29 2011	
MILLARD COUNTY	
CLERK	DEPUTY

TO: FOURTH DISTRICT COURT -  
Fillmore, Millard County, Utah

REGARDING: JOHNSON, Jamis M.

ATTN: Judge James Brady

CASE NO.: 051700056

FROM: Salt Lake A.P. & P.

OFFENSE: Securities Fraud, a Second Degree  
Felony

DATE: 03/22/2011

OFFENDER #: 178175

PROBATION DATE: 06/06/2007

ADDRESS: FEDERAL CUSTODY, Davis  
County Jail, Farmington, Utah

LEGISLATIVE DATE: 08/29/2013

EMPLOYMENT: None

DEFENSE ATTY: Tate W. Bennett

**COMMENTS:**

On June 6, 2007, the Court placed Jamis M JOHNSON on probation with the following conditions:

1. Defendant is to keep a current address on file with the court. Defendant is to report to the court whenever ordered to do so. Service by mail is deemed adequate notice.
2. Pay fines and fees in the amount of \$5,000.00, plus interest.
3. Serve 365 days in the Millard County Jail commencing 07/02/2007. Defendant to serve the first 6 months, the remaining 6 months he may be on home confinement with electronic monitoring. Defendant may be on work release if the Sheriff approves it.
4. Have no contact with Mr. Myers or Mr. Young.
5. Not be employed in a fiduciary position. Not to represent or handle third party money.
6. Pay restitution in the amount of \$120,000.00, in reference to case #051700056, at a rate as directed by Adult Probation and Parole.

**PREVIOUSLY SUBMITTED INFORMATION:**

On August 30, 2010, the Court held an Evidentiary Hearing on one of the two pending Orders to Show Causes in this matter.

Note: There is another Order to Show Cause from March 2009 on multiple Federal Charges. This Order to Show Cause has been continued several times. The defendant has a trial set for February 22, 2011 in the United States District Court.

At the conclusion of the Evidentiary Hearing, the Court found the defendant in violation of his probation, to wit: Failure to maintain full time employment. The Court ordered the defendant to serve 60 days in the Millard County Jail. The Court then placed the defendant on probation for his third attempt to complete probation.

On October 13, 2010, the Court held a hearing and released the defendant from the Millard County Jail. It appears the defendant filed a second appeal in this court case.

Note: The defendant has pursued an earlier appeal. The appeal was denied by the Utah Court of Appeals. The Utah Supreme Court denied review.

The defendant filed an Affidavit with the Court. In this affidavit, he admits he has not had employment since July 2007. See page 2 (top of the page) Affidavit of Indigency, Jamis Johnson, October 13, 2010 in the Court's File.

The Court suspended the balance of the 60 days jail sentence and released the defendant. The Millard County Jail released the defendant.

When I got the email (October 13, 2010) from the Millard County Jail that the defendant was being released, I called 801-364-2411. This phone number has been disconnected. I called the defendant's cell phone 801-347-1112. I left a message to remind him to report to Adult Probation and Parole on October 14, 2010.

On October 14, 2010, the defendant did not report to Adult Probation and Parole. The defendant did not call or otherwise leave a message about why he didn't report.

Note: Each time the defendant has reported to Adult Probation and Parole, I have given him a paper of instructions. The instructions denotes: **Report in person upon release from jail at 8:00 am the next business morning**. This instruction is capitalized, bolded, and underlined on this paper.

On October 21, 2010, the defendant did not report to Adult Probation and Parole. The defendant did not call or otherwise leave a message about why he didn't report.

Note: On July 15, 2010, the defendant was told to report on October 21, 2010. This instruction was denoted on a calendar of the month of October 2010. This date was shaded and bolded.

On October 22, 2010, the defendant has not reported since he was released from the Millard County Jail on October 13, 2010.

2567

**NEW INFORMATION:**

On March 18, 2011, a federal Jury convicted the defendant of the offense of Aiding and Abetting; Willfully Causing another to Commit a Crime (18 U.S.C. §1349 (2)(a) and (b)); Conspiracy (18 U.S.C. §1349); Mail Fraud (18 U.S.C. §1341); and Wire Fraud (18 U.S.C. §1343). He is set to be sentenced on July 18, 2011

The defendant is in the **low-risk** category. This category suggests we can help the defendant by getting him onto the right path and he would continue thereafter. The defendant has been working on his attitude and finances. The defendant still has a severe attitude problem, in that: he will not get viable employment and start doing the items on his probation agreement.

The defendant has a severe employment problem. The defendant has NEVER held employment during the last three years on probation. Further, the defendant has racked up multiple new federal offenses of Mail Fraud, Wire Fraud, Money Laundering, Conspiracy and Aiding and Abetting, and Willfully causing another to commit a crime. Adult Probation and Parole is concerned these new crimes arise solely and because of the defendant's refusal to get and hold viable, full time employment as approved by Adult Probation and Parole. Adult Probation and Parole is concerned about the relationship between the defendant and Joseph R. Goodman. Mr. Goodman has sworn out several Affidavits to this Court attesting the defendant has an employment type relationship going back through the years to October 2008. However, the defendant finally admitted (October 13, 2010) that he has not had employment since July 2007.

This is the **FIFTH** Order to Show Cause requested on the defendant. This is the **SIXTH** problem the defendant has had while on probation. In August 2007, the defendant was caught attempting to short sell his home (that is a part of the above alleged crimes) after the "buyer" ended up in foreclosure when no payment was made on the defendant's home. In May 2008, the defendant had no verifiable employment and had missed a restitution payment. In March 2009, the defendant was indicted by a Federal Grand Jury for Mail Fraud, Wire Fraud, Money Laundering, Conspiracy and Aiding and Abetting; and Willfully causing another to commit a crime. In February 2010, it was discovered the defendant doesn't actually have employment and isn't making his restitution payments. In March 2010, the defendant didn't have viable employment and was still committing the violation denoted in August 2007. In October 2010, the defendant was released from jail and never reported to Adult Probation and Parole. In March 2011, he was convicted of these federal charges.

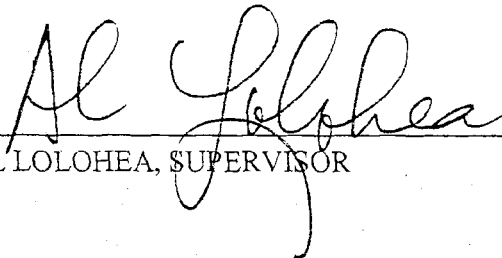
It should be noted one co-defendant taking a plea deal was sentenced to 56 months in federal prison. The other co-defendant hasn't been sentenced. It is estimated the defendant will receive about 60 to 180 months in federal prison.

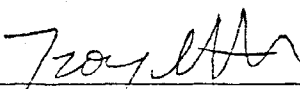
**OSC RECOMMENDATION:**

It is respectfully recommended to the Court that if the defendant is found in violation of one or more of the conditions of his probation that his probation be revoked, and the original sentence be imposed.

**RECOMMENDATION:**

It is respectfully recommended to the Court to allow Adult Probation and Parole to amend the pending Affidavit in Support of an Order to Show Cause and close Adult Probation and Parole's interest in this matter.

  
AL LOLOHEA, SUPERVISOR

  
TROY STAKER, PROBATION OFFICER

APPROVED AND ORDERED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

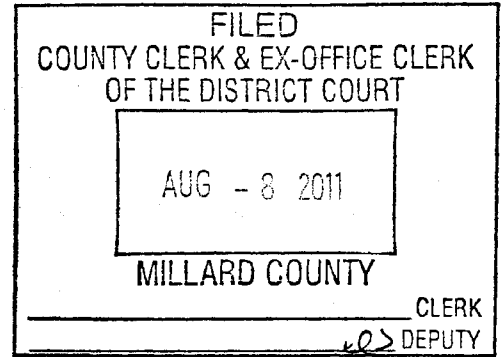
COMMENTS: \_\_\_\_\_

RECEIVED AND ACKNOWLEDGED: \_\_\_\_\_

# Addendum I







FOURTH DISTRICT COURT - FILLMORE  
IN AND FOR MILLARD COUNTY, STATE OF UTAH

\_\_\_\_\_  
)  
STATE OF UTAH                    )  
)  
Plaintiff,                    )  
)  
VS.                    ) CASE NO. 051700056  
)  
JAMIS M. JOHNSON                    )  
)  
Defendant.                    )  
\_\_\_\_\_)

BEFORE THE HONORABLE JAMES BRADY

FOURTH DISTRICT COURT - FILLMORE

765 S. HIGHWAY 99, SUITE 6

FILLMORE, UTAH 84631

EVIDENTIARY HEARING

ELECTRONICALLY RECORDED ON

APRIL 27, 2011

FILED  
UTAH APPELLATE COURTS

SEP 02 2011

Reported by: Colleen C. Southwick, RPR/CSR

COURT CERTIFIED DOCUMENT

2

1           A P P E A R A N C E S

2  
3       FOR THE PLAINTIFF:

4           MARK W. BAER  
5           Deputy Millard County Attorney  
6           765 South Highway 99  
7           Fillmore, Utah 84631

8       FOR THE DEFENDANT:

9           TATE W. BENNETT  
10          Millard County Public Defenders

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1 PROCEEDINGS

2 THE COURT: Please be seated, gentlemen. Call the  
3 case of State of Utah versus Jamis M. Johnson. Could I have  
4 both parties make their appearances, please.

5 MR. BENNETT: Tate Bennett for Jamis Johnson,  
6 defendant.

7 MR. BAER: Mark Baer, Attorney General's Office, for  
8 the State of Utah.

9 THE COURT: Are both sides ready to proceed?

10 MR. BAER: Your Honor, could we briefly approach?

11 THE COURT: You may.

12 (An off-the-record discussion was held at the Bench.)

13 THE COURT: You've been listening to my white noise  
14 for the last little while. Counsel, I believe we're ready to  
15 proceed now. Let me just make a record and indicate that  
16 during the last 15 or 20 minutes we've tried to make certain  
17 that we were organized and prepared and all addressing the same  
18 issues today.

19 There has been some question since late October as to  
20 which documents have been filed as order to show causes with  
21 affidavits, which documents are requests for the hearing, and

22 what issues are actually before the Court today. I think we've  
23 clarified. The Court has reviewed its file and has made copies  
24 for the parties, but just so we're clear, this is the State of  
25 Utah versus Jamis Johnson, Case No. 051700056. We're here

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1 today for hearing on the order to show cause brought against  
2 Mr. Johnson by the State of Utah alleging violations of his  
3 probation.

4 These allegations were initially raised in October.  
5 Based on a number of hearings that were held and motions that  
6 were filed, they were not responded to until the end of January  
7 at which time they were denied by Mr. Bennett on behalf of his  
8 client and the matters are now at issue for an evidentiary  
9 hearing.

10 I also have before me an order to show cause which  
11 was only recently filed. Garth, I can't find the order to show  
12 cause from April. This is, excuse me, these are all stapled  
13 together. Just give me one moment so I can read through them.  
14 Okay. I have the March ones here. And the November ones here.  
15 Thank you. I do have them.

16 We also have an order to show cause which was filed  
17 recently, the end of March, and it was scheduled and noticed  
18 for a hearing today. However, the defendant has not yet had a  
19 chance to admit or deny the allegations raised in that order to  
20 show cause and I'm just asking counsel now for defense, do you

21 wish to have an admit deny hearing today and if necessary  
22 schedule an evidentiary hearing for another day or how would  
23 you like to proceed?  
24 MR. BENNETT: I think that's the way we need to  
25 proceed, your Honor. And will the Court accept me entering a

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1 denial on Mr. Johnson's behalf?

2 THE COURT: I'll accept a general denial on all  
3 allegations.

4 MR. BENNETT: When it comes to the issue of setting a  
5 date, your Honor, the allegations include, among other things,  
6 that he was -- that Mr. Johnson was convicted in federal court  
7 of and then there's a number of charges listed there. While  
8 ordinarily an evidentiary hearing on that matter would just be  
9 a matter of well were you convicted or not and, you know, it's  
10 a pretty simple evidentiary hearing, never that simple, of  
11 course, with us. And what I mean by that is as the Court can  
12 see, despite what may have entered as a conviction, Mr. Johnson  
13 remains free today.

14 That's based in part on a hearing from about a week  
15 ago that I do not pretend to understand, but he has, in fact,  
16 been released. Sentencing is set for mid-July. In the interim  
17 Mr. Johnson plans on filing a motion for a new trial, et cetera  
18 which could potentially backdate or move back a sentencing

19 date. In any event, we have to deal with what's actually set  
20 and right now sentencing is set for July 18th. Fully  
21 anticipate the federal public defender's office filing the  
22 motion for new trial as we said earlier. Apparently it has  
23 been filed.

24 So we'd ask that if those are denied, then I would  
25 imagine they go forward with sentencing and then this

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1 evidentiary hearing would be rather short and sweet. So could  
2 we set it for just after the federal sentencing date as it  
3 exists now? Then if it gets more complicated, we can move it,  
4 but at the earliest I'd like it set -- my request is that it be  
5 set after the sentencing date in federal court which I believe  
6 right now is July 18th.

7 THE COURT: Okay. Before you respond, Mr. Baer, I'll  
8 give you a chance to respond, I don't have my calendar right in  
9 front of me. I can turn to my clerk and ask her to verify, the  
10 month of June is almost not available anymore and the month of  
11 May with the exception of the 17th and 18th -- well, not  
12 the 17th. We're already using that. The month of May is  
13 almost not available because of the Court's schedule already.  
14 I think we may have the 18th as a full day. That's  
15 available. We may actually have a day next week that I just  
16 found out about, but what I'm getting at is if it's not set  
17 before June 12th, and I don't know that we have the ability

18 to set it before June 12th, it cannot be set until after the  
19 Fourth of July.

20 So with that in mind, Mr. Baer, tell me what your  
21 preference would be?

22 MR. BAER: Our preference would be, your Honor, to  
23 have the hearing as soon as possible because we can combine --  
24 well, let's start the first issue. If you take a look at this  
25 new March, relatively new March allegations. It's not just the

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1 federal convictions. It also alleges other matters such as  
2 failure to report or failure to reveal established residence of  
3 record, that's allegation No. 1, or failure to report. I mean,  
4 these are much the same as the other allegations. And I  
5 believe that is exactly the issues that we're going to address  
6 today on the earlier orders to show cause which the Court would  
7 know he's a defendant, he's a felon, and he has an obligation  
8 to report both to this Court and to his probation officer. And  
9 so if he continues to not do that, probation officer has  
10 continued to file his PV report.

11 So there are other issues which would warrant us  
12 hearing it earlier regardless, but secondarily, he does stand  
13 convicted, this individual does stand convicted of federal  
14 crimes at this point. It is proforma in some cases and  
15 certainly customary that individuals file appeals, unless



16 there's some sort of stay issued by the federal court, those  
17 are convictions and we'd like to proceed on those.  
18 But given that they are separate issues entirely  
19 besides the federal that the Court can rest its hat on if the  
20 Court feels more comfortable, we'd ask it be set as soon as  
21 possible. And to make it hopefully not too much more money,  
22 this individual was released last week from federal custody.  
23 He has not reported to our knowledge to any authorities whether  
24 it's this Court or to the probation officer since his release  
25 last week.

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1 And based upon that, there's another ongoing PV  
2 report that we'd like to file today and then he can deny those  
3 so we know we're dealing with today's filing, March filings at  
4 our next sentencing. Today we know we're dealing -- all very  
5 clear now that we're dealing with November's allegations so it  
6 becomes very succinct so we don't run into this problem again.

7 THE COURT: Okay.

8 MR. BAER: Thank you.

9 THE COURT: Thank you.

10 MR. BENNETT: May we respond?

11 THE COURT: Yes.

12 MR. BENNETT: First, what he has filed is not an  
13 appeal. It's a motion for a new trial which would serve as a  
14 stay. So holding an evidentiary hearing based on convictions

15 prior to letting those convictions -- whether we know they  
16 stand or not kind of negates the purpose of him filing a motion  
17 for new trial. What would happen if we held the evidentiary  
18 hearing, the Court probably is going to take judicial notice  
19 that at this moment of our evidentiary hearing the convictions  
20 have been ordered and then they turn around and are overturned  
21 weeks later, then we have -- it's just a quagmire we don't need  
22 to get into.

23       So there's really no need -- if his motions are  
24 defeated, they will go forward with sentencing and then we can  
25 come back and it will just be a much cleaner situation so

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1 that's the basis for this. Well, and as to the allegations of  
2 not reporting, your Honor, those aren't before us now so I  
3 actually choose not to respond to those.

4       THE COURT: And I am not taking -- I won't be making  
5 decisions based on just allegations that are not before me, not  
6 admitted and not proven at this point, but I'm taking them as  
7 simply notice that the State is giving me that we may well have  
8 other matters that we may need to schedule.

9       In terms of today's hearing, we're going to proceed  
10 with the November issues. We'll have an evidentiary hearing on  
11 those issues. When we complete that, I'm going to address the  
12 timing of the next hearing. I'm not persuaded that I should

13 not hold a hearing until he's sentenced. I believe that his  
14 motion for a new trial could be granted or denied before the  
15 July date. It may not be. And so I'll address that when it  
16 comes time to setting that hearing.

17 I'm also not persuaded that I need to rush a hearing  
18 on his convictions if there is a pending motion to set aside  
19 that decision. And other than the convictions, I only have  
20 failures to respond, excuse me, failures to establish a  
21 residence or notify a change and failure to report which are  
22 not unlike what he already has alleged against him. So I'm not  
23 in a big rush to hear this on matters that we're not certain  
24 of, but I also don't feel a need to delay it until after a  
25 future sentencing date which may or may not exist by the time

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1 we get there anyway.

2 So we'll deal with that at the appropriate time. I  
3 believe the only issues that are before me today, other than  
4 having accepted his general denial on the January orders to  
5 show cause, the only things that are before me today is an  
6 evidentiary hearing on -- I'll call it the November order to  
7 show cause.

8 Are we ready to proceed on that?

9 MR. BAER: We are, your Honor.

10 THE COURT: Thank you, Mr. Baer. If you would call  
11 your first witness, please.

12 MR. BAER: First witness I call Mr. Troy Staker to  
13 the stand.

14 THE COURT: Please come forward, Mr. Staker. My  
15 clerk will swear you in.

16 MR. BAER: Judge, may I just proceed from the bench  
17 here?

18 THE COURT: Please do. I need to have you near a  
19 microphone.

20

21 DIRECT EXAMINATION

22 BY MR. BAER:

23 Q Sir, can you please state your full name and spell  
24 your last name for the record.

25 A Yes, Troy Staker, S-t-a-k-e-r.

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1 Q Mr. Staker, where do you work and what do you do,  
2 please?

3 A I work at Adult Probation and Parole for the  
4 Department of Corrections for the State of Utah.

5 Q And what office do you work under?

6 A Like what's the address?

7 Q No -- yeah, the Salt Lake office?

8 A Yeah, the Salt Lake office at 36 West Fremont.

9 Q All right. Sir, have you had an opportunity to

10 supervise an individual by the name of Mr. Jamis Johnson?

11 A I have.

12 Q And when were you first assigned that case?

13 A It's been a while. I'm not actually sure about when

14 I was first assigned that case.

15 Q You've had it for a couple of years at least?

16 A That would be accurate.

17 Q And has Mr. Johnson -- he's been under your

18 supervision personally. Is that correct?

19 A That would be correct.

20 Q And this individual, you've met with him previously,

21 seen him previously?

22 A Yes.

23 Q Is that individual in the courtroom today?

24 A Yes, he's sitting at the defendant's table.

25 MR. BAER: Your Honor, may the record reflect just

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1 the identification of the defendant?

2 THE COURT: Yes.

3 MR. BAER: Thank you.

4 BY MR. BAER:

5 Q Mr. Staker, you prepared and submitted an order to

6 show cause in this matter which we're referring to as the

7 November, meaning November 2010, order to show cause, correct?

8 A Yes, that's correct.

9 Q And we're just dealing with that one here today,

10 correct?

11 A Yes.

12 Q Could you outline for the Court what gave rise to the

13 filing and execution of that affidavit?

14 A Yes, basically what had happened is the Court had

15 found Mr. Johnson in violation of his probation and sentenced

16 him to a period of time in the Millard County Jail. I had

17 received an email from the Millard County Jail saying that they

18 were going to release Jamis Johnson on October 13th 2010. So

19 what happened is that I took and Mr. Johnson -- I didn't want

20 him to have any difficulties on this go around for probation so

21 what I did is I called his phone number of record to let him

22 know that basically I was aware that he would be getting out,

23 but that number had been disconnected so.

24 Q How would you have been provided with that number?

25 A When he would report. I would ask him what his phone

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1 number was. His address, phone number, where he worked, things

2 like that.

3 Q That number then was provided by the defendant

4 originally?

5 A Yes, that's correct.

6 Q Had he given you any additional numbers or any

7 additional contacts to substitute for that one?

8 A Yes, he had. He gave me a mobile number as well.

9 Q Okay. Well, did he give you another non-mobile  
10 number?

11 A I believe he gave me a house phone number that was  
12 disconnected and a mobile number that was not disconnected.

13 Q So you indicated that you called the home number.  
14 Just to be clear the record is clear, what happened when you  
15 did that?

16 A The thing said that the number had been disconnected.

17 Q Okay. Since the release of this defendant, had he  
18 called you and said I have a different home number?

19 A No.

20 Q Had he notified you of any different numbers?

21 A No.

22 Q Okay. You may proceed.

23 A So I called the defendant's mobile number which was  
24 still active and basically left a message letting him know that  
25 I was aware that he was going to be released from the Millard

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1 County Jail.

2 Q And who provided you with that number, again, so the  
3 record is clear?

4 A The defendant.

5 Q Okay. Proceed, please.

6 A And basically at that point I reminded him that  
7 whenever he'd come in and report, that I would always direct  
8 him to report to me at 8:00 the next business morning in person  
9 upon his release from jail and that would be October 14th.

10 Q What happened October 14th?

11 A The defendant didn't report to Adult Probation and  
12 Parole. He didn't call or otherwise leave a message to why he  
13 didn't report.

14 Q Did he do any of those activities any time relative  
15 to that October date?

16 A No.

17 Q Now, with respect to your affidavit, your second  
18 allegation indicates that -- I guess actually the first one,  
19 we've done this in reverse order, the failure to establish  
20 residency of record.

21 Why did you file that allegation?

22 A Oh, what had happened is that when Mr. Johnson had  
23 got out of jail, when I last met with Mr. Johnson on  
24 July 15th, 2010, I gave him a calendar and on the calendar  
25 basically it showed to report every third Thursday of every

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1 month. And basically the next third Thursday after his release  
2 from the Millard County Jail would have been October 21st and  
3 so at that point I waited to see if he was going to show up for



4 that meeting as well. On October 21st he didn't report and  
5 he didn't call or leave a message as to why he didn't report.

6 At that point we hadn't had any communication from  
7 Mr. Johnson as to where he left the Millard County Jail to go  
8 live, and we didn't have him ever reporting to us and letting  
9 us know that he had been released from Millard County Jail

10 Q Did you ever receive any new, additional or  
11 subsequent addresses from this defendant within that time  
12 period?

13 A No.

14 Q Or any other contact information within that time  
15 period?

16 A No.

17 MR. BAER: All right. Your witness.

18

19 CROSS-EXAMINATION

20 BY MR. BENNETT:

21 Q Mr. Staker, you indicated that you received a jail  
22 phone call from the Millard County Jail indicating that Mr.  
23 Johnson would be released on October 21st, 2010, correct?

24 A No, that wouldn't be correct. I received an email  
25 from the Millard County Jail on October 13th saying they were

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1 releasing him that day.

2 Q Okay. So he was to be released on October 13th.

3 Did the email indicate why they were releasing him on

4 October 13th, 2010?

5 A No.

6 Q Were you aware of why they were releasing him on

7 October 13th, 2010?

8 A No.

9 Q Did it strike you as odd that they were releasing

10 him?

11 A Yes, I was wondering because his 60 days or whatever

12 sentence the Court had given him hadn't expired at that time.

13 Q So you were, in fact, confused as to why they were

14 releasing him?

15 MR. BAER: I'll object to the form of the question.

16 THE COURT: You can ask the question. You can't tell

17 him what you think he was. I don't think he stated he was

18 confused so you need to re-ask the question.

19 MR. BENNETT: I believe I did ask. I said were you

20 confused as to why and he said yeah because the 60 days hadn't

21 been --

22 THE COURT: Okay. I thought I had heard it

23 differently.

24 MR. BENNETT: And perhaps I'm mistaken.

25 MR. BAER: I think the term was, and it's okay, we're

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1 probably splitting a hair here, but I think he asked him if he  
2 was surprised which is a different concept.

3 THE COURT: That was my understanding as well.

4 MR. BENNETT: Okay. I apologize.

5 THE COURT: Yep.

6 BY MR. BENNETT:

7 Q So you were surprised that he was being released?

8 A Yes.

9 Q Because of the surprise did you take any affirmative  
10 steps to find out why he was being released early?

11 A I did look up on court links to see if there was any  
12 notations and there was nothing on court links as to why he was  
13 being released.

14 Q So you had no idea as to why he was released?

15 A No.

16 Q As of today do you understand why he was released?

17 A I'm actually not 100 percent sure on that in that no  
18 motion documents or orders have ever been sent to me as to why  
19 he was released.

20 Q So none have ever been sent to you, but are you  
21 aware?

22 A I believe that he had a court hearing and the judge  
23 released him.

24 (Mr. Bennett is speaking away from the microphone and  
25 cannot be heard consistently.)

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1 Q Mr. Staker, do you recognize (inaudible)?  
2 A You want me to --  
3 Q Do you recognize the document?  
4 A I've never seen it actually before until now.  
5 MR. BENNETT: Your Honor, this is what I'm moving to  
6 introduce into evidence and so I'm asking to try and lay a  
7 foundation here. It's a Court signed certificate of probable  
8 cause and order of release. I'm asking the Court to take  
9 judicial notice that it, in fact, existed and (inaudible.)  
10 THE COURT: May I see it?  
11 MR. BENNETT: (Inaudible).  
12 THE COURT: Have you shown it to counsel?  
13 MR. BENNETT: I have.  
14 MR. BAER: I have a copy.  
15 THE COURT: Any objection, Counsel?  
16 MR. BAER: No, I think the Court can take judicial  
17 notice of its own pleadings anyway.  
18 THE COURT: Yeah.  
19 MR. BAER: And we're not going to argue about the  
20 foundation of that. I'm fairly certain where the argument will  
21 go in any event and we're prepared for that so that's fine.  
22 THE COURT: Having reviewed the document I recognize  
23 it as the document I previously reviewed that's in the Court  
24 file that I signed on November 3rd. It's admitted.  
25 (An exhibit was admitted but no number was mentioned

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1 so it cannot be identified in the index.)

2 MR. BENNETT: And then I would also -- I think this  
3 is probably the quickest way to do this, move for admission of  
4 both -- well, the Court would have conceded that order and  
5 that's the motion for stay pending appeal and application for  
6 certificate of probable cause, both of which were prepared by  
7 Mr. Johnson in his pro se capacity. You know, and I failed to  
8 mention there's also a memorandum in support of that motion for  
9 stay So there are three --

10 MR. BAER: Well, again, I think the Court can take  
11 judicial notice of its own pleadings. I don't know if it has  
12 to be entered as separate.

13 THE COURT: The only thing I need to do is verify  
14 what he's referring to is what I recognize. I'll note for the  
15 record and I will take judicial notice that I'm looking at a  
16 motion for stay pending appeal and memorandum in support of  
17 motion for stay and an application for certification of  
18 probable cause, all appear to have been prepared by Mr.  
19 Johnson. They all bear the Court stamps. All of them on  
20 September 7th, 2010. I'll take judicial notice of the fact  
21 that they are already in the Court's file.

22 MR. BENNETT: So in that case we do not need to  
23 (inaudible?)

24 THE COURT: You do not.

25 BY MR. BENNETT:

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1 Q Mr. Staker, you indicated that upon Mr. Johnson's  
2 release you attempted to make contact via telephone with Mr.  
3 Johnson, correct?

4 A That would be correct.

5 Q But that those numbers were disconnected, correct?

6 A That would not be correct. One number was  
7 disconnected, one number actually had a message machine or  
8 message-type thing that you could leave a message.

9 Q Okay. First, do you recall the number that you  
10 attempted to make contact with Mr. Johnson on that was  
11 disconnected?

12 A I don't. However, it's in the report. I believe it  
13 started with 347 and it's in the report of October 22nd I  
14 believe is the date of the report.

15 Q And then the number that you called where you  
16 indicated it just went to a voice machine-type thing?

17 A Uh-huh, that number is also reflected in the report.

18 Q Okay. Thank you. You indicated that part of your  
19 allegations in the probation violation were that Mr. Johnson  
20 had failed to establish a residence of record, correct?

21 A That would be correct.

22 Q And the requirement to establish a residence of

23 record is part of the Adult Probation and Parole agreement

24 entered into with Mr. Johnson and the Office of Adult Probation  
25 and Parole, correct?

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1 A Right, Paragraph 2.

2 Q And that agreement was entered into when  
3 approximately, if you don't know the exact date?

4 A I don't know the exact date Mr. Johnson executed that  
5 document.

6 Q Do you recall when Mr. Johnson was sentenced in this  
7 matter?

8 A I believe it was in 2007.

9 Q And so is it safe to say that he entered into the  
10 probation agreement sometime shortly after being sentenced in  
11 2007?

12 A That would be correct.

13 Q Okay. Do you recall when you filed this order to  
14 show cause dated -- counsel for the State referred to it as the  
15 November progress report violation?

16 A Uh-huh.

17 Q The day on, it and correct me if I am wrong, is  
18 October 25th, 2010, right?

19 A That would be correct.

20 Q Do you recall emailing that report to the local Adult  
21 Probation and Parole office here in Millard County for

22 dissemination?

23 A Yes, I don't do that personally. Our agent assistant  
24 does that and then sent me a copy saying that that had been  
25 done.

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1 Q Okay. And then do you recall or are you aware of  
2 counsel for Mr. Johnson responding to that email and kind have  
3 questioning what the basis for the probation violation was?

4 A I recall something about a motion or something that  
5 was filed to quash the warrant that was issued from that  
6 report.

7 Q And so just so we're clear, you're acknowledging that  
8 you recall receiving an email from counsel that stated to the  
9 effect of hold on a minute this motion is being filed?

10 Do you recall receiving an email from counsel is the  
11 specific question?

12 A That I do not.

13 Q You do not recall receiving an email from myself --

14 A No.

15 Q -- in response to your email to the local AP&P  
16 office?

17 A No, I don't recall an email on that. I'm not saying  
18 that email wasn't sent. I'm just saying I don't specifically  
19 recall anything on that.

20 Q And I guess it's possible that where you didn't send



21 the email personally, any response perhaps wasn't due by you  
22 personally either?

23 A Right.

24 Q But you were aware that an email was sent and this  
25 motion -- you called it a motion to quash, but this motion was

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1 filed. You were aware of that?

2 A I'm aware that basically I sent a report to the  
3 Court. The Court issued a warrant, I believe, in November and  
4 that basically there was some pleadings pursuant to having the  
5 warrant set aside and basically allowing Mr. Johnson to just  
6 come to an order to show cause.

7 MR. BENNETT: Okay. Thank you. No other questions,  
8 your Honor.

9 THE COURT: Very well. You may step down.

10 THE WITNESS: Thank you.

11 THE COURT: I'm sorry. Do you have any reply?

12 MR. BAER: It was just -- probably just to make sure  
13 that it's clear.

14

15 REDIRECT EXAMINATION

16 BY MR. BAER:

17 Q How many times have you met with Mr. Johnson over the  
18 years?

19 A Gosh --

20 MR. BENNETT: Objection. Relevance.

21 THE COURT: I find it relevant.

22 THE WITNESS: I would say -- well, generally Mr.

23 Johnson comes in every third Thursday of every month since he's

24 been assigned to the Salt Lake office and met with me.

25 BY MR. BAER:

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1 Q All right. With the exception of these allegations,

2 his non-report, correct?

3 A Right.

4 Q All right. So it's been years that you've had them,

5 correct?

6 A That would be correct.

7 Q Have you ever changed residence, your employment

8 residence at any time during this time period?

9 A No.

10 Q Have you changed your telephone number at any time

11 during this time period?

12 A No.

13 Q Have you changed your email at any time during this

14 time period.

15 A No.

16 Q Has anything changed that would make it different,

17 more difficult or otherwise minor or substantially altered way

18 to contact you from the beginning of this case to, in fact,  
19 this very day?

20 A No, and our reporting times have, I believe, been  
21 uniformly the third Thursday of every month between 7:30 in the  
22 morning and seven at night.

23 Q All right. It's fair to say you've handled hundreds  
24 if not thousands of probations over the years?

25 A That would be correct.

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1 Q This is standard procedure in these cases?

2 A Yes.

3 MR. BAER: No other questions.

4 THE COURT: Thank you? Any further questions.

5 MR. BENNETT: No, your Honor.

6 THE COURT: Witness may step down. Mr. Baer, any  
7 other witnesses?

8 MR. BAER: No, your Honor. I think we'd submit on  
9 those two narrow issues for purposes of today's hearing.

10 THE COURT: Thank you. Mr. Bennett, do you wish to  
11 call any witnesses?

12 MR. BENNETT: Your Honor, Mr. Johnson would like to  
13 testify on his own behalf so defense calls Jamis M. Johnson.

14 THE COURT: Mr. Johnson, if you'll come forward,  
15 raise your right hand to be sworn in.

16 JAMIS M. JOHNSON

17 Called by the Defendant, being first

18 duly sworn, testified as follows:

19 THE CLERK: Do you solemnly swear that the testimony

20 you are about to give in this matter will be the truth, the

21 whole truth and nothing but the truth, so help you God?

22 THE WITNESS: I do.

23 THE COURT: Come up here, Mr. Johnson. Have a seat.

24

25 DIRECT EXAMINATION

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1 BY MR. BENNETT:

2 Q Mr. Johnson, you've heard Mr. Staker testify today  
3 that he attempted to contact you at sometime after release on  
4 October 13th from the Millard County Jail, October 13th of  
5 2010 from the Millard County Jail, correct?

6 A Yeah, I heard that.

7 Q Were you aware at that time that Mr. Staker had  
8 attempted to contact you?

9 A I was aware, but I would like to go back before that  
10 because he --

11 THE COURT: No. Mr. Johnson, I'm going to instruct  
12 you that in this instance you're the witness and he's the  
13 attorney so you answer his questions at this time. Then if you

14 need to take a moment to talk to him about how he's conducting

15 his case, you're welcome to do that.

16 THE WITNESS: Okay.

17 THE COURT: But I'm not going to have you direct the  
18 conversation from the witness chair anymore than I would any  
19 other.

20 THE WITNESS: Okay.

21 THE COURT: So you ask the questions, you answer the  
22 questions, we'll proceed that way. Then if you want to take a  
23 break and talk to your attorney, you may.

24 THE WITNESS: Okay. Thank you.

25 BY MR. BENNETT:

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1 Q So, again, were you aware that Mr. Staker had  
2 attempted to contact you?

3 A I was aware of that. Mr. Staker called me and left a  
4 message October 14th at 7:45 in the morning. I'd gotten home  
5 the night before about 9:00. The judge had released me the day  
6 before and I got that call.

7 Q What did you do in response to that call?

8 A Well, I contacted you and I checked the Court docket  
9 because the judge had granted my two motions and --

10 Q You just mentioned two motions. Let's be clear what  
11 you're referring to.

12 A I had filed on September 7th -- when I entered the

13 Millard County Jail, I filed personally a -- as I recall, a  
14 motion for -- I filed a notice of appeal and I filed a motion  
15 for a stay pending appeal and I had filed an application for a  
16 probable cause certificate on September 7th and I sent notice  
17 to the State, to Mr. Baer.

18 Q Do you recall the date on which you sent that notice?

19 A Notices were sent three times. I sent notices on  
20 September 7th to Mr. Baer's office and then again roughly  
21 about 15 days later.

22 MR. BAER: Judge, I'm going to object on a relevance  
23 basis. You know whether or not he sends notice to the State  
24 doesn't change one way or another his obligations to the Court.  
25 I'd just ask for some sort of foundation as to the relevance to

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1 this proceeding.

2 THE COURT: Help me with the relevance question, Mr.  
3 Bennett.

4 MR. BENNETT: Well, first of all, Mr. Staker  
5 indicated that he had no notice of this. I think additionally  
6 whether the State had notice is relevant because ultimately  
7 these motions and the probable cause certificate were granted,  
8 in part I think the Court could deem it as a default because  
9 (inaudible). The Court, when the State failed to appear,  
10 granted these motions so I think whether or not Mr. Jamis  
11 complied with the concept of notice is important in

12 establishing that the State did, in fact, have notice of the  
13 filing of the proper --

14 THE COURT: But those issues have been resolved.  
15 They've been ruled on. As far as I know, there's not a  
16 question of notice at this time. The only question is after he  
17 was released what did he know, what did he do, and that's where  
18 we need to go.

19 MR. BENNETT: Okay. And we'll fast forward to that.  
20 And the Court is correct I was setting up an argument  
21 anticipating so I'll just farther forward.

22 BY MR. BENNETT:

23 Q So, Mr. Johnson, ultimately these probable causes,  
24 your motion for stay was granted or denied?

25 A It was granted.

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1 Q The probable cause certificate in order of release  
2 was granted or denied?

3 A It was granted.

4 Q And you were aware that they were granted of course?

5 A They were granted, yes, on October 13th and then  
6 again on November 4th.

7 Q What do you mean by that?

8 A November 4th there was -- the Court signed a fairly  
9 extensive order affirming the granting.

10 Q Okay. So you're released -- we need to fast forward  
11 kind of to the ultimate point. You're released. And as  
12 Mr. Staker indicated and you've sort of conceded, he made  
13 contact with you, but you did not respond to Mr. Staker,  
14 instead you responded by calling your counselor, correct?

15 A Right, I called you and also checked the court  
16 docket.

17 Q Can you kind of give us the context of what that  
18 conversation between -- and, of course, that would be otherwise  
19 frivolous conversation, but if you choose, would you like to  
20 share with the Court what the context of that conversation was?

21 A Yes, I indicated to you that I'd received this call  
22 from Mr. Staker and the -- I thought that this matter had been  
23 stayed and that probation had been shifted to the Court during  
24 the appeal.

25 Q That was your understanding?

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1 A That was my understanding.

2 Q And you base that understanding on what?

3 A Well, it was extensively argued. This specific  
4 remedy was asked for with specificity and it had been granted.

5 Q Okay. So you're saying that you had asked for that  
6 remedy in your motion to stay, in your memorandum in support of  
7 the motion to stay, correct?

8 A Yes.



9 Q So that we're clear, the remedy that you had asked  
10 for in those motions was that your probation be converted to  
11 court probation pending the outcome of the appeal, correct?

12 A Yes, and that the sentence of probation also be  
13 stayed pending the appeal.

14 Q Yes, correct. So after our conversation, did you  
15 then return Mr. Staker's call and report to AP&P as he  
16 indicated you should?

17 A No, the advice of counsel was that that was  
18 unnecessary, the matter had been stayed and that I had to  
19 report to the Court. You also indicated that you were  
20 concerned that I would -- it was simply an effort to get  
21 further information from me because the State had deliberately  
22 not appeared and we were concerned that that was improper.

23 Q I'm not -- well -- in any event, so is it safe to say  
24 then that you're relying on the orders of the Court and that  
25 your counsel was relying -- well, first of all, who prepared

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1 the order that was ultimately signed by the Court?

2 A On November 10th? I mean, November 4th?

3 Q The certificate of probable cause?

4 A Oh, I did.

5 Q Okay.

6 A The Court signed -- yeah, I think I did.

7 Q Okay. So for the purposes of determining your  
8 mindset on that day and maybe even today, what's your  
9 understanding as to what your probation obligations are pending  
10 the outcome of the appeal?

11 A My understanding was that the (inaudible) of  
12 probation was stayed pending appeal and that I had to report  
13 to -- I was on court probation and to clarify also that further  
14 action with the State sort of ratified, seemed to be ratifying  
15 their claim that they still were in charge.

16 Q But your belief of who you had to report to was whom?

17 A The Court.

18 MR. BENNETT: Your Honor, I have no further  
19 questions, but I'd like to confer with my client.

20 THE COURT: That's fine.

21 MR. BENNETT: No further questions.

22 THE COURT: Mr. Baer.

23 MR. BAER: Just a moment, please.

24 THE COURT: Okay.

25 MR. BAER: No questions, your Honor. I have no

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1 questions of this witness.

2 THE COURT: Thank you. You may step down.

3 THE WITNESS: Thank you, your Honor.

4 THE COURT: Any other witnesses that are going to be  
5 called by the defense?

6 MR. BENNETT: No, your Honor.

7 THE COURT: Do the parties wish to be heard on  
8 argument?

9 MR. BAER: Yeah, I think we do.

10 THE COURT: Okay. Mr. Baer.

11 MR. BAER: Thank you very much. And I'd like to  
12 reserve a little bit of my argument for rebuttal, but as far as  
13 the gravamen, the central theme and thrust and point of this is  
14 very clear. Mr. Johnson is -- has been convicted of a felony  
15 in this case. He is the probationer. Mr. Staker is not the  
16 probationer. Court is not the probationer. The State is not  
17 the probationer. Mr. Bennett is not the probationer. The  
18 Court and certainly this defendant is well aware of the  
19 obligations of any probationer in this case.

20 Mr. Staker has testified that he told him he had to  
21 report. He had to report regularly. He indicated that he had  
22 to keep in contact with him, give him information if he changed  
23 his residence. He didn't do that. He didn't give him the new  
24 telephone number. He didn't come into his office. Mr.  
25 Johnson's creation of documents do not go to the central

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1 obligation of a probationer to report to his probation officer.

2 What's pretty clear from this is Mr. Johnson is

3 attempting to play off this Court against the AP&P department,

4 and/or vice versa and cover that by essentially irrelevant  
5 testimony about whether he had any emails to his counsel or  
6 not. Actually what happened is what the Court should center  
7 its attention on. And what happened is this individual was  
8 convicted in July of 2007 of a securities fraud.

9 He has distinct and clear obligations as all  
10 probationers do to report to his officer, to let the officer  
11 know when he changes his address, to let the officer know if he  
12 has a new telephone number, if his old telephone number changes  
13 and to regularly report. And the unrefuted testimony, in fact,  
14 the admission by the defendant is that he didn't report to  
15 Mr. Staker or at least that he was aware that he had to report.  
16 That was his first point, but there's no evidence in front of  
17 this Court that he actually did report.

18 Instead he has an amorphous obligation in his mind  
19 that he has to report to the Court. If you take a look in any  
20 of those orders that the Court signed, nowhere in there does it  
21 negate his obligation to report to AP&P. It doesn't say here  
22 oh just report to the Court but never mind reporting to AP&P.  
23 It doesn't do that. It asked him to continue to report on a  
24 regular basis to the Court. And I think the Court -- by the  
25 way, I would ask that the Court take judicial notice of its own

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1 record. There's no point in asking the defendant. I think the  
2 Court can know whether he reported on a regular basis each

3 month on the 15th.

4 The Court --

5 MR. BENNETT: Objection, your Honor. That is not  
6 evidence that is properly admitted during the taking of  
7 evidence in this. It's introduction of evidence (inaudible).

8 MR. BAER: Well, he introduced, defense counsel  
9 introduced or attempted to introduce a certificate of probable  
10 cause. The Court takes judicial notice of its own pleading.  
11 So it's now been taken judicial notice in this proceeding and,  
12 therefore, the content of it is before the Court.

13 THE COURT: The content is before the Court. Whether  
14 he reported or not is the form of the objection. Counsel,  
15 that's not going to be the basis for my decision, but I do  
16 understand your point.

17 MR. BAER: Yeah, the argument, other than putting the  
18 Court or the clerk on the stand or maybe your computer, I'm not  
19 sure what other basis -- what other avenue we could use to get  
20 to that point, but it's the point and I appreciate the Court  
21 notes that.

22 It's a relatively simple matter -- despite the  
23 State's position, it's a relatively simple matter despite the  
24 defendant's attempts here to muddy the waters and to make them  
25 more difficult. He is a felon. As a felon he is a

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1 probationer. As a probationer he has a probation officer. He,  
2 like every other probationer, has a myriad of obligations both  
3 to this Court, to the Adult Probation and Parole, and, in fact,  
4 to society at large.

5 Society at large has reasonable expectation that this  
6 probationer like any probationer doesn't play games with the  
7 Court and doesn't play games with AP&P, but he reports as he  
8 should be reasonably and has been reasonably requested and  
9 ordered to do both by this Court and by his AP&P officer. And  
10 he just didn't do it. And he didn't report a change in  
11 residence and he didn't report that his phone had been changed.  
12 Again, we believe he's played off the Court against AP&P  
13 perhaps and vice versa, but despite all that at the end of the  
14 day he didn't do what he was asked to do.

15 And the final point would be this. And please  
16 correct me if I'm missing something because Lord knows it's  
17 confusing enough, but the documents that the Court took  
18 judicial notice of, the certificate of probable cause and order  
19 of release, is dated November 4th. That's the stamp on that  
20 document, and it was signed by this Court on November 3rd.  
21 Mr. Staker's testimony was about October. Now, that's before  
22 this order. So either he did or he didn't report in October.  
23 Either he did or didn't turn over the information or report the  
24 information to Mr. Staker that he was supposed to.

25 This November 4th, even if it were effective or the

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1 Court could find in some way that it effected the intent or the  
2 knowledge of this defendant, it's certainly not retroactive to  
3 October. And on that basis alone I think the Court can find  
4 this defendant in violation of the affidavit signed  
5 October 25th, 2010. Thank you.

6 THE COURT: Thank you, Mr. Baer. Mr. Bennett.

7 MR. BENNETT: The truth is we probably could have,  
8 and this is the fault of the attorney, we probably could have  
9 stipulated to some facts and made this a legal --

10 THE COURT: I think maybe, but we didn't do that.

11 MR. BENNETT: Anyhow, that's what we're doing now.  
12 Everything that Mr. Baer said I really take no issue with  
13 except that he doesn't address, and I think the State has to in  
14 order to make its argument, intentionally just ignore the fact  
15 that that certificate of probable cause in Subparagraph d, and  
16 I turned mine in as Exhibit 1 so I don't have it before me, but  
17 it clearly states that Mr. Johnson is to, upon his release,  
18 report to the Court on the 15th of each month. I'm not  
19 reading, but that's just what it says.

20 That's the intervening cause here. Forget about --  
21 well, Judge Eyre's revocation and reinstatement of probation  
22 was stayed. The Court previously ruled that nonetheless the  
23 filing of the original cause tolled out through at least  
24 December, and that's the only reason Mr. Johnson really has to  
25 respond to this allegation today because according to the

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1 Court, the probation was tolled, but that doesn't change the  
2 fact that the Court actually ordered Mr. Johnson's release,  
3 signed a certificate of probable cause which stated, among  
4 other things, and I think the relevant one is that he only had  
5 to be -- he reported to the Court. That then usurps the power  
6 from Adult Probation and Parole.

7 Therefore, it means Mr. Johnson isn't required -- I  
8 understand Mr. Staker, I questioned him and I have no reason to  
9 not take him at his word. He wasn't aware. He thought that  
10 Mr. Johnson, and he was telling Mr. Johnson you've got to  
11 comply, you've got to comply and, of course, in his mind he  
12 felt that he did, but that's because he wasn't aware of the  
13 certificate of probable cause which directs Mr. Johnson to  
14 report to the Court. I think it really is just that simple.

15 Mr. Baer did make one valid point a point that I  
16 considered previously and that's that the order is dated  
17 November 3rd. Well, that's simple. Nunc pro tunc -- orders  
18 are nunc pro tunc back to the day that they are actually  
19 ordered in court, that's the effective date of the order. This  
20 hearing that we held was September.

21 MR. BAER: October 13th.

22 MR. BENNETT: October 13th. That's the date that's  
23 relevant. So the fact that the Court didn't actually stamp or  
24 sign the order until November 3rd becomes irrelevant. I'd



25 just like to -- and I think I made my point, but quoting, your

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1 Honor, from State versus Hodges, which is actually quoting  
2 numerous other cases, in fact, it's an analysis of State v  
3 Bonza (phonetic) and United States Supreme Court case Bearden  
4 (phonetic) versus Georgia. It simply states that consistent  
5 with Utah law and with Bearden we hold that, as a general rule,  
6 in order to revoke probation for the violation of a condition  
7 of probation not involving the payment of money, the violation  
8 must be willful or if not willful, must presently threaten  
9 safety of society.

10 It can't be said then that Mr. Johnson willfully  
11 violated probation when he's relying on a probable cause  
12 certificate saying that he's to report to the court in lieu of  
13 reporting to AP&P. That was the opinion his counsel gave. I  
14 stand by that legal analysis as good legal analysis and as good  
15 legal advice. Even if the Court were to then say, and the  
16 memorandum of decision, and I think we'll ask the Court to  
17 clear this up, may have revoked the stay and may have actually  
18 ordered Mr. Johnson back on the original terms of probation, I  
19 don't believe it does, but that may be argument for another  
20 day. Even if the Court were to decide that, that order was  
21 issued in January so we can't then say Mr. Johnson should have  
22 known that we were going to change our mind about the probable  
23 cause certificate and impute to him knowledge.

24       What's relevant is was Mr. Johnson -- did he do  
25 anything that willfully violated probation? He did not. One,

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1 he actually did exactly what the Court told him to do, reported  
2 to the court on the 15th of each month. And two, even if  
3 that ultimately turns out not to have been the right way to  
4 handle it, he was reasonable in relying on that and, therefore,  
5 it can't be said to be a willful violation.

6       THE COURT: Mr. Baer.

7       MR. BAER: Just quickly, your Honor. The Court well  
8 knows standard here is lower than beyond a reasonable doubt.  
9 And the State believes its proved its burden of proof to the  
10 level necessary today. There are burdens on this defendant.  
11 Wilfulness, like intent, and I'm sure the Court has seen  
12 hundreds if not thousands of instructions to that effect, are  
13 not always -- are not always -- you cannot always find them  
14 intentional like I willfully decide not to call the Court, I  
15 willfully. You have to take the circumstances in total and  
16 look at those total circumstances to make that determination of  
17 willfulness or intent.

18       I think it's very clear from what's gone on here that  
19 this was an intentional act by the defendant not to comply with  
20 his orders of this Court and/or Adult Probation and Parole.  
21 He, in fact, did not do those things in the allegation. The

22 allegation is before this order whether the order is nunc pro  
23 tunc, his intent isn't nunc pro tunc. I mean, either he's  
24 thinking that or he wasn't in real time. So I think the case  
25 has been made that he didn't do what his obligation was. If

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1 you have to go to the letter of his own order, I'll just  
2 redirect the Court to that order.  
3 Nowhere in there does it say he has to stop reporting  
4 to AP&P. Nowhere in there does it say that he's not under the  
5 obligation of what he and any other probationer would have with  
6 Adult Probation and Parole. And I think the Court -- the State  
7 has made its case regarding these particular allegations.  
8 Again, just as we're attending to that first set and we'll  
9 obviously get to the other ones later.

10 We ask that the Court find him in violation at this  
11 time.

12 THE COURT: Thank you. Very interesting case. Very  
13 interesting issues. I need to indicate upfront that my initial  
14 impression is that there's plenty of questions about what Mr.  
15 Johnson may have been thinking at any given time when we talk  
16 about October 13th. There's a certain amount of known facts  
17 on that day. If we look at November 4th, there are different  
18 facts. In December there's different facts. January,  
19 February, March different facts, but on November 13th we had  
20 had a hearing and at that hearing I granted this motion.

21 I don't believe I ever ruled from the Bench that his  
22 probation had terminated. I think that's an assumption that he  
23 arrived at either on his own or with the help of counsel, but  
24 having been contacted by probation and being told that he  
25 needed to report, he then made the decision to walk the tight

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1 rope of not reporting and relying upon his belief that  
2 probation may have been terminated by my oral statements from  
3 the Bench.

4 In the order that was prepared based on those oral  
5 statements it also does not say that he's relieved from  
6 probation or that his probation is terminated. There was a  
7 question regarding his probation and how long his probation  
8 runs. And often times when faced with the perilous  
9 consequences, people sometimes like to see how close to the  
10 edge they can get. Some people like to stay far away and be  
11 more conservative.

12 I believe in my mind most conservative approach by  
13 Mr. Johnson would simply have been to make a phone call on the  
14 13th once he received his notice and to say I believe there's  
15 a question as to whether or not probation has jurisdiction over  
16 me or not. I believe the judge just released me from  
17 jurisdiction of probation. If I'm wrong, I'll check with my  
18 attorney, file the appropriate papers for clarification, but

19 instead Mr. Johnson decided to go forward with his belief that  
20 his probation had either terminated by act of time and along  
21 the terms of its original creations, or he relied on advice to  
22 believe that his probation may have terminated.

23 In either event subsequent to the 13th a  
24 determination was made that his probation had not terminated  
25 and it had nothing to do with this particular hearing or the

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1 release that had been signed by me. It had more to do with the  
2 tolling of the times for his probation. So I'm concerned that  
3 Mr. Johnson relied upon his belief or understanding and thereby  
4 took no action to respond to probation instead of at least  
5 broaching the subject with probation as I believe would have  
6 been reasonable under the circumstances and to say I know you  
7 want me to report, I'm not certain that I need to report,  
8 however, I don't want to be in trouble with you or with the  
9 Court. He didn't choose to go that direction. That may or may  
10 not be the determining factor in my decision, but it is one of  
11 the determining factors.

12 There's a little more fault to go around because this  
13 whole issue may not have come up but for a motion that was  
14 filed and not responded to and a hearing where nobody appeared  
15 and the Court entered an order that may have created confusion  
16 and that, I think, creates the argument that defense is relying  
17 upon that wouldn't be here but for those circumstances.

18 It was interesting in the closing arguments that Mr.  
19 Bennett argued that the Court should not consider evidence of  
20 whether Mr. Johnson reported to the Court by the 15th of each  
21 month under the terms of court probation, but then in his  
22 closing argument he indicated that Mr. Johnson met those terms  
23 and met with the Court on the 15th of each month. And I have  
24 to tell you from the Court's own knowledge, I'll take judicial  
25 notice of the fact, that I have not laid eyes on Mr. Johnson

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1 since our October meeting. And I do not know that he's  
2 reported on the 15th of each month even under that order.  
3 That's not before the Court. I haven't issued a Sua sponte  
4 order to show cause on those issues.

5 My point is that I believe both sides are doing a  
6 fair job of trying to present their case. In the end I do find  
7 that Mr. Johnson was under the jurisdiction of probation, Adult  
8 Probation and Parole. He was still controlled by the terms and  
9 conditions of his probation agreement and that he willingly  
10 violated that by not reporting notwithstanding that he was  
11 confused or that he was relying on his own beliefs or the  
12 beliefs that had been given to him by others.

13 Having said all of that, this is not a probation  
14 violation whose consequences I'm going to determine today. I'm  
15 going to enter the finding that he has violated. My

16 anticipation is that we're going to come back for further  
17 discussions about sentence or -- I don't know mean sentence,  
18 excuse me, sanctioning for these probation violations. We'll  
19 come back on another day and we will pursue other issues  
20 regarding the now outstanding order to show cause. And I've  
21 been told, we've all heard, that there may be yet another that  
22 may be filed.

23       So I think what's imperative today is I am finding  
24 that there was a violation. I'm going to reserve for a later  
25 date the opportunity to determine what the appropriate sanction

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1 would be. And we need to set a date for that hearing which  
2 will be a combination of any orders to show cause that are  
3 filed more than 20 days prior to that hearing. So if there is  
4 an order to show cause now that we know about, we're setting  
5 that. We're going to review the sanctions on this one. There  
6 may be another order to show cause filed between now and then,  
7 but I'm not going to allow any additional orders to show cause  
8 to be piled on to that date unless they are filed at least 20  
9 days prior to that date so that counsel has a chance to review  
10 and understand -- no, I can't even do that because we have to  
11 do the admit or deny. So at this point nothing else will be  
12 scheduled. We will schedule only the one that has been denied  
13 and the sanctions on this hearing.

14       If another one comes up, if there's time to process

15 through the admit and deny, we can add those to it, but I can't  
16 bypass the admit or deny stage.

17 MR. BAER: Your Honor, we do have another one here  
18 today because it's based -- as I mentioned before, there are  
19 allegations of violations since his release from federal  
20 custody so we could present those to the Court, enter denials,  
21 we'll hear those at the same time that we hear the March  
22 allegations and that way we have the November done. We just do  
23 the March and today's and there will be no more filed,  
24 particularly if we can get this hearing set fairly  
25 expeditiously.

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1 THE COURT: Well, at this point if you want to file  
2 something, file it. If Mr. Bennett wants to admit or deny, he  
3 can on behalf of his client, but I'm not going to press him to  
4 make that decision at this moment.

5 MR. BENNETT: The allegations that he hasn't reported  
6 since he was released on April 20th?

7 MR. BAER: Yeah.

8 THE COURT: I'm only responding to what I've heard.  
9 You certainly can review those allegations and in an  
10 appropriate timeframe respond to them, but at this point I'm  
11 just indicating that if we have appropriate pleadings,  
12 admissions and denials, then when we come back, we can hear



13 them. And if there's not enough time, we won't hear them so  
14 we'll deal with it when the time comes.

15 Right now I need to know when our available date is.

16 We're going to have an evidentiary hearing similar to this one  
17 so I'm assuming it will be done in an hour or less. Is that  
18 fair?

19 MR. BAER: It should be quicker than today because we  
20 now have the blue print and we know where we're headed.

21 THE COURT: Okay.

22 MR. BAER: And I suppose the only thing that would  
23 add a little time to it is if we add the new allegations. The  
24 State would also ask that the Court add what the Court declined  
25 to do. It's sua sponte request is information as to whether or

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1 not this individual reported to the Court. If he makes that  
2 representation, let's have that at issue at our next hearing.

3 THE COURT: And the Court will determine. That's why  
4 they call it Sua sponte. So at this time we have one hearing  
5 with a sanctions attached to it that we're scheduled for. When  
6 is my next available date?

7 MR. BENNETT: Which is joint with the evidentiary  
8 hearing on the denials that were entered today.

9 THE COURT: I'm sorry. That's what I meant to say,  
10 yes.

11 MR. BAER: Can we go the 18th? The 25th I happen

12 to be in trial.

13 THE CLERK: (Inaudible).

14 THE COURT: You could do the 17th. What we have on  
15 May 17th and 18th went off so we've now scheduled for the  
16 17th a morning calendar in Juab, but I could come here for an  
17 afternoon calendar.

18 THE CLERK: (Inaudible).

19 MR. BAER: The afternoon actually works better. I  
20 have a final pretrial for that trial in the morning and then I  
21 could come straight from court.

22 THE COURT: Well, let me see what Mr. Bennett's  
23 calendar indicates.

24 MR. BENNETT: I'm available May 17th, the  
25 afternoon, your Honor, but I just remind the Court what I've

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1 already stated, and maybe the Court is taking this into  
2 consideration, and that is the motions for new trial that would  
3 directly affect the evidentiary hearing on that day.

4 THE COURT: It would affect all but two of the items.  
5 Would you like to proceed on those two if the decision hasn't  
6 been made on the motions? The other option, Counsel, let me  
7 give counsel another option because you have a desire to wait  
8 until that decision comes out.

9 MR. BENNETT: Sure.

10 THE COURT: As a practical matter you may or may not  
11 choose to wait for that decision, but clearly I'm not going to  
12 address issues that are pending in motion in the other court so  
13 let me ask counsel this. I can simply set a date further out  
14 giving the Court, that is considering the motion, plenty of  
15 time. And then if and when a ruling is made on that motion,  
16 you could contact the Court and we could move it up.

17 MR. BAER: No, I think we should address the  
18 remaining allegation to one and two that are separate and  
19 distinct from the convictions. However, I would appreciate at  
20 least the opportunity to brief the Court on that issue if we  
21 find otherwise.

22 THE COURT: I understand that and that would be fine.

23 MR. BAER: Okay.

24 THE COURT: Let's go with the 17th. I'm coming  
25 from Juab. I believe we're doing prelims in the morning.

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1 Let's do it at 2:00 just so I'm sure I can be here.

2 MR. BENNETT: That's May 17th?

3 THE COURT: May 17th at 2:00. And just so we're  
4 clear on the record, evidentiary hearing on the order to show  
5 cause that was just recently filed at the end of March and  
6 determination of sanctions on the hearing that we had today.

7 MR. BAER: Judge, I guess we should probably then

8 have an admit/deny on the ones that we're filing today, if they

9 don't choose to admit or deny today, right, so we know where  
10 we're headed?

11 MR. BENNETT: Your Honor, may I approach the Bench  
12 with the new --

13 THE COURT: Give it to my clerk. That will be fine.  
14 I believe counsel has the right to review those with his client  
15 before he has to submit an admit or deny. I'm not going to put  
16 him on the spot at this moment at the Bench, although I can  
17 indicate a timeframe for him to enter an admit or deny then we  
18 can address those issues.

19 MR. BAER: Sure. No, I'm suggesting (inaudible.) If  
20 he doesn't respond to the Court with a denial, whatever is  
21 convenient for the Court or sufficient for the defendant, we'll  
22 just add that admit deny.

23 THE COURT: I'll add it as an admit deny in May.

24 MR. BAER: If we don't -- if he chooses not to do  
25 that in sometime, then (inaudible.)

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1 THE COURT: That's fine. Then let's put that as the  
2 third item on the calendar.

3 I'm sorry. Have I confused you completely? Oh, for  
4 purposes of the computer it will be evidentiary/sanctions.  
5 That would be fine.

6 Mr. Bennett.

7 MR. BENNETT: Yes.

8 THE COURT: On that date if it hasn't occurred prior  
9 to that time, I'm going to ask that your client respond to the  
10 allegations on the affidavit and order to show cause that are  
11 being filed today.

12 MR. BENNETT: That's what I would anticipate. Your  
13 Honor, I think I know the answer Mr. Johnson's request, and I  
14 don't think it's an unreasonable request, based on this Court's  
15 ruling then it's now Mr. Johnson's understanding that from this  
16 point forward he is to report and abide by the terms of the  
17 Adult Probation and Parole probationary terms, not the probable  
18 cause certificate probationary terms, correct.

19 THE COURT: That's my understanding?

20 MR. BENNETT: Okay.

21 THE COURT: And just to clarify. I understand there  
22 was a question at one time as to whether or not he was under  
23 Adult Probation and Parole jurisdiction because of the running  
24 of time, not addressing the tolling of time, and things of that  
25 nature. I don't know that I have ever intended to give anybody

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1 an indication other than that at this time he's under Adult  
2 Probation and Parole jurisdiction.

3 MR. BENNETT: Thank you.

4 THE COURT: So if there was confusion, I'm taking  
5 this opportunity to clear it up.

6 MR. BENNETT: There's kind of the parallel question  
7 and that's did the Court's memorandum of decision then overrule  
8 the motion to stay -- well, I think we know the answer to that  
9 too, but the motion to stay sentence pending appeal? The  
10 answer to that I'm assuming is no. That's a separate, that's a  
11 separate parallel, similar to parallel matter, right? I  
12 mean --

13 THE COURT: I would suggest that you read through my  
14 decision because I'm happy to answer the question. I just  
15 don't want to rehash the same material two or three times and  
16 run the risk that it's understood one way one time and another  
17 way another time. The decision really speaks for itself, but  
18 if you're asking me my current recollection of what I ruled on  
19 that date, my recollection is that I have issued a stay on his  
20 jail term and the imposition of the sanction that was issued by  
21 Judge Eyre pending an appeal and outcome, but I have not  
22 terminated his probation. That's my understanding.

23 UNIDENTIFIED SPEAKER: And, your Honor, I believe in  
24 our current PV going before the Court we're asking for a  
25 warrant. Perhaps now would be an appropriate time to look at

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1 whether or not it would be appropriate to issue a warrant and  
2 take Mr. Johnson in custody or if just issue the order to show  
3 cause --

4 THE COURT: I'll be glad to address that question.

5 Is the State requesting a decision on that?

6 MR. BAER: Yes, I think it's appropriate.

7 THE COURT: Very well. I now have a commitment from

8 Mr. Johnson's attorney that they are going to respond to those

9 allegations that were just filed today by the 17th of

10 November. He is represented by counsel. I'm not going to

11 authorize a warrant on this order to show cause, but we will

12 have a response by May 17th.

13 MR. BAER: Good.

14 THE COURT: Mr. Bennett, did you have anything

15 further?

16 MR. BENNETT: I do, but I don't want to try the

17 Court's patience. The Court's memorandum of decision indicated

18 that probation was tolled at least through December 17th. It

19 intentionally does not address whether it was tolled beyond

20 that.

21 THE COURT: Well, and that's because I don't have a

22 crystal ball and I don't know to what extent other probation

23 violations may be alleged and what affect they would have. As

24 was indicated, I think, in my memorandum of decision, that upon

25 the filing of an order to show cause, simply the filing of the

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1 order to show cause tolls the probationary period. Now, if you

2 put that into effect on Mr. Johnson's history from, let's say,

3 October 13th or even before when Judge Eyre was considering the  
4 one that was filed last spring or last summer, you can count up  
5 the days and you can add those up and see if there was ever a  
6 time period. I don't believe there has been a time period  
7 since Judge Eyre issued his order when there wasn't some level  
8 of tolling that was being considered.

9 Now, maybe from the time he ordered until the time he  
10 was serving his sanctions in jail, maybe it tolled then. I  
11 don't recall, but there was a tolling when it was filed last  
12 spring and summer. This one we were dealing with was filed at  
13 the end of October and we're just now dealing with it today so  
14 it's arguable that it tolled from the end of October until  
15 today. My decision said at least until December 17th because I  
16 didn't know when this would be resolved, if it would be  
17 resolved, anything else that might be filed and the effect it  
18 might have.

19 I can't project how many different tollings might  
20 come in on a certain case, but on this case I hope I've  
21 clarified for you that it did not end with the tolling on  
22 December 17th. It was at least until that time.

23 MR. BENNETT: Right. I understood the at least. So  
24 at the very least the time between the October order to show  
25 cause and this, that amount of time, Mr. Johnson is at least

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1 responsible to report to AP&P that amount of days starting  
2 today?

3 THE COURT: If you want to look into the future, and  
4 I'm not going to be held to establishing a deadline --

5 MR. BENNETT: Yeah. No, no, no. Right.

6 THE COURT: -- or any early date for probation, but I  
7 am going to indicate my understanding, and you can do the math,  
8 that anytime an order to show cause issues until the order to  
9 show cause is resolved, at the very least that period of time  
10 is added on. It's not added on, but the time is tolled during  
11 that period so the necessary effect is that the probationary  
12 period extends out further and further.

13 Now, I won't go through the math. I won't give you a  
14 date and I won't make you feel comfortable that as of June or  
15 July or three years from August, I'm not going to do that, but  
16 you can go through the math and calculate it. And if there is  
17 a question, you can present it and I'll address that question,  
18 but at this point I'm not going to do it today.

19 Counsel, I appreciate both of you being here and  
20 responding. I need to move on. We do have other matters.

21 MR. BAER: Can I just ask one quick request with  
22 that. Could the judge issue at least its order just clarify  
23 what we're going to do on that next hearing or would you like  
24 me to prepare one either way just so there's no --

25 THE COURT: If you would like to prepare one, send it

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1 over to Mr. Bennett and Mr. Bennett will approve it as to form  
2 or let you know why he doesn't. The other option is my clerk  
3 can prepare a minute entry, but if you want it to be more  
4 specific, you're welcome to prepare the order.

5 MR. BAER: So we don't have any confusion. And just  
6 so it's clear on the record, I will include that, at least the  
7 State's understanding currently if the Court will consider what  
8 it would not consider Sua sponte today, whether or not there  
9 was compliance then with the defendant's own order. Now, that  
10 will be coming. He may not approve of that as to form, but  
11 that will be one of the things the State is asking the Court to  
12 consider at our next hearing.

13 THE COURT: You might indicate that you're requesting  
14 it to be considered.

15 MR. BAER: Exactly.

16 THE COURT: But I'm not very comfortable having  
17 parties indicate to me what I ought to be doing Sua sponte so.

18 MR. BAER: That's probably the wrong way to phrase  
19 it.

20 THE COURT: Thank you.

21 THE DEFENDANT: Your Honor, may I ask a clarification  
22 and I do this with all due respect so I understand and it's on  
23 the record. From this day forward I will contact -- I'm to  
24 contact my probation officer, Mr. Staker, and comply with the  
25 probation that was in place.

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1 Have I understood you correctly?

2 THE COURT: I will answer it this way. I believe you  
3 had that responsibility since you began that agreement and that  
4 it has not terminated as of today.

5 THE DEFENDANT: Okay.

6 THE COURT: And that it will continue for some future  
7 time. I do not know how long.

8 THE DEFENDANT: And then I have a further question.  
9 There was a stay. Is the Court today overruling the stay or is  
10 the stay that was ordered still in place?

11 THE COURT: The stay was not addressing probation.  
12 It was addressing the order of Judge Eyre and that included his  
13 findings and his sentence, whatever that sentence was. It's on  
14 appeal and I've stayed it.

15 THE DEFENDANT: Okay. Thank you, your Honor.

16 MR. BAER: Thank you, your Honor.

17 MR. BENNETT: Thank you.

18 THE COURT: Thank you.

19 (PROCEEDINGS IN THE ABOVE-ENTITLED  
20 MATTER WERE CONCLUDED.)

21

22

23

24

## COURT CERTIFIED DOCUMENT

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## 1 REPORTER'S CERTIFICATE

2 STATE OF UTAH )

: SS.

3 County of Utah )

4 I, Colleen C. Southwick, Registered Professional

5 Reporter for the State of Utah, do certify that the foregoing

6 transcript was taken down by me stenographically from an

7 electronic recording and thereafter transcribed;

8 That the same constitutes a true and correct

9 transcription of the said proceedings;

10 That I am not of kin or otherwise associated with any

11 of the parties herein or their counsel, and that I am not

12 interested in the events thereof.

13

14 WITNESS my hand at Provo, Utah, this 4th day of

15 August, 2011.

16

17

18

19

---

Colleen C. Southwick, RPR, CSR

20

21

22

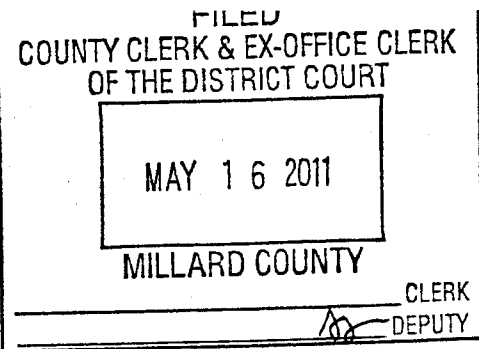
23

24

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# Addendum J



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Telephone: (801) 366-0197  
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Attorneys for Plaintiff

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
MILLARD COUNTY, STATE OF UTAH

---

STATE OF UTAH,		<b>ORDER</b>
Plaintiff,	:	
vs.	:	
JAMIS M. JOHNSON,	:	Case No. 051700056
Defendant.	:	Judge James Brady

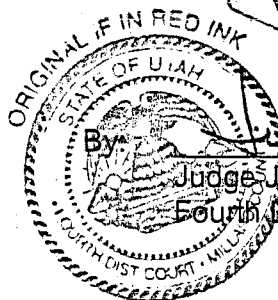
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A hearing was held on April 27, 2011 in the above cited matter. The defendant, defendant's counsel, counsel for the State and the defendant's probation officer were in attendance. Based upon testimony received, representations of the parties, and good cause appearing, this Court hereby Orders as follows:

1. Defendant Jamis M. Johnson is found to be in violation of his conditions of probation as memorialized in the November 2010 affidavit of defendant's probation officer, Troy Staker. The defendant will be sentenced on this finding of violation on May 17, 2011 at 2pm.
2. The defendant, Jamis M. Johnson further entered denials to allegations contained in the March 2011 affidavit of probation officer Troy Staker. The Court will hear evidence concerning this affidavit alleging a probation violation on May 17, 2011 at 2pm.
3. Adult probation officer Troy Staker filed an additional Probation/Violation Report and affidavit on April 27, 2011. The Court will receive defendant's admit or deny responses to the allegations in this affidavit on May 17, 2011.

4. Other (per the Court): Ma

SO ORDERED this 11 day of May, 2011



Approved as to form:

Tate Bennett  
Attorney for defendant Johnson

### CLERK'S CERTIFICATE OF SERVICE

\_\_\_\_\_ I hereby certify that on this 16 day of May, 2011, I caused a true and correct copy of the foregoing to be served by the method indicated below upon the following:

by hand

Tate Bennett, Esq.  
P.O. Box 272  
Fillmore, Utah 84631  
Fax No. (888) 743-4102

Mark Baer  
Office of the Attorney General  
160 East 300 South 5<sup>th</sup> Floor  
Salt Lake City, Utah 84111  
Fax No. (801) 366-0268



# Addendum K

FOURTH DISTRICT COURT - FILLMORE 8 AM 9:33

IN AND FOR MILLARD COUNTY, STATE OF UTAH

FILED BY

*[Signature]*

STATE OF UTAH

Plaintiff,

VS.

JAMIS M. JOHNSON

Defendant.

CASE NO. 051700056

BEFORE THE HONORABLE JAMES BRADY

FOURTH DISTRICT COURT - FILLMORE

765 S. HIGHWAY 99, SUITE 6

FILLMORE, UTAH 84631

EVIDENTIARY HEARING and SENTENCING

ELECTRONICALLY RECORDED ON

MAY 17, 2011

FILED  
UTAH APPELLATE COURTS

SEP 02 2011

Reported by: Colleen C. Southwick, RPR/CSR

ORIGINAL

2975

A P P E A R A N C E S

FOR THE PLAINTIFF:

MARK W. BAER  
Deputy Millard County Attorney  
765 South Highway 99  
Fillmore, Utah 84631

FOR THE DEFENDANT:

TATE W. BENNETT  
Millard County Public Defenders

PROCEEDINGS

THE COURT: Thank you. Please be seated, gentlemen. We're here today on two different items. State of Utah versus Jamis M. Johnson, Case No. 051700056. Today we are to address an allegation of probation violation which was denied by Mr. Dotson and is set for an evidentiary hearing today. Also today is the sentencing based on an earlier finding of probation violation.

Are both parties ready to proceed?

MR. BAER: State is ready, your Honor. Mark Baer for the State.

THE COURT: Thank you, Mr. Baer.

MR. BENNETT: Tate Bennett for the defense. Your Honor, may I address the issue of the evidentiary hearing issue briefly?

THE COURT: You may.

MR. BENNETT: Last time we were here when we discussed an issue of whether or not it was appropriate for Mr. Johnson to even enter an admission or denial to new allegations which are allegations that he'd been convicted of a crime in federal court in violation of a term of his probation, we indicated to the Court at that time that there was a motion for new trial, another potentially dispositive motion pending in that case.

The Court indicated at that time that it would be

1 hesitant to hold an evidentiary hearing or make findings  
2 subsequent to an evidentiary ruling if that was, in fact, the  
3 case. So as a preliminary matter that motion to -- motion for  
4 a new trial does exist, it is pending and so is it, in fact,  
5 then the Court's intention to go forward with that part of  
6 today's hearing?

7 THE COURT: Mr. Bennett, I'm going to ask you to  
8 remind me your recollection of what it is I said because I  
9 believe that at that time we had allegations. There was a  
10 question of whether he wanted to admit or deny.

11 MR. BENNETT: Correct.

12 THE COURT: You indicated there was a matter -- that  
13 although there was a conviction there were motions pending in  
14 the federal case. I had nothing in front of me at that time  
15 regarding the federal case. I didn't even have, I don't  
16 believe, evidence of the conviction other than verbal  
17 communications and verbal communications that there were some  
18 matters pending.

19 Did we not proceed at that point to enter a denial  
20 for him?

21 MR. BENNETT: We did. We did.

22 THE COURT: Okay.

23 MR. BENNETT: And for those reasons, but in the  
24 interim, though, assuming the Court has verified that there is,  
25 in fact, a motion, there are motions pending in the federal

1 court which would then serve -- if I understood the Court's  
2 position correctly would then serve as a precursor, that they  
3 would have to be resolved prior to this evidentiary hearing  
4 which of course they haven't. I may have misread the Court.

5 THE COURT: And perhaps I wasn't very clear in my  
6 thinking at that time or in my expressions. I would hesitate  
7 to proceed on anything based on verbal representations that  
8 there were either convictions or that there were matters  
9 pending. And today in response to a comment you've just made,  
10 Mr. Bennett, the Court has done nothing to research whether or  
11 not there are any orders or any motions pending in the federal  
12 court. I'm anticipating the parties will fill me in on that  
13 kind of information rather than have me do that research.

14 MR. BENNETT: Okay.

15 THE COURT: So I don't have any firsthand knowledge  
16 of anything other than I did receive a document that appears to  
17 have been filed just today and I'm -- well, I'm in -- excuse  
18 me. That's not true. There was a document filed just today,  
19 but I don't know that it's pertinent to today's hearing. That  
20 was an appeal by Mr. Johnson that he filed pro se. I have a  
21 document that is recorded as of yesterday and in that document  
22 I do have attached to that a verdict form from the federal  
23 district court indicating various findings and indictment and  
24 other documents relating to the federal court.

25 Digitized by eGangotri Law Library, eGangotri Law School, eGangotri  
Machine-generated OCR, may contain errors.

1 with me. I'm not aware of any other information. And when I  
2 say I hesitate to go forward, I don't think it was that I would  
3 hesitate to go forward because in another matter there may be  
4 other proceedings, but I would not want to go forward without  
5 some evidence of what those were or what their status was. So  
6 I am prepared for both sides to go forward today on this  
7 probation violation allegation.

8 MR. BENNETT: Okay. Then the follow-up question is  
9 does the Court want the parties to actually present evidence,  
10 for example, be it testimony or just proffer?

11 THE COURT: Have you received a copy of the State's  
12 hearing and sentencing memorandum?

13 MR. BENNETT: I did. It was in my email this  
14 morning. I can see it was sent yesterday. I object to that  
15 actually being -- we haven't reviewed it. Obviously I haven't  
16 had time to go over it so I object to the Court actually  
17 considering that in determining because there is two parts to  
18 this hearing the sentencing so I object to the -- or at least  
19 need time to be able to prepare and respond to that memorandum.

20 THE COURT: Well, let me tell you what I guess I need  
21 more information from you on then, Mr. Bennett. As I look at  
22 this, there's a couple of items that they've attached with  
23 regard to restitution that you dispute, the calculation of the  
24 amounts or the payment or nonpayment, but when it comes to a  
25 document that they've presented to me that comes from --

1 purports to come from the federal district court and it does  
2 have the federal district court stamp on it and it does  
3 reference a trial which I assume your client was present for,  
4 what is there that you would need to prepare for that would  
5 preclude me from simply taking judicial notice of the fact that  
6 there are (inaudible).

7 MR. BENNETT: Well, I'm only saying we need some time  
8 to respond to the sentencing. The fact that there's a jury  
9 verdict, I don't need time to respond to that. It speaks for  
10 itself. Am I clear there --

11 THE COURT: You were asking me if I wanted evidence  
12 or proffer and I was going to indicate that we do have some  
13 items that I think could be proffered or I could take judicial  
14 notice of, and that may resolve at least part of what those new  
15 allegations are. Is that correct?

16 MR. BENNETT: Absolutely.

17 THE COURT: Okay. So as to that aspect we're not  
18 in -- you don't have a request for additional time to respond?

19 MR. BENNETT: No, no, no, no. Absolutely not. That  
20 verdict form is something or the conviction is something that  
21 Mr. Staker actually provided, although it wasn't a certified  
22 copy. I don't know that it matters, he provided me a copy with  
23 the verdict form at least ten days ago so I have no objection  
24 to that.

25 THE COURT: Okay.



1 MR. BENNETT: Just the sentencing memorandum itself  
2 which I haven't even had time to review.

3 THE COURT: And the truth is I don't know that I  
4 asked either side to give me a memorandum for sentencing. I  
5 think that I simply stayed my decision until after this hearing  
6 was held and it's not -- it's not my custom to take the  
7 evidence and then ask the parties to brief what their  
8 recommendations are for my decision with regard to any type of  
9 sentence. It's really not a sentence. It's a --

10 MR. BENNETT: Sanction.

11 THE COURT: -- it's a sanction hearing. And I  
12 typically don't ask for briefs on sanctions, but I allow either  
13 side to make any comment that they think I ought to take into  
14 consideration.

15 Having addressed these issues with you, Mr. Bennett,  
16 the Court is ready to proceed with an evidentiary hearing and I  
17 do have some documents which I anticipate, Mr. Bear, you're  
18 going to want the Court to take judicial notice of?

19 MR. BAER: I will, your Honor, if I could -- just to  
20 back up just a moment. Your first comments were that we were  
21 here on two matters. I think we're here on three matters  
22 actually. There is the sentencing, then there's today's  
23 evidentiary hearing which is on the federal convictions, and  
24 then the third one is an admit deny on the probation violation  
25 report that was filed at the last hearing.

1 THE COURT: Okay. And has Mr. Johnson received a  
2 copy of that report? Is he in a position today that he could  
3 admit or deny? Do you know?

4 MR. BENNETT: I can just enter a denial on his  
5 behalf, your Honor.

6 THE COURT: Okay.

7 MR. BAER: So that would take care of No. 3 on your  
8 last order so we're down to the last two points. And, yes,  
9 your Honor, then I can address the next point which was we did  
10 bring a certified copy of that verdict, if I may approach, and  
11 we would ask the Court to take judicial notice of that  
12 certified copy.

13 THE COURT: Just so we're clear on the record, I've  
14 just received Mr. Bennett's general denial on the admit deny on  
15 the new allegations and we'll set a hearing date for that. Is  
16 that correct?

17 MR. BENNETT: That's correct.

18 THE COURT: On the sanctions to be imposed for the  
19 hearing that was held in April, that has not occurred at this  
20 point and we are now proceeding with what will be the  
21 evidentiary portion of the hearing scheduled today on an  
22 evidentiary hearing.

23 MR. BAER: That's correct, your Honor.

24 THE COURT: Very well.

25 MR. BAER: If I might approach, your Honor?

1 THE COURT: Please.

2 MR. BAER: This is a certified copy. The State would  
3 ask that be accepted by the Court as our sole exhibit for the  
4 purposes of the evidentiary hearing for today's allegations,  
5 the allegations that are being held, substantive hearing on  
6 them --

7 THE COURT: I'll note I just received a certified  
8 copy of the verdict form from the District Court Central  
9 Division in the federal court here in Salt Lake City  
10 identifying Jamis Melwood Johnson as the defendant and the  
11 United States of America as the plaintiff. Counsel, as I read  
12 through this, it appears that we have 38 counts and they appear  
13 to be sequential. So am I to understand then that this is  
14 being presented to show me 38 guilty verdicts with regard to  
15 Mr. Johnson in the federal court case?

16 MR. BAER: That is correct, your Honor.

17 THE COURT: Very well. It will be received for that  
18 purpose.

19 (An exhibit has been received into evidence but not  
20 identified by number and cannot be entered in the  
21 index.)

22 THE COURT: Mr. Bennett, did you have any objections?  
23 I was quick on the draw?

24 MR. BENNETT: No objections, your Honor.

25 THE COURT: Very well. It will be received.

1 Anything further, Mr. Bear?

2 MR. BAER: I don't believe so, your Honor, not on  
3 that particular issue unless the Court needs some elucidation.  
4 I know the probation officer monitored that case being his  
5 probation officer, Mr. Staker, who is present here today can  
6 answer any questions of the Court. I think the allegations  
7 we're addressing from an evidentiary standpoint today regard  
8 those convictions. We've entered certified copies now of those  
9 convictions which speaks directly to that allegation. And  
10 unless the Court needs clarification, I think that evidence  
11 speaks for itself on that issue.

12 THE COURT: Thank you, Mr. Bear. Mr. Bennett, do you  
13 have -- I'm sorry. Do you have any other evidence then? Does  
14 the State rest?

15 MR. BAER: The State rests on that allegation.

16 THE COURT: Thank you. Mr. Bennett, do you have any  
17 evidence that you want the Court to consider?

18 MR. BENNETT: First -- and, yes, I will address that  
19 your Honor, but allegation five of the order to show cause for  
20 which we're here for an evidentiary hearing states that Mr.  
21 Johnson was convicted of mail fraud on or about June 27<sup>th</sup> of  
22 2007. As the State has just rested and I don't believe any  
23 evidence was offered that substantiates that allegation, I'm  
24 going to ask that the Court dismiss allegation No. 5 from the  
25 order to show cause. I'm referring to Mr. Staker's affidavit.

1 Well, no, allegation five from the order to show cause.

2 THE COURT: Give me just a moment. I may have that  
3 in my earlier files because I'm not finding it here. Thank  
4 you, counsel. I have it. This is the affidavit of Troy  
5 Staker, March 22<sup>nd</sup>, 2011, Paragraph 5 having committed or  
6 having been convicted of the offense of mail fraud on or about  
7 June 27<sup>th</sup>, 2007, in violation of condition number 3 of the  
8 probation agreement.

9 Is that what you're referring to?

10 MR. BENNETT: I don't believe -- I'm sorry, your  
11 Honor. You indicated you're looking at the March 22<sup>nd</sup>  
12 probation violation report, correct?

13 THE COURT: That's correct.

14 MR. BENNETT: And the order to show cause page 2  
15 allegation No. 5.

16 THE COURT: Is that not what I read? By having  
17 committed or having been convicted of the offense of mail  
18 fraud, and then the section on or about June 27<sup>th</sup>, 2007?

19 MR. BENNETT: That's correct.

20 THE COURT: Okay.

21 MR. BENNETT: So I motion the Court to dismiss that  
22 as the State hasn't even attempted to introduce evidence that  
23 substantiates that allegation.

24 THE COURT: Any response?

25 MR. BAER: Yes, your Honor. If you take a look at

1 the copy of the -- now, the certified copy of the guilty  
2 verdict form what's attached to it starting at page 11, you'll  
3 see it corresponds to the Count 5, 6, 7, 8, all that is mail  
4 fraud. With respect to having committed, No. 5 here says mail  
5 fraud 18 USCA, 1341, and that's what those counts were  
6 referring to in that document.

7 THE COURT: Beginning on page 11?

8 MR. BAER: Yeah, I mean, actually if you look at  
9 page 9, it says Counts 1 through 10 are mail fraud, and then it  
10 spells out each one and names this particular defendant in  
11 those -- in each one of those federal Counts 5, 6, 7, 8, 9, and  
12 10 so it's all mail fraud.

13 MR. BENNETT: Your Honor, so that this makes sense,  
14 Mr. Johnson was sentenced and placed on probation in this Court  
15 in -- kind of just off the top of my head -- June of 2007.

16 THE COURT: Right?

17 MR. BENNETT: Count 1 indicates the date of the  
18 occurrence would be March of 2006. Count 2, April 2006. Count  
19 3, April 2006. It's true of every count with the exception of  
20 Count 10. Indicates it's June 22<sup>nd</sup>, 2007.

21 THE COURT: That doesn't happen often. Excuse me,  
22 folks.

23 Mr. Bennett, I see the dates you're referring to  
24 ending with June 22nd of '07 before I interrupted you.

25 MR. BENNETT: Okay. So all actions there that

1 occurred prior to Mr. Johnson being placed on probation can't  
2 serve as the basis for a probation violation. I understand  
3 that doesn't resolve Count 10, 22 --

4 THE COURT: Let me make it easy for you.

5 MR. BENNETT: -- 10 or 22. Yeah, please.

6 THE COURT: No, I'm sorry. Go ahead. I shouldn't  
7 cut you off.

8 MR. BENNETT: However, we brought today, your Honor,  
9 a copy of the minute entry which was just actually obtained.  
10 If you recall, I indicated I assumed the Court was going to do  
11 it whereas in state court we use court exchange. There's the  
12 Pacer system for the federal court. The minute entry indicates  
13 clearly that both Counts 10 and 22, among others, but only  
14 dealing with 10 and 22, were dismissed. So actions occurring  
15 prior to violation can't be deemed as the basis for a probation  
16 violation nor can counts that were dismissed. He wasn't  
17 convicted of them. They were dismissed.

18 The only two counts that even fit chronologically  
19 within the terms of his probation were 10 and 22 and the minute  
20 entry that I'll present to the Court indicates that those were  
21 dismissed.

22 MR. BAER: Judge, I'd object to the entry of that  
23 document in this hearing. It's not certified. We don't know  
24 where it came from. We don't have any notice of that, but I  
25 can address it in a different way that may make it easier for

1 the Court, that the Court could look at that, but I don't think  
2 it's -- and I'll object also on a relevancy basis and let me  
3 tell you why. Because counsel brings up the point about the  
4 timing of the convictions, but he's going off of the wrong date  
5 because he's going off of the conviction date in this case  
6 which happened in 2007.

7           However, this case was filed in 2005 for allegations  
8 of activities that happened back before 2005, so what's going  
9 on here is that after the filing of the criminal Information in  
10 this case, and at least some of the counts occurred during the  
11 time period between when this case was filed and this case was  
12 continued and some of them continued on past the date of  
13 conviction in this case. So beyond the fact that we'd object  
14 to the introduction of that document, we don't know the source  
15 of it, we don't know the contents of it, it's not certified, we  
16 maintain that the criminal activity occurred subsequent to the  
17 filing of the criminal case in this case and some of the  
18 convictions occurred -- some of the criminal activity occurred  
19 clearly after the convictions were entered in this case, some  
20 of the criminal activity in the federal case, and I think it's  
21 a distinction without a difference, the Court could find on one  
22 or two as easily as it could find on six. The criminal  
23 activities continued past both the filing and the conviction in  
24 our case and that's the sui generis of our allegation here  
25 today.



1 THE COURT: Mr. Baer, let me ask you a question  
2 directly if I can?

3 MR. BAER: Sure.

4 THE COURT: Take this away from our current set of  
5 facts because of the involvement that everybody has with their  
6 own case, but just in generic sense, an individual commits a  
7 crime. He has a two-year delay before he goes to trial and  
8 then at trial he's convicted and he is sentenced and he's  
9 placed on probation. Subsequent to being placed on probation  
10 the Court finds out that he has committed other crimes in the  
11 interim.

12 Are those considered probation violations if the  
13 person is not on probation at the time of their commission  
14 regardless of when he gets convicted? Isn't the probation  
15 violation something where the probation has to be in existence,  
16 right in place before the actions take place?

17 MR. BAER: Correct, your Honor, and that would go to  
18 the second point. We don't know the general context of that  
19 particular document that was just handed to us, but clearly  
20 some of the convictions happened for acts after the convictions  
21 of the -- the federal convictions happened far after  
22 convictions that were entered in this state case. So the  
23 distinction that you're making is a good one, but at the end of  
24 the day one or two or ten, a violation is a violation, and I'd  
25 ask that you find a violation based upon those.

1           If we can -- it may warrant if the Court is not  
2       anxious -- I understand why the Court may not be anxious to  
3       enter violations on those earlier ones, if we just give leave,  
4       if the Court feels if necessary for us to check those dates and  
5       cross check them to make sure we have -- to make sure that the  
6       numbers in this document just handed to us are consistent with  
7       the numbers in the federal indictment and cross check with the  
8       dates of occurrence, we'd be able to respond, I guess, a little  
9       bit more accurately, but the bottom line is at least a couple  
10      of them have occurred clearly outside that critical timeframe.

11           THE COURT: Okay. Let me do this just so we're clear  
12      on the record. The State has rested its case. There's a  
13      motion to dismiss at least as to No. 5 and I'm going to deny  
14      that motion because I believe there is evidence indicating at  
15      least one, if not more, possible counts that would apply.  
16      However, I think there are arguments to to be made. And my  
17      concern is we're slipping into arguments on the motion to  
18      dismiss which more appropriately ought to be placed on whether  
19      or not there's a violation. And I don't want to preclude the  
20      argument that I anticipate State will make on other violations.

21           Counsel, I think that you've made a good argument as  
22      to items that are alleged to have occurred prior to being  
23      placed on probation, and you can elucidate me further at the  
24      end of your presentation of evidence if you intend to, but if  
25      you don't intend to present evidence, we can go into those

1 arguments now.

2 MR. BENNETT: No, we do. That was just the evidence  
3 as it related to just allegation five. That wasn't meant  
4 obviously to address any of the other allegations.

5 THE COURT: And what I do note is that in my file  
6 sentencing took place on June 6<sup>th</sup>, 2007. That being the  
7 case, I would be very hesitant to find any actions taken by the  
8 defendant prior to June 6<sup>th</sup> to be violations of probation,  
9 but he was placed on probation on June 6<sup>th</sup>. In response to  
10 your motion I see that Count 10 does occur after June 6th and,  
11 therefore, I'm going to deny your motion, but I'll allow you to  
12 argue further at a later time.

13 Do you have other motions or would you like to  
14 continue?

15 MR. BENNETT: Well, you say it's -- you're looking at  
16 Count 10?

17 THE COURT: Yes. Excuse me, Count 10 of the  
18 exhibit -- Count 10 on page 12 of the exhibit that was  
19 presented to me by the State.

20 MR. BENNETT: Okay.

21 THE COURT: If you look at page 9 --

22 MR. BENNETT: Yes. Yes.

23 THE COURT: -- page 9 indicates these are mail fraud.

24 MR. BENNETT: My apologies.

25 THE COURT: You turn through each page then has dates

1 of events. All of these up through nine predate his conviction  
2 here and his sentencing here, excuse me, predate his sentencing  
3 here. Count 10 comes at least several weeks after he was  
4 placed on probation.

5 MR. BENNETT: I understand.

6 MR. BAER: And that would include No. 22 as well.

7 THE COURT: And as I said, there is at least a basis  
8 for me to deny the motion on No. 10 alone and you can argue the  
9 rest when we complete evidence.

10 MR. BENNETT: Which then brings me to the exhibit  
11 that I move to introduce.

12 THE COURT: I'll be glad to consider the exhibit.

13 MR. BAER: If the Court could just note the State's  
14 objections at this point.

15 THE COURT: I note the State has made its objection  
16 at this point. I'd like to see the exhibit so I understand the  
17 objections better. Thank you.

18 I've been handed Defendant's Exhibit 2 which appears  
19 to be a printout from the Pacer Service Center. Give me just a  
20 moment so I can read through this.

21 If I understand the objection correctly, Mr. Baer, if  
22 I misstate this, you correct me, you're indicating it's not a  
23 certified court document. You don't have foundation and you're  
24 concerned about the source and accuracy of the information. Is  
25 that correct?

1           MR. BAER: That's correct, your Honor. And without  
2 proper time to cross reference the content, the substantive  
3 content of that. There are a lot of numbers being bantered  
4 around. The only certified copy of anything here is the  
5 verdict, the federal verdict which has the numbers clearly  
6 delineated on it that the State is relying upon.

7           THE COURT: I don't know if either of you can  
8 enlighten me on this. I do have a concern. We are relying  
9 more and more on computerized printouts. The Courts are  
10 encouraging people to file and utilize computer systems. We  
11 now have a Pacer service that is nationwide for federal courts  
12 and some of the state courts and I'm handed a document which is  
13 very similar to being handed a copy of a docket, a minute entry  
14 out of some file. My concern is in part it doesn't have the  
15 type of certification that I would like to see it have, but the  
16 thing that really concerns me is if I followed this document,  
17 it's a direct contradiction of the other document that I'm  
18 looking at unless either of you can help me understand how  
19 these two are not inconsistent.

20           I have the verdict which shows Counts 1 through 38  
21 being found guilty, but I'm told that even before -- if I look  
22 at Defendant's Exhibit No. 2, I'm told that even before the  
23 closing arguments and before it was given to the jury, a number  
24 of these were dismissed. So I'm trying to understand why it  
25 would be given to me -- I mean, how it could have occurred and

1 how I can try to understand these two interplay.

2 MR. BENNETT: I don't know the answer, your Honor, so  
3 I can just surmise here, but as this Court is well aware, often  
4 times an Information filed at the state court will begin with  
5 Counts 1 through 5. Via motions to suppress or some other  
6 reason prior to trial the counts will be dismissed. They don't  
7 then refer to the counts at trial as Counts 1, 2 and 5 if 3 and  
8 4 were dismissed. They renumber them Counts 1, 2, and 3. I  
9 don't know that's what happened, but that seems to be the  
10 reasonable response.

11 THE COURT: Mr. Baer, would you like to be heard on  
12 my question?

13 MR. BAER: I wouldn't want to speculate at this  
14 point, your Honor.

15 THE COURT: Thank you. As I look at this, Counsel, I  
16 considered that same question, but I have in addition to the  
17 verdict form, I have the indictment. Maybe I better check the  
18 date and see if this is an amended indictment without saying  
19 it's amended. The indictment I'm looking at has 38 counts. It  
20 doesn't say it's amended. It's dated 3/18 2009, at least  
21 that's when it was assigned to Judge Benson. The stamp date I  
22 really can't read on it, March 16<sup>th</sup> of something. I guess  
23 that will remain a mystery to me for now. I'm going to allow  
24 this in.

25 MR. BAER: All right, your Honor. I will make one

1 point on this particular document. I think the Court, as the  
2 Court is well aware on an order to show cause, it's a noticed  
3 Information and defendant is on notice. The Court -- we are  
4 not talking about an indictment situation where a date is off  
5 by a day or off by a month or even off by six months or a year.  
6 The Court can find of its own, and I think probably I'm wafting  
7 into the argument for later on, but certainly the Court can  
8 find of its own volition that this individual -- I mean, you  
9 would have to suspend all consideration and conclude that this  
10 defendant here sitting before you, in fact, has not been  
11 convicted of any federal crimes even Sua sponte much less the  
12 fact he's been put on notice that the State believes and Adult  
13 Probation and Parole believes that there's a violation of the  
14 conditions of his probation for his federal convictions.

15 The fact that it may be off by a day or month or even  
16 a few months we believe is diminimus and it does not speak to  
17 the sui generis or the gravamen of the offense.

18 MR. BENNETT: If you look at the verdict form,  
19 actually I think it is answered here. Just as I glance at it,  
20 it appears as though the verdict form returns guilty verdicts  
21 in 1 through 38, but as you look closer, there is no Count 10  
22 nor is there a 22.

23 THE COURT: Thank you.

24 MR. BENNETT: So I think that answers that.

25 THE COURT: They aren't sequential then as I assumed

1 earlier they would be. There is no three. There is no eight.  
2 There is no ten.

3 MR. BENNETT: Correct.

4 THE COURT: There is no 17, no 20, no 22. Thank you.

5 Anything further, Mr. Baer?

6 MR. BENNETT: We do. I think we now have to respond  
7 to allegations three, four and six. So in order to do that,  
8 your Honor, the State {sic} calls Jamis Johnson to the stand.

9 THE COURT: Mr. Johnson, please come forward and be  
10 sworn in.

11 JAMIS M. JOHNSON

12 Called by the Defendant, being first

13 duly sworn, testified as follows:

14 THE CLERK: Do you solemnly swear that the testimony  
15 you are about to give in this matter will be the truth, the  
16 whole truth and nothing but the truth, so help you God?

17 THE WITNESS: Yes.

18

19 DIRECT EXAMINATION

20 BY MR. BENNETT:

21 Q Mr. Johnson, you're aware of why you're here today,  
22 correct?

23 A I believe I am.

24 Q You're aware of the allegations three, four and six  
25 in the State's order to show cause, correct?



1           A     I read the order to show cause. I'm not sure  
2 specifically which they are, but I'm --

3           Q     Well, even generally then. What is it you've been --  
4 I want to make sure that we're clear that you understand what  
5 it is -- because I want to limit our question and response here  
6 to just the allegations that are left remaining.

7                     So can you tell us the substance of allegations 3, 4,  
8 and 6 even in general terms?

9           A     I can't from memory.

10          Q     Do you recall where you were on March 18<sup>th</sup>, 2011,  
11 Jamis? Jamis, is there a federal case pending --

12          A     Yeah, because I was in trial.

13          Q     Okay. Okay. And you are aware of the allegations of  
14 the State that you've been convicted of federal crimes,  
15 correct?

16          A     Oh, okay. Yes, yes.

17          Q     Okay. Now, the State has presented to the Court a  
18 copy of a verdict form. Are you denying that you were  
19 convicted on March 18<sup>th</sup>, 2011 --

20          A     No.

21          Q     -- of federal crimes?

22          A     No.

23          Q     After a conviction on that date, where did you go?  
24 Where were you housed?

25          A     Well, I was released -- well, I went back to the

1 Davis County Jail that evening.

2 Q Why were you in the Davis County Jail? Do you  
3 remember?

4 A Well, I have to back up. On December 7 I was  
5 detained as a flight risk on a motion by the U.S. Attorney and  
6 I was sent to jail.

7 Q That was prior to your federal trial?

8 A Yes.

9 Q Okay. You said you wanted to back up. Was there  
10 anything else you wanted to state prior to -- because I just  
11 want to fast forward to the date of the conviction and what's  
12 happened since the entry of conviction.

13 A Okay. Well, no, that's why I was detained  
14 December 7<sup>th</sup> of -- or December 8<sup>th</sup>, I'm sorry.

15 Q Okay. So you were detained prior to trial because  
16 you were deemed a flight risk, correct?

17 A Yes.

18 Q Then you were convicted on March 18<sup>th</sup>, 2011, of  
19 various federal crimes, correct?

20 A Yes.

21 Q Are you still in custody, federal custody?

22 A No, in -- a motion was made -- well, there was some  
23 posttrial motions made. There was a -- on March 15<sup>th</sup>, excuse  
24 me, on April 15<sup>th</sup> a motion for new trial was made.

25 Q Okay. And who made that motion, Jamis?

1 A It was filed by Rob Hunt.

2 Q And Mr. Hunt is?

3 A Mr. Hunt was my former federal prosecutor.

4 Q He was your federal prosecutor?

5 A I mean, my federal defender.

6 Q Okay.

7 A Former federal defender. There was also a motion for  
8 to release me from detention based on, I guess, prosecutorial  
9 misconduct and that I was not actually a flight risk and that  
10 the original findings were incorrect.

11 Q Were findings or orders made pursuant to your motion?

12 A Yeah, we had a hearing on April 20<sup>th</sup>. Judge  
13 Waddups --

14 MR. BAER: Judge, I'm going to object to this on both  
15 hearsay grounds and relevance grounds.

16 MR. BENNETT: We're in an evidentiary hearing  
17 probation violation. The Rules of Evidence are clearly lax in  
18 these types of hearings. He's not -- I don't know what the  
19 hearsay would be. He's saying these motions were filed. I  
20 asked if --

21 THE COURT: Well, asked whether they are filed, I  
22 don't think that's a hearsay question, but I believe he was  
23 just telling us what Judge Waddups was saying at a hearing.

24 MR. BENNETT: Well, if he was, I apologize.

25 BY MR. BENNETT:

21

1 Q The question is were there findings and order made  
2 pursuant to your motion?

3 THE COURT: And that's either a yes or no.

4 THE WITNESS: Yes, there were.

5 BY MR. BENNETT:

6 Q And what was that order?

7 MR. BAER: I'm going to object. I know that lax  
8 Rules of Evidence apply here, but Best Evidence Rule is if  
9 we've got an order, we should at least look at the order, not  
10 Mr. Johnson's --

11 THE COURT: Or least a minute entry of it.

12 THE WITNESS: I have the minute entry and the  
13 transcript of that hearing.

14 THE COURT: Counsel, spend a moment with your client  
15 and see what documents he might have and then if he does have  
16 documents, show it to Mr. Baer before it's discussed further.

17 (Counsel conferred with his client.)

18 (Counsel is not speaking directly into a microphone  
19 and is difficult to understand.)

20 MR. BENNETT: Your Honor, I presented Mr. Baer, and  
21 Mr. Johnson has actually brought an entire transcript from  
22 (inaudible) or certified copy of order or findings and  
23 conclusions. That's not what we have available. We have an  
24 actual transcript of the April 20<sup>th</sup> motion hearing  
25 (inaudible).

1 THE COURT: Mr. Baer.

2 MR. BAER: I'm sorry?

3 THE COURT: He's just presented a document to be  
4 marked and he's asking that it be admitted into evidence. I'm  
5 just wondering your response, if any. Any objection?

6 MR. BAER: Well, it's the same objection as before.  
7 It's not certified. We haven't had a chance to look at it and  
8 it's a relevance objection. If the Court wishes to take a few  
9 moments to review through that and wants to point out what's  
10 relevant, I think the relevancy objection goes to this very  
11 simple detail which I've alluded to before that this defendant  
12 can make his arguments as much as he wishes.

13 He stands convicted of federal crimes including  
14 aiding and a betting and conspiracy which covers all of the  
15 dates and that's what's in the allegations, all of the dates.  
16 And the Court is now on notice that he is, in fact, convicted  
17 of those.

18 This may be better for argument from counsel that in  
19 some ways he believes this Court should not take that into  
20 consideration, that's one thing, and he certainly has a right  
21 to present his evidence, but we believe the Court can cut to  
22 the chase by noting those violations and the fact that they  
23 either are violations or they aren't. And if he wants to make  
24 an argument about why they should not be considered, that's  
25 different.

1 MR. BENNETT: That argument, though, hinges of  
2 evidence which is, as the Court indicated, not before the  
3 Court. So prior to me even making argument when I'm going to  
4 reference evidence, the Court has indicated it needs evidence  
5 before it. We don't have certified copies.

6 THE COURT: Tell me, if I can understand, just very  
7 succinctly, Mr. Bennett, I'm assuming in this document you want  
8 to present to me is something indicating the status of the  
9 federal court on the motions that were made and that you want  
10 to utilize that status as a basis for some type of argument.

11 Is that a fair statement?

12 MR. BENNETT: That is exactly correct, your Honor,  
13 (inaudible) motion to dismiss has been filed, that the kind of  
14 ancillary motions, his motion for his own release which  
15 obviously was granted because he's here, but there's also  
16 evidence of that. So the Court is correct I want to just  
17 specify of the two or three things. One, is that a motion to  
18 dismiss actually has been filed in court.

19 MR. BAER: For a new trial.

20 MR. BENNETT: And evidence of that is referenced and  
21 noted in the transcript. Also, his motion for his release and  
22 motion for appointment of a new public defender, I believe  
23 those are (inaudible,) but those would be the three pieces of  
24 evidence which I'll need to allude to make the argument that  
25 everyone --

1 THE COURT: And I understand from his testimony that  
2 those motions were made. It may also be --

3 MR. BENNETT: They were objected to as hearsay and  
4 the Court, I believe, was going to sustain those so.

5 THE COURT: Not that the motion was made. I  
6 understand. I've allowed him to testify as to the motions that  
7 were made. I have not allowed testimony as to rulings by  
8 judges. My question is are these transcripts -- is this  
9 transcript going to contain a ruling by the judge or is it  
10 simply indicating that motions were made?

11 MR. BENNETT: Well, with respect to the motion to  
12 dismiss or, excuse me, the motion for a new trial, merely  
13 reference that it has been made, that it has been filed.

14 THE COURT: Okay.

15 MR. BENNETT: With respect to the motion for release  
16 pending hearing on the motion for new trial, that it was  
17 granted.

18 THE COURT: Okay.

19 MR. BENNETT: And with respect to motion for  
20 appointment of a new public defender, that it was granted. So  
21 I think there's a --

22 THE COURT: May I confer with counsel for a moment?  
23 I feel like I'm losing control of everything.

24 Counsel, what you want me to understand from this  
25 that you consider relevant then is that there's a motion for a

1 new trial, whether he has a new attorney or not, whether he's  
2 in custody or out. The relevant issue is they are alleging a  
3 conviction. He's alleging he wants a new trial. And as I  
4 understand it, the district court has not yet ruled on that.

5 Is there more to this for relevancy purposes than I  
6 understand?

7 MR. BENNETT: It speaks to, and if we need to be a  
8 little bit more formal about it, then we can withdraw Mr.  
9 Johnson after he finishes this testimony, but it speaks to the  
10 sanction that will sort of be the second part of this hearing.

11 THE COURT: Okay.

12 MR. BENNETT: But if we want to take evidence from  
13 Mr. Johnson on two separate occasions so that we're clear, then  
14 that's fine.

15 THE COURT: Counsel, I'm going to have my abilities  
16 to sort through this. Mr. Baer, I hope you'll have patience  
17 and understanding, but I'm going to overrule the objection.  
18 I'm going to admit the transcript. I'm going to accept  
19 counsel's brief recitation as to what the rulings are as being  
20 indicative of what that transcript will say, but I'll note for  
21 the record I haven't read it and I probably will -- at least  
22 I'll read the ruling portion of it before I make a decision.

23 Go ahead, Counsel.

24 BY MR. BENNETT:

25 Q So Jamis, then what was the -- what was the finding



1 and order with respect to the motion for release and motion for  
2 new public defender?

3 A Well --

4 MR. BAER: I'll make it easy, not that it's my job to  
5 make the defendant's job easier, but (inaudible) and the Court,  
6 we'll stipulate he's been released. He's here. We'll  
7 stipulate he has a new counsel. He has new counsel and I don't  
8 believe that that's particularly relevant to this -- I mean,  
9 it's relevant probably to Mr. Bennett's argument, but we have  
10 stipulated (inaudible).

11 THE COURT: Thank you.

12 MR. BENNETT: If it was then stipulated to and that  
13 becomes evidence, then the following question is:

14 BY MR. BENNETT:

15 Q Jamis, it's just been stipulated that, in fact, those  
16 motions were granted. You're out --

17 MR. BAER: Well, no, no, the motions were made and  
18 that he's out --

19 (Counsel were talking on top of one another and could  
20 not be understood.)

21 BY MR. BENNETT:

22 Q So Jamis, are you still required -- are you under  
23 some sort of restrictions in this federal jurisdiction or the  
24 purview of the federal court? Are you still under some  
25 obligation?

1           A       Yes, when I was released, I was released into custody  
2 of a federal pretrial officer and I brought a letter from him.  
3 I report daily and I am at my son's home. I was released on  
4 the evening of April 20<sup>th</sup> and that's where I am. There are  
5 some things I think I need to correct.

6           THE COURT: Mr. Jamis, I am not going to have you be  
7 attorney from the chair. You're here as a witness today. I  
8 understand you're a party. I'll give you any break you want as  
9 far as time to consult with your attorney.

10          THE WITNESS: Okay.

11          THE COURT: But I am not going to have him direct the  
12 case from the table and have you direct your case from the  
13 chair. That won't happen.

14          MR. BENNETT: If I may approach, I'm afraid he's  
15 going to say that I've misrepresented the --

16          THE COURT: If you two want to take a brief recess  
17 and talk, you're welcome to, but when you come back, Counsel, I  
18 want to address you and I want him to answer questions.

19          MR. BENNETT: Understood, your Honor.

20          THE COURT: Thank you. We'll take a five minute  
21 recess.

22                   **(Recess taken by the Court.)**

23          THE COURT: Counsel, during the break I had an  
24 opportunity to scan through what's been marked as Defendant's  
25 Exhibit No. 3. This is the transcript. By no means have I

1 made a thorough read of this document. It would have taken  
2 quite a bit of time, but trying to skip through and find items  
3 that are pertinent and relevant to the case, it's clear to me  
4 why it is the Court's don't accept matters that are not  
5 relevant to the issues before them.

6 It makes for fascinating reading, but it also  
7 clutters the mind with a lot of information and circumstances  
8 that really are not relevant to the questions that I need to  
9 answer. What I'm going to do, I've already admitted this over  
10 the objection of counsel, but I'm going to indicate to both  
11 counsel that rather than read through Exhibit 3 to understand  
12 its purpose, I'm going to accept the representations that have  
13 been made that there's a motion pending for a new trial, that  
14 there is a motion and request for a new public defender and  
15 that there was a request for release. And the last two of  
16 those were approved and that the first one has not been  
17 approved. And that's as far as my inquiry into this document  
18 is going to go. Otherwise, I'm concerned that I'm going to be  
19 influenced or tainted by irrelevancies.

20 MR. BENNETT: And that's the only evidence we're  
21 attempting to --

22 THE COURT: Thank you. Are we ready to proceed?

23 MR. BENNETT: We are, your Honor.

24 THE COURT: Mr. Bennett, go ahead.

25 MR. BENNETT: Your Honor, now that that's been

1 cleared up, I just want to indicate to the Court that the  
2 following questions are now geared to -- not the response to  
3 the allegations i.e., the evidentiary hearing, but rather speak  
4 to sanctions or the second part of this hearing.

5 THE COURT: Okay.

6 BY MR. BENNETT:

7 Q So, Mr. Johnson, backing up August 30th, 2010, you're  
8 convicted or, excuse me, you're found in violation of a term of  
9 your probation. At that time what transpired?

10 A Judge revoked my probation and reinstated 36 months  
11 of probation and sent me to jail for 60 days.

12 Q Did you serve those 60 days?

13 A Yeah, it was put off for a week approximately and I  
14 entered on the -- or started serving this new probation term on  
15 the 7th of September.

16 Q Okay. Why did you not complete the entire 60 days?

17 A I made a motion for -- I filed an appeal of this new  
18 36 month probation and made a motion also for a probable cause  
19 application, for probable cause certificate and a motion to  
20 stay the remainder of the sentence I was serving pending my  
21 appeal.

22 Q And what's your understanding or what was your  
23 understanding at the time of the outcome of those motions?

24 A Well, the day that it was October 13<sup>th</sup> we argued it  
25 and originally from the Bench it was granted and my

1 understanding was that the -- in the motions the old stay had  
2 been -- the old probation had been revoked and I was serving a  
3 new sentence and I didn't believe that I was serving the  
4 parallel -- that they were both running parallel and then I was  
5 released and I went home that evening.

6 Q Okay. Did you report -- well, we know you didn't  
7 report to probation because that's what -- in our prior  
8 evidentiary hearing in this Court you were found in violation  
9 for a term of your probation for failing to report to  
10 probation, but now, and maybe it's been answered, but why  
11 didn't you report on that day for probation?

12 A Well, the next morning I got the call from Mr. Staker  
13 saying I was to report and as you know, I called you and we  
14 discussed it. I thought that I was operating under a new  
15 sentence and that it had been stayed, and I thought the old  
16 sentence had been revoked and then we discussed it and you  
17 advised me that I didn't want to acquiesce or waive that stay  
18 and that I shouldn't -- I shouldn't proceed to communicate  
19 further.

20 Q In any of those motions for stays or motions for  
21 stays pending appeal and the application for certificate of  
22 probable cause did you ask for any specific remedy from the  
23 Court?

24 MR. BAER: Objection at this point, your Honor. This  
25 has been going on for a long time, but I think we are talking

1 about things that we had already resolved at your last hearing.  
2 This is what we're talking about the stay pending. And also  
3 what Mr. Johnson knows or thinks or believes is not relevant  
4 for purposes of the court determination of whether he has  
5 violated what we're here to do. I know he's speaking to the  
6 sentencing issue, but still it certainly isn't relevant to the  
7 violations that we're asking the Court to find here today nor  
8 -- and in addition, rather, it has been discussed and reviewed  
9 at the last hearing.

10 MR. BENNETT: Of course Mr. Baer is correct. It  
11 isn't relevant to the State's request that he be found in  
12 violation. It's not supposed to be. It just speaks to  
13 sanctions. The Court at the prior evidentiary hearing found  
14 that Mr. Johnson's violation was willful. Notwithstanding that  
15 we're not trying to argue with the Court about that, but there  
16 are varying degrees of willfulness when we talk about a  
17 violation. It's not well it was willful and, therefore, it was  
18 (inaudible). For this Court to impose an appropriate sanction  
19 the Court needs to consider what goes on in the mind of a  
20 probationer when they violate.

21 How willful is it? Is it a blatant thumb of the nose  
22 to the Court or is it he was legally erroneous, but was he  
23 acting reasonably in acting the way he did. Those merit very  
24 separate sanctions from the Court. So it is relevant in  
25 understanding what was Mr. Johnson's mindset so the Court can

1 then impose an appropriate sanction based on the level of  
2 willfulness of the violation.

3 THE COURT: I appreciate the objection. I'm going to  
4 overrule it. Continue, Mr. Bennett.

5 BY MR. BENNETT:

6 Q So Mr. Johnson, did you ask for any specific remedy  
7 in those motions that we've just read?

8 A I did. I asked for the stay. I asked also to be put  
9 on court probation. And I decided that the prior sentence had  
10 been revoked and I asked that the current sentence, while we  
11 explore this, that it be stayed. So those are the two  
12 primary -- and I also asked --

13 Q With respect to probation, did you ask for any  
14 specific remedy?

15 A Well, that it be stayed and that I be put on court  
16 probation.

17 Q Okay. And, again, your understanding of the outcome  
18 of those motions was what?

19 A Well, I thought that it was stayed and that I would  
20 have to report to the Court and that I also would have to  
21 comply.

22 Q Let me stop you there. Did you ever report to the  
23 Court?

24 A Yes, in -- in -- in -- well, in mid-October we spoke  
25 and you first --

1 Q Mr. Johnson, did you ever report to the Courts?

2 A Well, yes, pursuant to that I wrote a letter --

3 THE COURT: I'm sorry, Counsel. I appreciate your  
4 not objecting. I want him to answer yes or no questions with  
5 yes or no. If you're going to follow up on it, then ask him a  
6 follow-up question. I do not want him to be utilizing a single  
7 question as the launching pad for a general discussion.

8 BY MR. BENNETT:

9 Q Mr. Johnson, did you ever report to the Court?

10 A Yes.

11 Q When and how?

12 A It was -- I think it was in, like, late October,  
13 early November I wrote a letter. I wasn't sure how to report,  
14 but I wrote a letter that conveyed the -- there was a motion --  
15 there was an order that was signed by the Court that was sent  
16 in, that was prepared and sent in. I prepared it. And on  
17 November, I think, 4th the Court signed it. The cover letter,  
18 I believe it was that cover letter. I also indicated in that  
19 letter at the end of the letter that I'm trying to be in  
20 compliance and I indicated to the court that I was reporting  
21 and I wasn't sure beyond that what I should do but.

22 Q When did you say that letter was sent to the Court?

23 A I believe it went with the order that was signed  
24 November 4<sup>th</sup>. And I can't recall the date specifically, but  
25 it would have been -- it was intended to be for November.



1 Q And did you report to the Court in December?

2 A No, I was detained in December.

3 Q Okay. And that detention was because of the federal  
4 case, correct?

5 A Yes, I was gone.

6 Q Following -- and we started this a little bit. And,  
7 your Honor, just so the Court is aware this is, again,  
8 attempting to speak to Mr. Johnson's degree of willfulness of  
9 that October 20<sup>th</sup> violation.

10 You indicated previously, Mr. Johnson, that you are  
11 subject to certain requirements or conditions in your federal  
12 release. Is that correct?

13 A Yes.

14 Q And what are those conditions?

15 A Well, I have a letter that outlines them, but I  
16 report daily and I am to -- I have a curfew, ten in the evening  
17 to six in the morning, and then I'm not to leave Salt Lake  
18 County without prior permission.

19 Q Well, and I'm assuming there's a list of others, but  
20 I think we get the point. Are you in compliance with the terms  
21 of your federal release?

22 A Yes, I'm in compliance.

23 (Counsel is again not speaking in the microphone.)

24 MR. BENNETT: Your Honor, and I've showed this to Mr.

25 Baer, I move for admission of the letter of Mr. Johnson's -- I

1 don't know if the term is federal probation officer, but the  
2 person with whom he reports pursuant to (inaudible)?

3 THE COURT: Mr. Baer.

4 MR. BAER: Same objection as before, your Honor.

5 THE COURT: Thank you. It will be admitted. Thank  
6 you.

7 (At which time an exhibit was admitted but no number  
8 was referred to and cannot be entered in the index.)

9 BY MR. BENNETT:

10 Q Mr. Johnson, you were, and we talked about this, but  
11 since you were found in violation of the term of your probation  
12 that you report to AP&P as directed to do so, that finding  
13 being made by this Court April 27<sup>th</sup> of this year, just a few  
14 weeks ago, since that time have you been in compliance with the  
15 terms of your state probation?

16 A I reported to Mr. Staker as requested, but I also  
17 told him that I don't have a job. I've been found to be  
18 disabled by social security and I think that might -- I'm  
19 supposed to have full-time work under the terms of the old  
20 probation and I just got out and I don't have a full-time job  
21 and I have this disability determination, so that would not be  
22 in compliance, I would imagine, but I'm trying to be and I've  
23 reported.

24 Q Okay. Mr. Johnson, is there anything else -- with  
25 respect to your desire to be in compliance, with respect to the

1 willfulness of the violation of failing to report on  
2 October 20<sup>th</sup>, 2010, to Mr. Staker, is there anything else  
3 you'd like the Court to be aware of?

4 A Yes.

5 Q Please.

6 A Further indication of not only did I write the Court  
7 which I thought I was supposed to do, but we sent an email to  
8 Mr. Staker, you sent an email to Mr. Staker in mid-October  
9 informing him of the status, our understanding of the status.  
10 And the (inaudible) I would like before the Court that I  
11 certainly have every desire to be in compliance. I didn't  
12 willfully try to avoid reporting. I'm glad to report.

13 THE COURT: Thank you. Mr. Baer, do you have any  
14 questions for Mr. Johnson?

15 MR. BAER: Just a couple of questions for  
16 clarification.

17

18 CROSS-EXAMINATION

19 BY MR. BAER:

20 Q Mr. Johnson, it's true then, you have just admitted  
21 with explanation, that you failed to report to the probation  
22 officer on October 21<sup>st</sup>, 2010, on your release with  
23 explanation; yes or no?

24 A Yeah, I didn't report to him on the 21<sup>st</sup>.

25 Q Okay. And by not reporting you'd have to agree it

1 would be impossible for you to establish with him any residency  
2 that you may have had upon your release. Isn't that true?

3 MR. BENNETT: Objection, Judge. I believe we've  
4 resolved those in the prior evidentiary hearing. The Court has  
5 found that he was in violation of the term of his probation for  
6 failing to report on those days.

7 MR. BAER: Yeah, but I just want to make sure that  
8 it's clarified his testimony. I mean, it was brought up on  
9 direct.

10 THE WITNESS: Could you ask me again.

11 THE COURT: Oh, it's overruled. I have heard the  
12 objection and it is overruled for the reason that it was  
13 brought up and also for further clarification. I will tell  
14 both sides in my mind I can differentiate between the findings  
15 that have already been made by the Court and a determination of  
16 what the sanctions should be and I anticipate that you brought  
17 things up to help clarify what was in his mind, and I  
18 anticipate that counsel is trying to establish that he knew  
19 that he had not done certain things and I don't see a problem  
20 with that. Continue, Counsel.

21 MR. BAER: Thank you, your Honor.

22 BY MR. BAER:

23 Q So just a follow up, I think close facsimile at least  
24 to the last question. You have to agree then by not reporting  
25 when you were supposed to report, you could not have reported

1 your establishment or your residence of establishment at that  
2 time period, correct?

3 A I didn't have any notice I was to report. I didn't  
4 get that notice.

5 Q The question is by -- I'll let it sit.

6 THE COURT: Sounds like a good argument.

7 MR. BAER: Thank you, your Honor.

8 THE COURT: I'm sorry. I don't mean to qualify your  
9 question. I'm simply saying that's more of an argument than an  
10 evidentiary question.

11 MR. BAER: Thank you, your Honor.

12 BY MR. BAER:

13 Q Now, Mr. Johnson, it's true that with respect to your  
14 federal convictions, that the time period of those convictions  
15 started in 2005 and finished on or around August 6, 2007.  
16 That's true, isn't it?

17 A No.

18 Q That's what the allegations were?

19 A No.

20 Q That's not what it says in the conspiracy document?

21 A No.

22 MR. BAER: No other questions, your Honor.

23 THE WITNESS: I'll correct it.

24 THE COURT: Anything further?

25

## REDIRECT EXAMINATION

BY MR. BENNETT:

Q Mr. Johnson, do you want to -- obviously on direct you can't -- you need to answer yes or no, but you appeared to want to correct something.

A Yes.

Q Please.

A There was one -- there were October -- there were June 2007 transaction that was the basis for Counts 2 and 22, not in August 2007. And those are the two counts that were dismissed.

MR. BENNETT: Thank you.

THE COURT: Anything further Mr. Baer?

MR. BAER: No, your Honor. Thank you.

THE COURT: Thank you, Mr. Johnson. Please step down. Mr. Bennett, any further witnesses?

MR. BENNETT: No, your Honor. When we come to -- obviously it's the State's burden to argue, but we will then move to sanctioning and so I don't know who needs to go first or not. If we were just doing sanctioning, I would ask to go first, but I understand we're dealing with the burden which lies with the State so I'll defer to the Court as to who speaks first.

THE COURT: If the parties will permit me, I'll tell you where I'm at and you can then decide what you need to do to

1 persuade me which way you feel I need to go.

2           Based on the evidence that was presented,  
3 specifically Plaintiff's Exhibit No. 1, the verdict and the  
4 attached indictment, after listening to argument that was  
5 presented by defendant and reviewing these documents combined  
6 with the affidavit of the probation officer, Mr. Staker, that  
7 was signed March 22<sup>nd</sup>, if we looked at Item No. 3, the  
8 allegation is that he was convicted of aiding and a betting  
9 willfully causing another to commit a crime. On No. 5 there's  
10 an allegation that he was convicted of mail fraud, and on No, 6  
11 excuse, me did I skip the wrong one?

12           MR. BAER: You skipped No. 4, your Honor.

13           THE COURT: No. 4, conviction of the offense of  
14 conspiracy and on No. 6, wire fraud. I've just gone through  
15 these various allegations during the break and what I find is  
16 that on No. 5 by the federal court having dismissed or whoever  
17 it was in the federal court that made the motion, the Court  
18 dismissed the allegation on Count No. 10 in their action, and I  
19 believe that was the only allegation that tied into our current  
20 probable cause statement and affidavit alleging mail fraud. I  
21 don't see that I have a lot of evidence on mail fraud. You may  
22 want to address that if you feel I'm viewing that in error.

23           I do see by the convictions that there are  
24 convictions on Counts 18 through 20 -- I'm sorry. The  
25 following convictions refer to incidents or counts that are

1 alleged to have transpired after sentencing, and that would  
2 include the Counts 18 through 22, 23 and 24 through 28, so  
3 combining all of those it's 18 through 28.

4 Now, the concerning part to me in all of this is that  
5 the State is trying to prove that he has violated probation by  
6 committing these acts even though they weren't convictions  
7 until later. He committed these acts after the time of  
8 sentencing.

9 It appears to me that viewing the verdict and also  
10 the attached indictment, that Mr. Johnson may have been  
11 involved in a series of conduct over a period of several years  
12 interrupted by his conviction in this court, but in which he  
13 continued to participate even following his conviction and that  
14 that didn't result in a conviction on those following matters  
15 until after it was addressed in the federal court recently.

16 So I'm telling both sides that I find in my mind  
17 right now that I'm leaning towards, on the question of  
18 violation, finding that he has committed certain acts which the  
19 federal court now has entered convictions on that occurred  
20 after the 26<sup>th</sup>, excuse me, 6/6 of '07 which are found in  
21 Counts 18 through 28. I believe that those will substantiate  
22 several of the State's allegations, but not substantiate at  
23 least one of the State's allegations. I'm not stating this as  
24 a finding. I'm stating this as my understanding. And I would  
25 appreciate either side informing me if they believe I have



1 misinterpreted what I have read.

2 With regard to the arguments, I'm going to ask Mr.  
3 Baer to proceed with any arguments that he feels needs to be  
4 made with regard to the probation violation issue and then  
5 after I rule on probation violation, we will address sentencing  
6 on either the former or both of these violations.

7 Mr. Baer, proceed.

8 MR. BAER: Thank you, your Honor. The State, without  
9 it coming as a surprise, would subscribe to the comments of the  
10 Court. That is the focal point of the State's position that he  
11 continued to conduct these acts not only after the conviction  
12 in the underlying state case, but I think the Court can also,  
13 either by way of the allegations in the probation violation  
14 report or Sua sponte, note that clearly these acts continued  
15 after his conviction.

16 I respect the Court's comments before, but I think  
17 that is too fine a distinction. The State believes it's too  
18 fine a distinction. Certainly once this defendant was  
19 convicted on the State count, and that would be back in March,  
20 to continue to engage in the criminal activity that led to the  
21 federal convictions is thumbing -- in the State's view is the  
22 defendant thumbing his nose at this Court.

23 The fact that he may have been sentenced later, and  
24 if you look at the docket, he was sentenced quite a bit later  
25 based upon some continuations which I probably should have

1 looked a little closer at that before I made the argument, the  
2 State is usually prepared to go forward in these matters and  
3 the continuations are filed by the defendant. I don't know  
4 that for fact, but I'll just represent that the State's  
5 position would clearly be that it was the defendant's thumbing  
6 of this Court by continuing in those criminal acts right after  
7 the day of his conviction on until sentencing to say nothing of  
8 the post-sentencing time.

9           So we believe he's in violation for those reasons of  
10 the allegations now contained in the March allegations that  
11 we're doing substantively here today. And I can speak to the  
12 sanctions if the Court finds for violations today or I can  
13 speak just to the November findings or I can wait. I don't  
14 think the State, quite frankly the State's position is not  
15 going to be any different. This defendant has been violated  
16 before by this Court. He's been violated for not maintaining  
17 employment. He's been violated for not complying with other  
18 conditions; not reporting to this probation officer. He's now  
19 being requested he be violated for federal convictions, also  
20 for not reporting again to this officer in establishing his  
21 place of residence.

22           The sum in this case is bigger than the parts. I  
23 mean, what we have is a sophisticated defendant who has played  
24 this game for a very long time and parsed it extremely closely,  
25 but even he can't pars it close enough to negate the findings

1 that he has violated the orders of this Court. He certainly  
2 has violated the spirit of the orders of this Court. He has  
3 not -- he seems to seek to be treated differently because he's  
4 a smart guy and because he's a sophisticated guy and because he  
5 can pars words and say what his understanding is.

6 But the clear evidence is that he has violated the  
7 spirit and the orders of this Court and the State maintains  
8 that the Court should invoke the original sanction that was  
9 available to this Court at sentencing and that would be on the  
10 underlying felony that he was convicted of in this case.

11 THE COURT: Thank you, Mr. Baer. Mr. Bennett.

12 MR. BENNETT: Your Honor, as I read the indictment,  
13 the date on or about is similar to filing of an Information in  
14 the State court where it alleges that specific illegal conduct  
15 occurred on or about and then the date follows. None of the  
16 allegations except for Counts 10 and 22 even allege that the  
17 criminal conduct occurred when the defendant was placed on  
18 probation. Those on or about dates all predate Mr. Johnson's  
19 probation. That is clear, unequivocal.

20 Counts 10 and 22, the on or about dates clearly show  
21 that the alleged misconduct there did occur after Mr. Johnson  
22 was placed on probation. That's obvious. But to the Court's  
23 point that that somehow demonstrates that he continued to  
24 persist in illegal conduct after he was placed on probation,  
25 the Court can't make that leap because there is no conviction.

1 Those were dismissed. They were dismissed.

2 And while the Court may be tempted to say well the  
3 fact that he was charged, you know, there can be inferences  
4 drawn it's evidence that, but the bottom line is he wasn't  
5 convicted so how can this Court find that he violated a term of  
6 probation based on allegations only two of which even  
7 chronologically occurred or alleged to have occurred when he  
8 was on probation when those very counts were dismissed? I  
9 think that's violative of a number of defendant's; rights;  
10 notice, due process, but more specifically there's just no  
11 conviction on which the Court can hang its hat. That's my  
12 response to allegation No. 5 of the order to show cause.

13 In response to allegations three, four and six, the  
14 only reason that the State didn't have to put on much evidence  
15 is because it doesn't take much to show that he was, in fact,  
16 convicted on March 18<sup>th</sup> of this year. We can't even dispute  
17 that. What we're asking the Court to do, though, however, is  
18 to refrain from making findings or conclusions, much less  
19 sanctions, when there are potentially dispositive motions filed  
20 in the Court. That conviction, in short time, mind you, could  
21 be overturned and then we would have a situation where the  
22 State court has sanctioned Mr. Johnson for being convicted of a  
23 federal crime which conviction no longer stands.

24 That certainly wouldn't be in the interest of  
25 justice, so while there's no getting around the fact that he

1 was convicted on March 18<sup>th</sup>, there are motions that could  
2 overturn that conviction. It makes sense in the interest of  
3 justice for this Court then to hold off in making findings,  
4 conclusions, much less any sanction until those are determined.  
5 And it's my understanding that sentencing is still set for July  
6 in this case. Therefore, any motion for a new trial would have  
7 to be heard and would have to take place prior to sentencing.  
8 Sentencing hadn't been moved out. It's still existed July.

9           So it's not like we're asking the Court to hold off  
10 for a year or two to see if his conviction is overturned. I  
11 can't see how the federal courts can make its decision after  
12 sentencing. It would have to do so prior to sentencing even  
13 considering its motion for a new trial. So we're not asking  
14 the Court to hold off making any findings for any lengthy  
15 period of time.

16           I'm not going to pretend like things don't get  
17 continued in federal court too. I'm sure they do just as they  
18 do in state court, but, again, with respect to allegation five,  
19 in summation the allegations that fit that could have even  
20 occurred when he was on probation were dismissed. The  
21 convictions that now exist could be overturned.

22           Thank you, your Honor.

23           THE COURT: Thank you, Mr. Bennett. Before Mr. Baer  
24 responds, I got the impression that Mr. Baer combined both his  
25 argument regarding whether or not a violation existed with his

1 argument for sanctions.

2 MR. BENNETT: Okay.

3 THE COURT: And I don't want you to be confused  
4 because I think when you finish, I'm going to hear from Mr.  
5 Baer regarding his final argument and I will allow you one last  
6 argument, but that's all.

7 MR. BENNETT: And just so we're clear I have not  
8 spoken to an appropriate sanction.

9 THE COURT: And that's why I'm saying you could  
10 either do it now or you could wait until after Mr. Baer  
11 concludes his presentation.

12 MR. BENNETT: I'll do so now if the Court --

13 THE COURT: Very well.

14 MR. BENNETT: On August 30th Mr. Johnson was found in  
15 violation. That's pending appeal. A brief has been filed.  
16 The State has -- actually it was a non-complying brief. The  
17 original is fine, but Fedex or Kinkos hadn't made it double  
18 sided so that's only recently been remedied. In fact, Monday  
19 was when it was remedied. The State hasn't responded, but in  
20 any event the revocation and reinstatement of the sanction was  
21 stayed.

22 At that time Mr. Johnson began to serve the sanction  
23 of 60 days. Prior to the 60 days, he filed a motion to stay  
24 and a probable cause certificate. In those documents he  
25 specifically asked the Court to place him on court probation

1 pending the outcome of the appeal. That was granted. The  
2 probable cause certificate -- and I understand this is the  
3 identical argument we made at the evidentiary hearing, but it  
4 just speaks to the degree of willfulness, but the probable  
5 cause certificate signed and issued by this Court states that  
6 he is to report to the Court.

7 And the other terms for that matter sound very much  
8 like court probation, so I don't think it's -- and I'm in part  
9 defending my own legal analysis of the situation, much less Mr.  
10 Johnson's or including Mr. Johnson's, but that when you ask for  
11 specific relief and your motion is granted, the probable cause  
12 certificate -- well, it didn't specifically say you no longer  
13 have to report to AP&P, but it did say you are to report to the  
14 Court on a monthly basis. When you combine those two, I think  
15 it's reasonable for Mr. Johnson to think that the relief he  
16 sought was granted and that his probation was then converted to  
17 court probation pending the outcome of the appeal.

18 Additionally, the other evidence that was introduced  
19 I hope tends to show that when he, Mr. Johnson, is made clear  
20 of his duties, such as the requirements or the terms of his  
21 federal release, he's compliant. He's been compliant since the  
22 last evidentiary hearing as far as compliance with Mr. Staker  
23 and the Adult Probation and Parole. And prior to that there  
24 were -- I'm not going to hyphen the fact that there were other  
25 orders to show causes filed throughout, but that evidence I

1 think tends to show two things. One, he's reasonable in his  
2 analysis as I was reasonable in mine when I gave him counsel  
3 that he had been granted the relief he sought, he was on court  
4 probation, he was to report to the Court. He said he did that  
5 in November. He failed to do that December through April  
6 because he was incarcerated apparently.

7           So what degree of willfulness of the violation is  
8 there? And I think the Court has found that it was willful,  
9 but I think it has to be a minimal amount of willfulness  
10 because he's reasonable in relying on -- if you're not  
11 reasonable in relying on the Court's probable cause  
12 certificate, then I don't know what you are reasonable relying  
13 on. So is the violation willful? I think it was minimal,  
14 minimal amount of willfulness that is. So, you know, the Court  
15 can impose the sanction it wants to. Obviously it merits  
16 something far less than what the State is asking for which is  
17 the original sentence of prison, a term in prison be imposed.

18           Lastly, your Honor, Mr. Johnson, when it has been  
19 clear to him, I know the State is going to adamantly object to  
20 this, but when it's been clear to Jamis, he does more or less  
21 what it is he's been told. Now, he has some certain  
22 disabilities and prior orders to show causes having to do with  
23 restitution amount, he's, you know, been found to be disabled  
24 by the federal government so, you know, there's always -- but  
25 that's really not before the Court, but I recognize the Court



1 is going to say well he hasn't always been compliant, that's a  
2 stretch to say just because he complies with the federal terms  
3 of his release, that he's supervisable or amenable to  
4 supervision.

5 So I just want to address what I anticipate, and  
6 that's what it comes to restitution, he has some disabilities.  
7 In fact, he's talked to me numerous times about asking the  
8 Court to modify his probation. That isn't before the Court  
9 either, but in general when Jamis is aware what he's required  
10 to do, at least since August 30th of 2010, he's done so. I  
11 can't speak to prior to that, but since August 30th, 2010, when  
12 it's been clear and he's not relying on something -- reasonably  
13 relying on something else, he's been complying.

14 THE COURT: Thank you, Mr. Bennett.

15 MR. BENNETT: And in light of that, your Honor, I ask  
16 for a minimal sanction on Mr. Johnson.

17 THE COURT: Thank you, Mr. Bennett. Mr. Baer.

18 MR. BAER: Thank you, your Honor. I'll start right  
19 at the end, your Honor. Counsel brought up the concept of  
20 restitution. And as the Court is aware, it can check its own  
21 docket or it can review the State's note in the Information  
22 from the probation officer, the restitution is not to be  
23 considered obviously for a violation here today, but it  
24 certainly can be considered for sanctions.

25 What you have here is an individual who was

1 originally ordered to pay \$120,000 to his victim. He has been  
2 found guilty of securities fraud for defrauding these victims  
3 in real time. This is all the way back in the early part of  
4 2000. So here we are seven or eight years later. Not only  
5 does he owe the \$120,000, he owes \$136,000 because he hasn't  
6 found the time or the ability in his own mind, because he is  
7 the one who brought up that he is disabled, to get any kind of  
8 a reasonable job and make reasonable payments on that  
9 restitution. I'm sure that carries a lot of weight and a lot  
10 of water with the victims who are sitting out there out  
11 \$120,000. No, \$136,000 plus as of the day that we were sitting  
12 here.

13           With respect to his representation that he can't get  
14 a job, let's look a little bit historically at that. You were  
15 not the trial court here, your Honor, but at the trial this  
16 individual indicated that he was so blind that he couldn't  
17 proceed in this case and that he required a motion to consider  
18 striking of the trial and to set it off in the distance because  
19 he couldn't see.

20           The State was required to get, at its own expense,  
21 and this is not a complaint, just an observation from the  
22 historical perspective, to get a machine that this individual  
23 could read when he put a piece of paper in and blew it up nice  
24 and large in front of him. Notice there's no such machine here  
25 today. What does that go to? That goes to the credibility of

1 this defendant. What else goes to the credibility of this  
2 defendant? This defendant can talk about his understanding  
3 upon his release whether he has to report a probation officer  
4 or not, but he can't remember that in the indictment for which  
5 he stood trial in federal court for a week or so in front of a  
6 jury, he can't recall that the conspiracy in the aiding and  
7 abetting periods and certainly the conspiracy periods goes up  
8 until August 2007. He can only remember the point that he's  
9 intended to comply with his officer.

10 With respect to whether or not he's complying with  
11 his federal officer, that information comes from one source and  
12 one source only. It comes from the defendant who -- again,  
13 whose credibility is suspect, if not entirely debunk at this  
14 time. There is no independent finding that he is complying or  
15 completely complying or being cooperative with that probation  
16 officer. And even if he were, it does not speak to the myriad  
17 of violations both today and historically in this particular  
18 case.

19 The State's position is pretty clear or should be by  
20 now that this case for which there has been a conviction for  
21 nearly four years, into in excess of four years, there has been  
22 no attempt by this defendant, reasonable attempt, keeping it to  
23 a reasonable person's standard of what you would expect of any  
24 probationer, to comply with the conditions of probation. It is  
25 systemic. Whether or not you find a violation on the federal

1 convictions, it is already established as systemic. A quick  
2 look at the docket will show that this is hardly the first  
3 rodeo for all of us in this regard. He does it time and time  
4 again.

5 Now, with respect to those federal convictions.  
6 While counsel was speaking I did have a chance to look at the  
7 docket. And as I suspected, the original sentencing in this  
8 case was going to be earlier than June. However, on 5/2 '07  
9 James Barber, this defendant's attorney at the time, did file  
10 the motion to continue sentencing. So the State would ask that  
11 the Court even back up its analysis at least until that point  
12 with respect to the timing of the federal convictions.

13 But that also raises an important question. One that  
14 obviously none of us have briefed, but, you know, what is the  
15 responsibility of a defendant in between the time he's  
16 convicted and the time that he's sentenced? Does he get to go  
17 out and rape and maim? Does he get to go out and commit arson?  
18 Does he get to go out and -- and that has no reflection on the  
19 sentencing or the consideration of this Court when it's brought  
20 finally to this Court's attention and when he's finally brought  
21 to a conviction on those additional charges, the State would  
22 submit that it is relevant just on a totality of the  
23 circumstances consideration, but it certainly is a particularly  
24 relevant matter when you look at the docket and you note that  
25 this defendant was the one who delayed his sentencing. And at

1 least a reasonable portion or some portion of the federal  
2 convictions occurred post sentencing or post at least the  
3 motion to continue the sentencing and certainly post the  
4 conviction.

5 Now, as for the motion to stay, that is a  
6 post-conviction motion which is filed, as the Court knows, in  
7 most, if not all, jury convictions. And the question becomes  
8 what is the likelihood that the defendant would prevail on  
9 appeal. We've had no evidence here today that he would likely  
10 prevail on appeal. And we would submit that that is a motion  
11 which is something that the federal government has to consider.  
12 And if or when they consider it in any way, fashion or form  
13 favorable to this defendant, they can bring, the defendant that  
14 is can bring this back to the Court's review.

15 However, at this point he stands convicted of a  
16 plethora of federal crimes and he has not shown -- there has  
17 been no showing rather that there's a likelihood that he would  
18 prevail on appeal. Even putting that aside for a moment and  
19 considering in all views favorable to the defendant that maybe  
20 he would be likely to prevail on appeal, he still remains in  
21 violation of the conditions of this Court both historically and  
22 on those November allegations and by Reincorporations .1 and 2  
23 of the March allegations which are consistent with the November  
24 ones.

25 I don't know how the Court wishes to address that.

1 It probably is a distinction without much of a difference.  
2 Because of that it is the State's view that this manipulative  
3 process has been going on for a very very long time indeed. It  
4 is time to bring it to an end. And the actual actions of this  
5 defendant vis-a-vis his lack of restitution, lack of  
6 employment, when you look around the world, your Honor, you see  
7 an awful lot of people who work sitting in wheelchairs, working  
8 without a leg, working without appendages, it's a thin read,  
9 indeed, for which the defendant to rest his laurels in this  
10 court to say that he has some problems getting employment. And  
11 not only is it a thin read, I think it's an insult not only to  
12 this Court, but to all those individuals who do go out there  
13 and do work under some very very trying circumstances.

14 I know I've mixed and matched a little bit what we  
15 believe the sanctions s are and findings should be of this  
16 Court, but I think the Court can pars out the parts of the  
17 arguments of each and we'd ask that you impose the original  
18 finding of a further violation here today and the imposing of  
19 the sanctions as previously noted.

20 THE COURT: Thank you.

21 MR. BENNETT: Your Honor, at this time I would just  
22 impose an objection even if it's ultimately for the sake of  
23 preservation, and that's an objection to relevance to the  
24 State's argument with respect to restitution, well, excuse me,  
25 relevance as well as kind of an objection of proper notice as

1 well as the fact that there's no evidence before the Court of  
2 those numbers that were thrown out. That's precisely, having  
3 just skimmed through the State's hearing and sentencing  
4 memorandum, what is set forth there. At the outset of this  
5 hearing we indicated we objected to the Court's considering of  
6 that memorandum.

7 With respect to the comments made to Mr. Johnson at  
8 the time of trial, object as to relevance. Argument made with  
9 respect to employment, again, objection as to relevance. I  
10 trust and hope that the Court can compartmentalize the parts of  
11 the State's argument that were relevant and set those aside in  
12 determining an appropriate sanction from those that actually  
13 were relevant, but specific objections to arguments set forth  
14 on those three issues; restitution, defendant's behavior at  
15 trial, employment, actually as well as prior alleged probation  
16 violations which are not properly before the Court at this time  
17 either.

18 THE COURT: Thank you, Mr. Bennett. Mr. Baer, do you  
19 want to address his objections?

20 MR. BAER: I do. Only because in two ways. The  
21 first one is that if you take a look at those marked  
22 allegations, it's under page 3, so they are on notice of this  
23 issue, the defendant has a severe employment problem. The  
24 defendant has never held employment during the last three years  
25 of probation. That's part of the March allegation packet

1 before the Court, but secondly, and perhaps more dispositively  
2 to this Court, this defendant sat up in that very chair right  
3 there and talked about his inability to be employed.

4 Now, why else would that be relevant to this Court  
5 except for the payment of restitution to victims who were  
6 defrauded originally so many years ago in this case? So he has  
7 brought it up himself. He's opened up that door. It's also  
8 part of the PV report and packet that we're addressing today.  
9 And also in the event that the Court feels otherwise, we also  
10 have full confidence the Court can compartmentalize that  
11 information. Again, it was introduced not for violative  
12 purposes, but for purposes of sanctions.

13 THE COURT: Thank you. With regard to the objection,  
14 let me just make a finding. For better or for worse this is a  
15 case in which a fresh set of eyes has come on the scene after  
16 many years of a prior court dealing with this case and prior  
17 probation violation allegations. I don't know if that cuts in  
18 favor of one side or the other, but at one point I wondered  
19 myself how much I should try to immerse myself in the history  
20 of the case so I could have a sense and feeling of how the case  
21 developed and got to the point it is.

22 And the truth is I'm looking only at a probation  
23 violation. I do compartmentalize. I'm looking specifically at  
24 a probation violation. With regard to the objections, I do  
25 find that both the issues regarding restitution payment and



1 employment are really to what we're doing. And I do that  
2 specifically because the allegation has been made that  
3 whenever -- whenever the defendant clearly understands what's  
4 expected of him he complies. Now, that was a statement that I  
5 recall being made, the argument that was made. And I think the  
6 countervailing argument is not with regard to some aspects, not  
7 with regard to employment and restitution. And for that  
8 purpose I think those are relevant. And although it comes  
9 after the fact, I want you to know I will be sustaining or  
10 overruling the objection as to those two and I do rely on those  
11 as part of my thought process.

12 As to the accommodations at the time of trial, again,  
13 that's probably something that came about before my time and  
14 before anything that I have observed in court. I don't know  
15 that it's directly relevant at all to the issues that are  
16 before me, so as to your concerns, Mr. Bennett, I will not  
17 consider behaviors, requests, those kinds of issues as they  
18 come up at the time of trial. Beyond that, I think all of us  
19 understand these are arguments of counsel. I wasn't here.  
20 There's no evidence as to those accommodations, why they were  
21 brought or how they were used or not used. I consider it to be  
22 part of the expression of emotion that comes at the time of  
23 argument and I will not be relying on those. They are not  
24 evidence.

25 Counsel, I appreciate your arguments and I'm going to

1 take the matter under advisement. If you'll wait a few  
2 moments, I'm going to organize my thoughts and I'll be back  
3 out.

4 MR. BAER: Thank you, your Honor.

5 (Recess taken by the Court.)

6 THE COURT: Thank you. Please be seated. I've had a  
7 chance to consider the evidence that's been presented, the  
8 argument, the exhibits. With regard to the findings of  
9 violations alleged in the probation officer's March 22<sup>nd</sup>,  
10 2011, affidavit, I find on the first allegation contained in  
11 Paragraph No. 1 that the evidence has failed to establish a  
12 violation that he failed to establish or that he changed his  
13 residence without permission on October 21<sup>st</sup>, 2010.

14 I do find that he knowingly violated Paragraph No. 2  
15 by failing to report as directed on October 21<sup>st</sup>, 2010, and  
16 my finding is based on a combination of the prior finding of  
17 the Court that whether he relies on his own understanding or  
18 relies on counsel's representations isn't relevant to me. He  
19 was under probation. He knew he was under probation. It was a  
20 matter of record. I don't believe his probation was stayed for  
21 the reasons stated in my subsequent ruling. And I think a  
22 failure to respond and report as directed by probation, you do  
23 that at your own risk. If you misunderstand or misinterpret  
24 law, that's a risk you take.

25 No. 3, I do find a violation of probation for his

1 conviction of aiding and abetting or willfully causing another  
2 to commit a crime. I'm referring specifically to the findings  
3 of guilt on Counts 18, 19, 21, 23, 27 and 28 of the federal  
4 jury verdict form.

5 Item No. 4, I do find that he's in violation of  
6 probation by having a conviction of conspiracy which, again, is  
7 Count 23, could be interrupted for either three or four, No. 3  
8 or 4 allegation of violation.

9 As to Paragraph No. 5, I find no violation. The  
10 evidence does not support a finding of violation on No. 5.

11 On No. 6 I find that the evidence does support a  
12 finding of violation for the conviction of wire fraud. You  
13 specifically refer to Counts 27 and 28.

14 There are allegations of other violations and, excuse  
15 me, there are convictions of other counts through the federal  
16 document. I'm only referring to those counts that I find the  
17 evidence supports because they occurred after the date of  
18 sentencing in this case, not the ones that occurred before.  
19 It's been suggested that I don't have to rely on the conviction  
20 standard because he was told not to commit crimes either.

21 The argument is that clearly he committed these  
22 crimes even if there's not a finding or a conviction of these  
23 crimes. And I do not accept that approach that you can  
24 independently find -- I do believe you can, but I don't have  
25 evidence of those crimes independently. There's been no

1 showing of any one specific crime that occurred. And I take  
2 very seriously the presumption of innocence and the requirement  
3 that evidence be presented.

4 In other settings I have had other hearings where  
5 people actually do come in and have a trial within a probation  
6 violation allegation. That didn't happen here so I'm  
7 specifically finding that the violation did occur because there  
8 are convictions of record, not because of the actual commission  
9 of the crimes.

10 Having found that he has violated his probation both  
11 in the October and -- excuse me, the November 2010 and the  
12 March 2011 order to show cause matters, I'm now going to turn  
13 to sanctions and I'm going to look first at the general  
14 understanding I have of probation.

15 First of all, probation, as we've heard many times  
16 repeated, is a privilege. It's not a sanction. It's an  
17 opportunity to keep yourself from going to prison. The  
18 statutory prison sentence on this case is at least, not less  
19 than, one year and not more than 15 years in prison. And  
20 probation is allowed to individuals who are of slight risk or  
21 minimal risk, and it's given for the opportunity of the person  
22 to meet certain goals with the assistance of their probation  
23 officer.

24 However, probation is not for everybody. It does  
25 require compliance. It requires strict adherence. It does not

1    lend itself well to people who fail to comply, who interpret  
2    things differently than they are told or who choose not to  
3    follow certain aspects of probation because it's difficult or  
4    uncomfortable or they don't want to do it.

5           In this case the defendant has previously been  
6    convicted, excuse me, has been found to have violated probation  
7    on numerous occasions. I will be remiss because I don't  
8    remember the numbers, but I do recall that there have been  
9    several. Prior to my taking the Bench, he had been found in  
10   violation in an August hearing and shortly thereafter I was  
11   asked to review the sanction that was issued. He was given a  
12   period of 60 days incarceration.

13           That was stayed primarily because there was no  
14   opposition to the motion to stay. And as I indicated in my  
15   findings in our earlier hearing, I think to some extent the  
16   State shares some of the responsibility for the Court's  
17   confusion or reasons for entering that stay and creating the  
18   circumstance that may have caused some confusion.

19           If he had been sanctioned to serve first to the  
20   revocation and reinstatement of his probation for 36 months and  
21   then to serve 60 days in jail and still violated, I would  
22   normally increase the amount of jail time or I would find some  
23   other sanction that would be appropriate. And it would not  
24   surprise me if I had considered 75 or 90 days or community  
25   service or something along those lines as an appropriate

1 sanction for his violation for the matter that we discussed  
2 from the November allegations.

3 I want to make sure that it's clear in everybody's  
4 mind, but specifically in the defendant's mind, that I don't  
5 consider a violation of probation to be a contempt of court  
6 question. I'm not offended by a violation of probation. I  
7 simply note that the person does not comply with the terms and  
8 conditions of the probation that were set. As I indicated,  
9 probation is a privilege. It's an opportunity. If it doesn't  
10 work for them, I note that and we move on to the next step.  
11 This is not a contempt hearing. It's different standards.  
12 It's different sanctions. We approach it differently. I  
13 simply am focusing on his compliance or non-compliance and what  
14 it would take to persuade him to comply.

15 With regard to the violations that we have heard  
16 today and that I have found today, I'm considering sanctions  
17 more severe than what I had indicated would be a step up from  
18 the 60 or so days that he had been ordered prior. It's been  
19 said that when he clearly understands his probation, he  
20 complies. I don't find that. I'm not persuaded. I'm  
21 persuaded that even though he clearly understands his  
22 probation, he tries to find ways to avoid his obligations.

23 He claims that he reported to the Court on a monthly  
24 basis. And I appreciate the argument, but it's not persuasive.  
25 I don't believe I ever met with Mr. Johnson. I don't think

1 he's ever provided me any information regarding his housing,  
2 his employment, his income, his opportunities or his efforts to  
3 make restitution. If he submits a motion to the Court, I don't  
4 consider that a report to the Court for probation purposes. I  
5 also don't believe that he was on court probation, but if he  
6 understood it that way, he didn't comply. He didn't comply  
7 with AP&P probation either.

8           So the question comes to me do I delay any sanctions  
9 because we have some factual question as to whether or not his  
10 convictions are truly convictions. And if I carry that  
11 argument out, then I would say no, we need to sentence him now  
12 because we have a conviction on the one hand. On the other  
13 hand I would say well is that conviction secure? And if it's  
14 not secure, then perhaps we ought to hold off until his motion  
15 is ruled on.

16           If I take that to the next logical step, well, what  
17 if he appeals it and it could be overturned on appeal. Should  
18 I hold off then too? And if it's not overturned on appeal,  
19 should I then hold off because he's filed a post-conviction  
20 relief request. I don't find those persuasive. I think we do  
21 ourselves a disservice by going down that road. It presumes  
22 that he has some invested right to probation which he doesn't.

23           When he violates probation, it has multiple  
24 repercussions. It has taken the time, energy, concern,  
25 efforts, money of the State, of the probation department,

1 probably more the probation department than anybody, but the  
2 probation department, the State, his own defense attorney,  
3 himself, the Court, court staff, and if that happens once or  
4 that happens twice and he learns from it and he changes his  
5 behavior and we can see progress, then perhaps he's a candidate  
6 for continued reinstatement of probation.

7           In this case I don't find those to be present.  
8 What's really concerning to me is what I indicated just prior  
9 to argument and that is it appears the defendant was involved  
10 in a continuing, ongoing criminal process that took a number of  
11 years to commit various frauds. In the middle of which he was  
12 convicted in state court for the crime that he was convicted  
13 of. And yet that didn't have an impact on his behavior. Even  
14 though it wasn't brought to light and hasn't been brought to  
15 this Court's attention until just now, it's apparent now that  
16 he continued for at least one year, if not beyond, in his  
17 criminal activities as has been established by his convictions  
18 in the federal court.

19           He didn't cease. He didn't stop. He didn't try to  
20 undue. He took the benefit of and continued to encourage  
21 others to take the benefit of his criminal activities. Some of  
22 those activities occurred before he was sentenced, some  
23 occurred before he was on probation, some after, but it's clear  
24 that the Court's efforts at this point, at least in  
25 establishing the original probation, did not alter his behavior



1 or did not stop his criminal behavior.

2 My decision is that I'm revoking his probation. I'm  
3 reinstating the statutory sentence. He is ordered to report to  
4 the prison. I will allow him 30 days to report to prison.  
5 Those 30 days before he reports to prison I want him held in  
6 Millard County in jail, and that's only to allow him time to  
7 put his affairs, including any motions that he wants the Court  
8 to consider or appeals if he wants to take them, to be filed,  
9 and he will need access to his attorney for that purpose and I  
10 don't believe it's appropriate for our public defender to have  
11 to travel up to the prison to address those issues with him.

12 So I'm going to allow him 30 days in the Millard  
13 County Jail unless he waives that and requests that he be  
14 ordered and transported up to jail in which -- or to prison in  
15 which case I will accommodate that. Otherwise, he will be in  
16 custody as of today and he will remain in Millard County Jail  
17 for 30 days and then after transported to prison.

18 Mr. Baer, do you have any questions or are there any  
19 issues that I have not addressed?

20 MR. BAER: Only one small matter and this is based  
21 upon experience. In this case with this defendant now ordered  
22 to Utah State Prison, if the Court's record could reflect the  
23 seriousness, I guess, and I want to word this correctly, but  
24 the seriousness of the restitution obligation because the  
25 concern is prison is an indeterminate sentence, as you know,

1 and in white collar fraud cases for better, for worse, it's  
2 usually on a low end. And even then there can be good  
3 behavior.

4 And I'm not reflecting upon that. The prison has its  
5 own jurisdiction obviously and its own considerations as to  
6 what it may or may not do. However, I want to make it clear  
7 that hopefully it can be clear in any sentencing order that  
8 it's a deep concern of this Court that that restitution be an  
9 obligation of any parole because what historically has happened  
10 is sometimes notices don't go out, the victims don't hear about  
11 it, parole doesn't properly consider that obligation and it's  
12 an important obligation and one that the State believes he  
13 needs to address when he gets out. I mean, this is an order of  
14 this Court and these people are left wanting financially so if  
15 and when he gets out or when he gets out, that that be  
16 addressed in a proper content.

17 THE COURT: Anything further that you'd like me to  
18 address, Mr. Bennett?

19 MR. BENNETT: I believe the State is just asking to  
20 do what parole -- the Office of Probation and Parole will do  
21 upon his release and obviously this Court isn't in the position  
22 to indicate what the terms of parole will be.

23 We do, however, and I would call it to the Court's  
24 attention, the fact that in previous instances where Mr.  
25 Johnson has been incarcerated he has filed motions to be

1 allowed to use certain visual aids during his incarceration. I  
2 believe that's been on more than one occasion that he's  
3 requested that and it's always been granted.

4 I don't know if the Court is comfortable ruling on a  
5 motion if I were to make it orally at this point or if the  
6 Court would just indicate that that should be made during his  
7 30 day intern, but we would motion the Court to allow Mr.  
8 Johnson visual aids, exactly what those visual aids are I'm not  
9 fully aware, but identical motions have been made in previous  
10 instances with this Court and they have always been granted.

11 It's my understanding that Mr. Johnson has been  
12 afforded those visual aids here in Millard County Jail,  
13 requests have been made to Lieutenant (inaudible) and he'd  
14 approved those as well, that's my understanding, so at this  
15 time I motion the Court for an order granting him the use of  
16 his visual aids as the Court has done on prior occasions.

17 THE COURT: Mr. Bennett, I have not reviewed those  
18 prior motions and so I can't be specific enough in my order to  
19 simply give a blanket that the Court will do what Mr. Johnson  
20 asks, but I will be glad to review those motions or if you'd  
21 like, you're welcome to file your own motion and I'll respond  
22 to it as quickly as I can. For the benefit of both counsel, I  
23 am available until the 10th of June. Should any motions be  
24 filed that I need to consider, I can consider them prior to  
25 that date. After the 10th of June, I will be gone until the

1 27<sup>th</sup> of June and, therefore, any motions that are received on  
2 the 10th or not fully briefed by the 10th I cannot consider and  
3 will not address until I return in July.

4 With regard to a motion for accommodations in jail,  
5 I'm glad to consider that, Mr. Bennett. As you know, my  
6 calendar takes me to several different cities this week. If  
7 you would like, you can contact me by FAX with your motions  
8 and, Mr. Baer, I'm going to ask you to promptly respond to  
9 those motions. I know that we have rules and you have  
10 timeframes. I'm just going to ask you to do your best to  
11 respond as quickly as you can.

12 If I don't find anything objectionable to a motion  
13 and it seems pretty straight forward, I don't mean to cut you  
14 off from your opportunity to respond, but I may rule on them if  
15 they are pretty proforma.

16 MR. BAER: And not only does the State have no  
17 objection to that, but to the extent that he requires any sorts  
18 of aids, there'd be no objection.

19 THE COURT: Thank you. The other issue that I wanted  
20 to address briefly is that there was a request by the State in  
21 its briefing at one point that I not make this a concurrent  
22 sentence with anything that might come out of the federal  
23 court, but that I make it consecutive and I don't believe my  
24 rules allow me to do that.

25 MR. BENNETT: Yeah, I believe whoever sentences the

1 second half is going to make decision.

2 THE COURT: So he is sentenced. Whatever it is  
3 consecutive to or concurrent with was determined at the time of  
4 his sentencing and we will leave that as it is.

5 MR. BENNETT: Your Honor, Mr. Johnson is indicating  
6 that the visual aids doesn't actually require a motion in order  
7 to (inaudible). Would the Court entertain him --

8 THE COURT: Tell me what the visual aids are.

9 MR. BENNETT: I don't know.

10 THE DEFENDANT: Your Honor --

11 MR. BENNETT: Well, hold on. Permission for Mr.  
12 Johnson to address the Court.

13 THE COURT: I'd like Mr. Johnson to address me. Mr.  
14 Johnson, what visual aids do you feel you need?

15 THE DEFENDANT: They were actually -- when I came  
16 with Judge Eyre, they were already reviewed by the judge -- by  
17 the sheriff and by the judge.

18 THE COURT: Can you tell me what they are?

19 THE DEFENDANT: They consist of a camera, a computer  
20 and an XY table, a little printer device that enlarges and just  
21 their relative cables.

22 THE COURT: Are these devices that you provide or are  
23 these devices that you're asking the jail to --

24 THE DEFENDANT: Yeah, these are the ones that the  
25 state has given me that I have.

1           THE COURT: Then you can have -- I will allow that  
2 material to be used by you as long as the jail does not have an  
3 objection to it. And if they do, I would like to hear that  
4 before the end of the week.

5           THE DEFENDANT: The other thing is I wonder if I can  
6 have some time to collect this stuff. Before I was given a few  
7 days to report to jail so I can go get this stuff and I've  
8 proven very willing to report. I've just got to get some stuff  
9 and I've got to bring it down with me. Otherwise, I'm without  
10 the ability to.

11           MR. BENNETT: Your Honor, what he's referring to is  
12 the August 30th revocation reinstatement of probation with a 60  
13 sanction that at that time Mr. Johnson asked for three or four  
14 days prior to reporting to Millard County Jail and that was  
15 granted. He's now indicating to the Court that there should be  
16 no fear of a flight risk if the Court would entertain and grant  
17 said motion. On behalf of Mr. Johnson, I motion the Court that  
18 he be given three or four days to report to Millard County  
19 Jail.

20           THE DEFENDANT: I was also given 30 days to report  
21 from Judge Eyre to report the first time and I faithfully  
22 reported and I was just found by a federal judge not to be a  
23 flight risk.

24           THE COURT: Thank you. Mr. Baer.

25           MR. BAER: All right. Judge, I'm not sure exactly

1 how to frame this except I think we'd have to enter a general  
2 objection to that. It's just time. It's just time. And I  
3 think that the County has some concerns and certainly the State  
4 has some concerns. It's just time. It's time to finish the  
5 matter. This individual, if the Court needs a factual basis,  
6 certainly has more flight risk justifications at this point  
7 both in facing federal sentencing as well as the sanctions here  
8 today and so we just don't think it's appropriate.

9 It's been given in the past and we find ourselves  
10 back here on violations and now find him in violations again,  
11 so I think it's time for him to report and I think the jail has  
12 some concerns with that as well given the far flung  
13 jurisdictions that we're talking about here between Salt Lake  
14 and Millard County.

15 MR. BENNETT: Well, it speaks for the fact that he  
16 requested the exact same consideration in August and he  
17 reported promptly.

18 THE COURT: Mr. Bennett, my concern as I think it's  
19 not been directly addressed, but my concern is that he now  
20 faces an indeterminate term in prison. He's never faced that  
21 before that I know of.

22 MR. BENNETT: Well, in the federal court he obviously  
23 did, and these convictions, at least what the Court is relying  
24 at least in part on for this sanction, he faced it at that  
25 time. He's been released since mid-April (inaudible) on two

1 separate occasions.

2 THE COURT: Yes, but he has not yet been sentenced in  
3 federal court and he has not yet been told by a judge that he's  
4 going to prison. So I'm weighing that on one side. To the  
5 benefit that the federal court did find that he was not a  
6 flight risk and has in place a number of sanctions and  
7 provisions, not the least of which I understand would involve  
8 the forfeiture of his Visa as well as an obligation to report  
9 to his probation officer on a daily basis.

10 Mr. Staker, are you available to speak with Mr.  
11 Johnson on a daily basis if you were to initiate the call?

12 MR. STAKER: Basically what we'd have to do -- well,  
13 except for Friday Saturday and Sunday because we're not open.

14 THE COURT: My question more specifically is if I  
15 allow him to return to his home tonight and order that he  
16 report here first thing Friday morning, would you be able to  
17 receive PHONE calls from him at a predetermined time?

18 MR. STAKER: Yeah, or we could have him meet any  
19 morning at 8:00, just what I've always told Mr. Johnson that I  
20 would be available.

21 THE COURT: Let's do this then. I will allow Mr.  
22 Johnson to return to his home tonight. He's ordered to report  
23 to the jail not later than 10:00 a.m. Friday morning. He is to  
24 report to Mr. Staker in person each morning beginning tomorrow,  
25 Wednesday and Thursday also, 8:00 a.m?



1 MR. STAKER: Yes.

2 THE COURT: He's to be there by 8:00. If it becomes  
3 8:15 and Mr. Johnson is not there, I will immediately  
4 authorized a warrant for his arrest.

5 MR. BENNETT: Understood.

6 THE COURT: And that is to allow him those two or  
7 three days necessary to do what he needs to do for his  
8 equipment and any other affairs he has to deal with. After  
9 that, he's to be held in jail for 30 days to make him available  
10 to his attorney and thereafter transferred to the prison.

11 MR. BENNETT: Thank you, your Honor.

12 MR. BAER: Judge, if I could address one more issue.  
13 You just mentioned his equipment. I think there's some concern  
14 from the sheriff's office about that equipment, what sorts of  
15 things are going to be brought into the jail certainly within  
16 his computer. They don't have computer experts here. I don't  
17 know how to address that quite honestly except to bring it to  
18 the Court. And it doesn't sound like an unreasonable concern,  
19 particularly historically his original violation in this case  
20 was -- in essence he was doing the sorts of, we believe,  
21 financial activities that he was proscribed from and Judge Eyre  
22 found that in the original order to show cause.

23 I think it's not unreasonable to be concerned that  
24 that sort of activity might go on given if he's allowed to  
25 bring in his own computer or without some sort of expert to be

1     able to make sure what's on there is clean and addresses --

2             THE COURT: I am anticipating that what he's told me  
3     is computer equipment and some enlargement and printing  
4     equipment. And I think I made my order subject to the approval  
5     of the jail of the equipment as it comes in. I guess I could  
6     clarify my order that he's not to have internet access on his  
7     computer, no wires or cables that would connect him to a  
8     telephone.

9             UNIDENTIFIED SPEAKER: As you know, there is wireless  
10    internet. All computers, his laptop. What I would only like,  
11    he has an attorney, if he needs things enlarged, he can bring  
12    his enlarging machine, but he does not need a computer. He can  
13    bring what he needs to see to enlarge things, that's fine, but  
14    I don't see a reason for a computer when he has an attorney.  
15    He's getting 30 days to be here. We don't give all our clients  
16    computers back there, but if he needs to see something --

17            THE COURT: Mr. Bennett, help me understand why a  
18    computer is necessary for the next 30 days?

19            MR. BENNETT: Well, Mr. Johnson will have to explain,  
20    but I will indicate that according to Mr. Johnson, this was  
21    ordered previously and (inaudible).

22            THE DEFENDANT: It's the same equipment that was  
23    approved last time and it was used successfully. It's also  
24    equipment that was provided by the State Vocational  
25    Rehabilitation Services. The enlarging equipment can't be run

1 without the computer. It enlarges and helps me see.

2 (Inaudible) under the American Disabilities Act and I believe  
3 (inaudible) as that (inaudible) institution that includes that.  
4 Otherwise, I'm without the ability to see and to use my  
5 equipment, but, again, it was the same equipment that was  
6 successfully used last time.

7 THE COURT: Okay. My order is as I've stated it and  
8 my order will be enforced the way I stated it. If the jail  
9 objects to any piece of equipment that you are bringing in, you  
10 have access to an attorney who can file a motion who can get it  
11 to me. If there have been prior orders, and I'll tell you I'm  
12 not aware of them, if there have been -- hold on. If there  
13 have been prior orders and they specifically provide for  
14 equipment or other items, I'm speaking now to Mr. Bennett, you  
15 may want to include those in any motion, but at this point I  
16 have insufficient information for me to feel comfortable to  
17 order that he can have or can't have anything except what the  
18 jail is comfortable that he has. If the jail and he disagree,  
19 then the jail will control and he will file an appropriate  
20 pleading.

21 MR. BENNETT: Thank you, your Honor.

22 THE COURT: Anything further, Mr. Bennett, we need to  
23 address today?

24 MR. BENNETT: No. Thank you, your Honor.

25 MR. BAER: Nothing from the State. Thank you, your

1 Honor.

2 THE COURT: We're keeping the exhibits.

3 MR. BAER: I just wanted to ask to withdraw the  
4 exhibits.

5 THE COURT: Oh, I'm sorry. I didn't have that  
6 motion, but I don't mind if you want to withdraw the exhibit.

7 Counsel, these are exhibits and it may be something  
8 where somebody may choose to appeal my decision. If they do, I  
9 need copies of the exhibits.

10 MR. BAER: Actually why don't we just leave  
11 (inaudible).

12 THE COURT: Take copies that you need from the file.  
13 I'd like to keep the exhibits. We're adjourned. Thank you,  
14 gentlemen, for being here today.

15 (PROCEEDINGS IN THE ABOVE-ENTITLED  
16 MATTER WERE CONCLUDED.)

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## REPORTER'S CERTIFICATE


STATE OF UTAH            )  
                              :  SS.  
County of Utah            )

I, Colleen C. Southwick, Registered Professional  
Reporter for the State of Utah, do certify that the foregoing  
transcript was taken down by me stenographically from an  
electronic recording and thereafter transcribed;

That the same constitutes a true and correct  
transcription of the said proceedings;

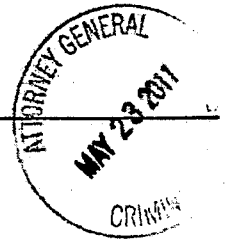
That I am not of kin or otherwise associated with any  
of the parties herein or their counsel, and that I am not  
interested in the events thereof.

WITNESS my hand at Provo, Utah, this 8th day of  
August, 2011.

  
Colleen C. Southwick, RPR, CSR

# Addendum L

4TH DISTRICT COURT - MILLARD  
MILLARD COUNTY, STATE OF UTAH



STATE OF UTAH, : MINUTES  
Plaintiff, : ORDER TO SHOW CAUSE  
vs. :  
JAMIS M JOHNSON, : Case No: 051700056 FS  
Defendant. : Judge: JAMES BRADY  
: Date: May 17, 2011

PRESENT

Clerk: sheris  
Prosecutor: MARK W BAER  
Defendant  
Defendant's Attorney(s): TATE W BENNETT

DEFENDANT INFORMATION

Date of birth: February 14, 1952  
Audio  
Tape Count: 2:09:31

CHARGES

1. SECURITIES FRAUD - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 03/07/2007 Guilty

HEARING

COUNT: 2:09:31

AP&P Agent Troy Staker is also present.

The Court indicated that this case has been set for hearing for an Evidentiary Hearing on the denials entered on 4/27/11 in regards to the Progress Violation Report dated 11/15/10.

Sanctions from previous OSC hearing regarding Progress Violation Report of 10/25/10 and also hearing on Progress Violation Report filed on 3/22/11.

Attorney Bennett entered denials on behalf of the defendant on the Progress Violation Report dated 4/27/11.

Attorney Bennett addressed the Court and indicated that he only received the State's sentencing memorandum yesterday and would request time to respond.

The Court has reviewed the file and will proceed with the Evidentiary Hearing on Progress Violation Report dated 11/15/10 and 3/22/11.

Attorney Baer offered to the Court Plaintiff's Exhibit 1 - Certified copy of Verdict Form from the Federal Court. Court received. State rests.

Attorney Bennett argued and motioned the Court to dismiss allegation #5 from Order to Show Cause Affidavit. State responded. Court denies the Motion.

Attorney Bennett offered Defendant's Exhibit 2 - copy of docket in Federal Case. State objects. Court received.

Attorney Bennett called defendant Jamis Johnson to testify.

COUNT: 2:55

Court takes a brief recess to allow Attorney Bennett to confer

with his client.

TIME: 3:01 PM Court resumes. Court reviewed Exhibit 3 while in recess. The Court will accept the argument of counsel in regards to the transcript admitted.

TIME: 3:02 PM Testimony proceeds. Attorney Bennett will examine the defendant in regards to the sanctions. Defendant's Exhibit 4 - Proof of compliance w/Federal probation. Offered and received.

TIME: 3:14 PM Attorney Baer cross examined.

TIME: 3:18 PM The Court addressed the parties with his interpretation of what issues to have been put before him today.

TIME: 3:22 PM Attorney Baer gave argument.

TIME: 3:25 PM Attorney Bennett gave closing argument. Attorney Baer responded. Court finds that unpaid restitution and employment is relevant to the issues the Court will be addressing today.

TIME: 3:47 PM Court will take the matter under advisement. Court takes a brief recess and return with a decision.

TIME: 4:10 PM Court resumes and enters sanctions. Court revoked probation and imposed the original sentence of an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Defendant is to report to the Millard County Jail no later than Friday, May 20 at 10:00 a.m. Defendant to remain in the jail for transportation to the Utah State Prison after 30 days.

The defendant is to report to Mr. Staker, AP&P the next two mornings at 8:00 am. The Court indicated to Mr. Staker that if Mr. Johnson does not appear by 8:15 the Court will issue an immediate warrant for his arrest.

The Court indicated that for the 30 days Mr. Johnson is awaiting transportation to the prison counsel would be more available for the preparation of any motions the parties feel the Court may need to address.

The defendant's probation is revoked.

The defendant is to serve the sentence as imposed in the original Sentence, Judgment and Commitment.

COMMITMENT is to begin immediately.

The defendant's probation is terminated unsuccessfully.

The defendant may bring visual aids equipment when reporting to the jail if approved by jail personnel. If there is any objection of any type of equipment by jail personnel Mr. Johnson may file a motion with the Court.

Date: May 19, 2011

ORIGINAL IF IN RED IN  
STATE OF UTAH  
JAMES BRADY  
District Court Judge  
Sheri Stephenson  
STAMP USED AT DISCRETION OF JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 051700056 by the method and on the date specified.

MAIL: MARK W BAER 160 E 300 S 5TH FLR POB 140814 SALT LAKE CITY,  
UT 84114-0814

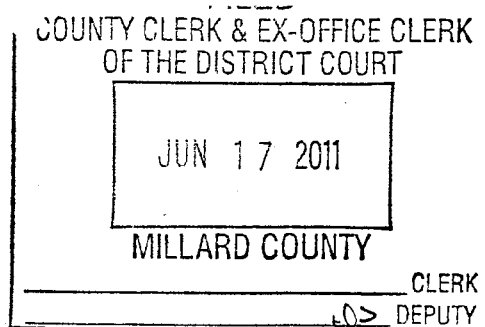
MAIL: TATE W BENNETT PO BOX 272 FILLMORE UT 84631

Date: May 19, 2011

Shari Stephenson

Deputy Court Clerk

# Addendum M



FOURTH DISTRICT COURT, STATE OF UTAH  
MILLARD COUNTY DEPARTMENT

STATE OF UTAH,  Plaintiff,  vs.  JAMIS J. JOHNSON,  Defendant.	ORDER  Case No. 051700056  Date: June 17, 2011 Judge: James Brady
--	--

Having reviewed Defendant's pro se expedited motion to amend and extend jail term 30 days to allow for stay and probable cause process, and Plaintiff's response thereto, the court reviewed the records and recordings of the May 17, 2011 hearing. Based on that review the court enters the following findings:

The May 17, 2001 hearing was to consider allegation of probation violations by Defendant as a result of criminal convictions in a separate federal case. It was also to determine appropriate sanctions for findings of probation violations determined on April 21, 2011 as well as sanctions, if any arising out of the alleged violations based on the federal convictions.

With regards to only the violations related to the federal violations, after review the court now makes the following findings:

1. The court made a clear and unambiguous determination that Defendant could not

be found in violation of probation for actions he took prior to being placed on probation.

2. Although two of the counts in the Federal trial were alleged to have occurred on dates following Defendant being placed on probation by this court, upon further argument and examination of the document, at the May 7, 2001 hearing, the court concluded that counts 10 and 22 of the federal indictment were dismissed by the United States Attorney, and did not result in a conviction. This court ruled that these two counts would not be considered a violation of Defendant's probation.
3. This court explicitly ruled that it would not consider as evidence of a violation of probation, any convictions in the federal case for actions taken before the date of sentencing in this case.
4. On May 17, 2011, when considering the States allegations of convictions on counts 18, 19, 21, 23, 27, 28 and others, contained in the federal indictment, this court came to the conclusion that Defendant was engaged in wrong doings including conspiracy and aiding and abetting others to commit mail fraud and wire fraud after being placed on probation. This conclusion was made in error. Upon review it is clear that the dates of these offenses predate Defendant's sentencing in the present case.
5. At the time of determining an appropriate sanction for defendant's violation of his

probation, this court considered defendant's perceived continuing criminal activities a significant violation, sufficient to justify the revocation of probation, and the imposition of the statutory sentence.

6. In that the court erred in believing that defendant's criminal conduct continued after being placed on probation, it is appropriate for the court to review and correct the sanction it issued at the hearing on May 17, 2011.
7. The evidence at the hearing was clear and convincing that defendant violated probation when he failed to report to his probation officer.
  - a. Defendant does not dispute that he failed to report to his probation officer, despite knowledge that the probation officer attempted to contact him several times. Defendant claims he was relieved from his obligations to contact his probation officer either because of an implication contained in an order of this court, or because his probation period had lapsed.
  - b. This court did not order the termination of Defendant's probation, nor his obligation to report to his probation officer.
  - c. Although Defendant claims his obligation was changed from reporting to his probation officer to an obligation to report to the court on a monthly basis, this interpretation is only partially correct. The order did not terminate Defendant's probation, but did order him to report monthly to the court.

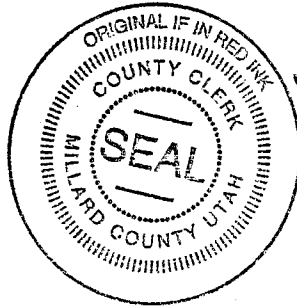
- d. As to his argument that reporting to the court supplanted his obligations to the probation officer, it did not. It should also be noted that even if it did Defendant also did not report to the court.
  - e. As previously determined by this court, Defendant's probation period did not lapse before the order to show cause was issued in October 2011 for Defendant's various probation violations.
8. This court previously found that Defendant violated his probation by failing to inform the probation department of his then current residence, or by changing his residence without notification to his probation officer, and for his failure to report to his probation officer on October 21, 2011.
9. Previously Defendant had been found in violation of his probation agreement and was sentenced to 60 days in jail. That matter is on appeal at this time.
10. Based on the court's review of its findings and the order issued May 17, 2011, the court finds it is appropriate to amend its order.
11. Defendant's probation is revoked and reinstated for 36 months. Defendant is ordered to serve 120 days in the Millard County jail. Defendant shall come before the court for review before his release from jail.

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///

Dated this 17<sup>th</sup> day of June, 2011.



BY THE COURT:

*Jim Brady*  
JAMES BRADY  
DISTRICT COURT JUDGE

By *Irene Scott*  
STAMP USED AT DISCRETION OF JUDGE

# Addendum N



BRETT L. TOLMAN, United States Attorney (No. 8891)  
SCOTT J. THORLEY, Assistant United States Attorney (No. 3248)  
Attorneys for the United States of America  
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Telephone: (801) 524-5682  
Email: Scott.Thorley@usdoj.gov

FILED  
U.S. DISTRICT COURT

2009 MAR 18 P 3:23

DISTRICT OF UTAH

BY: \_\_\_\_\_  
F. J. O'NEILL

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONALD WILLIAM HAYCOCK, SR.,  
LYLE CLAY SMITH, and  
JAMIS MELWOOD JOHNSON,

Defendants.

Case No.

I N D I C T M E N T

Vio. 18 U.S.C. §1341 (Mail Fraud);  
18 U.S.C. § 1343 (Wire Fraud); 18  
U.S.C. § 1956 (a)(1)(A)(i) (Money  
Laundering); 18 U.S.C. § 1349  
(Conspiracy); 18 U.S.C. §§ 2(a) and  
2(b)(Aiding and Abetting; Willfully  
Causing Another to Commit a Crime)

Case: 2:09-cr-00133  
Assigned To : Benson, Dee  
Assign. Date : 3/18/2009  
Description: USA v

The Grand Jury Charges:

BACKGROUND

At all times relevant to this Indictment:

**Scheme Participants**

1. Defendant RONALD WILLIAM HAYCOCK, SR. was a resident of Davis County, Utah. Defendant HAYCOCK formed and controlled the following four business entities (collectively, the "Haycock Entities"):

2858

- a. Lawrence Skinner and Associates ("Lawrence Skinner") - Defendant HAYCOCK was a managerial accountant doing accounting work for Lawrence Skinner;
- b. Paramount Strategies ("Paramount") - Paramount, a subsidiary company of Lawrence Skinner, conducted real estate transactions and handled real estate investments;
- c. Layton Davis Financial ("Layton Davis") - Layton Davis managed mortgages and properties on behalf of Paramount; and
- d. Ireland West LLC ("Ireland West") - Ireland West was a joint venture that conducted real estate transactions and handled the proceeds of those transactions.

2. Defendant LYLE CLAY SMITH was a resident of Davis County, Utah.

Defendant SMITH was vice president of Lawrence Skinner, identified properties to be purchased through Lawrence Skinner, and processed and completed loan transactions on behalf of Lawrence Skinner. Defendant SMITH also managed Layton Davis.

3. Defendant JAMIS MELWOOD JOHNSON was a resident of Salt Lake County, Utah. Defendant JOHNSON engaged in activities related to Lawrence Skinner, Paramount, and Layton Davis real estate transactions, including issuing verifications of deposit ("VODs") and verifications of assets ("VOAs") to facilitate the closing of some of the loan transactions identified in this Indictment. Defendant JOHNSON did not have a license to practice law in Utah but was licensed to practice in New York.

4. Various "straw buyers" participated in the loan transactions identified in this Indictment. These straw buyers were recruited to sign and submit real estate purchase agreements and loan documentation (collectively, "purchase and loan documents") to lenders using their favorable personal credit rating. At times, and as described below, the purchase and loan documents contained false and misleading financial information about the straw buyers and

concealed from the lender material information concerning the funding of the transaction and use of loan proceeds.

**Scheme Victims: The Mortgage Lenders**

5. America's Wholesale Lender ("AWL"), Countrywide Home Loans ("CHL"), Countrywide Bank ("CWB"), Argent Mortgage ("AM"), Paragon Home Lending ("PHL"), Shoreline Lending ("SL"), and Mountain States Mortgage ("MSM"), were mortgage lenders with national business operations that included offices or lending functions in Utah. As described in detail below, these mortgage lenders approved and funded loans primarily based upon borrowers providing true and accurate information, along with adequate documentation, which met their respective mortgage underwriting standards.

**The Mortgage Loan Application, Approval, and Funding Process**

6. As part of the mortgage application process, mortgage lenders AWL, CHL, CWB, AM, PHL, SL, and MSM (collectively, the "Mortgage Lenders") required a loan application, along with supporting documentation, which accurately reflected a borrower's financial condition, assets, income, liabilities, and ability to repay and retire the mortgage, as well as information concerning the condition of the property serving as security for the loan. The loan application was required to be signed by the borrower under oath. The Mortgage Lenders required the foregoing information, attested to under oath, in order to make knowledgeable and informed lending decisions. This phase of loan verification during which an assessment of the risk of granting a loan against the possibility of a borrower default is called "underwriting."

7. Prior to closing the transaction, the Mortgage Lenders also required submission of an appraisal report accurately reflecting the fair market value of the property and market conditions surrounding the property. The Mortgage Lenders used the appraisal report in their underwriting and lending decisions.

8. At the loan closing, the closing agent was required to prepare a Settlement Statement ("Form HUD 1") which accurately reflected the receipt and disbursement of transaction funds. The Form HUD 1 also showed, among other things, the down payment paid by the borrower and funds due to the seller. Based on the closing instructions, the closing agent was charged with verifying the legitimate source of the down payment, collecting the indicated funds from the borrower and, following execution by the borrower and seller of appropriate legal documents, disbursing the loan proceeds for the benefit of the seller.

#### **THE SCHEME AND ARTIFICE TO DEFRAUD**

9. Beginning sometime prior to mid-2005 to around August 2007, in the Central Division of the District of Utah, and elsewhere,

**RONALD WILLIAM HAYCOCK, SR.,  
LYLE CLAY SMITH, and  
JAMIS MELWOOD JOHNSON,**

defendants herein, devised and intended to devise, and did aid and abet each other therein, a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises and omissions of material facts by obtaining real estate loans from one or more of the Mortgage Lenders, as detailed below. In executing and attempting to execute the scheme and artifice to defraud, the defendants:

- a. knowingly transmitted and caused to be transmitted, by means of wire communications in interstate commerce, writings, signs, signals, pictures, and sounds, in violation of 18 U.S.C. § 1343 (Wire Fraud);
- b. knowingly deposited and caused to be deposited in an authorized depository for mail a matter or thing to be sent and delivered by the United States Postal Service or by any private or commercial interstate carrier, according to the directions thereon, in violation of 18 U.S.C. § 1341 (Mail Fraud); and
- c. caused financial transactions to be conducted with proceeds of the specified unlawful activities (i.e., mail fraud and wire fraud) with

the intent to promote the carrying on of such activities, in violation of 18 U.S.C. § 1956(a)(1)(A)(i).

**OBJECT OF THE SCHEME AND ARTIFICE TO DEFRAUD**

10. It was the object of the scheme and artifice to defraud for the defendants to obtain money fraudulently by inducing the Mortgage Lenders, through false statements, misrepresentations, deception, and omissions of material facts, to loan money to straw borrowers.

**MANNER AND MEANS OF THE OF THE SCHEME AND ARTIFICE TO DEFRAUD**

11. It was a part of the scheme and artifice to defraud that defendant HAYCOCK caused defendant SMITH and others associated with the Haycock Entities to search for and identify residences that could be placed under contract for purchase in Davis, Salt Lake, and Utah Counties. These residential properties often were in financial distress that had either remained unsold for an extended period of time on the market or for which the owner or builder had a need to sell.

12. It was further a part of the scheme and artifice to defraud that defendant HAYCOCK caused purchases and sales of residential properties including, among others, the following properties in Davis County, Salt Lake County and Utah County, Utah (collectively, the "Haycock Properties"):

- a. 11897 Harvest Moon Lane, Highland, Utah;
- b. 354 East Pheasant View Drive, Draper, Utah;
- c. 1408 Military Way, Salt Lake City, Utah;
- d. 15023 South Pastoral Way, Salt Lake City, Utah;
- e. 14788 South Shadow Grove Court, Draper, Utah;
- f. 10094 South Wasatch Boulevard, Sandy, Utah;

- g. 19 East Windsong Drive, Pleasant Grove, Utah;
- h. 891 East Osmond Lane, Provo, Utah;
- i. 533 East Mountainville, Alpine, Utah;
- j. 13595 Royal Chase Circle, Draper, Utah;
- k. 62 West Roberts Circle, Farmington, Utah; and
- l. 214 North Morningside Drive, Farmington, Utah.

13. It was further a part of the scheme and artifice to defraud that defendant

HAYCOCK:

- a. induced the owners/sellers of the Haycock Properties to sell their homes at a fixed price to an entity or a straw buyer controlled by defendants HAYCOCK and SMITH;
- b. required each owner/seller of the Haycock Properties to enter into a joint venture agreement with Paramount or Ireland West (the "Joint Venture"); and
- c. promised owners/sellers, under the Joint Venture agreement, a portion of the profits stemming from the sale of their residence.

14. It was further a part of the scheme and artifice to defraud that defendants

HAYCOCK and SMITH:

- a. recruited straw buyers to participate in the purchases of the Haycock Properties. These straw buyers were often referred to by the defendants as "FICO buyers;"
- b. induced straw buyers to participate in the purchases of the Haycock Properties by making, or causing to be made, one or more of the following false and fraudulent representations:
  - (1) the straw buyer would not have to make a down payment or invest any money of their own to buy the home;
  - (2) the straw buyer would be paid a substantial fee for signing the loan papers;
  - (3) the straw buyer would have no financial risk and would have no obligation to make loan payments on the home;

- (4) one of the Haycock Entities would make the loan payments for the Haycock Properties;
  - (5) the straw buyer need not occupy the home; and
  - (6) the home would be resold in short order, thus relieving the straw buyer of any liability for the loan;
- c. required and instructed straw buyers to form a limited liability company, or "LLC," to qualify for the loan and to receive a portion of the transaction proceeds as a fee for their participation;
  - d. concealed from the Mortgage Lenders, as summarized in paragraphs 14.b. and 14.c. above, material information concerning the funding of the transaction and use of loan proceeds;
  - e. caused material false statements to be made in purchase and loan documents submitted to the Mortgage Lenders concerning the straw buyer's income, assets, plans to occupy the residence, down payment, and plans to make loan payments; and
  - f. caused the straw buyers to sign purchase and loan documents to purchase one or more of the Haycock Properties.

15. It was further a part of the scheme and artifice to defraud that defendants HAYCOCK and SMITH caused the creation and submission to the Mortgage Lenders appraisals supporting straw buyer purchase and loan documents on the Haycock Properties. These appraisals reflected a value equivalent to a sales price established by the defendants rather than the price agreed to by the owner/seller. To obtain the inflated appraisals necessary to approval of the loans, the defendants supplied the appraisers with the straw buyer sales contract price, and rejected appraisals that failed to reflect that inflated value.

16. It was further a part of the scheme and artifice to defraud that defendants HAYCOCK, SMITH, and JOHNSON caused the straw buyer loans to be closed under false and fraudulent pretenses by concealing from the Mortgage Lenders one or more of the following deceptive aspects of the loan transactions:

- a. that the buyer was a "straw buyer;"

- b. that the straw buyer had neither made a down payment nor invested any of his own funds, resulting in virtually all of the financial risk in the purchase and loan transaction being transferred to the Mortgage Lender;
- c. that the straw buyer was being paid a kickback or fee from the loan proceeds as an inducement to apply for the loan from the Mortgage Lender;
- d. that the straw buyer had no intention to occupy the home or to make payments on the loan;
- e. that the straw buyer had a materially smaller income stream and materially fewer assets than represented on his loan application, thereby lacking the financial wherewithal to qualify for the loan or to make the monthly payments on the loan after closing;
- h. that the loan closing documentation created the false appearance that the straw buyer had made a down payment to purchase the property;
- i. that material portions of the loan proceeds were not being paid to the seller, but to entities controlled by the defendants pursuant to false second mortgages or other fictitious liens or obligations against the property that appeared at the closing; and
- j. that loan funds paid out to the joint venture entities controlled by the defendants were being deposited into a general account and were used to make loan payments and related payments for the Haycock Properties in the place of the straw buyers and used to pay the costs related to planning and funding future straw purchase transactions.

17. It was further a part of the scheme and artifice to defraud that defendants HAYCOCK and SMITH, for a period of time, caused one of the Haycock Entities, instead of the straw buyers, to make payments on the straw purchase loans for the Haycock Properties in order to give the Mortgage Lenders the false impression that the loans were normal transactions and were performing appropriately. The defendants often referred to the account from which excess loan funds were drawn as the "slush fund."

18. It was further a part of the scheme and artifice to defraud that defendants HAYCOCK, JOHNSON and SMITH caused funds from the "slush fund" to be diverted to make



down payments, earnest money payments, or monthly loan payments on other straw purchase loans and other transactions related to the Haycock Properties.

19. It was further a part of the scheme and artifice to defraud that after defendants HAYCOCK and SMITH created the false appearance that the loans were performing, they caused one of the Haycock Entities to cease making payments on the loans, leaving the straw buyers with mortgages that they had no ability to repay, and Mortgage Lenders with non-performing loans secured by the properties worth far less than the outstanding loan balances.

**COUNTS 1 through 10**  
**18 U.S.C. § 1341**  
**(Mail Fraud)**

18. The allegations set forth in paragraphs 1 through 17 of this Indictment are incorporated herein by reference as though fully set forth herein.

19. On or about the dates enumerated in each count below, in the Central Division of the District of Utah, and elsewhere, for the purpose of executing and in furtherance of the scheme and artifice to defraud more particularly described in paragraphs 1 through 17 of this Indictment, and for obtaining money and property of the Mortgage Lenders by means of false and fraudulent pretenses, representations, and promises, and omissions of material facts, and attempting to do so, the defendants named below did knowingly deposit and cause to be deposited in any post office or authorized depository for mail the matter or thing listed below to be sent and delivered by the United States Postal Service or any private or commercial interstate carrier, and did cause such matter or thing to be delivered according to the directions thereon as more particularly described for each count below, and did aid and abet, counsel, command, induce, procure, and cause said mailing:

COUNT	DATE (On or About )	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF MAILING
1	3/24/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and  JAMIS MELWOOD	11897 Harvest Moon Lane, Highland, Utah	Transfer of V.P. signed loan closing document package from Westland Title office (Salt Lake City, Utah) to the office of Shoreline Lending (Mission Viejo, California) via overnight common courier
2	4/12/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and  JAMIS MELWOOD JOHNSON.	354 East Pheasant View Drive, Draper, Utah	Transfer of S.P. signed loan closing document package from Westland Title office (Salt Lake City, Utah) to the office of Argent Mortgage (Irvine, California) via overnight common courier (FedEx)
3	4/21/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and  JAMIS MELWOOD JOHNSON.	1408 Military Way, Salt Lake City, Utah	Transfer of R.F. signed loan closing document package from Deer Creek Title office (Park City, Utah) to the office of Countrywide Bank (Jacksonville, Florida) via overnight common courier
4	5/9/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and  JAMIS MELWOOD	15023 South Pastoral Way, Salt Lake City, Utah	Transfer of R.F. signed loan closing document package from Westland Title office (Salt Lake City, Utah) to the office of Shoreline Lending (Laguna Hills, California) via overnight common courier (FedEx)

COUNT	DATE (On or About)	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF MAILING
		<b>JOHNSON,</b>		
5	6/8/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON,</b>	14788 South Shadow Grove Court, Draper, Utah	Transfer of C.M. signed loan closing document package from Brighton Title office (Midvale, Utah) to the office of Shoreline Lending (Laguna Hills, California) via overnight common courier (FedEx)
6	7/26/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON,</b>	891 East Osmond Lane, Provo, Utah	Transfer of G.S. signed loan closing document package from Surety Title office (Midvale, Utah) to the office of America's Wholesale Lender (Jacksonville, Florida) via overnight common courier (FedEx)
7	10/6/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON,</b>	533 East Mountainville, Alpine, Utah	Transfer of R.S. signed loan closing document package from Surety Title office (Midvale, Utah) to the office of Contrywide Bank (Jacksonville, Florida) via overnight common courier (FedEx)
8	10/20/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD</b>	13595 Royal Chase Circle, Draper, Utah	Transfer of J.N. signed loan closing document package from Surety Title office (Midvale, Utah) to the office of America's Wholesale Lender (Jacksonville, Florida) via overnight common courier (FedEx)

COUNT	DATE (On or About)	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF MAILING
		<b>JOHNSON,</b>		
9	10/27/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON,</b>	62 West Roberts Circle, Farmington, Utah	Transfer of S.P. signed loan closing document package from Surety Title office (Midvale, Utah) to the office of America's Wholesale Lender (Anaheim, California) via overnight common courier (FedEx)
10	6/22/07	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON,</b>	214 North Morningside Drive, Farmington, Utah	Transfer of T.R. signed loan closing document package from Surety Title office (Midvale, Utah) to the office of Paragon Home Lending (Brookfield, Wisconsin) via overnight common courier (FedEx)

all in violation of Title 18, United States Code, Sections 1341, 2(a), and 2(b).

**COUNTS 11 through 22**

**18 U.S.C. § 1343**

**(Wire Fraud)**

20. The allegations set forth in paragraphs 1 through 17 of this Indictment are incorporated herein by reference as though fully set forth herein.

21. On or about the dates enumerated as to each count, in the Central Division of the District of Utah, and elsewhere, for the purpose of executing and in furtherance of the scheme and artifice to defraud more particularly described in paragraphs 1 through 17 of this

Indictment, and for obtaining money and property of the Mortgage Lenders as described below by means of false and fraudulent pretenses, representations, and promises, and omissions of material facts, and attempting to do so, the defendants named below did knowingly transmit and cause to be transmitted, by means of wire communications in interstate commerce, the writings, signs, signals, pictures, and sounds as more particularly described for each count below, and did aid and abet, counsel, command, induce, procure, and cause said wire transmission:

COUNT	DATE (On or About )	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF WIRE COMMUNICATION
11	3/29/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and  JAMIS MELWOOD JOHNSON.	11897 Harvest Moon Lane, Highland, Utah	Wiring of approximately \$389,468.93 in Shoreline Lending loan proceeds related to mortgage loan number 2006-198093 from a bank outside the State of Utah on behalf of Shoreline Lending (Mission Viejo, California) to the account of Westland Title at Zions Bank (Salt Lake City, Utah)
12	1/18/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and  JAMIS MELWOOD JOHNSON.	354 East Pheasant View Drive, Draper, Utah	Wiring of approximately \$541,500.64 in Argent Mortgage loan proceeds related to mortgage loan number 0096464474 from a bank outside the State of Utah on behalf of Argent Mortgage (Irvine, California) to the account of Westland Title at Zions Bank (Salt Lake City, Utah)
13	4/25/06	RONALD WILLIAM HAYCOCK, SR.,  LYLE CLAY SMITH, and	1408 Military Way, Salt Lake City, Utah	Wiring of approximately \$1,680,807.68 in Countrywide Bank loan proceeds related to mortgage loan number 134995050 from a bank outside the State

COUNT	DATE (On or About)	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF WIRE COMMUNICATION
		<b>JAMIS MELWOOD JOHNSON.</b>		of Utah on behalf of CWB (Jacksonville, Florida) to the account of Deer Creek Title at Zions Bank (Salt Lake City, Utah)
14	5/15/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>	15023 South Pastoral Way, Salt Lake City, Utah	Wiring of approximately \$549,592.22 in Shoreline Lending loan proceeds related to mortgage loan number 2006-198327 from a bank outside the State of Utah on behalf of Shoreline Lending (Laguna Hills, California) to the account of Westland Title at Zions Bank (Salt Lake City, Utah)
15	6/12/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>	14788 South Shadow Grove Court, Draper, Utah	Wiring of approximately \$528,751.43 in Shoreline Lending loan proceeds related to mortgage loan number 2006-198420 from a bank outside the State of Utah on behalf of Shoreline Lending (Laguna Hills, California) to the account of Brighton Title at Zions Bank (Salt Lake City, Utah)
16	7/10/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>	10094 South Wasatch Boulevard, Sandy Utah	Wiring of approximately \$615,101.29 in Mountain States Mortgage loan proceeds related to mortgage loan number 06060127 from a bank outside the State of Utah on behalf of Mountain States Mortgage (Salt Lake City, Utah) to the account of Brighton Title at Zions Bank (Salt Lake City, Utah)
17	7/21/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>	19 East Windsong Drive, Pleasant Grove, Utah	Wiring of approximately \$155,505.46 in Mountain States Mortgage loan proceeds related to mortgage

COUNT	DATE (On or About)	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF WIRE COMMUNICATION
		<b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>		loan file number 94607 from a bank outside the State of Utah on behalf of Mountain States Mortgage (Salt Lake City, Utah) to the account of Surety Title at Bank of Utah (Sandy, Utah)
18	7/25/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>	891 East Osmond Lane, Provo, Utah	Wiring of approximately \$1,011,118.59 in America's Wholesale Lender loan proceeds related to mortgage loan number 139219829 from a bank outside the State of Utah on behalf of America's Wholesale Lender (Jacksonville, Florida) to the account of Surety Title at Bank of Utah (Ogden, Utah)
19	10/11/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>	533 East Mountainville, Alpine, Utah	Wiring of approximately \$642,692.92 in Countrywide Bank loan proceeds related to mortgage loan number 151040337 from a bank outside the State of Utah on behalf of Countrywide Bank (Jacksonville, Florida) to the account of Surety Title at Bank of Utah (Ogden, Utah)
20	10/20/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>	13595 Royal Chase Circle, Draper, Utah	Wiring of approximately \$1,101,802.27 in America's Wholesale Lender loan proceeds related to mortgage



COUNT	DATE (On or About)	DEFENDANTS	PROPERTY ADDRESS	DESCRIPTION OF WIRE COMMUNICATION
		<b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>		loan number 151644724 from a bank outside the State of Utah on behalf of America's Wholesale Lender (Jacksonville, Florida) to the account of Surety Title at Bank of Utah (Ogden, Utah)
21	10/30/06	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON.</b>	62 West Roberts Circle, Farmington, Utah	Wiring of approximately \$327,964.34 in Countrywide Home Loans loan proceeds related to mortgage loan number 153051527 from a bank outside the State of Utah on behalf of Countrywide Home Loans (Jacksonville, Florida) to the account of Surety Title at Bank of Utah (Ogden, Utah)
22	6/25/07	<b>RONALD WILLIAM HAYCOCK, SR.,</b>  <b>LYLE CLAY SMITH, and</b>  <b>JAMIS MELWOOD JOHNSON,</b>	214 North Morningside Drive, Farmington, Utah	Wiring of approximately \$302,495.34 in Paragon Home Lending loan proceeds related to mortgage loan number 119149PE from a bank outside the State of Utah on behalf of Paragon Home Lending (Brookfield, Wisconsin) to the account of Surety Title at Bank of Utah (Ogden, Utah)

all in violation of Title 18, United States Code, Sections, 1343, 2(a) and 2(b).

**COUNT 23**  
**18 U.S.C. § 1349**  
**(Conspiracy)**



22. Beginning in or about mid 2005 to around August 2007, in the Central Division of the District of Utah, and elsewhere,

**RONALD WILLIAM HAYCOCK, SR.,  
LYLE CLAY SMITH, and  
JAMIS MELWOOD JOHNSON,**

defendants herein, and others known and unknown to the Grand Jury, did knowingly and willfully combine, conspire, confederate, and agree to commit offenses against the United States of America, that is: mail fraud, in violation of Title 18, United States Code, §1341; and wire fraud, in violation of Title 18, United States Code, §1343.

23. The object and the manner and means used to further the conspiracy are set forth in paragraphs 1 through 17 of this Indictment, and by this reference are fully incorporated in this Count of the Indictment.

24. In furtherance of the conspiracy and to effect the objects thereof, at least one of the conspirators committed at least one overt act in the District of Utah. The events set forth in each Count of Counts 1 through 17 each and individually constitute an overt act in furtherance of the conspiracy, and each overt act is incorporated in this Count of the Indictment as if fully set forth herein; all in violation of Title 18, United States Code, Section 1349.

**COUNTS 24 THROUGH 37**

**(Money Laundering, §18 U.S.C. 1956(a)(1)(A)(i), and §2)**

25. Between on or about January 2006 and January 2007, the defendants did unlawfully and knowingly conduct and attempt to conduct approximately sixty-five (65) financial transactions totaling more than approximately Three Hundred Thousand Dollars (\$300,000) in excess loan proceeds

generated by the mail fraud and wire fraud described in Counts 1 through 22 above.

26. On or about the dates set forth below, in the Central Division of the District of Utah and elsewhere, the defendants,

**RONALD WILLIAM HAYCOCK, SR.,  
LYLE CLAY SMITH, and  
JAMIS MELWOOD JOHNSON,**

did unlawfully and knowingly conduct and attempt to conduct financial transactions affecting interstate commerce, that is, causing excess loan proceeds generated by the mail fraud and wire fraud described in paragraphs 1 through 23 above, and Counts 1 through 22 above, to be placed in the "slush fund" and from there used to make down payments, earnest money payments or monthly loan payments in order to promote other unrelated fraudulent loan transactions for the benefit of the defendants, knowing that the property involved in these transactions represented the proceeds of some form of unlawful activity, and which transactions in fact involved the proceeds of specified unlawful activity, that is, mail fraud and wire fraud in violation of Title 18, United States Code, Sections 1341 and 1343 as described above, with the intent to promote the carrying on of specified unlawful activity, to-wit:

Count	Date	Loan Generated Proceeds	Amount	Description of Financial Transaction
24	10/27/2006	13595 South Royal Chase Circle	\$2,543.68	Monthly payment on 850 W 600 N, West Bountiful, UT 84087
25	10/27/2006	13595 South Royal Chase Circle	\$20,278.33	Monthly payment on 12091 S Draper Farm Cove, Draper, UT, 84020
26	10/27/2006	13595 South Royal Chase Circle	\$25,000.00	Transfer of funds to nominee buyer's account for a Verification of Deposit (VOD).
27	10/02/2006	533 E. Mountainville	\$4,557.05	Monthly payment on 19 East Windsong, Pleasant Grove, UT 84062
28	10/02/2006	533 E. Mountainville	\$4,688.41	Monthly payment on 10094 Wasatch Blvd., Sandy, UT, 84092
29	05/18/2006	15023 Pastoral Way	\$5,522.68	Monthly payment on 14728 S. Pristine Way, Draper, UT 84020
30	05/18/2006	15023 Pastoral Way	\$5,676.24	Monthly payment on 1767 East Springdale Way, Draper, UT, 84020
31	06/19/2006	14788 S. Shadow Grove Court	\$35,015.00	Transfer of funds to nominee buyer's account for a Verification of Deposit (VOD).

32	06/19/2006	14788 S. Shadow Grove Court	\$5,522.68	Monthly payment on 14728 S. Pristine Way, Draper, UT 84020
33	08/10/2006	19 E. Windsong Drive	\$14,407.45	Monthly payment on 1408 E Military Way, Salt Lake City, UT 84103
34	08/14/2006	19 E. Windsong Drive	\$11,655.11	Monthly payment on 1334 N Canyon Oaks Way, Salt Lake City, UT 8410
35	04/19/2006	354 E. Pheasant View Drive	\$5,676.24	Monthly payment on 1767 E. Springdale Way, Draper, UT 84020
36	04/19/2006	354 E. Pheasant View Drive	\$11,100.58	Monthly payment on 1334 N Canyon Oaks Way, Salt Lake City, UT 84109
37	04/03/2006	11897 Harvest Moon Lane	\$4,061.40	Monthly payment on 1769 E Burning Oak Dr., Draper, UT 84020
38	04/03/2006	11897 Harvest Moon Lane	\$5,808.51	Monthly payment on 14702 S. Pristine Way, Draper, UT 84020

All in violation of Title 18, United States Code, §1956(a)(1)(A)(i), and §2.

**NOTICE OF INTENTION TO SEEK CRIMINAL FORFEITURE**

(18 U.S.C. Section 981(a)(1)(C); 28 U.S.C. Section 2461)

As a result of committing the felony offenses alleged in Counts 1 through 15 of the Indictment, each of which is punishable by imprisonment for more than one year, defendants RONALD WILLIAM HAYCOCK, SR., LYLE CLAY SMITH, JAMIS MELWOOD JOHNSON, shall forfeit to the United States pursuant to 18 U.S.C. Section 981(a)(1)(C); 28 U.S.C. Section 2461 any and all property constituting or derived from any proceeds said defendants obtained directly or indirectly as a result of the said felony charges alleged in the Counts listed in this Notice, and any property traceable thereto, including but not limited to the following:

**PROCEEDS (MONEY JUDGMENT)**

As to RONALD WILLIAM HAYCOCK, SR., LYLE CLAY SMITH, JAMIS MELWOOD JOHNSON: The approximate aggregate sum of Two Million Eight-Hundred Sixty-Five Thousand Dollars (\$2,865,000) in United States currency received and diverted by RONALD W. HAYCOCK, SR., LYLE SMITH, JAMIS MELWOOD JOHNSON, in connection with the above-referenced offenses.

If more than one defendant is convicted of an offense, the defendants so convicted are jointly

and severally liable for the amount involved in such offense.

SUBSTITUTE ASSETS

If any of the above-described forfeitable property, as a result of any act or omission of the defendants,

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third person;
- (3) has been placed beyond the jurisdiction of the Court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty;

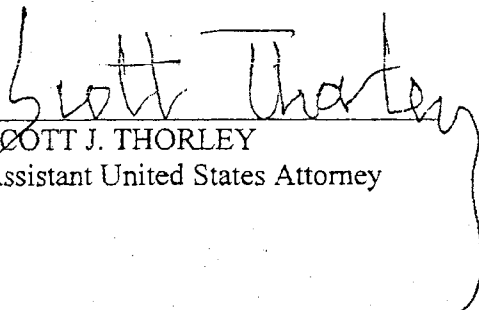
it is the intent of the United States, pursuant to 28 U.S.C. Section 2461(c) and 21 U.S.C. Section 853 (p), to seek forfeiture of any property of said defendants up to the value of the above-forfeitable property.

A TRUE BILL:

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\_\_\_\_\_  
FOREPERSON OF THE GRAND JURY

BRETT L. TOLMAN  
United States Attorney

  
SCOTT J. THORLEY  
Assistant United States Attorney

# Addendum O

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

MAR 18 2011

D. MARK JONES, CLERK  
BY                       
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMIS MELWOOD JOHNSON,

Defendant.

**VERDICT**

2:09-CR-00133 CW

We, the jury duly impaneled in the above-entitled case, find the defendant JAMIS  
MELWOOD JOHNSON:

- ☒ GUILTY ☐ NOT GUILTY as to Count 1 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 2 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 4 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 5 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 6 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 7 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 9 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 11 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 12 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 13 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 14 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 15 of the Indictment.

2877

- ☒ GUILTY ☐ NOT GUILTY as to Count 16 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 18 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 19 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 21 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 23 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 27 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 28 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 29 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 30 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 31 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 32 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 33 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 35 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 37 of the Indictment.
- ☒ GUILTY ☐ NOT GUILTY as to Count 38 of the Indictment.

DATED this 18 day of March, 2011.

  
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FOREPERSON