

2016

**State of Utah, Plaintiff/ Appellee, v. Girato Kamillo Phillip,
Defendant/ Appellant.**

UTAH COURT OF APPEALS

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Case No. 20150278-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

GIRATO KAMILLO PHILLIP,
Defendant/Appellant.

Brief of Appellee

Appeal from an order revoking probation on a conviction for aggravated robbery, a first degree felony, in the Third Judicial District, Salt Lake County, the Honorable Mark Kouris presiding

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IN THE
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STATE OF UTAH,
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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from an order revoking probation on a conviction for aggravated robbery. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West Supp. 2012).

STATEMENT OF THE ISSUES

AP&P mistakenly closed Defendant's court-ordered probation on its internal computers before it even began supervising him. AP&P discovered its mistake two months before Defendant's probationary period had run and filed a report alleging several violations. AP&P amended that report to allege that Defendant had since committed three new crimes. The trial court revoked Defendant's probation and sent him to prison on the original sentence.

1. Did AP&P's failure to supervise Defendant foreclose the trial court from enforcing its previously-ordered probation terms?

Standard of Review. This presents a question of law, reviewed for correctness. *State v. Candedo*, 2010 UT 32, ¶7, 232 P.3d 1008.

2. Was Defendant on notice that he was on probation when he committed the violations, where the trial court told Defendant at sentencing that he was on probation and the announced probationary period had not yet expired?

Standard of Review. This Court reviews a trial court's finding for clear error and its probation decision for an abuse of discretion. *State v. Maestas*, 2000 UT 22, ¶¶12, 13, 997 P.2d 314.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute is reproduced in Addendum A:

- Utah Code Ann. §77-18-1 (West Supp. 2015) (probation statute)

STATEMENT OF THE FACTS AND CASE¹

The underlying crime and plea agreement

In February 2009, Defendant pleaded guilty in an earlier case to aggravated assault.² He received a suspended sentence and probation.

¹ Because Defendant pleaded guilty, the facts are taken from the pleadings, including the presentence investigation report.

R129:1-2, 7, 9-10. The day after Christmas 2010, while still on probation, Defendant, with a gun on his hip, and two friends (one armed with a baseball bat) held up a convenient store. R2-3.

Defendant was charged in this case with aggravated robbery with a group enhancement, a first degree felony. R1-2. Defendant pleaded guilty to aggravated robbery in exchange for the State's dropping the group enhancement and dismissing an unrelated case that charged Defendant with a third degree felony (issuing a bad check), and three misdemeanors (theft by deception). R1-2, 43.³ The State also agreed to recommend 36 months' probation. R1, 43.

Defendant given zero tolerance probation

On April 15, 2011, Defendant was sentenced to a prison term of five years to life, but the trial court suspended the prison term and placed

² Utah R.Evid. 201 allows this Court to take judicial notice that Defendant was convicted of aggravated assault in July 2009 in case number 09190040. See *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App. 1988) (interpreting Rule 201, Utah Rules of Evidence allows this Court to take judicial notice); Third District Court Docket, Case No. 091900040 (available on Xchange).

³ The theft by deception and issuing a bad check charges were part of case number 111900351. The record in this case refers to the case number of the discussed case, but does not state the charges in that case. Rule 201, Utah Rules of Evidence allows this Court to take judicial notice that case number 111900351 charged Defendant with three theft by deception charges and one issuing a bad check charge. *Mel Trimble Real Estate*, 758 P.2d at 456.

Defendant on 36 months' zero-tolerance probation, which included 365 days in jail with credit for time served. R34-35.

The sentencing court announced the conditions of probation and ordered Defendant to comply with them. R136:6. The court-ordered conditions included to not "hang out with other gang members"; submit to drug testing; and to not have "contact with the victim" or "co-defendants." R136:6-7. The court then explained to Defendant that "when you get to AP&P they're going to give you a contract to sign and it's going to have all these conditions on it." R136:6. The court instructed Defendant that he should "make sure" that he understands those conditions and to "follow" them. R136:6. When the prosecutor told the court that Defendant was already on probation for aggravated assault, the court warned Defendant that he was on "zero tolerance" probation and that the "next time we see you in this courtroom we're going to be sending you to prison. You better comply." R136:6.

Defendant's prior probation revoked

About a month after sentencing, on May 13, 2011, Defendant's probation in the aggravated assault case was revoked and he was sent to prison on that conviction. R51; Br. Appt. 4, n.4; see Third District Court Docket, Case No. 091900040 (available on Xchange).

Defendant's probation agreement with AP&P

About three months after his aggravated assault probation was revoked, on August 18, 2011, AP&P reviewed the probation agreement with Defendant. R114-116 (probation agreement) (addenda B); R129:21. The probation agreement included the court-ordered terms. Cf. R136:5-6 (terms stated by the court at sentencing); R114-116 (probation agreement).

The probation agreement first explained that any "violation of the 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." R114. The agreement then—paragraph by paragraph—explained each probation condition, including that Defendant must: establish and reside at a residence and not change the residence without first notifying AP&P; report to AP&P; "obey all state" laws; submit to alcohol and drug testing; abstain from consuming or possessing alcohol; serve 365 days in jail starting on April 15, 2011; and pay fees and fines. R114-115. The agreement further explained that the probation was "zero tolerance." R115. Last, the agreement stated that Defendant was acknowledging that he had "read, underst[oo]d, and agree[d] to be bound by" the agreement, that if he violated "any of the conditions" "the Court may revoke" probation, and that he had received a

copy of the agreement. R116. Defendant initialed each paragraph of the agreement and signed it. R114-116.

AP&P "closed" its internal file on Defendant's aggravated robbery case, sometime while Defendant was serving his aggravated assault prison term. R51; R129:11. AP&P did not notify anyone, including the trial court or the Defendant, that the file was inadvertently closed. R51. AP&P also did not notify the aggravated robbery trial court that Defendant was sentenced to prison for his aggravated assault case. R51.

Defendant was paroled on his aggravated assault conviction in May 2013. R50, 52. AP&P began supervising Defendant as a parolee, with conditions substantially the same as those imposed in his aggravated robbery probation. R129:1-2, 4, 21; R50, 52, 67. At that point, Defendant was 25 months into his 36 month probation term for his aggravated robbery case. R35; see Utah Code Ann. §77-18-1(2)(a);(8). Because AP&P's computer system listed Defendant's aggravated robbery probation case as closed, AP&P was not monitoring his probation on that case. R129:2.

Probation Violation Report

In February 2014, Defendant's AP&P parole officer discovered that Defendant had not been living at the address he had given AP&P. R51. This prompted the AP&P officer to audit Defendant's case, which revealed that

Defendant's aggravated robbery probation case had been "inadvertently closed out" in the AP&P computer system. R51. The AP&P officer corrected the error and on February 8, 2014 began dual supervision of Defendant, as both a parolee and a probationer.⁴ R51.

Defendant's AP&P officer met with him ten days later, on February 18th. The officer instructed Defendant to reside at his address of record and to not move without first obtaining permission from AP&P. R51. The officer also told Defendant to submit to a drug test at AP&P that day, but Defendant left without doing so. R51.

On that day, the AP&P officer learned that Defendant had tested positive for alcohol consumption at his substance abuse treatment facility four times: on December 4, 2013, December 23, 2013, January 15, 2014, and February 4, 2014. R49, 51. The officer also learned that Defendant had moved from his address without first notifying AP&P. R51.

On February 20, 2014, the AP&P officer submitted a violation report to the trial court alleging that Defendant had violated his aggravated robbery probation by: moving without permission, not submitting to a drug

⁴ The record is unclear when AP&P may have informed Defendant of the error and that he was dually supervised. But at the very least, Defendant was put on notice when AP&P filed its initial violation report on February 20, 2014. R48-53.

test, and testing positive for alcohol use on four occasions. R48-49. The AP&P officer also noted in his report that Defendant had text messages on his cellphone indicating that he was possibly using, possessing, or distributing marijuana and spice. R53.

On September 24, 2014, Defendant's AP&P officer filed an amended violation report adding that Defendant was arrested on September 20, 2014 for: having an open container in a public place, a class C misdemeanor, concealing his identity or furnishing false information, a class B misdemeanor, carrying a dangerous weapon, a class B misdemeanor, and possession of marijuana, a class B misdemeanor. R66. Defendant was convicted on September 23, 2014 for possession of marijuana spice or controlled substance and carrying a concealed dangerous weapon charges. R63, 66. The report also informed the court that on April 1, 2014 Defendant was arrested for assault, a class B misdemeanor.⁵ R66, R129:28. Finally, the report informed the court that Defendant's parole for his aggravated assault case had been revoked, and Defendant was back in prison. R66. AP&P

⁵ Because the assault case was on-going at the time the probation violation report was filed, the final disposition was not included. However, the record shows that Defendant was convicted on January 26, 2015 for that crime. R129:28.

recommended that Defendant's probation in this case be revoked and the original sentence imposed. R67.

Revocation Hearing

The trial court held a revocation hearing on March 20, 2015 on the original and amended probation violations. R129. Defendant did not contest that he committed the allegations in AP&P's violation report. R129:29-30. Defendant argued instead that because AP&P did not supervise his probation as it was court-ordered to do, the court could not find that he is violated probation. R129:2-5, 10, 18. Defendant also argued that he lacked noticed of his probation terms and that he was in violation of probation because of AP&P's lack of supervision. R129:5.

Following a lengthy argument, the prosecutor proffered evidence that Defendant violated his probation by consuming alcohol on four different occasions and by amassing three new convictions while on probation: possession of marijuana or spice, carrying a concealed weapon, and assault. R129:27-28.

Neither party entered the probation agreement into evidence at the revocation hearing. During the revocation hearing, the court asked the probation officer two different times if Defendant had ever met with any probation officer. R129:8, 20. The first time the court asked the question, the

officer stated that “[w]ell, yeah, I think,” and then gave a short history of the case. R129:9. The second time the court asked the officer, the officer stated that he did not “think so.” R129:20. There was no other discussion of the agreement at the hearing.

After argument and reviewing the probation conditions given to Defendant at sentencing, the trial court found that Defendant “was on notice” that he was on probation because the court had explained to Defendant that he was in fact on probation and had explained the conditions of his probation. R129:25. The trial court, however, agreed with Defendant that he was only on notice of the probation terms announced by the court at sentencing and not on any additional terms imposed by AP&P. R129:25. Thus, the court agreed that it could revoke Defendant’s probation only for violating the express court-ordered terms of probation R129:25.

The trial court thus did not revoke Defendant’s probation for violating the residency requirements or not submitting to a drug test, because the trial court believed those terms were not imposed by the court at sentencing. R129:25; R63.

The trial court did find that Defendant had violated his probation by consuming alcohol on December 4, 2013, December 23, 2013, January 15, 2014, and February 5, 2014—violations from first violation report dated

February 20, 2014. R129:25-26; R63. The trial court also found that Defendant violated his probation by being convicted of possession of marijuana and carrying a concealed dangerous weapon, and committing assault—all occurring after AP&P's first report and Defendant's first order to show cause hearing in April 2014. R63; R129:29. The trial court thus revoked Defendant's probation and imposed the original prison sentence of five years to life, to run concurrently with his aggravated assault prison sentence. R129:32.

Defendant timely appealed. R117-118.

SUMMARY OF ARGUMENT

Point 1: Defendant argues that contrary to the trial court's ruling AP&P can terminate a probation by not complying with its statutory or court-ordered duties because AP&P's supervision is a necessary condition of probation. Defendant argues that his probation violations cannot support his probation revocation because AP&P was not supervising him when he violated probation. The plain language of the probation statute defeats Defendant's claim. Under the probation statute, a defendant remains on probation until either the court terminates the probation or a defendant completes 36 months of probation without a violation. And under the probation statute, AP&P must notify the sentencing court when termination

of probation is being requested by the department or will occur by law.

Nothing in the probation statute states or even implies that AP&P may terminate probation merely by not complying with its statutory and court ordered duties. Moreover, the trial court never terminated Defendant's probation early and Defendant's probationary period had not expired when AP&P filed its violation report on February 20, 2014. Thus, the trial court's ruling that Defendant's probation had not terminated based on AP&P's failure to supervise was correct.

Point 2: Defendant argues that his probation violations were not willful because he did not know that he was on probation. But the record refutes Defendant's argument that he lacked notice. Defendant was told by the trial court that he was on a 36-month zero tolerance probation and the court detailed the conditions of his probation. And Defendant was never told by the court or anyone else that his probation had been terminated early.

ARGUMENT

I.

AP&P'S FAILURE TO SUPERVISE A PROBATIONER DOES NOT FORECLOSE THE TRIAL COURT FROM ENFORCING ITS PREVIOUSLY-ORDERED PROBATION TERMS

Defendant argues that the trial court was "mistaken" when it ruled that AP&P "can't close" probation. Br. Aplt. 8. According to Defendant, the "plain language" of the probation statute "implies that where, as here, a court places a defendant on [supervised] probation," AP&P's "'supervision is a necessary condition of the defendant's probation.'" Br. Aplt. 8 (quoting Utah Code Ann. § 77-18-1(2)(a)(i)). Defendant argues that AP&P "effectively close[d] probation by not supervising it." Br. Aplt. 8. Defendant reasons that since AP&P was not supervising his probation when he committed the violations, the violations "cannot support the revocation of [his] probation." Br. Aplt. 9.

The plain language of the probation statute defeats Defendant's argument. Under the statute there are only two ways for probation to terminate, neither of which happened here: (1) when the court orders it, or (2) upon completion of the probationary term without violation. Utah Code Ann. § 77-18-1(10)(a)(i)(West 2015). Nothing in the statute permits probation to be "closed" or "terminated" because AP&P failed to fulfill its court-

ordered supervision duties due to a clerical error in its internal system. And, in any event, by the time Defendant committed three of the violations on which he was revoked (the three new crimes), AP&P was supervising him.

A. The probation statute does not allow AP&P to unilaterally terminate court-ordered supervised probation.

A trial court may, as it did here, “suspend the execution” of a sentence and “place the defendant on probation.” Utah Code Ann. §77-18-1(2)(a). As Defendant points out, the trial court may place Defendant on probation to be supervised by the Department of Corrections (*i.e.*, AP&P) or under bench probation, which is not supervised by AP&P.⁶ Br. Aplt.8; *see* Utah Code Ann. § 77-18-1(2).

By accepting probation, a defendant “enters into an agreement with *the sentencing court* to comply with the conditions of probation as established by that court in exchange for not having to serve a prison sentence.” *Rawlings v. Holden*, 869 P.2d 958, 961 (Utah Ct. App. 1994) (emphasis added). If a defendant does not follow those terms, he is subject to sanctions. *State v. Warner*, 2015 UT App 81, ¶14, 347 P.3d 846 (court properly revoked probation and sentenced defendant to prison when

⁶ The court may also place a defendant “on probation with an agency of local government or with a private organization.” Utah Code Ann. § 77-18-1(2)(a)(ii).

defendant violated probation terms by failing to pay fines); *State v. Brady*, 2013 UT App 102, ¶¶2,10, 300 P.3d 778 (court properly revoked probation and sentenced defendant to prison for failing to pay restitution, a violation of probation conditions). Defendant asserts that the “plain language of the [probation] statute implies that where, as here, as court places a defendant on probation ‘under the supervision of’ AP&P, that ‘supervision is a necessary condition of the defendant’s probation.’” Br. Aplt. 8 (quoting Utah Code Ann. § 77-18-1(2)(a)(i)). “Indeed,” Defendant continues, “if [AP&P] terminates supervision, the defendant is no longer ‘on probation under the supervision of’ AP&P. *Id.* (quoting Utah Code Ann. § 77-18-1(2)(a)(i)). Defendant thus reasons that “under the probation statute,” AP&P “effectively closes probation by not supervising it.” Br. Aplt. 8.

The probation statute, however, provides exactly the opposite. Under the statute, a defendant remains on probation until it is terminated by one of two events: (1) “the *court*,” in its “discretion” terminates it, or (2) “upon completion without violation of 36 months probation.” Utah Code Ann. §77-18-1(10)(a)(i)(West Supp. 2015) (emphasis added); *see also State v. Wellington*, 2015 UT App 12, ¶9, 343 P.3d 328 (defendant remains on probation “from the point his prison sentence [is] suspended” and he is “placed on probation ... until that probation [is] revoked”). If a defendant

violates the terms of his probation, the *court* may terminate probation by revoking it, or the *court* may modify or extend probation. Utah Code Ann. § 77-18-1(12)(b); *see also State v. Anderson*, 2009 UT 13, ¶15, 203 P.3d 990.

Contrary to Defendant's argument, nothing in the statute permits AP&P to unilaterally terminate court-ordered probation either intentionally or by negligently failing to supervise as it was ordered to do. As stated, the statute expressly assigns the authority to terminate probation to the court. In contrast, the statute relegates AP&P's role to "monitoring, investigating," "supervising," and notifying *the court* of violations. Utah Code Ann. §64-13-21(5) (West 2015) (probation and parole officer duties); Utah Code Ann. §64-13-29 (West 2015) (duty to report violations to court). Indeed, the statute expressly provides that any modifications to probation, including revocation or extending the time, must be done by the court. *See* Utah Code Ann. §77-18-1(8) (list of requirements that "the *court* may require that the defendant") (emphasis added); (10(a)(i) (probation "may be terminated at any time at the discretion of the court"); (12)(a)(i) (probation may not be "modified or extended" except upon a finding "in court" that the probationer has violated the conditions of probation"); 12(a)(ii) (probation "may not be revoked except upon a hearing in court" and a finding that probation has been violated).

And if that were not enough, the statute states that AP&P must “notify the sentencing court, the Office of State Debt Collection, and the prosecuting in writing in advance in all cases when termination of supervised probation is being *requested* by the department or will occur by law.” Utah Code Ann. § 77-18-1(10)(b) (emphasis added). If AP&P could terminate probation without prior court approval, there would be no need for it to “request” termination from the court.

In short, nothing in the probation statute “implies” that AP&P may terminate probation merely by not complying with its statutory and court-ordered duties to supervise a probationer. Rather, the statute clearly states that probation is terminated only if the *court* “in its discretion” terminates probation or the probationary period expires without violation. See Utah Code Ann. § 77-18-1(10)(a)(i). Here, Defendant does not dispute that the trial court never “in its discretion” terminated his probation early or that the probationary period had expired before AP&P filed its violation report in February 20, 2014. Thus, the trial court’s ruling that probation had not terminated based on AP&P’s failure to supervise was correct.

B. Alternatively, Defendant was under AP&P’s supervision when he committed three new crimes.

Even under Defendant’s theory that AP&P supervision was a prerequisite to his being on probation, the trial court properly revoked here

because by the time he committed his three new crimes, he was under AP&P's active supervision. AP&P re-opened its case and began supervising Defendant in February 2014. Defendant does not argue that AP&P could not re-open its case; nor does he argue that AP&P was not supervising him once it did re-open his case. *See* Br. Aplt. 10.

After AP&P began supervising Defendant, Defendant committed three new probation violations by committing three new crimes—possession of marijuana, carrying a concealed dangerous weapon, and assault. R63, R129:29.

Those new crimes—in addition to the earlier alcohol violations—served as the basis for revoking probation. *See* R66. Excluding the alcohol violations—which were committed before AP&P re-opened its case—probation revocation was still not only proper, but inevitable. *See State v. Legg*, 2014 UT App 80, ¶11, 324 P.3d 656 (noting only one violation is required for probation revocation); *State v. Pacheco*, 2016 UT App 19, ¶¶4-5, -P.3d--, 805 Utah Adv. Rep. 4 (defendant's probation revoked for committing new crime). This is particularly true where the court had warned Defendant at sentencing that he was on zero-tolerance probation and that if he came back to court he would be going to prison. *See* R136:6-7.

II.

DEFENDANT WAS ON NOTICE THAT HE WAS STILL ON PROBATION BECAUSE THE TRIAL COURT TOLD HIM HE WAS ON A 36 MONTHS PROBATION AT SENTENCING AND 36 MONTH'S HAD NOT LAPSED WHEN AP&P FILED ITS VIOLATION REPORT

To revoke a defendant's probation, a trial court must find by a preponderance of the evidence that a violation occurred and that violation was willful. *State v. Hodges*, 798 P.2d 270, 277 (Utah App. 1990); *State v. Peterson*, 869 P.2d 989, 991 (Utah App. 1994). Defendant does not contest that while on probation he consumed alcohol and committed three crimes — assault, carrying a concealed dangerous weapon, and possession of marijuana. Defendant argues only that his probation violations were not willful because he did not know that he was on probation. Br. Aplt. 13-19.

The record refutes Defendant's argument that he was not on notice that he was on probation when he committed any of his violations. The trial court explicitly told Defendant in open court that he was on a 36-month zero-tolerance probation term and the court detailed the conditions of that probation, including not to "hang out with other gang members"; to submit to drug testing; and to not have "contact with the victim" or "codefendants." R136:6-7. The court explained to Defendant that he would meet with AP&P, sign a contract with AP&P that listed his probation

conditions and that he would have to follow those conditions. R136:6-7. The court also explained that he was on "zero-tolerance" probation, meaning that if he came back to court, "we're going to be sending you to prison," so "you better comply." R136:6-7. That 36 month period had not yet expired when AP&P filed its initial violation report.

Defendant argues that he did not know that he was on probation because (1) there was no evidence that AP&P initially met with him, supervised him or provided him assistance with his probation; (2) AP&P's own records did not show that he was on probation; and (3) Defendant was sentenced to prison and subsequently paroled on a different case, thus giving rise to a reasonable inference that he was no longer on probation in this case. Br. Aplt. 13-19. As explained below, each of Defendant's reasons fail.

In support of his first contention, Defendant cites to his probation officer's statement at the revocation hearing that the officer did not "think" that Defendant had ever "sat down with AP&P and initiated his probation," because Defendant was "already in custody at the prison."⁷ R129:20.

⁷ The revocation hearing transcript does not identify the probation officer as stating this; rather it lists the speaker as "Mr. ?." R10,15,19. Given the context of the question, however, the probation officer had to be the speaker.

Whether or not Defendant ever “sat down” with AP&P to enter into a probation agreement does not answer whether Defendant knew he was on probation. As stated, the trial court here unequivocally told him at sentencing that he was to complete 36 months’ zero-tolerance probation and serve one year in jail. He was also told that he was to meet with AP&P. R136:6 Defendant was never told by the court—or anyone else for that matter—that his probation had been terminated early. Defendant nowhere explains how his failure to meet with AP&P translates into a reasonable inference that he was no longer on the court-ordered probation.

But Defendant’s first argument fails for a more fundamental reason. Although not presented at the revocation hearing, the record shows that in fact AP&P did meet with Defendant and reviewed the terms and conditions of probation on August 18, 2011. R114-116. The record contains a probation agreement initialed and signed by the Defendant on August 18, 2011. R114-116. The agreement states that defendant agreed “to be directed and supervised by” AP&P and that he further agreed “to abide by all the conditions of probation as ordered by the court and set forth in this agreement.” R114. The agreement contains fourteen paragraphs setting forth Defendant’s probation conditions, including: “obey all state, federal, and municipal laws, and court orders”; “not possess” dangerous weapons;

report to AP&P; and to “not consume or possess alcoholic beverages.” R114-116. And next to each of these fourteen paragraphs, Defendant wrote his initials, indicating that he agreed to and understood his responsibilities. R114-116. Thus, Defendant’s contention that AP&P failed to even meet with him is without merit.

Defendant’s second argument—that AP&P’s records did not show he was probation—likewise fails. *See* Br. Aplt. 18-19. Although AP&P’s internal records may have shown that they had closed Defendant’s case, nothing in the record suggests that was ever communicated to him. Defendant cannot rely on a record that he had no knowledge of to suggest he reasonably believed that he was not on probation.

Defendant relatedly argues that without active supervision from AP&P, Defendant could have reasonably believed that he was not on probation. Br. Aplt. 8-10. But that argument ignores that Defendant was expressly told by the court that he was on probation and that he had to comply with express conditions. Defendant does not explain how AP&P’s failures would lead him to reasonably believe that he was not obligated to comply with the court’s orders. This argument is also fraught with the potential for abuse and manipulation. Under it, a probationer bears no responsibility to meet with AP&P as ordered or to comply with express

court orders if AP&P happens to negligently drop him from their caseload. Rather, the probationer may—as apparently Defendant did here—decide to say nothing, hoping that he will fly under the radar until probation expires on its own terms.

Third, Defendant argues that because he was sentenced to prison and subsequently paroled on a wholly different case, it was reasonable for him to infer that he was no longer on probation in this case. Br. Aplt. 17-18. Defendant does not explain how his serving a sentence in an entirely different (and prior) case would make him think that he had served his first-degree felony sentence in this case. He certainly cites no authority supporting that claim. Defendant thus provides no reasonable basis for him to conclude that this case had been closed.

Finally, Defendant argues that he was “prejudiced” by the revocation “because he will now be serving additional time at the prison.” Br. Aplt. 20. He reasons that if the trial court “had found” that Defendant “could not be revoked on probation because he did not willfully violate his probation, then the Utah Board of Pardons would not currently have jurisdiction over this matter” and Defendant “would only be serving time for his other matter.” Br. Aplt. 20.

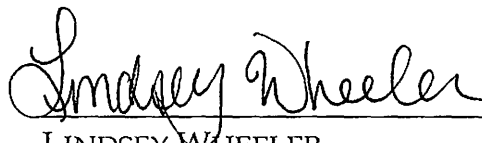
As explained, the trial court was well within its discretion to revoke Defendant's probation. But Defendant is wrong that he is serving "additional time" as a result of the revocation in any event. Defendant was given a suspended five-years-to-life prison sentence in this case. R34. In an act of grace, the trial court allowed him probation—notwithstanding his prior aggravated assault conviction. R34-35. By revoking Defendant's probation, the trial court executed on his original sentence. Thus, Defendant is not serving any "additional time" on this case. He is only serving the time that he always knew he would have to serve if he violated his probation. There is nothing unfairly prejudicial about that result.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on April 1, 2016.

SEAN D. REYES
Utah Attorney General

A handwritten signature in cursive script, reading "Lindsey Wheeler", written over a horizontal line.

LINDSEY WHEELER
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on April 1, 2016, two copies of the Brief of Appellee were

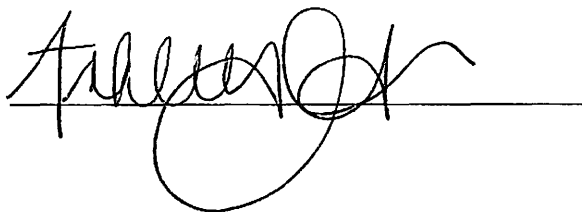
☐ mailed ☒ hand-delivered to:

Teresa Welch
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8,
a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

§ 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 with a mental illness, 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 results of a risk and needs assessment;

(iii) the demand for services;

(iv) the availability of agency resources;

(v) public safety; and

(vi) 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) Before 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:

(i) 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;

(ii) 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;

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

(iv) recommendations for treatment of the offender; and

(v) the number of days since the commission of the offense that the offender has spent in the custody of the jail and the number of days, if any, the offender was released to a supervised release or alternative incarceration program under Section 17-22-5.5.

(c) The contents of the presentence investigation report 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 10 working days to resolve the alleged inaccuracies of the report with the department. If after 10 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 the defendant 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 76-6-107.1;

(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, 12 months in cases of class B or C misdemeanors or infractions, or as allowed pursuant to Section 64-13-21 regarding earned credits.

(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. If the court retains jurisdiction for this limited purpose, the court may order the defendant to pay to the court the costs associated with continued probation under this Subsection (10).

(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 the defendant's 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 is being requested by the department or 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.

(iii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation constitutes service of time toward a term of incarceration imposed as a result of the revocation of probation.

(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 the defendant's arrest or a copy of the affidavit and an order to

show cause why the defendant's 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 if the defendant 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 the defendant's 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 a period of incarceration is imposed for a violation, the defendant shall be sentenced within the guidelines established by the Utah Sentencing Commission pursuant to Subsection 63M-7-404(4), unless the judge determines that:

(A) the defendant needs substance abuse or mental health treatment, as determined by a risk and needs assessment, that warrants treatment services that are immediately available in the community; or

(B) the sentence previously imposed shall be executed.

(iv) If the defendant had, prior to the imposition of a term of incarceration or the execution of the previously imposed sentence under this Subsection (12), served time in jail as a condition of probation or due to a violation of probation under Subsection 77-18-1(12)(e)(iii), the time the probationer served in jail constitutes service of time toward the sentence previously imposed.

(13) The court may order the defendant to commit himself or herself 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 the superintendent's 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 are classified protected in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63G-2-403 and 63G-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 63G-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.

Addendum B

Gary R. Herbert
Governor



STATE OF UTAH
Department of Corrections
PROBATION AGREEMENT

Name: PHILLIP, GIRATO K

Offender Number: 189930

Court: 3RD DISTRICT - SALT LAKE
CITY

County: SALT LAKE

Case: 101909538

I, PHILLIP, GIRATO K, agree to be directed and supervised by Agents of the Utah State 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.

- GP 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.
- GP 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.
- GP 3. CONDUCT: Obey all state, federal and municipal laws, and court orders.
- GP 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.
- GP 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.
- GP 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.
- GP 7. ASSOCIATION: Without approval from the AP&P Officer, I will not knowingly associate with any person who is involved in criminal activity or who has been convicted of a felony.
- GP 8. 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.

- GP 9. 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.
- GP 10. 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.
- GP 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.
- GP 12. CURFEW: Comply with curfews as directed by the AP&P Officer.
- GP 13. CASE ACTION PLAN: Comply with Case Action Plan as directed by Adult Probation and Parole.
- GP 14. SPECIAL CONDITIONS:
1. ALCOHOL Do not consume or possess alcoholic beverages or frequent places where alcohol is chief item of sale.
 2. ALCOHOL TESTING Submit to testing for the use of alcohol.
 3. JAIL Serve 365 days in the Salt Lake County Jail commencing 04/15/2011.
 4. NO CONTACT Have no contact with victim(s).
 5. OTHER ZERO TOLERANCE
 6. RECOUPMENT Pay (LDA) recoupment fee of \$150.00.
 7. COMPLETE GANG PROGRAM.
 - a. GANG MEMBERS Not associate with any known member.
 - b. INSIGNIAS/EMBLEMS Not wear, display, use or possess any insignias, emblems or clothing associated with a specific gang(s) including, but not limited to: belt buckles, jewelry, caps/hats, jackets, shoes/shoe laces, scarves/bandanas, shirts inscribed "In Memory Of" a deceased or incarcerated gang member, or other articles of clothing modified to represent a particular gang(s).
 - c. SIGNS/GESTURES Not display any gang signs, gestures or any posturing associated with any specific gang(s).
 - d. DOCUMENTS/DATA/PHOTO Not have in my possession any written materials, documents, computer data, photographs which give evidence of gang involvement or activity such as: (1) membership or enemy lists, (2) articles which contain or have upon them gang-associated graffiti, drawings or lettering, (3) photographs or newspaper clippings of gang members, gang crimes or activities including obituaries, (4) photographs of myself in gang clothing, demonstrating hand signs or holding weapons.
 - e. PAINT/PENS Not have in my possession or under my control spray paint, spray can tips, large marking pens or other items commonly used to create graffiti, or tagger magazines.
 - f. FREQUENT GANG PLACES Not frequent places where known gang members congregate.
 - g. NOT AT COURT Not appear in court or at a court building where other known gang member(s) are present and/or where a judicial proceeding involving a gang member is in progress, unless a party to proceedings in that court or subpoenaed to appear.
 - h. FREQUENT SCHOOLS Not visit or frequent any school ground unless I am a student registered at that school and present during appropriate class hours.
 - i. STOLEN VEHICLE Not be an occupant in any stolen vehicle, or vehicle I should have known was stolen.
 - j. FIREARM/AMMUNITION Not have in my possession, in my custody, under my control, in a vehicle in which I am a passenger, or on the premises where I reside: (1) any firearm or replica thereof, (2) ammunition, or (3) dangerous weapon (any item which, in the manner of its use or intended use, is capable of causing death or serious bodily injury), and further, I shall not associate with, or be in the company of, any individual who has firearms or dangerous weapons in their possession or under their control.
 - k. FIREARMS USED Not be involved in activities in which, or frequent places at which, firearms or dangerous weapons are used, legally or otherwise including, but not limited to, hunting or target shooting.
 - l. DRIVER LICENSE/ID Obtain and carry on my person at all times a valid Utah Driver License, Utah Identification Card or other approved photo identification.

m. LAW ENFORCE CONTACT If/when contacted by law enforcement, I shall provide my true name, place of residence (street address, not PO Box) and date of birth, and inform the officer(s) of my probation or parole status; I shall report such contact to my supervising agent within 48 hours, including the date and the nature of the contact, the law enforcement agency and any potential charges.

n. VICIOUS DOGS Not own, possess, maintain or raise vicious dogs, nor keep them on the premises where I reside.

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 08, 2011

Witnessed By: [Signature]

Girato Phillip
Probationer:

Addendum C

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	: Case No. 101909538 FS
	:
Plaintiff,	: Appellate Court Case No. 20150278
	:
vs.	:
	:
GIRATO KAMILO PHILLIP,	:
	:
Defendant.	: With Keyword Index

CHANGE OF PLEA APRIL 15, 2011

BEFORE

THE HONORABLE KATIE BERNARDS-GOODMAN

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

FILED
UTAH APPELLATE COURTS
NOV 16 2015

20150278-CA

APPEARANCES

For the Plaintiff:

NATHAN J. EVERSHED
Deputy District Attorney

For the Defendant:

SCOTT A. WILSON
Attorney at Law

* * *

1 SALT LAKE CITY, UTAH; APRIL 15, 2011

2 JUDGE KATIE BERNARDS-GOODMAN

3 (Transcriber's note: Identification of speakers may
4 not be accurate with the audio recordings.)

5 PROCEEDINGS

6 MR. WILSON: Girato Phillip, Your Honor,
7 P-H-I-L-L-I-P, Your Honor.

8 THE COURT: Okay, Girato Kamilo Phillip.

9 MR. WILSON: Your Honor, this is going to be a plea
10 of guilty on Case No. 101909538. The other case is going to
11 be dismissed. He'll be pleading guilty to aggravated
12 robbery, a felony first. This will be a Rule 11 pleading
13 where the agreement is if he pleads guilty, there will be no
14 prison, serve 365 days as a condition of probation with
15 credit for the time that he's already served and dismiss
16 1119003511 but pay restitution on that case.

17 MR. EVERSLED: And the enhancement language, Your
18 Honor, on the aggravated robbery will be a (inaudible).

19 THE COURT: Will this be a second?

20 MR. WILSON: First.

21 MR. EVERSLED: Will still be aggravated robbery but
22 there will be no group enhancement.

23 THE COURT: Oh, the group enhancement.

24 MR. WILSON: It's a felony first (inaudible).

25 THE COURT: Let me just write this number down in

1 case these files get separated. And you're anticipating
2 after the jail he goes to AP&P?

3 MR. EVERSLED: Yes, Your Honor.

4 THE COURT: Mr. Phillip, is that what you want to
5 do?

6 DEFENDANT PHILLIP: Yes.

7 THE COURT: Do you want to plead guilty today?

8 DEFENDANT PHILLIP: Yes.

9 THE COURT: Have you read through a plea form?

10 DEFENDANT PHILLIP: Yes.

11 THE COURT: And does he read and write the English
12 language?

13 DEFENDANT PHILLIP: No, I read Arabic.

14 THE COURT: And the form is in English?

15 MR. WILSON: It is.

16 THE COURT: And did you translate for him?

17 TRANSLATOR: Yes, Your Honor, (inaudible).

18 THE COURT: Are you under the influence of any
19 medications today?

20 DEFENDANT PHILLIP: No.

21 THE COURT: Did you understand the rights that are
22 in that form?

23 DEFENDANT PHILLIP: Yes, I understand.

24 THE COURT: Do you understand that you have a right
25 to a speedy trial where you would a fair and impartial,

1 unbiased jury? At that trial you would have the right to
2 confront and cross examine witnesses that the State would
3 call. You would have the right to call witnesses on your own
4 behalf of you wanted to. You have the right to testify if
5 you wanted to. Or you could choose not to testify if you
6 want to. At a trial you are presumed innocent and the State
7 has to prove each and every element beyond a reasonable
8 doubt.

9 DEFENDANT PHILLIP: Yes, I understand.

10 THE COURT: After the trial you would have rights
11 to appeal if something had gone wrong at that trial?

12 DEFENDANT PHILLIP: Yes, I understand.

13 THE COURT: So you understand that by pleading
14 guilty today you are waiving all of those rights, you will
15 not be having a preliminary hearing or trial?

16 DEFENDANT PHILLIP: Yes, I understand.

17 THE COURT: Do you want to give me a factual basis?

18 MR. WILSON: Yes, Your Honor, on December 26, 2011
19 in Salt Lake County, Utah, the defendant along with others
20 took money by force from Maverick Gas Station, the clerk
21 being Gerad Grow, G-R-O-W. A co-defendant was armed with a
22 baseball bat.

23 THE COURT: Mr. Phillip, is that what happened?

24 DEFENDANT PHILLIP: Yes this has been - it happened
25 in October, no - it happened in 2010.

1 MR. WILSON: Yes, I'm sorry.

2 THE COURT: It did, okay, he's right.

3 Do you understand that a first degree felony has a
4 potential penalty of five years to life in the prison, a
5 \$10,000 fine with a 90 percent surcharge? Today we have all
6 agreed that you are going to do a year in jail and then go to
7 AP&P probation, but you need to understand if you don't
8 comply with probation and do everything they tell you, a
9 Judge could bring you back and sentence you to that maximum
10 amount, do you understand that?

11 DEFENDANT PHILLIP: Yes, I understand.

12 THE COURT: Have any promises or force been used to
13 get you to plead?

14 DEFENDANT PHILLIP: No.

15 THE COURT: Do you have any questions before you
16 plead?

17 DEFENDANT PHILLIP: No.

18 THE COURT: Then I'll ask how you plead to Count 1,
19 aggravated robbery, a first degree felony that on or about
20 December 26, 2010 at 1707 South 300 West, you did unlawfully
21 and intentionally take or attempt to take personal property
22 from the possession of another by use of fear or force with
23 the intent to permanently deprive the owner of that property
24 and that a weapon was used? How do you plead?

25 DEFENDANT PHILLIP: I'm guilty.

1 THE COURT: I'll have you sign the form, the plea
2 form that was read to you.

3 MR. WILSON: And Judge, we would ask to be
4 sentenced today if that's okay with the Court.

5 THE COURT: All right, we'll adopt that into the
6 plea colloquy and find that the plea has been knowing,
7 voluntarily and intelligently given.

8 Okay, you have a right to be sentenced in not less
9 than two nor more than 45 days, do you want to waive that two
10 days and get sentenced today?

11 MR. WILSON: Yes.

12 THE COURT: That means you will not be having an
13 opportunity to withdraw your plea once you have been
14 sentenced. No changing your mind. All right, then -

15 MR. WILSON: Judge, I will prepare an order for the
16 credit of time served from December 26th to today.

17 THE COURT: Okay. Then the sentence of this Court
18 will be to stay the five to life in prison, the \$10,000 fine
19 with the 90 percent surcharge and place the defendant with
20 Adult Probation and Parole for a period of 36 months. He is
21 to serve 365 days in jail with credit for the time that he
22 has done so far. He is to pay restitution on this case as
23 well as the case No. 111900351.

24 What conditions should we have on that?

25 MR. WILSON: Gang conditions, Your Honor.

1 THE COURT: He'll have gang conditions. Drug and
2 alcohol?

3 MR. EVERSHED: Regular conditions.

4 THE COURT: Drug and alcohol conditions.

5 MR. EVERSHED: And Your Honor, we ask (inaudible)
6 recoupment as well for the services of the (inaudible).

7 THE COURT: And \$150 recoupment for the use of your
8 legal defender. Now those conditions mean you can't hang out
9 with other gang members. Also means you can drug tested when
10 they want to. You can be searched when they want to search
11 you, your car, your person, your house. When you get to AP&P
12 they're going to give you a contract to sign and it's going
13 to have all these conditions on it. You make sure you
14 understand that and you follow it.

15 MR. EVERSHED: Your Honor, he's on probation for an
16 aggravated offense already. We'll be seeking (inaudible)
17 conviction (inaudible) for your information. So if you do
18 place him on probation (inaudible).

19 THE COURT: He needs to be zero tolerance.

20 MR. EVERSHED: Absolutely zero tolerance. If he
21 doesn't report (inaudible) long history of (inaudible). This
22 is the second time (inaudible). That's why we're going to be
23 seeking prison (inaudible).

24 THE COURT: Okay, they're telling him, telling you,
25 next time we see you in this courtroom we're going to be

1 sending you to prison. You better comply.

2 MR. EVERSHED: Oh, Your Honor, no contact with
3 (inaudible) or the places (inaudible) business and no contact
4 with co-defendants.

5 THE COURT: Okay, also, no contact with the victim,
6 you cannot go back to the place where this happened, no
7 contact with the co-defendants you did this with.

8 MR. EVERSHED: Obviously, Your Honor, no violations
9 of the law (inaudible) that's built into the standard -

10 MR. WILSON: Anything else?

11 MR. EVERSHED: This is on a recovery (inaudible).

12 THE COURT: Yeah, it's coming.

13 (Inaudible conversation)

14 MR. WILSON: He's not a gang member. Just don't
15 become a gang member, don't hang out with these guys that are
16 involved with this (inaudible).

17 Thank you, Your Honor.

18 THE COURT: You're welcome.

19 (Whereupon the hearing was concluded)

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21

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23

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(10-19-15)

<p>\$</p> <p>\$10,000 4:5 5:18 \$150 6:7</p> <hr/> <p>1</p> <p>101909538 1:10 10-19-15 7:20 11 1:12 111900351 5:23 1119003511 1:16 15 1:1 1707 4:20</p> <hr/> <p>2</p> <p>2010 3:25 4:20 2011 1:1 3:18 26 3:18 4:20 26th 5:16</p> <hr/> <p>3</p> <p>300 4:20 36 5:20 365 1:14 5:21</p> <hr/> <p>4</p> <p>45 5:9</p> <hr/> <p>9</p> <p>90 4:5 5:19</p> <hr/> <p>A</p> <p>absolutely 6:20 accurate 1:4 adopt 5:5 adult 5:20 aggravated 1:11,18,21 4:19 6:16 agreed 4:6 agreement 1:13 alcohol 6:2,4 amount 4:10 anticipating 2:1 ap&p 2:2 4:7 6:11 appeal 3:11 april 1:1 arabic 2:13 armed 3:21 attempt 4:21 audio 1:4</p>	<p>B</p> <p>back 4:9 7:6 baseball 3:22 basis 3:17 bat 3:22 become 7:15 behalf 3:4 bernards-goodman 1:2 better 7:1 beyond 3:7 bring 4:9 built 7:9 business 7:3</p> <hr/> <p>C</p> <p>call 3:3,3 cannot 7:6 car 6:11 case 1:10,10,16 2:1 5:22,23 changing 5:14 choose 3:5 city 1:1 clerk 3:20 co-defendant 3:21 co-defendants 7:4,7 colloquy 5:6 coming 7:12 comply 4:8 7:1 concluded 7:19 condition 1:14 conditions 5:24,25 6:1,3,4,8,13 confront 3:2 contact 7:2,3,5,7 contract 6:12 conversation 7:13 conviction 6:17 count 4:18 county 1:1 3:19 courtroom 6:25 credit 1:15 5:16,21 cross 3:2</p> <hr/> <p>D</p> <p>days 1:14 5:9,10,21 december 3:18 4:20 5:16</p>	<p>defendant 2:6,8,10,13,20,23 3:9,12,16,19,24 4:11,14,17,25 5:19 defender 6:8 degree 4:3,19 deprive 4:23 dismiss 1:15 dismissed 1:11 doubt 3:8 drug 6:1,4,9</p> <hr/> <p>E</p> <p>element 3:7 english 2:11,14 enhancement 1:17,22,23 evershed 1:17,21 2:3 6:3,5,15,20 7:2,8,11 everything 4:8 examine 3:2</p> <hr/> <p>F</p> <p>factual 3:17 fair 2:25 far 5:22 fear 4:22 felony 1:12,24 4:3,19 files 2:1 find 5:6 fine 4:5 5:18 five 4:4 5:18 follow 6:14 force 3:20 4:12,22 form 2:9,14,22 5:1,2</p> <hr/> <p>G</p> <p>gang 5:25 6:1,9 7:14,15 gas 3:20 gerad 3:21 girato 1:6,8 given 5:7 group 1:22,23 grow 3:21 g-r-o-w 3:21 guilty 1:10,11,13 2:7 3:14 4:25 guys 7:15</p> <hr/> <p>H</p>	<p>hang 6:8 7:15 happened 3:23,24,25 7:6 hearing 3:15 7:19 he'll 1:11 6:1 history 6:21 house 6:11</p> <hr/> <p>I</p> <p>identification 1:3 impartial 2:25 influence 2:18 information 6:17 innocent 3:6 intelligently 5:7 intent 4:23 intentionally 4:21 involved 7:16</p> <hr/> <p>J</p> <p>jail 2:2 4:6 5:21 jury 3:1</p> <hr/> <p>K</p> <p>kamilo 1:8 katie 1:2 knowing 5:6</p> <hr/> <p>L</p> <p>lake 1:1,1 3:19 language 1:17 2:12 law 7:9 legal 6:8 less 5:8 life 4:4 5:18 long 6:21</p> <hr/> <p>M</p> <p>maverick 3:20 maximum 4:9 mean 6:8 means 5:12 6:9 medications 2:19 member 7:14,15 members 6:9 mind 5:14 money 3:20 months 5:20</p> <hr/> <p>N</p> <p>need 4:7</p>
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
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Addendum D

101009538 FS

IN THE THIRD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 101909538 FS
	:	
Plaintiff,	:	Appellate Court Case No. 20150278
	:	
v	:	FILED DISTRICT COURT Third Judicial District
	:	
GIRATO KAMILO PHILLIP,	:	APR 22 2015
	:	SALT LAKE COUNTY
Defendant.	:	With Keyword Index  Deputy Clerk

EVIDENTIARY HEARING MARCH 20, 2015

BEFORE

THE HONORABLE MARK KOURIS

CAROLYN ERICKSON, CSR	
CERTIFIED COURT TRANSCRIBER	FILED
1775 East Ellen Way	UTAH APPELLATE COURTS
Sandy, Utah 84092	
801-523-1186	JUL 02 2015

20150278-CA

ORIGINAL

APPEARANCES

For the Plaintiff:

PETER G. LEAVITT
Deputy District Attorney

For the Defendant:

EDWIN S. WALL
Attorney at Law

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1 SALT LAKE CITY, UTAH - MARCH 20, 2015

2 JUDGE MARK KOURIS

3 (Transcriber's note: Identification of speakers
4 may not be accurate with audio recordings.)

5 P R O C E E D I N G S

6 THE COURT: All right. Okay, let's call the case of
7 the State of Utah vs. Mr. Girato Phillip. If counsel will
8 please state their appearances for the record?

9 MR. LEAVITT: Peter Leavitt for the State.

10 THE COURT: Thank you.

11 MR. WALL: Edwin Wall on behalf of Mr. Phillip -

12 THE COURT: Okay.

13 MR. WALL: - who is present, Your Honor.

14 THE COURT: Thank you, Mr. Wall. I believe we're here
15 today for an order to show cause hearing. What are we planning
16 to do?

17 MR. WALL: Your Honor, if I could make a brief opening
18 statement, I think that would -

19 THE COURT: Please.

20 MR. WALL: - help guide the court.

21 THE COURT: Okay.

22 MR. WALL: Your Honor, there were two events occurring
23 in this case that I think are relevant for the Court to focus
24 on. One is that my client had been released on parole and was
25 being supervised pursuant to the terms and conditions on

1 parole. Alternatively, in a different matter in this case, he
2 was ordered to be on probation, and he was to be supervised on
3 probation. For whatever reason, Adult Probation & Parole did
4 not put him into their system to be supervised on probation,
5 and now they're asserting that the Court should find that
6 there's a violation of his probation, because while they
7 initially put him into their system indicating he was on
8 probation, they're claiming there was a clerical error, and so
9 he wasn't supervised pursuant to probationary terms. Although
10 the terms for his parole supervision apparently are nearly
11 identical if not identical, to his probation. So we have a
12 parole violation for which he has been held accountable, and he
13 is now in the State Prison, and then we have the court putting
14 him on probation. And then because Adult Probation & Parole
15 didn't supervise him pursuant to that probation, although it's
16 the same terms and conditions as parole, they're asserting that
17 this Court should find he's in violation of his probation, and
18 revoke his probation, and impose a sentence in this case.

19 We submit that the evidence will show that, because
20 he was not being supervised for his probation that the Court
21 shouldn't find he's in violation of his probation, that his
22 probation should continue in this case. I don't believe this
23 Court's decision will have any bearing with regard to his
24 parole and the violation of that.

25 THE COURT: Well, let me ask you this. You indicated

1 that the terms of the probation and the parole were the same -

2 MR. WALL: That's correct.

3 THE COURT: - and they found that he's violated his
4 parole. Wouldn't that mean then he's also violated his
5 probation?

6 MR. WALL: If he had been supervised, then pursuant to
7 that supervision, there would have been a record established.
8 That particular procedural avenue would have followed. If he'd
9 been supervised, then it would be a violation of his probation.

10 THE COURT: He was being supervised for parole,
11 though, right?

12 MR. WALL: For parole.

13 THE COURT: I'm not sure I see the difference.

14 MR. WALL: It's because, for example, Your Honor,
15 let's assume hypothetically -

16 THE COURT: Okay.

17 MR. WALL: - that on parole, he had five terms --

18 THE COURT: Right.

19 MR. WALL: - that are completely different from the
20 terms of probation.

21 THE COURT: Okay.

22 MR. WALL: If he violated his parole, the court would
23 revoke his parole - or the, I should say, the board would
24 revoke his parole, and he'd go to prison, but it wouldn't be a
25 basis for the court to -

1 THE COURT: Right.

2 MR. WALL: - revoke his probation.

3 THE COURT: I agree, except I think this is one where
4 the two are the same. So if he's being supervised -

5 MR. WALL: This is one where the terms are the same,
6 yes, exactly.

7 THE COURT: Okay. So the example then would be
8 completely different, because if the two terms were the same
9 and he wasn't being supervised on - was - was on the other
10 determined to violate the other had - there was no chance he
11 could have violated the other without violating the one that he
12 wasn't being supervised on. So -

13 MR. WALL: Except for the -

14 THE COURT: Oh, go ahead.

15 MR. WALL: - systems of supervision are different in
16 that one is a probation supervision, one is a parole
17 supervision, and the consequences are different for the
18 violation. One is an individual goes before the board, and the
19 rest of their prison sentence is imposed. With regard to
20 probation, an individual goes before the court, and then the
21 court evaluates whether or not there's been a violation of
22 those terms. So we - what we have is the board overlapping
23 with the court -

24 THE COURT: Right.

25 MR. WALL: - but the court's order with regard to the

1 supervision pursuant to its order isn't occurring.

2 THE COURT: But the only - I understand that, and I
3 understand that the punishment side would be different based on
4 both of those routes, but the elements of the violation would
5 be exactly the same, would they not?

6 MR. WALL: If he had been supervised, then the
7 elements would be the same.

8 THE COURT: Okay.

9 MR. WALL: But since he wasn't being supervised and he
10 wasn't in their system, he wasn't even getting notice that he
11 was in violation of the terms of his probation.

12 THE COURT: Okay.

13 MR. WALL: He was being told he was in violation of
14 the terms of his parole. And so not receiving notice of the
15 violation of the terms of his probation, the consequences that
16 follow pursuant to those violations are something that he's not
17 given notice of, and so there's an inherent need in due process
18 of an individual being supervised, receiving notices of his
19 violations, and knowing that the consequences that will flow
20 will be the violation of his probation, not the violation of
21 his parole.

22 THE COURT: I see. Okay, thank you.

23 Mr. Leavitt, would you like to respond to that?

24 MR. LEAVITT: Sure. It seems that it's a semantical
25 question, but probation is a court order. It's an order by the

1 court. They're given certain conditions. AP&P's job is to
2 just followup and see if that's happening and if they violated
3 those conditions. But by violating their parole, they're not
4 violating AP&P's supervision. AP&P's just the ones who report
5 back to the court that the court's order has been violated.

6 THE COURT: Right.

7 MR. LEAVITT: And so because there was - and again
8 this all stems from inside the probation report - inside of the
9 order to show cause, the agent says that he wasn't aware he was
10 on probation for this case due to a clerical error, and that's
11 simply because the case had mistakenly then closed out, but
12 they were still supervising him and still looking at those same
13 conditions. And if it's about notice, the defendant was here
14 when he was sentenced on - what day was that? Let's see here.

15 MR. ?: April. April 15th, 2011

16 MR. LEAVITT: April 15th of 2011 when he was sentenced
17 when the judge told him it was zero tolerance probation, gang
18 conditions, no contact with the co-defendants or victim in this
19 case, drug and alcohol conditions, and no violations of the
20 law. One of the violations that he admitted to the parole
21 board was a new offense - a new charge and a new conviction.

22 So whether AP&P was really supervising him on parole -
23 it's not that he's here because he was - he didn't obey his
24 supervision. It's - an order to show cause is because he
25 didn't obey the court's order. So whether AP&P puts in their -

1 if they close out the case in their system and supervise him on
2 another case or however AP&P's looking at it, it's
3 inconsequential. The question is is did he obey the court's
4 order on probation? The obvious consequence is is when he went
5 before the board. He - and admitted, and he went to prison on
6 a zero to five. This is five to life. So obviously this is
7 going to carry a greater consequence, but it's still the same
8 violation. It's still the court's order he's violated. I'm
9 not sure if we want to put the evidence on. I don't know if
10 there's much of dispute. He went before the parole board and
11 admitted to basically what the - what they're alleging in these
12 allegations, but again I think it's a - it's a creative
13 argument of technicality, but the simple fact is is that it's
14 the court's order. AP&P is the liaison between the court to
15 make sure a person is doing what the court has ordered.
16 Because they - if AP&P puts something in their computer, that
17 doesn't erase the court's order. It's the court to which the
18 defendant's bound. It's not to the AP&P agent and he was still
19 being supervised.

20 THE COURT: So was he given - I'm not sure I exactly
21 follow the defense argument, but was he given some notice that
22 his case with AP&P was closed and, therefore, he didn't have to
23 deal with those people any longer?

24 MR. LEAVITT: No, cause he was still dealing with
25 AP&P.

1 THE COURT: With his parole case?

2 MR. LEAVITT: Right. So no, there was no notice that
3 it was closed. It was just in their system. It - in their
4 system it had been closed, but nothing with regard to the
5 defendant. It was - they were still supervising him.

6 THE COURT: Had the court indicated that the
7 supervision will stop now at any point?

8 MR. LEAVITT: No -

9 THE COURT: So AP&P -

10 MR. LEAVITT: - not that I'm aware of.

11 THE COURT: - AP&P does not have the ability to stop
12 probation on someone, right? That's only the providence of the
13 court?

14 MR. LEAVITT: That's the providence of the court.
15 When they want that done, they file a progress report with the
16 court and ask that the court close the person's probation
17 successfully or unsuccessfully or whatever. Again they're the
18 liaison. They're letting - they're getting - giving the court
19 notice -

20 THE COURT: Right.

21 MR. LEAVITT: - so that the court doesn't have to
22 babysit somebody.

23 THE COURT: Was there ever a time that he met with a
24 probation agent to kick this off, or did - or was it just a non
25 starter from the beginning? Do we know?

1 MR. ?: Well, yeah, I think - I think what happened in
2 this case was that when he got his - he was convicted on a one
3 to fifteen. And when we got to prison and they're going
4 through and seeing that he wasn't convicted on the case -- the
5 five to life on this case here, they inadvertently closed that
6 out. But when he came out on parole, I had an active probation
7 agreement in our system, and I had an active parole agreement
8 in our system, and so - but it was - I don't know, it was just
9 - when I initially started going through the paperwork and all
10 that, it was - you know, the initial thing is is that I see
11 that that one case is closed out, but then as I went further
12 through, you know, now, when he ended up absconding supervision
13 on parole, then I started really dissecting everything and find
14 out - I went through - you know, I go - I pulled up the court
15 docket, and I went through the court docket to see where the
16 court had ordered him to be terminated from probation, and I
17 could never find that, and so I was able - so I was able to
18 erase that end date that had inadvertently been put in, cause
19 technically he was on - still on probation.

20 THE COURT: So if I understand the sequence of events,
21 he gets in front of this judge on a five to life. This judge
22 puts him on probation. A subsequent judge then sends him to
23 prison. So now he's got a prison -

24 MR. LEAVITT: On another case.

25 THE COURT: On another case?

1 MR. ?: On a different case, Your Honor.

2 THE COURT: On another case? So now, we've got a
3 person that's been sentenced to prison on one case, yet is
4 serving probation on another case.

5 MR. ?: Right.

6 THE COURT: So then when he's paroled, I guess, the
7 question then is that probation still in place?

8 MR. ?: Yes.

9 THE COURT: And the only way that pro - Mr. Wall,
10 correct me if I'm wrong. And the only way that probation would
11 end would be - there's no such thing as a statutory termination
12 of a person who is put in a prison. So the only way that
13 probation initially would end would be by a judge's order
14 saying - I don't know what they might say, but hypothetically
15 they could say, well, now that he's in prison, I'm vacating the
16 order.

17 MR. WALL: Well, Your Honor, what is in addition to
18 the terms and conditions that were imposed on my client -

19 THE COURT: Right.

20 MR. WALL: - as the court's order that my client be
21 supervised by Adult Probation & Parole. Then they violate that
22 term and condition by closing his case without a court order,
23 and so now Adult Probation & Parole isn't supervising him and
24 he is no longer being supervised on probation.

25 THE COURT: Well, wait. This is -

1 MR. WALL: And the close -

2 THE COURT: - while he's in the prison?

3 MR. WALL: Whenever they did it in their file, because
4 apparently he went back in and erased that, and I don't have
5 any documents that show it, but I have a report that says that
6 they closed his probation.

7 THE COURT: Right. But when he gets -

8 MR. WALL: And then -

9 THE COURT: - out, he is still being supervised by
10 that same agency?

11 MR. WALL: I don't know whether they closed his
12 probation before he got out of prison or after he got out of
13 prison.

14 THE COURT: Okay, but no -

15 MR. WALL: At some point in time, they close it, and -

16 THE COURT: But nevertheless,

17 MR. WALL: - Adult Probation & Parole terminates his
18 probation -

19 THE COURT: Right, but -

20 MR. WALL: - and that's -

21 THE COURT: - during this period of time, though - the
22 entire period of time we're watching, AP&P is still supervising
23 him?

24 MR. WALL: On parole.

25 THE COURT: Okay. That con -

1 MR. WALL: Not probation.

2 THE COURT: Right, and those conditions are the same
3 as the probationary conditions?

4 MR. WALL: Roughly the same. I don't know the exact
5 details.

6 THE COURT: So I guess, my -

7 MR. WALL: - whether there's a minor difference.

8 THE COURT: I -

9 MR. WALL: But the difference is, in a probation
10 system, he is off probation, because they closed it. They've
11 terminated it -

12 THE COURT: But they -

13 MR. WALL: - inappropriately without a court order,
14 and -

15 THE COURT: Well, they don't have the ability to close
16 it.

17 MR. WALL: But they did close it.

18 THE COURT: Well, no, they didn't close it, because
19 they can't close it. It's like saying I can stuff a
20 basketball. Well, guess what? I can't jump that high.

21 MR. WALL: Well -

22 MR. LEAVITT: And I think the difference is closing it
23 in their system is different than officially closing it. I can
24 go back to my office and within our system, I can close it in
25 our computer system. That doesn't close the case. That just

1 closes the file in the way we keep track of the information,
2 and that's what happened here.

3 MR. ?: Right.

4 MR. LEAVITT: It's within their - see, they haven't
5 closed the probation. They closed their file.

6 THE COURT: Right.

7 MR. WALL: Well, the requirement by the court was that
8 he be supervised by Adult Probation & Parole, and they closed
9 that supervision.

10 THE COURT: Okay.

11 MR. WALL: Now, they're trying to say that he violated
12 the terms of the supervision that was to be in place.

13 THE COURT: I see what you're saying, but I -

14 MR. WALL: And -

15 THE COURT: - think that your original example, I
16 think, was much more powerful. And that is if the terms of the
17 probation and the terms of parole were completely different,
18 and AP&P quit supervising on these terms for whatever reason,
19 could he then be held to account for these terms that they
20 never supervised him on? And I think you have a much better
21 argument there. But if the terms are exactly the same and they
22 overlap, which it sounds like they are here - well,
23 particularly when you're dealing with new crimes, which would
24 be the same in both systems - I don't know if there's a
25 difference. They do - AP&P does not have the ability to close

1 probation. The court is the only one that has that ability or
2 it can be closed by running its allotted term that the judge
3 has given it. But aside from that, I don't know why he still
4 would be super - he's supervised. Whether there's supervising
5 or not, I'm not sure is the issue. The issue is, was he
6 legally being supervised at that point, and he was. If AP&P
7 wasn't doing anything about, well, that's another issue.

8 MR. WALL: Well, in this case when you take an example
9 where there's completely disparate terms -

10 THE COURT: Right.

11 MR. WALL: - then you start to see some overlap, and
12 then complete overlap. And in this case, I don't know how much
13 overlap there is.

14 THE COURT: Well, one of the terms here is that he
15 used - he's been convicted of some drug offenses here and
16 carrying a dangerous -

17 MR. WALL: It's a misdemeanor.

18 THE COURT: - weapon.

19 MR. WALL: Misdemeanor offenses.

20 THE COURT: Okay, that's fine. But nonetheless, it
21 still violates both agreements. I can guarantee you it says
22 there'll be no new criminal activity, right? So that's a clear
23 violation of the probation and the parole.

24 MR. ?: Well, and if I might just - I mean, the - you
25 know, the seven initial allegations when he went fugitive was,

1 you know, residence, changing residence without record, and
2 then a whole bunch of alcohol violations, testing positive for
3 drugs and alcohol in treatment, which were both the same for
4 probation and parole.

5 THE COURT: Okay.

6 MR. ?: So I think - yeah, they're - I mean, they're -
7 it's not that they overlap. It's - the conditions that he -
8 that we're alleging that he violated in our probation are the
9 same as the court - as the board, and it would be the same with
10 - yeah, there's no difference in this.

11 THE COURT: All right.

12 MR. WALL: Well, Your Honor, I would submit that when
13 the court orders Adult Probation & Parole to supervise someone-

14 THE COURT: Okay.

15 MR. WALL: - and then with the delegation to that
16 agency -

17 THE COURT: Right.

18 MR. WALL: - the court's authority for supervision -

19 THE COURT: Right.

20 MR. WALL: When they close the file, then the
21 individual's supervision has been terminated in that case -

22 THE COURT: Well, no.

23 MR. WALL: - for that matter.

24 THE COURT: They don't know. Why would they have the
25 authority to do that? Let's say that - I can't think of a fair

1 example, but let's say the defense lawyer goes back to his
2 office. And in his screen, types in the person's been
3 acquitted. Does that mean the person's been acquitted? And
4 the answer is no. They don't have the authority to do that. I
5 would think the same thing -

6 MR. WALL: No, but the court hasn't -

7 THE COURT: - with -

8 MR. WALL: - delegated that authority to the defense
9 attorney to impose that condition.

10 THE COURT: But we haven't delegated that authority as
11 well to AP&P. They have no authority to stop supervising
12 somebody or to terminate that probation.

13 MR. WALL: But in this case, they did it when the
14 court delegated the supervision over the defendant.

15 THE COURT: No, no. What I -

16 MR. WALL: The court -

17 THE COURT: No, no, no. I didn't delegate the su - I
18 ordered them to supervise him.

19 MR. WALL: Correct.

20 THE COURT: And if he violated that supervision, they
21 were to bring him back to me.

22 MR. WALL: And then they didn't -

23 THE COURT: But -

24 MR. WALL: - supervise him, but -

25 THE COURT: Right.

1 MR. WALL: - closed it.

2 THE COURT: Right, but they didn't have the ability to
3 close the case. That's what I'm saying.

4 MR. WALL: So follow this.

5 THE COURT: All right.

6 MR. WALL: The court delegates to them an order that
7 says you must -

8 THE COURT: Not delegate. Order.

9 MR. WALL: Orders them to -

10 THE COURT: Yeah.

11 MR. WALL: - supervise him -

12 THE COURT: Correct.

13 MR. WALL: - on probation.

14 THE COURT: Correct.

15 MR. WALL: They close the file.

16 THE COURT: Right.

17 MR. WALL: Now, they -

18 THE COURT: They violated a court order now, but that
19 certainly doesn't violate the probation agreement.

20 MR. WALL: Now, they're seeking to violate him -

21 THE COURT: Okay.

22 MR. WALL: - for a failure to comply with the terms of
23 his supervision -

24 THE COURT: Okay.

25 MR. WALL: - but he wasn't supervised. They closed

1 it. So if the court has said to them, I order you -

2 THE COURT: Well, you can - you can violate something
3 without being supervised on it.

4 MR. WALL: But the court ordered him to be supervised.

5 THE COURT: Correct.

6 MR. WALL: They don't supervise him.

7 THE COURT: No. The court ordered him to follow
8 through with certain things, and told AP&P to supervise him to
9 make sure he followed through with those things.

10 MR. WALL: And the court -

11 THE COURT: So -

12 MR. WALL: The court had Adult Probation & Parole
13 impose those conditions for his supervision.

14 THE COURT: No. I imposed the conditions, and told
15 AP&P to monitor to make sure he followed through with those
16 conditions. Now, if they don't follow through and he does some
17 violation, and I don't know about it, that's not consented to
18 by the court. That's AP&P's problem, and that means they're
19 not doing their job.

20 But at the end of the day if AP&P says, "Well, wait a
21 minute. This judge says this guy has to do X, Y, and Z, and
22 we're suppose to babysit him while we do that," we choose not
23 to babysit him today. That doesn't let the defendant off the
24 hook. It puts them on the hook, but it certainly doesn't - the
25 judge still ordered the defendant to jump through X, - to jump

1 through those hoops. Am I right or not?

2 MR. WALL: The judge has ordered that he follow the
3 terms and conditions of his supervision.

4 THE COURT: Right, and the terms and supervision were
5 given to him at the time of his sentencing. There were no vi -
6 specifically, it reads, "There will be no further violations of
7 the law."

8 MR. WALL: Well, the allegations in this case with
9 regard to the seven I have is he's not suppose to consume
10 alcohol. He's suppose to submit to testing, serve 365 days in
11 jail, have no contact with the victims, zero tolerance, pay a
12 recoupment fee, and complete the GAIN Program.

13 THE COURT: Okay.

14 MR. WALL: So it's standard terms and conditions of
15 supervision.

16 THE COURT: Okay.

17 MR. ?: There are standard conditions above and
18 beyond those special conditions that the court ordered.

19 THE COURT: Right.

20 MR. WALL: There - listen to that. There are standard
21 conditions above and beyond those conditions that the court
22 ordered.

23 THE COURT: No, no, no.

24 MR. WALL: Those are conditions -

25 THE COURT: No.

1 MR. WALL: - of supervision -

2 THE COURT: No, standard -

3 MR. ?: No.

4 MR. WALL: - ordered by the court.

5 THE COURT: No, No. That's incorrect. What you said
6 is not correct.

7 MR. ?: Okay. Well -

8 THE COURT: The standard - when I say the standard,
9 ordinary conditions of AP&P - those are the ones that we're
10 talking about now. That's the amount that he - those are the
11 ones he's told about when he goes down to sign up with them for
12 the first day. Okay? So that goes under that umbrella. But
13 specifically at the time of the sentencing he was told he's not
14 to violate the law again, and he's to follow those conditions.
15 Was there a time he sat down with AP&P and initiated his
16 probation?

17 MR. ?: That, I don't - I don't think so, because I
18 think he was already in custody at the prison.

19 THE COURT: Oh, all right. Well, if that's the case
20 then, he wouldn't have known, and that would be an issue, but
21 he wouldn't have known that these other conditions - I don't
22 know if the judge said. I'll find out right now.

23 MR. WALL: Well, I mean - well, actually - but let me
24 ask another question.

25 THE COURT: Okay.

1 MR. WALL: Was - did anyone ever sit down with him and
2 give him the conditions of parole?

3 MR. ?: Yes.

4 MR. WALL: And are those conditions identical to -

5 MR. ?: They're not -

6 MR. WALL: - the conditions of his probation?

7 MR. ?: They're not identical. But with regards to
8 the allegations that he has here, they'd be the same.

9 MR. LEAVITT: That's the part that - we're pretending
10 he wasn't supervised, because we're using the semantics between
11 probation and parole, but -

12 THE COURT: No.

13 MR. LEAVITT: - they did supervise him.

14 THE COURT: I understand. I understand you're right.

15 MR. LEAVITT: And someone's not ordered - again
16 they're not ordered to obey supervision.

17 THE COURT: Right.

18 MR. LEAVITT: They're ordered to obey conditions of
19 probation.

20 THE COURT: Right.

21 MR. LEAVITT: And so -

22 THE COURT: But if, in fact, he was never given a
23 condition of probation, could you violate it if you didn't know
24 what it was?

25 MR. LEAVITT: If he was never given that condition,

1 sure, but he was at the sentencing.

2 THE COURT: No, I agree.

3 MR. LEAVITT: He was given the [inaudible] -

4 THE COURT: I agree with that.

5 MR. LEAVITT: Yeah.

6 THE COURT: We're talking now about the ones that you

7 sit down when you do -

8 MR. LEAVITT: So if -

9 THE COURT: - the -

10 MR. LEAVITT: If there -

11 THE COURT: At the sentencing, he definitely -

12 MR. LEAVITT: If there are additional ones -

13 THE COURT: - did.

14 MR. WALL: So -

15 MR. LEAVITT: - that he was never given, -

16 THE COURT: Right.

17 MR. LEAVITT: - then I - he -

18 THE COURT: Right.

19 MR. LEAVITT: - probably doesn't have notice of that,

20 and that's probably right.

21 THE COURT: I -

22 MR. ?: And that'll be like -

23 MR. LEAVITT: Those should be stricken.

24 THE COURT: Okay.

25 MR. ?: And that would be like number one and number

1 two out of 10.

2 THE COURT: Okay.

3 MR. ?: Like number one and two in regards to his
4 residence, and the rest of them would stand.

5 THE COURT: Okay, and I'm trying to find the minutes
6 here of the sentencing.

7 MR. WALL: I don't know what you're referring to as
8 number one.

9 THE COURT: Oh, it is.

10 (Inaudible conversation)

11 MR. ?: Well, you don't have a copy of the order to
12 show cause?

13 MR. WALL: Your Honor, I've never been given the
14 affidavit. He's - I've been given this document that says
15 there's a violation report. He's -

16 MR. LEAVITT: And that's what I have too. This is
17 from the agent. I'll give it to Mr. Wall.

18 THE COURT: All right. I've got those here too.

19 MR. LEAVITT: Those are the allegations for
20 [inaudible].

21 MR. WALL: And [inaudible], Your Honor, I've just now
22 received the allegations in this case. My client's not aware
23 of those.

24 THE COURT: Do you want -

25 MR. LEAVITT: Oh, he is aware.

1 THE COURT: - some more time?

2 MR. ?: We can come back.

3 MR. LEAVITT: He is aware from the -

4 THE COURT: Let's see. It says - here it is right
5 here. Here are the conditions directly given by the judge
6 during the sentencing. "Number one. It's a zero tolerance
7 probation. Number two. He'll pay the fees along with the
8 restitution within 60 days. He'll violate no laws. Comply
9 with all standard and all conditions imposed by the probation
10 agency. Do not use, consume, or possess alcohol." So this was
11 read to him by the judge. "Or illegal drugs, or associate with
12 any person using. Don't frequent any place." So even if we
13 say, fair enough, he never had a chance to meet with the
14 probation agent. He never had a chance to sit down and go over
15 the standard and ordinary conditions of probation. That's
16 fine. He wasn't given notice of those things, but he was given
17 specific notice at the time of the sentencing to these
18 conditions, which are precisely some of the conditions that are
19 included in this form.

20 MR. WALL: Your Honor, (inaudible)

21 THE COURT: Okay.

22 MR. WALL: Each one of these allegations are as I had
23 anticipated. In that it says at the end of every allegation,
24 "In violation of the standard condition of the probation
25 agreement."

1 THE COURT: Correct.

2 MR. WALL: They closed it. They terminated the
3 probation agreement -

4 THE COURT: Well, I think -

5 MR. WALL: - on each and every one of these counts.

6 THE COURT: Well, I appreciate that argument, but I
7 think this - that argument's run its course. I think that
8 argument goes to whether he had knowledge or notice that he, in
9 fact, was on probation during this period of time. And based
10 upon the minutes of the sentencing, I absolutely believe he was
11 on notice. As a matter of fact, it doesn't talk about
12 allegation number one about a residence of record. That's
13 nothing that the judge would have told him about. So that's
14 allegation one. Change residence without permission, that's
15 still the same thing. However, allegation three - by consuming
16 alcohol is specifically listed by the judge. Allegation four,
17 allegation five, allegation six - the failure to submit, I
18 don't believe was given by - well, it would have been testing.
19 I don't know if he would have known about that, though, based
20 on the issue. Then we have the conviction of the marijuana,
21 and of the dangerous weapon, and of assault.

22 So I agree with Mr. Wall's argument in that I think
23 number one, number two, and number seven, based upon probation
24 departments closing of the matter, the defendant was not given
25 adequate notice in terms of what he had to follow through with.

1 The other ones, however, he was given that notice irrespectable
2 of what the probation department did, and he obviously - so
3 that's why we are here today. So the question then is, what do
4 you want - are we going to go forward with the hearing?

5 MR. WALL: Your Honor, I -

6 THE COURT: Do you want a minute to talk to your
7 client?

8 MR. WALL: Well, and I think that the point is each of
9 the allegations have to do with violating the agreement, which
10 was not in place. I think that the government has evidence
11 that it can present with regard to these other facts, and I
12 don't want unduly waste the time of the Court.

13 THE COURT: Okay.

14 MR. WALL: But I would submit that the Court's
15 instruction that the allegations for the order to show cause
16 are sufficient because of violations of court orders. When the
17 actual affidavit and the allegations are violations of the
18 probation agreement, which wasn't in place, is and issue -

19 THE COURT: Well, they could go to -

20 MR. WALL: - for -

21 THE COURT: They could go back and amend that, and it
22 would change - I mean, what difference would that make? They
23 could go back and amend this to read in violation of the
24 condition that the court gave you at the time of sentencing.

25 MR. WALL: I recognize that, Your Honor.

1 THE COURT: Okay.

2 MR. WALL: And I'm just -

3 THE COURT: So I'm not sure -

4 MR. WALL: - I'm just making my objection -

5 THE COURT: I appreciate -

6 MR. WALL: - for the record -

7 THE COURT: That's fine

8 MR. WALL: - and that's all there is to it.

9 THE COURT: Okay, all right. Well, if that's the case
10 then - with regard to the allegations three through six and
11 eight through 10, do you want me to ask your client now at this
12 time whether he admits or denies those allegations?

13 MR. WALL: I'd ask the court to request the State to
14 submit them as a proffer, because -

15 THE COURT: Okay.

16 MR. WALL: - I want to preserve this issue for an
17 appeal.

18 THE COURT: Very good. If that's the case then, Mr.
19 Leavitt, would you mind proffering what you've demonstrated to
20 show -

21 MR. LEAVITT: Sure. Can I get that?

22 Your Honor, by way of proffer, we have Mr. Phillip's
23 assigned agent here, and we believe that we can put on evidence
24 that the defendant had consumed or possessed an alcoholic
25 beverage on or about December 4th of 2013. Also that doing

1 that again - possessed an alcoholic beverage and tested
2 positive for alcohol on December 23rd, 2013. That he had
3 consumed or possessed alcoholic beverage and tested positive
4 for alcohol on January 15th of 2014 as well as possessed or
5 consumed alcoholic once again on February 5th of 2014, and then
6 that he was convicted of possession of marijuana, a class B
7 misdemeanor, on September 18th, 2014. Also that he was
8 convicted of carrying a concealed or dangerous weapon, a class
9 B misdemeanor, on or about September 18th, 2014 as well as
10 committing a new tactical offense, which was the offense of
11 assault, a class B misdemeanor, on April 1st of 2014. And
12 actually - and actually I'm sorry. He was - I now - we can put
13 forward evidence that in West Valley Justice Court he was
14 convicted of assault on January 26th of 2015. So that's the
15 information that we would proffer.

16 THE COURT: All right, very good. Based on that
17 proffer then, Mr. Wall, what do you want - what are you
18 planning to do?

19 MR. WALL: I think the Court can rule as to whether
20 the Court finds - whether he violated the terms of his
21 probation, and then we would ask to argue whether or not it be
22 reinstated.

23 THE COURT: All right, very good. If that's the case
24 then, I guess, - well, so you're just going to submit it?

25 MR. WALL: Yes.

1 THE COURT: Okay. Based on that submission then, I do
2 find, in fact, that he's in violation of allegation number
3 three, allegation number four, allegation number five,
4 allegation number six, allegation number eight, allegation
5 number nine, and allegation number 10. Based on those
6 violations, I find that the defendant is in violation of his
7 probation agreement, and, therefore, violating the same.

8 Now, with regard to sentencing, Mr. Wall?

9 MR. WALL: Your Honor, I think the Court finds and
10 will find that a large number of his allegations have to do
11 with the consumption of alcohol. The offenses for which he has
12 ended up convicted - the first one being the marijuana and the
13 possession of a dangerous weapon - the weapon in that case was
14 a knife. It was a small amount of marijuana. And in that
15 case, the result that the Court imposed was a six day jail
16 sentence. So the Court, in dealing with that matter, found it
17 to be a matter of some minor significance.

18 With regard to the assault case in West Valley City,
19 my client entered a plea of no contest and received a sentence
20 of 60 days. Your Honor, given the fact that he's facing such a
21 substantial, potential sentence in this case of five years to
22 life, also given the anomaly with regard to what occurred in
23 his supervision - but in addition looking at the nature of
24 these violations of his supervision and the fact that the board
25 has reinstated the sentence he was previously serving, I'd ask

1 the Court to revoke and then reinstate his probation in this
2 case. I think that the Court has certainly been able to get my
3 client's attention with regard to what is going on, the need
4 for him to comply with the Court's order concerning not
5 violating the law, not consuming alcohol. I think that he's
6 dedicated, from my visit with him, he's dedicated to complying
7 with the law once he has completed his time in custody on the
8 current sentence that he's serving to remaining out of custody
9 for the rest of his life, because he does not intend to live a
10 life that results in him spending life in prison, which he's
11 facing. So we'd ask the Court to reinstate his probation with
12 supervision by Adult Probation & Parole.

13 THE COURT: Let me ask you two questions first. How
14 long has he been in prison this time?

15 MR. PHILLIP: Six months.

16 MR. WALL: Six months so far.

17 THE COURT: Six months? And what is this - what is he
18 in prison for?

19 MR. WALL: Go ahead and tell him

20 MR. PHILLIP: [inaudible] zero to five.

21 MR. WALL: For what's the charge? Was it -

22 MR. PHILLIP: It's aggravated assault and -

23 MR. WALL: Aggravated assault.

24 MR. PHILLIP: - [inaudible].

25 THE COURT: Okay, thank you.

1 MR. WALL: It was amended. Thank you.

2 THE COURT: All right. Mr. Leavitt?

3 MR. LEAVITT: Your Honor, the underlying conviction is
4 for an aggravated robbery in which defendant with some other
5 people went into a store with a baseball bat and a gun, and
6 they committed an aggravated robbery. The Court put him on
7 probation, zero tolerance. That should certainly mean
8 something, especially if someone's committing a new crime, and
9 one of them of which - one of which is assault.

10 If we look at just his history - his gang activity
11 and just the nature of this crime, the fact that the defendant
12 got 365 days in the first place for this type of crime was a
13 gift. A gift that he obviously didn't take very seriously.
14 He's already at the prison. It doesn't make a whole lot of
15 sense to start him on probation when he's serving a sentence
16 now. I don't see anything that would merit deviating from the
17 zero tolerance that the original judge put in place for this
18 type of crime, and that I would think they put that in place,
19 because again they were giving him a jail sentence on a first
20 degree aggravated robbery count. So I think that the original
21 sentence should [inaudible].

22 THE COURT: All right. Well, based upon the fact that
23 the very first sentence was set at a zero tolerance, and I'm
24 reading it here off the screen from the judge that actually
25 sentenced him. Based upon the very violent nature of that

1 first crime and all the facts therein, I'm going to send him to
2 prison for a period of five to life. That will run
3 concurrently with whatever he's doing at this time. As well,
4 I'll give him credit for the time that he's served. Okay?

5 Anything due and owing will be sent to the prison, I guess, for
6 restitution.

7 Anything else before we adjourn?

8 MR. LEAVITT: No, thank you.

9 MR. ?: Thank you, Your Honor.

10 MR. WALL: No, Your Honor.

11 THE COURT: Okay, thank you all.

12 (Whereupon the hearing was concluded)

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(4-16-15)

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding held by Judge Mark Kouris was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed April 16, 2015 in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

