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**State of Utah, Plaintiff/Respondent, v. John L. Legg, Jr.,  
Defendant/Petitioner**

Utah Supreme Court

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Case No. 20160810-SC

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IN THE  
UTAH SUPREME COURT

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STATE OF UTAH,  
*Plaintiff/Respondent,*

*v.*

JOHN L. LEGG, JR.,  
*Defendant/Petitioner.*

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Brief of Respondent

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*On Writ of Certiorari to the Utah Court of Appeals*

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Case No. 20160810-SC

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IN THE  
UTAH SUPREME COURT

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STATE OF UTAH,  
*Plaintiff/Respondent,*

*v.*

JOHN L. LEGG, JR.,  
*Defendant/Petitioner.*

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Brief of Respondent

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**STATEMENT OF JURISDICTION**

This case is before the Court on a writ of certiorari to the Utah Court of Appeals in *State v. Legg (Legg II)*, 2016 UT App 168, 380 P.3d 360 (Addendum A). The Supreme Court has jurisdiction under Utah Code Ann. § 78A-3-102(5) (West 2009).

**STATEMENT OF THE ISSUES**

1. “Whether the court of appeals erred in overruling its decisions in *State v. Allen*, 2015 UT App 163, 353 P.3d 1266, and *State v. Warner*, 2015 UT App 81, 347 P.3d 846, with respect to the question of whether collateral consequences from probation revocations may be presumed.” Order in this case, January 31, 2017.



*Standard of Review.* This Court reviews questions of law for correctness. *Haik v. Salt Lake City Corp.*, 2017 UT 14, ¶17, \_\_\_ P.3d \_\_\_.

2. “If the court of appeals erred in dismissing the appeal, whether this Court should address the merits of Petitioner’s appellate claim that the district court failed to apply the court of appeals’ prior mandate on remand.” Order, January 31, 2017

*Standard of Review.* No standard of review applies.

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

No constitutional provisions, statutes, and rules are directly relevant to this petition.

## **STATEMENT OF THE CASE**

### **A. The offenses.**

Legg was charged with nine offenses in three cases. *See* R0677 at 1-2; R1007 at 1-3; R3013 at 1. In December 2009, Legg knocked his girlfriend to the floor, tried to strangle her, and—when she tried to call police—repeatedly hit her head against the floor. R0677 at 2-3. That conduct gave rise to the first case.

A month later, Legg again knocked his girlfriend to the floor and this time stomped on her chest. R1007 at 3. His girlfriend called police. *Id.* Officers found Legg hiding in a nearby garage and saw a knife. *Id.* at 4.

Legg admitted the knife was his. *Id.* Charges in the second case were based on that conduct.

In a third case, Legg mailed his girlfriend a letter in violation of the conditions of a protective order. *See* R1007 at 268 (referencing -3013).

**B. Proceedings in the district court.**

*Trial and judgment.* As part of a global resolution of the cases, Legg pleaded guilty to aggravated assault in -0677 and weapon possession by a restricted person in -1007. R0677 at 246-54; R1007 at 224-32. The court dismissed the remaining charges in those cases and all charges in -0313. *See id.; see also* R3013 at 70.

The court held a consolidated sentencing hearing and gave Legg two concurrent indeterminate prison terms of up to five years on his convictions. R0677 at 246-47; R1007 at 224-25. The judge suspended the prison terms, placed Legg on 24 months' probation, and imposed concurrent 180-day jail terms as a condition of probation. *Id.*

*Probation violation.* Legg was released from jail on January 5, 2012. R0677 at 270-03; R1007 at 242-245. Eight days later, Adult Probation and Parole (AP&P) filed a violation report in both cases. *See id.* Legg's probation officer filed an affidavit in support of an order to show cause. *See* R0677 at 274-75; R1007 at 246-47. The officer alleged that Legg had violated

the terms of his probation by possessing cocaine, using methamphetamine, and not being cooperative and truthful with AP&P. *See id.* Legg denied the allegations. R0677 at 285; R1007 at 256.

On 24 April 2012, the officer filed an amended violation report and an affidavit in support of an order to show cause. R0677 at 292-302; R1007 at 265-71. He alleged five violations:

1. Legg's possessing a controlled substance (cocaine);
2. Using amphetamines;
3. Not being cooperative, compliant, and truthful in his dealings with AP&P;
4. Not establishing a residence of record or having changed his residence without approval from AP&P.
5. Knowingly associating with a known criminal.

R0677 at 302; R1007 at 271. Legg denied the allegations. R0677 at 305; R1007 at 278.

***Probation revocation.*** Following an evidentiary hearing, the district court found that the State had proved allegations 1, 3, and 4 by a preponderance of the evidence, but not allegations 2 and 5. R0677 at 307-08;

R1007 at 279-80; R301:76, 88-91, 94.<sup>1</sup> The district court concluded that, based on his violent history, Legg was likely ineligible for residential rehabilitation and that the jail did not offer programs that would help him. R301:127-29. The court revoked Legg's probation and executed his original prison terms. R301:127-28.

**C. *Legg I*—Legg's first appeal.**

Legg appealed, and the court of appeals affirmed the district court's finding that Legg willfully violated his probation by not being cooperative, compliant, and truthful in his dealings with AP&P (allegation 3). *Legg I*, 2014 UT App 80, ¶¶20-21. But the court of appeals held that the district court had not adequately identified the evidence supporting its findings that Legg willfully violated by possessing drugs or by failing to establish a residence (allegations 1 and 4). *Id.* ¶¶19, 23, 25. The court of appeals recognized "that a single violation of probation is legally sufficient to support a probation revocation." *Id.* ¶11 (citing *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990)). But the court of appeals was "not confident that, standing on its own, the single violation" it affirmed on appeal "would have resulted" in revoking probation. *Id.* 25. So the court of appeals remanded for the district court to identify the evidence that supported allegations 1

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<sup>1</sup> R301 is the transcript of the evidentiary hearing held May 2, 2012. It is part of the record in both -0677 and -1007.

and 4 and to “reassess whether, under all the circumstances,” Legg’s “probation should be revoked.” *Id.*

**D. Proceedings in the district court on remand.**

On remand, the State withdrew allegations 1 and 4 and proceeded solely on allegation 3, the willful violation affirmed on appeal. *See* R377:9; *see also Legg I*, 2014 UT App 80, ¶25. The parties agreed to forgo an evidentiary hearing and to proceed to oral argument. *See* R377:9-10. Thus, the only question for the district court was “whether, under all the circumstances,” it would still revoke Legg’s probation based on the single willful probation violation. *Legg I*, 2014 UT App 80, ¶25.

At the remand hearing, defense counsel informed the district court that Legg had six months left on his original sentence, and that he would not be paroled in this case, given that he had “been to prison before and revoked before.” R377:13. Counsel acknowledged that Legg had “a long history in the system,” but argued that he was nevertheless an appropriate candidate for probation. *Id.*; *see* R377:14 (“He is not a problem out at the prison and he has aged. . . . He’s gonna have a difficult time but he doesn’t feel like he’s gonna be using drugs. He feels strong and I do see he’s aged through a lot of these difficult times.”).

The prosecutor argued that Legg's prison sentence should be executed for essentially three reasons: (1) Legg had an extensive criminal history; (2) the original sentencing recommendation was for prison; and (3) a single violation was a sufficient basis for reinstating the prison sentence. *See* R377:15. Legg also addressed the district court and acknowledged his long criminal history, which went back to about 1987. R377:16. Legg also acknowledged that he had previously failed to successfully complete probation. R377:17. Before ruling, the district court also commented on Legg's history: "I have dealt with [Legg] on my calendar for some time." R377:19.

The district court then ruled that based on the single violation for not cooperating with AP&P, it would have revoked and would still revoke Legg's probation even absent any other violation: "There is no question that had I found a violation, looking at his history, looking at the recommendation, looking at the opportunity for probation that he had received, I would have imposed the original sentence." R377:23. "My finding is that based on what information the court had at the time that there was a finding [of] a violation of probation [and] that it was properly a basis for revoking probation, looking at the entire history of both cases." R377:24-25.

The court made clear that it would reach the same result reassessing the question on remand: “[T]he only question [that] remains is, was the revocation of probation sufficient on that one single violation? And I have no question that *that would have been my ruling*, and that I find that *those circumstances still support it.*” R377:24 (emphasis added).

Accordingly, district court confirmed its revocation of Legg’s probation and its execution of his suspended sentences. R377:24-25; R0677:368-69.

**E. Legg II – Legg’s second appeal.<sup>2</sup>**

Legg again appealed. *See* R0677:360. But during the pendency of the appeal, Legg completed his prison sentence and was unconditionally released from custody. *See* Utah Department of Corrections letter confirming that Legg was discharged from prison on July 15, 2015 (attached in Addendum C).<sup>3</sup> The State therefore argued that because Legg had been

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<sup>2</sup> Much of the history relevant to Legg’s second appeal is taken verbatim from the Court of Appeals’ opinion. For readability, the court of appeals’ history of the case has been reproduced without quotation marks or indentation.

<sup>3</sup> Although not included in the record on appeal, this Court may take judicial notice of the Department of Corrections discharge letter. *See* Utah R. Evid. 201 (court may judicially notice fact that is not subject to dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned); *see also State ex rel. F.M.*, 2002 UT App 340, ¶3, n.2, 57 P.3d 1130 (“Courts may take judicial notice of the records and prior proceedings in the same case.”)

released from prison and had served the sentence that was reinstated when the district court revoked his probation, his case was moot. *Legg II*, 2016 UT App 168, ¶7.

The court of appeals concluded that Legg’s case was moot. *Id.* The court of appeals also concluded that the case did not fall within a recognized exception to mootness. *Id.* ¶16. In so doing, the court of appeals determined that two of its recent decisions—*State v. Warner*, 2015 UT App 81, 34 P.3d 846, and *State v. Allen*, 2015 UT App 163, 353 P.3d, 1266—“failed to analyze and apply the collateral consequences exception to mootness according to precedent,” and that neither case was “firmly established.” *Id.* ¶¶40-41. Accordingly, the court disavowed the mootness holdings in *Warner* and *Allen*. *Id.* ¶42. Analyzing Legg’s appeal in light of established prior precedent, the court of appeals found that Legg’s appeal [was] moot and that he [had] failed to demonstrate that his case fit[] within a recognized mootness exception.” *Id.* ¶47. Accordingly, the court dismissed the appeal. *Id.*

## SUMMARY OF ARGUMENT

**Issue 1. Whether the court of appeals erred in overruling its 2015 decisions in *Warner* and *Allen*.** The court of appeals correctly overruled *Warner* and *Allen*, two less-than-weighty cases that only a year earlier



departed from both this Court's and the court of appeals' own extensive precedent. Legg does not dispute that the case is technically moot, i.e., that the Court cannot grant him any relief because his sentence has expired. But he asserts that because this is a criminal, not a civil case, this Court should presume that the district court's revocation of his probation will have collateral legal consequences harmful to him and should therefore address his challenge to the revocation. That argument is contrary to long-established law from this Court, the court of appeals, and the U.S. Supreme Court.

These courts presume that criminal *convictions* will have collateral legal consequences. For instance, a criminal conviction can be used to impeach a defendant's character or as a factor in determining a sentence in a future trial; and a conviction can affect a defendant's ability to vote. In fact, the collateral legal consequences of criminal convictions are so likely that the courts presume they will follow a conviction unless shown otherwise.

But the likelihood that a sentencing decision or a probation or parole revocation will have similar consequences is far more speculative. First, the defendant would have to reoffend. Second, it is far more likely that the circumstances underlying the sentencing decision or probation revocation would have some future effect on the defendant than the fact of the

sentence or revocation itself. Moreover, consideration of the sentence or revocation in a later proceeding (or by a prospective employer) is not mandatory, but lies in the discretion of the decision-maker and is usually only one of a multitude of facts the decision-maker might consider.

For these reasons, appellate courts do not presume that collateral consequences, which are seldom legally mandated, will follow. Thus, when something other than a criminal conviction is at stake, the courts will find an exception to mootness only if the defendant can demonstrate that such a consequence will in fact follow.

Here, Legg is not challenging his conviction. Accordingly, this Court should not presume collateral legal consequences. Rather, because Legg has not demonstrated that his probation will have any actual collateral consequence, this Court should affirm the court of appeals' holding that the case is moot.

**Issue 2. If the court of appeals erred, whether this Court should address the merits of Petitioner's claim that the district court failed to comply with the court of appeals' prior mandate.** On certiorari review, this Court generally reviews the decision of the court of appeals. The court of appeals did not address the merits of Legg's claim that the district court failed to comply with the court of appeals' prior mandate. This Court

should therefore remand to the court of appeals to do so. But if this Court decides to address the merits, it should hold that the district court complied with the court of appeals' mandate following the first appeal.

## **ARGUMENT**

### **I.**

#### **THE COURT OF APPEALS CORRECTLY OVERRULED ITS 2015 DECISIONS IN *WARNER* AND *ALLEN***

##### **A. The court of appeals incorrectly decided *Warner* and *Allen* in 2015 and correctly overruled them a year later.**

Legg argued in his second appeal that the district court erroneously revoked his probation both when it originally revoked and when it reaffirmed its revocation on remand. He asked the court of appeals to reverse the district court's decision and remand for the district court to again determine whether, under all the circumstances, Legg's probation should have been revoked.

But Legg's sentence expired while his appeal was pending, and he was released from prison. The court of appeals, therefore, could not give him any relief, and his appeal was moot.

##### **1. An appeal is moot when the requested relief cannot affect the rights of the appellant.**

*The mootness doctrine.* An issue is moot when the requested relief cannot affect the rights of the appellant. *State v. Sims*, 881 P.2d 840, 841

(Utah 1994); see *Utah Transit Auth. v. Local 382 of Amalgamated Transit Union* (*Local 382*), 2012 UT 75, ¶19, 289 P.3d 582. “The defining feature of a moot controversy is the lack of capacity for the court to order a remedy that will have a meaningful impact on the practical positions of the parties.” *Local 382*, 2012 UT 75, ¶14. An issue becomes moot while an appeal is pending if “circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.” *State v. Black*, 2015 UT 54, 355 P.3d 981 (quoting *Local 382*, 2012 UT 75, ¶14) (internal quotation marks omitted); see also *State v. Peterson*, 2012 UT App 363, ¶4, 293 P.3d 1103; accord *In re Adoption of L.O.*, 2012 UT 23, ¶8, 282 P.3d 977; *State v. Hooker*, 2013 UT App 91, ¶2, 300 P.3d 1292. See also *Local 382*, 2012 UT 75, ¶15 n.1 (citing *Mills v. Green*, 159 U.S. 651, 653-54 (1895), for proposition that “an appeal should be dismissed as moot where, by virtue of an ‘intervening event’ the appellate court cannot ‘grant ... any effectual relief whatever’ in favor of the appellant”).

When an issue is moot, both judicial policy and the Utah Constitution “dictate[]” that the court not issue an advisory opinion. *Featherson v. Utah Bd. of Pardons & Parole*, 2013 UT App 17, ¶3, 295 P.3d 715 (per curiam) (citing *Sims*, 881 P.2d at 841); *Local 382*, 2012 UT 75, ¶¶16, 19, 20. A moot appeal “must be dismissed ... unless it can be shown to fit within a

recognized exception to the mootness principle.” *Hooker*, 2013 UT App 91, ¶2 (citation omitted). That is because the court has “no power to decide abstract questions or to render declaratory judgments, in the absence of an actual controversy directly involving rights.” *Local 382*, 2012 UT 75, ¶19.

*Exceptions to mootness.* Utah law recognizes two common exceptions to the mootness rule. The first is for technically moot cases that present issues of public interest likely to recur and capable of evading review. This Court discussed that exception in *Ellis v. Swensen*, 2000 UT 101, 16 P.3d 1233, a case dealing with ballot booklets. That exception applies “when a case presents an issue that affects the public interest, is likely to recur, and because of the brief time that any one litigant is affected, is capable of evading review.” *Id.* ¶26; *see also Local 382*, 2012 UT 75, ¶¶30-33. The Court explained that the issues of public interest which it has addressed under this exception are generally “class actions, questions of constitutional interpretation, issues as to the validity or construction of a statute, or the propriety of administrative rulings.” *Id.* ¶27 (quoting *McRae v. Jackson*, 526 P.2d 1190, 1191 (Utah 1974) (internal quotation marks omitted) (emphasis omitted)). Defendant does not claim that his conviction falls under the “issues of public interest likely to recur and capable of evading review” exception.

The other exception is for a case that is technically moot, but will nonetheless likely result in negative collateral legal consequences. This Court discussed that exception in *Duran v. Morris*, 635 P.2d 43 (Utah 1981). The Court explained that “it is now clearly established that ‘a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the criminal *conviction*.’” *Id.* ¶45 (emphasis added). “Such collateral consequences may include the use of the *conviction* to impeach the petitioner’s character or as a factor in determining a sentence in a future trial, as well as the petitioner’s inability to vote.” *Id.* (emphasis added) (citing *Sibron v. New York*, 392 U.S. 40, 57 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968)).

But the Court also explained that other criminal cases “entail no collateral legal consequences of the kind that result from a criminal conviction.” *Id.* That was true for Duran, who petitioned the district court for a writ of habeas corpus, claiming that prison officials had violated his constitutional rights by transferring him from medium to maximum security. *Id.* 45. The district court denied Duran’s petition for the writ, and Duran appealed. *Id.* But at the time this Court addressed Duran’s appeal, Duran had been returned to medium security. *Id.* The court held that the case was moot. The Court could give Duran no relief, and the

administrative decisions he challenged did not entail legal consequences of the kind “that result from criminal convictions.” *Id.*

Utah’s law is consistent with federal law. Federal law has long recognized the mootness doctrine and will dismiss an appeal as moot “where, by virtue of an ‘intervening event’ the appellate court cannot ‘grant ... any effectual relief whatever’ in favor of the appellant.” *Mills v. Green*, 159 U.S. at 653-54. Indeed, the U.S. Supreme Court has repeatedly dismissed federal criminal appeals because they were moot and the Court could provide the defendants with no relief. *See, e.g., Spencer v. Kemna*, 523 U.S. 1 (1998); *Lane v. Williams*, 455 U.S. 624 (1982); *cf. United States v. Juvenile Male*, 131 S.Ct. 2860 (2011) (juvenile offender’s appeal moot where court could provide no relief).

But the U.S. Supreme Court also recognizes exceptions to the mootness doctrine. In a number of criminal cases, it has held that an appeal was not moot, even though the defendant had served his sentence, because the defendant’s *conviction* would likely result in adverse collateral legal consequences. In *Sibron v. New York*, the U.S. Supreme Court acknowledged “the obvious fact of life that most criminal convictions do in fact entail adverse collateral consequences.” *See* 392 U.S. at 53-55 (citing *Fiswick v. United States*, 329 U.S. 211 (1946); *United States v. Morgan*, 346 U.S. 502 (1954);

*Pollard v. United States*, 352 U.S. 354 (1957)). Under the U.S. Supreme Court's law, the mere possibility that a conviction will result in such consequences preserves a criminal case from dismissal for mootness." *Sibron*, 392 U.S. at 55.

**Challenges to convictions.** Under both Utah and federal law, the difference between criminal cases where the collateral consequences exception applies and those where it does not is the nature of the defendant's challenge. Even though a defendant's sentence has expired, if he challenges his *conviction*, the courts presume that the conviction will have adverse collateral legal consequences—actual consequences that are imposed by law. For that reason, this Court has explained that a challenge to a conviction constitutes an exception to the mootness rule. *See Duran*, 635 P.2d at 45. Accordingly, when a defendant challenges a criminal conviction, the Court will presume that the conviction will carry collateral legal consequences. *Id.* The case will therefore be dismissed as moot only if it is shown that "there is no possibility that any collateral consequences will be imposed on the basis of the challenged conviction.'" *Duran*, 635 P.2d at 45 (citing *Sibron*, 392 U.S. at 57).

This too is consistent with federal law. *See Sibron*, 392 U.S. at 57 n.17 (although sentence had been completed while appeal was pending, adverse



consequences could flow from New York state law permitting use of *conviction* to impeach character of a defendant in later criminal proceeding); *Carafas*, 391 U.S. at 237 (criminal *conviction* may preclude a person's engaging in certain businesses, serving as a labor union official, serving as a juror, or voting); *Ginsberg v. New York*, 390 U.S. 629, 632 n.2 (1968) (criminal *conviction* could result in ineligibility for licensing under state and municipal license laws); *Fiswick v. United States*, 329 U.S. 211, 221 (1946) (*conviction* could subject defendant to adverse legal consequences affecting deportation).

**Challenges to sentences, probation and parole revocation, etc.** But where a defendant challenges something other than his conviction—for example, his sentence, his probation or parole revocation, or a prison segregation order—collateral consequences like those attendant to a criminal conviction are not likely. In those cases, Utah law holds that expiration of the sentence renders the case moot unless the defendant can show some actual adverse legal consequence, some concrete injury-in-fact. Accordingly, the courts do not presume the existence of such consequences in a case where the defendant is not challenging his conviction.

As explained, in *Duran*, Duran challenged the district court's denial of his petition for a writ of habeas corpus, claiming that prison officials had

violated his constitutional right by transferring him from medium to maximum security. 635 P.2d at ¶45. By the time this Court addressed the appeal, Duran had been returned to medium security. *Id.* The Court held that the appeal was moot. *Id.* It could give him no relief, and the administrative decisions he challenged did not entail legal consequences like those resulting from criminal convictions. *Id.*

The court of appeals has also addressed exceptions to the mootness doctrine in numerous cases. It has distinguished challenges to convictions from challenges to sentencing, probation and parole revocation, stalking injunctions, and prison discipline orders.

In a series of cases, the court of appeals has held that an appeal from a sentence is moot once a defendant has served his sentence, been released from jail, and had his case closed. *See State v. McClellan*, 2014 UT App 271, 339 P.3d 942 (addressing challenge to sentences where sentences had been served); *State v. Matthews*, 2014 UT App 169, 332 P.3d 406 (addressing challenge to probation revocation where sentence had been served); *Featherson v. Utah Bd. of Pardons & Parole*, 2013 UT App 17, 295 P.3d 715 (addressing challenge to decision denying parole where sentence had been served); *Hooker*, 2013 UT App 91 (addressing challenge to probation revocation where sentence had been served); *State v. Peterson*, 2012 UT App

363, 293 P.3d 1103 (addressing challenge to sentence where sentence had been served); *cf. Towner v. Ridgway (Ridgway)*, 2012 UT App 35, ¶2, 272 P.3d 765 (addressing challenge to stalking injunction where injunction had expired); *State v. Moore*, 2009 UT App 128, 210 P.3d 967 (addressing challenge to discipline imposed while defendant was in jail awaiting sentencing where defendant had been sentenced and transferred to prison).

Each of these cases held that the relief sought was impossible or of no legal effect because the sentence had been served and the case was therefore moot. In *Hooker*, the court of appeals noted that Hooker had not alleged, much less demonstrated that either the collateral consequences or public interest exception applied. 2013 UT App 91, ¶3. In *McClellan*, the court addressed McClellan's claim of possible legal consequences, but held that the consequences that he proffered were not imposed by law and thus did not qualify as collateral consequences in the mootness context. 2014 UT App 271, ¶5. Nor did the appeal fit within the exception for an alleged wrong "capable of repetition yet evading review." *Id.* ¶6. In *Peterson*, the court expressly stated that because Peterson did not challenge his conviction, "the collateral consequences attendant to an unlawful conviction [were] not at issue." 2012 UT App 363, ¶5. In *Ridgway*, the Court refused to presume that Ridgway's expired civil stalking injunction imposed negative

collateral legal consequences on him. 2012 UT App 35, ¶¶7-11. The court reiterated, “Unless a party is challenging a criminal *conviction*, we will not presume that such collateral consequences exist.” *Id.* ¶7 (emphasis added).<sup>4</sup> In *Moore*, the court held that the decision to place Moore in solitary confinement would have no bearing on his ability to vote, engage in businesses, or serve on a jury; it could not be used to impeach his character or as a factor in determining a sentence in a future trial; and it did not require that the parole board deny parole in a future hearing. 2009 UT App

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<sup>4</sup> This Court has held that collateral negative consequences in a civil case can constitute an exception to mootness. In *In re Giles*, 657 P.2d 285 (Utah 1982), this Court addressed an appellant’s appeal from a decision ordering defendant’s involuntary commitment after he was found not guilty of aggravated assault by reason of insanity. *Id.* 286-86. Defendant argued that the district court has erroneously ruled that the evidence sufficed to show beyond a reasonable doubt that, among other things, he suffered from a mental illness at the time of his hearing, that he posed an immediate danger of physical injury to others or himself, and that he lacked the ability to engage in a rational decision-making process regarding his treatment. R287-89.

While the appeal was pending the defendant was released from the hospital. *Id.* 286. This Court nevertheless addressed his claims. *Id.* 287. Noting that the doctrine of collateral consequences is chiefly applied in criminal cases, the court held that the doctrine was “equally applicable to patients of mental hospitals who face similar deprivations of liberty.” *Id.*

This decision does not support Defendant’s claim that the decision he challenges in the instant case—revocation of his probation—presents adverse collateral legal consequences. It simply holds that the deprivation of liberty applicable in nonvoluntary commitment is sufficiently similar to the nonvoluntary commitment following a criminal conviction to merit appellate review even where technically moot.

128, ¶¶13, 17. Any collateral consequences resulting from Moore’s prison disciplinary record were hypothetical, and the court would not presume them. *Id.* ¶¶17-19.

The court of appeals has also entered a series of orders dismissing appeals as moot because the defendants had served their sentences and consequently no relief was available on appeal. *See State v. Reynolds*, 20140706-CA, order dated December 18, 2014 (sentence completed); *State v. Craner*, 20130526-CA, order dated February 27, 2014 (challenge to trial court’s order terminating probation was moot; defendant had completed his jail confinement and probation was terminated; unlike collateral consequences of criminal convictions, “collateral consequences regarding the effect of terminating probation as unsuccessful are merely hypothetical rather than actual adverse consequences that would defeat mootness”); *State v. Herrera*, 20130368-CA, order dated January 23, 2014 (challenge to district court’s sentencing decision moot where sentence completed and defendant released from jail; no collateral consequences alleged or demonstrated).

Utah’s law is consistent with federal law. Federal law also presumes that convictions carry collateral legal consequences, but that sentences, probation and parole revocations, and most other criminal matters do not. In *Lane v. Williams*, the U.S. Supreme Court held that Williams’ challenge to

the court's failure to advise him of a mandatory state parole requirement was moot because Williams had completed parole and been released. 455 U.S. 624, 626-33 (1982). Revocation of Williams' parole and incarceration for his parole violation subjected him to no legal collateral consequences. *Id.* "At most, certain non-statutory consequences [might] occur; employment prospects, or the sentence imposed in a future criminal proceeding could be affected." *Id.* 632. But, the U.S. Supreme Court reasoned, the "discretionary decisions that are made by an employer or a sentencing judge ... are not governed by the mere presence or absence of a recorded violation of parole; these decisions may take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation. Any disabilities that flow from whatever respondents did to evoke revocation of parole are not removed – or even affected – by a District Court order that simply recites that their parole terms are 'void.'" *Id.* 632-33.

In *Spencer v. Kemna*, 523 U.S. 1 (1998), the U.S. Supreme Court held that Spencer's challenge to allegedly unconstitutional parole revocation procedures was moot because his sentence had expired. The U.S. Supreme Court declined "to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement resulted from [Spencer's] parole

revocation.” *Id.* 14. Citing *Sibron*, the Court noted that it had, in recent decades, “been willing to presume that a wrongful criminal *conviction* has continuing collateral consequences.” *Id.* 8 (emphasis added). But, the Court observed, Spencer did not “attack his convictions for felony stealing and burglary”; rather, he asserted “only the wrongful termination of his parole status.” *Id.* 9.

The U.S. Supreme Court noted that in the context of criminal convictions, “the presumption of significant collateral consequences is likely to comport with reality.” *Id.* 12. But, the Court continued, the “same cannot be said of parole revocation.” *Id.* Citing *Williams*, the Court noted that it had hitherto refused to extend its “presumption of collateral consequences” to parole revocation. *Id.* 12 (citing 455 U.S. at 624). The Court observed that it “was not enough that the parole violations found by the revocation decision would enable the parole board to deny [Williams] parole in the future,” where the violations did not render him ineligible for parole, but were “‘simply one factor, among many, that may be considered by the parole authority.’” *Id.* 13 (quoting *Williams*, 455 U.S. at 639-40). Moreover, the parole violations remaining on Williams’ record could not affect a subsequent parole determination unless he again violated the law. *Id.* Finally, these “nonstatutory consequences” were “dependent upon ‘[t]he

discretionary decisions ... made by an employer or a sentencing judge ... not governed by the mere presence or absence of a recorded violation of parole.” *Id.* (quoting *Williams*, 455 U.S. at 632-33).

Thus, the U.S. Supreme Court declined “to presume that collateral consequences adequate to meet Article III’s injury-in-fact requirement resulted from petitioner’s parole revocation.” *Id.* 14. The Court recognized that Spencer could avoid a dismissal by showing a concrete injury-in-fact, but it rejected the four injuries that he proffered because they did not constitute concrete injuries-in-fact.<sup>5</sup> *Id.* 14-16.

In sum, under both Utah and federal law, the courts presume that a *conviction* will result in a negative collateral legal consequences and, unless the State can show that such consequences are impossible, will hear a defendant’s challenge to a conviction even if he is no longer in custody. But

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<sup>5</sup> *Spencer* gives guidance about what does not constitute a concrete injury-in-fact. Spencer argued he had suffered the following injuries-in-fact: (1) his parole revocation could be used to his detriment in a future parole proceeding, (2) the revocation could be used to increase his sentence in a future sentencing procedure, (3) the revocation could be used to impeach him in a future criminal proceeding, and (4) the revocation might be used directly against him in a future criminal proceeding. *Spencer*, 523 U.S. at 14-16. The U.S. Supreme Court rejected them all. The Court held that the asserted injuries depended on Spencer’s again violating the law and on discretionary decisions by the prosecutor and the presiding judge in any future criminal proceedings. *Id.* They were thus merely hypothetical, not actual consequences or injuries. *Id.* Moreover, they were not imposed by law. *Id.*



the courts will not presume that a challenge to a parole revocation or any other sentence (such as probation) will result in negative collateral legal consequences. Thus, when a defendant challenges his sentence or probation or parole revocation, the case will be moot if his sentence has expired unless the defendant can show a concrete injury-in-fact.

Stated another way, where a defendant challenges his conviction, the State has the burden to show that no collateral legal consequences are possible. But when a defendant challenges something other than his conviction—for instance, his sentence or his probation revocation—the defendant has the burden to show that collateral legal consequences actually exist, i.e., that there is a concrete injury-in-fact.

As explained above, the court of appeals has recognized and applied this precedent in numerous decisions. But the State acknowledges that in two anomalous 2015 cases the court of appeals did not. In *State v. Warner*, 2015 UT App 81, 347 P.3d 846, and *State v. Allen*, 2015 UT App 163, 353 P.3d 1266, the court of appeals declined to dismiss as moot challenges to probation revocations, even though the defendants had served their sentences and been released from jail. In *Warner*, the court addressed Warner's challenge to his probation revocation, even though Warner had completed his sentences and had been released from jail. 2015 UT App 81,

¶1. In *Allen*, the court addressed Allen’s claim that trial counsel had rendered ineffective assistance in connection with his probation revocation, even though Allen had also been released from custody. 2015 UT App 163, ¶¶1 & 4 n.2. Neither case involved a challenge to a criminal conviction. Rather both Warner and Allen challenged the revocation of probation. *Warner*, 2015 UT App 81, ¶1; *Allen*, 2015 UT App 163, ¶1.

The *Allen* court stated that it was “not convinced that Allen face[d] no collateral legal consequences as a result of his felony *conviction* and revoked probation terms.” 2015 UT App 163, ¶4 n.2 (emphasis added). But Allen did not challenge his conviction. Rather, he argued that his trial counsel had rendered ineffective assistance by not asserting that he had mental health issues as a defense to his probation violation. *Id.* ¶1. Because Allen did not challenge his conviction, any collateral legal consequences of the conviction were not at issue.

*Warner* challenged his probation revocation, not his conviction. 2015 UT App 81, ¶1. But when the State argued that Warner’s enumerated consequences were “merely hypothetical or possible,” this Court determined that the State’s argument was “based on the standard applicable to civil cases, not criminal cases.” *Id.* ¶3.

As authority, the court of appeals cited its own decision in *Ridgway*, 2012 UT App 35. The court recited *Ridgway*'s language that "collateral consequences may be presumed when 'a party is challenging a criminal conviction,' but not in civil cases." *Id.* (quoting *Ridgway*, 2015 UT App 35, ¶3). *Ridgway*'s language is correct, but it does not support the *Warner* decision. Collateral legal consequences may not be presumed merely because a case addresses criminal proceedings. Rather, collateral legal consequences are presumed when an appellant is challenging a criminal conviction. That is because—as stated—a criminal conviction almost always results in legally-imposed collateral consequences.

But a defendant's probation revocation, parole decision, or sentence may not be so used. While probation, parole, and sentencing decisions may be considered by courts, employers, and others in making discretionary decisions, they do not impose consequences as a matter of law. The *Warner* court's decision is therefore anomalous.

The *Allen* court also misread relevant precedent when it rejected the State's mootness argument. In that case, Allen appealed his sentence arguing that his trial counsel rendered ineffective assistance by not asserting that Allen had mental health issues as a defense for his probation violation. 2015 UT App 163, ¶1. While Allen's appeal was pending, Allen was

released from jail. *Id.* ¶4 n.2. The State therefore argued that the appeal was moot. *Id.*

The panel rejected that argument, reading *Duran* to hold that “in a criminal case a [defendant’s] release from custody renders a case moot only if there is no possibility of collateral consequences.” *Id.* But in so doing, the panel ignored the *Duran* language that applies this standard only when a defendant is challenging a criminal conviction, not when he is challenging other decisions that may be made during the criminal process—such as a decision to revoke probation.

*Allen* and *Warner* were anomalous. Both cases misinterpreted governing case law. Accordingly, this Court should apply the collateral legal consequences exception as set forth in its own case law and in the court of appeals extensive pre-2015 case law, not as set forth in *Warner* and *Allen*.

**2. Legg’s appeal is moot because now that his sentence has expired, this Court cannot grant him any relief.**

Legg here is not challenging his criminal conviction. Rather, he is challenging the district court’s revocation of his probation. He seeks yet another probation hearing to ask the district court to reconsider its decision to revoke his probation. But his sentence has expired, and he has been released from prison. Thus, Legg’s appeal is moot. As explained, an issue

becomes moot while an appeal is pending if “circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.” *Peterson*, 2012 UT App 363, 4. A new revocation hearing will not allow the district court to reinstate his probation and give him another opportunity to avoid the prison term ordered as a result of his probation revocation.

Moreover, because Legg is challenging his probation revocation, not his conviction, Utah’s appellate courts will not presume that the probation decision will have collateral legal consequences.<sup>6</sup> Rather, Legg has the burden to show some concrete injury-in-fact—some consequence imposed by law that he will actually, not hypothetically, suffer because his probation was revoked. Legg has not met that burden. For that reason, this Court should dismiss his appeal as moot.

**B. *Warner* and *Allen* are not rooted in long or firmly established legal principles.**

Moreover, neither *Warner* nor *Allen* was rooted in long or firmly established legal principles. See *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994). Legg claims that *Warner* and *Allen* properly applied *Duran*, the 1981 case from this Court, because “a probation revocation appeal is a criminal

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<sup>6</sup> As noted, Legg does not contend that Utah’s other exception to the mootness doctrine, the exception for issues of public interest likely to recur and capable of evading review, applies here.

case.” Br.Resp’t at 20. But that claim rests on a misunderstanding. “The doctrine of collateral legal consequences is chiefly applied in criminal cases.” *Towner v. Ridgeway*, 2012 UT App 35, ¶7, 272 P.3d 765 (citing *In re Giles*, 657 P.2d 285, 286 (Utah 1982)). But the doctrine does not apply to any and all challenges that arise in criminal cases. “Unless a party is challenging a criminal conviction, the appellate courts will not presume that such collateral consequences exist.” *Id.* (citing *State v. Moore*, 2009 UT App 128, ¶17, 210 P.3d 967) (in turn citing *Spencer v. Kemna*, 523 U.S. 1, 14 (1998)) (internal quotation omitted).

The issue is not merely whether a case is a criminal rather than a civil matter. The issue is whether a defendant is challenging a criminal conviction. As explained above, under this Court’s decision in *Duran*, “it is now clearly established that ‘a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.’” 635 P.2d at 45 (citing *Sibron v. New York*, 392 U.S. 40 (1968)). But where a defendant is challenging other matters in a criminal case—the sentence, probation or parole revocation, administrative segregation, etc.—and such a challenge is moot, the defendant bears the burden to show that collateral legal consequences actually exist and are not merely hypothetical.

As explained above and in the preceding sections of this argument, this allocation of burdens has long been mandated by both federal and Utah law. Because neither *Warner* nor *Allen* addresses this precedent, neither case constitutes weighty authority on the matter. *Menzies*, 889 P.2d at 399 (noting that stare decisis effect of case is substantially diminished where court fails to explain why it is abandoning a long-established rule). The court of appeals' 2015 decisions in *Warner* and *Allen* were not rooted in long or firmly established legal principles, but were instead contrary to long and firmly established precedent.

Moreover, the State's Westlaw review of *Warner* and *Allen* indicates that the only case citing either of them is the court of appeals' decision now on certiorari review before this Court. Thus, as the court of appeals' reasoned, "it would be problematic to allow the mootness holdings of *Allen* and *Warner* to stand" and "prudent to take this early opportunity to straighten the path of precedent from which those cases departed." *Legg II*, 2016 UT App 168, ¶42.

## II.

### IF DISMISSING THE APPEAL WAS ERROR, THIS COURT SHOULD REMAND THE CASE TO THE COURT OF APPEALS TO DETERMINE WHETHER THE DISTRICT COURT FAILED TO COMPLY WITH THAT COURT'S PRIOR MANDATE

#### A. If dismissing this appeal was error, this Court should remand this case to the court of appeals.

If the court of appeals erred in dismissing the appeal, this Court should not address the merits of Legg's claim that the district court failed to comply with the court of appeals' mandate following his first appeal. Rather, the Court should remand the case to the court of appeals to address the merits of that claim.

On certiorari, this Court reviews "the decision of the court of appeals." *Brierley v. City*, 2016 UT 46, ¶18, 390 P.3d 69 (citing *State v. Strieff*, 2015 UT 2, ¶12, 357 P.3d 532, *rev'd on other grounds*, 136 S.Ct. 2056 (2016)). Here, the court of appeals did not address the merits of Legg's claim that the district court failed to follow the mandate issued by the court of appeals as part of Legg's first appeal. Accordingly, if the court of appeals erred in dismissing the appeal, this Court should remand to allow the court of appeals to address the merits. Moreover, the court of appeals issued the mandate in the first place and could possibly be in a better position to



determine whether the district court complied with its mandate than this Court is.

**B. If this Court decides to address the merits of this claim, the Court should hold that the district court complied with the court of appeals' prior mandate.**

But if this Court decides to address the merits of the claim, it should hold that the district court complied with the court of appeals' mandate following Legg's first appeal. As explained in the Summary of Proceedings in this brief, when addressing Legg's first appeal, the court of appeals affirmed the district court's finding that Legg willfully violated his probation by not being cooperative, compliant, and truthful in his dealings with AP&P (allegation 3). *Legg I*, 2014 UT App 80, ¶¶20-21. But because the district court had not adequately identified the evidence supporting its findings that Legg willfully violated by possessing drugs or by failing to establish a residence (allegations 1 and 4), *id.* ¶¶19, 23, 25, the court of appeals remanded for the district court to identify the evidence that supported allegations 1 and 4 and to "reassess whether, under all the circumstances," Legg's "probation should be revoked." *Id.* ¶25. The court of appeals recognized "that a single violation of probation is legally sufficient to support a probation revocation." *Id.* ¶11 (citing *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990)). But the court of appeals was "not confident

that, standing on its own, the single violation” it affirmed on appeal “would have resulted” in revoking probation. *Id.* 25.

On remand, the State withdrew allegations 1 and 4 and proceeded solely on allegation 3, the willful violation affirmed on appeal. *See* R377:9; *see also Legg I*, 2014 UT App 80, ¶25. The parties agreed to forgo an evidentiary hearing and to proceed to oral argument. *See* R377:9-10. Thus, the only question for the district court was “whether, under all the circumstances,” it would still revoke Legg’s probation based on the single willful probation violation. *Legg I*, 2014 UT App 80, ¶25.

The district court therefore addressed that question. “There is no question that had I found a violation, looking at his history, looking at the recommendation, looking at the opportunity for probation that he had received, I would have imposed the original sentence.” R377:23. “My finding is that based on what information the court had at the time that there was a finding [of] a violation of probation [and] that it was properly a basis for revoking probation, looking at the entire history of both cases.” R377:24-25.

The court made clear that it had reached the same result reassessing the question on remand: “[T]he only question [that] remains is, was the revocation of probation sufficient on that one single violation? And I have

no question that *that would have been my ruling*, and that I find that *those circumstances still support it.*" R377:24 (emphasis added).

Accordingly, the district court confirmed its revocation of Legg's probation and its execution of his suspended sentences. R377:24-25; R0677:368-69. In so doing, the district court complied with the court of appeals' mandate.

### CONCLUSION

This Court should affirm the court of appeals' holding that this case is moot and that no exception to mootness applies. The Court should then dismiss the case without addressing the merits of Legg's claim that the district court failed to comply with the court of appeals' mandate following his first appeal.

If the Court concludes that the case is not moot, it should remand the case to the court of appeals to decide whether the district court complied with its mandate. But if the Court instead decides to address the merits of Legg's claim rather than remanding to the court of appeals, the Court should hold that the district court did, in fact, comply with the mandate following Legg's first appeal.

Respectfully submitted on April 12, 2017.

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Counsel for Respondent

### **CERTIFICATE OF COMPLIANCE**

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 7535 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

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JEANNE B. INOUE  
Assistant Solicitor General

## CERTIFICATE OF SERVICE

I certify that on April 12, 2017, two copies of the Brief of Respondent were ☐ mailed ☐ hand-delivered to:

Dianna Pierson  
Salt Lake Legal Defender Assoc.  
424 East 500 South, Suite 300  
Salt Lake City, UT 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.

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Addenda

Addenda

# Addendum A

380 P.3d 360  
Court of Appeals of Utah.

State of Utah, Appellee,  
v.  
John L. Legg Jr., Appellant.

No. 20140716–CA  
|  
Filed August 4, 2016

Appeal dismissed.

West Headnotes (15)

### Synopsis

**Background:** State petitioned to revoke defendant's probation and impose original sentence on conviction for aggravated assault with a deadly weapon. The Third District Court, Salt Lake Department, Ryan M. Harris, J., granted petition and impose original sentence. Defendant appealed. The Court of Appeals, 324 P.3d 656, affirmed in part and remanded. On remand, the trial court again revoked probation. Defendant appealed.

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

<sup>[1]</sup> defendant's appeal was moot;

<sup>[2]</sup> appellate court would not presume that collateral consequences existed from trial court's decision, abrogating *State v. Allen*, 353 P.3d 1266 and *State v. Warner*, 347 P.3d 846; and

<sup>[3]</sup> collateral consequences exception to mootness doctrine did not apply.

<sup>[1]</sup> **Criminal Law**  
⚙️ Grounds of dismissal in general

Defendant's appeal of probation revocation was moot, where defendant had served the prison sentences that were reinstated when probation was revoked, and sentences had expired.

Cases that cite this headnote

<sup>[2]</sup> **Action**  
⚙️ Moot, hypothetical or abstract questions

Mootness is a jurisdictional issue.

Cases that cite this headnote

<sup>[3]</sup> **Action**  
⚙️ Moot, hypothetical or abstract questions



The burden of persuading the court that an issue is moot lies with the party asserting mootness.

Cases that cite this headnote

[4] **Criminal Law**  
⚡ Mootness

An issue on appeal is considered moot when the requested judicial relief cannot affect the rights of the litigants, or, in other words, when the requested relief appears to be impossible or of no legal effect.

Cases that cite this headnote

[5] **Criminal Law**  
⚡ Mootness

Appellate courts generally will not resolve an issue that becomes moot while the appeal is pending, where circumstances change so that the controversy is eliminated.

Cases that cite this headnote

[6] **Action**  
⚡ Moot, hypothetical or abstract

questions

If it is demonstrated that a case is moot, it must be dismissed unless it can be shown to fit within a recognized exception to the mootness principle.

Cases that cite this headnote

[7] **Action**  
⚡ Moot, hypothetical or abstract questions

The recognized exceptions to mootness involve cases that affect public interest, are likely to recur, and are capable of evading review, and in the criminal realm, cases in which collateral legal consequences will be imposed on the basis of the challenged conviction.

Cases that cite this headnote

[8] **Criminal Law**  
⚡ Grounds of dismissal in general

In its simplest form, the collateral consequences exception permits an appeal to survive dismissal on mootness grounds if, notwithstanding the fact that the direct and immediate consequences of a lower court decision have

already occurred and cannot be directly remedied by an appellate decision, there are adverse collateral legal consequences that will be imposed on the basis of the challenged issue on appeal.

Cases that cite this headnote

defendant's appeal on its merits, but where decisions from other kinds of proceedings are challenged, there is no such presumption; rather the burden is on the opponent of dismissal to demonstrate that actual, non-speculative consequences will flow from the decision despite the direct consequences having already played out.

Cases that cite this headnote

[9]

### **Criminal Law**

⚡ Grounds of dismissal in general

Generally, once mootness has been demonstrated, the party seeking to survive dismissal bears the burden of demonstrating that collateral legal consequences will flow from the challenged issue; in other words, under most circumstances, appellate court will not presume that collateral consequences exist.

Cases that cite this headnote

[11]

### **Judges**

⚡ Judicial powers and functions in general

Generally, as a matter of horizontal stare decisis, the first decision by a court on a particular question of law governs later decisions by the same court.

Cases that cite this headnote

[10]

### **Criminal Law**

⚡ Grounds of dismissal in general

When a defendant challenges the validity of his conviction in an otherwise moot appeal, unless the party seeking dismissal shows that there is no possibility that any collateral legal consequences will be imposed, appellate court retains jurisdiction to consider the

[12]

### **Courts**

⚡ Erroneous or injudicious decisions

To overturn its own precedent, court must be convinced that there has been a change in the controlling authority, or that its prior decision was clearly erroneous.

Cases that cite this headnote

[13] **Criminal Law**

⚡ Grounds of dismissal in general

Court of Appeals would not presume that collateral consequences existed from trial court's decision to revoke defendant's probation and reinstate defendant's prison sentence, as could support application of exception to mootness doctrine, on defendant's appeal of revocation decision, after defendant was released from prison during pendency of appeal, where defendant did not challenge underlying conviction; abrogating *State v. Allen*, 353 P.3d 1266 and *State v. Warner*, 347 P.3d 846.

Cases that cite this headnote

[14] **Criminal Law**

⚡ Grounds of dismissal in general

Possibility that having probation revocation on defendant's record could affect a sentencing recommendation in a future criminal case against defendant was not a collateral consequence that would support application of collateral consequences exception to mootness doctrine, on defendant's appeal of

revocation of his probation, after defendant was released from prison during pendency of appeal; consequence was merely possible and therefore speculative, since a probation revocation was only one among many factors that could affect a court's discretionary sentencing decision, and consequence was dependent on contingent event of defendant committing a future crime.

Cases that cite this headnote

[15] **Criminal Law**

⚡ Grounds of dismissal in general

Possibility that having probation revocation on defendant's record could lead a prosecutor to refuse to make a favorable offer of probation in a future criminal case against defendant was not a collateral consequence that would support application of collateral consequences exception to mootness doctrine, on defendant's appeal of revocation of his probation, after defendant was released from prison during pendency of appeal; consequence was contingent and speculative, since decision to negotiate plea was within prosecutor's sphere of discretion.

Cases that cite this headnote

\*361 Third District Court, Salt Lake Department, The Honorable Ann Boyden, No. 101900677.

### Attorneys and Law Firms

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Judge Stephen L. Roth authored this Opinion, in which Judge Gregory K. Orme and Senior Judge Russell W. Bench concurred.<sup>1</sup>

<sup>1</sup> Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11–201(6).

### Opinion

ROTH, Judge:

¶1 John L. Legg Jr. appeals the district court’s determination to revoke his probation. We dismiss the case as moot.

### BACKGROUND

¶2 In August 2011, Legg pleaded guilty in two separate cases to one count of

possession of a dangerous weapon by a restricted person and one count of aggravated assault with a deadly weapon, both third degree felonies. The district court sentenced Legg to concurrent \*362 prison terms of zero to five years on each count and suspended the prison terms in favor of probation. Legg’s twenty-four-month probation was to be supervised by Adult Probation and Parole (AP & P), and the court required him to serve 180 days in jail as a condition of probation.

¶3 Legg was released from jail on January 5, 2012, and eight days later AP & P filed an affidavit with the district court, alleging several probation violations. At a subsequent hearing, the court found that Legg had committed three violations of his probation: (1) knowing possession of a controlled substance; (2) “fail[ing] to establish a residence of record”; and (3) failing to be “cooperative, compliant and truthful in all dealings with [AP & P].” The court revoked Legg’s probation and committed him to prison to serve the sentences that had originally been suspended. Legg appealed the district court’s decision.

¶4 On appeal, we affirmed the district court’s determination regarding Legg’s failure to be “cooperative, compliant, and truthful” in his dealings with AP & P but remanded the court’s other two findings of probation violation for further consideration. *State v. Legg (Legg I)*, 2014 UT App 80, ¶¶ 19, 21, 23, 25, 324 P.3d 656. With regard to the allegation that Legg had possessed a controlled substance, we concluded that “we [could not] determine from the record what evidence, if any, the trial court relied on in finding that Legg had knowledge of the

narcotic character” of the substance found in his possession, and we remanded for the court “to identify the evidence it relied on and its reason for moving so quickly ... to a finding of knowledge that the substance was cocaine.” *Id.* ¶ 19. As to the allegation that Legg had failed to establish a residence of record, we concluded that the district court’s findings did not provide us with an adequate basis for review. *Id.* ¶ 23. Accordingly, because we were “not confident that, standing on its own, the single violation that we affirm[ed] would have resulted in a revocation of probation,” we remanded “on the issues of possession of a controlled substance and failure to establish a residence of record for further consideration and explanation by the trial court.” *Id.* ¶ 25. In particular, we stated that “[o]n remand, the trial court must reassess whether, under all the circumstances, Legg’s probation should [still] be revoked.” *Id.*

¶5 On remand, the State dropped its allegations of controlled substance and residence violations, choosing instead to move forward on the single violation of failure to be cooperative, compliant, and truthful with AP & P, which we had affirmed on appeal. The district court, through a judge who had succeeded the prior judge who conducted Legg’s initial probation revocation hearing, then determined that the single violation was sufficient to justify revocation of Legg’s probation. In reaching its decision, the district court concluded that our decision in *Legg I*, though in part a remand “for another evidentiary hearing ... for findings as to whether or not there was a willful violation” of Legg’s drug possession and residence requirements, also contemplated that the

district court could determine whether the single “willful violation of probation”—the failure to be cooperative, compliant and truthful—“would ... have been sufficient” to justify revocation of Legg’s probation. In that regard, the district court found that “[t]here is no question that had [it] found a violation, looking at his history, looking at the [prosecution’s sentencing] recommendation, looking at the opportunity for probation that he had received, [the court] would have imposed the original sentence.” It concluded that the single probation violation affirmed on appeal “was properly a basis for revoking probation, looking at the entire history of both cases.” Legg appeals this decision. During the course of briefing on appeal, Legg was released from prison, having served his sentences.

## ISSUES ON APPEAL

¶6 Legg argues that the district court abused its discretion when it affirmed the decision to revoke his probation, because its decision did not follow the mandate of our decision in *Legg I*. “The mandate rule ... binds both the district court and the parties to honor the mandate of the appellate court.” *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 28, 196 P.3d 588.

¶7 The State contends, however, that because Legg was released from prison on July \*363 15, 2015, and has served the sentence that was reinstated when the district court revoked his probation, his case is moot. Before we reach the merits of

Legg’s appeal, we “must be satisfied that the issue[ ] raised [is] not moot.” *Barnett v. Adams*, 2012 UT App 6, ¶ 4, 273 P.3d 378. “Where the issues that were before the trial court no longer exist, the appellate court will not review the case.” *In re Adoption of L.O.*, 2012 UT 23, ¶ 8, 282 P.3d 977 (citation and internal quotation marks omitted). Because we conclude that Legg’s case is moot, we dismiss this case without reaching the merits of his appeal.

## ANALYSIS

### I. Mootness and Its Exceptions

<sup>11</sup>¶8 The State contends that Legg’s appeal is moot because Legg has now served the prison sentences that were reinstated when his probation was revoked and the sentences have now expired.

<sup>12</sup> <sup>13</sup> <sup>14</sup> <sup>15</sup> <sup>16</sup>¶9 Mootness is a jurisdictional issue. *See Carlton v. Brown*, 2014 UT 6, ¶¶ 29–30, 323 P.3d 571 (characterizing mootness as one component of “justiciability,” and stating that “[i]n the absence of any justiciable controversy between adverse parties, the courts are without jurisdiction” (alteration in original) (citation and internal quotation marks omitted)). “The burden of persuading the court that an issue is moot lies with the party asserting mootness.” *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 21, 234 P.3d 1105 (citation and internal quotation marks omitted). “An issue on appeal is considered moot when the requested judicial

relief cannot affect the rights of the litigants,” *State v. Sims*, 881 P.2d 840, 841 (Utah 1994) (citation and internal quotation marks omitted), or, in other words, when the requested relief appears to be “impossible or of no legal effect,” *State v. McClellan*, 2014 UT App 271, ¶ 3, 339 P.3d 942 (citation and internal quotation marks omitted). And appellate “[c]ourts generally will not resolve an issue that becomes moot” while the appeal is pending, where “circumstances change so that the controversy is eliminated.” *State v. Black*, 2015 UT 54, ¶ 10, 355 P.3d 981 (citation and internal quotation marks omitted). Thus, if it is demonstrated that a case is moot, it “must be dismissed ... unless it can be shown to fit within a recognized exception to the mootness principle.” *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981).

¶10 Here, the State has met its initial burden to show that Legg’s case is moot. Legg has requested relief from the revocation of his probation and the resulting reinstatement of his suspended prison sentences, and the State has shown that he has now been released from prison and his sentences have been served. As a consequence, providing Legg with relief from his probation revocation would be “of no legal effect.” *See Black*, 2015 UT 54, ¶ 10, 355 P.3d 981 (citation and internal quotation marks omitted). As the State points out, “[a] new revocation hearing will not allow the district court to reinstate his probation and give him another opportunity to avoid the prison term ordered as a result of his probation revocation.” Thus, in order for Legg’s appeal to survive dismissal, his case must fit within a recognized exception to mootness.

## A. Exceptions to Mootness

<sup>17</sup>¶11 The recognized exceptions to mootness in Utah involve cases that affect public interest, are likely to recur, and are capable of evading review, *see Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 2012 UT 75, ¶ 32, 289 P.3d 582, and in the criminal realm, cases in which “ ‘collateral legal consequences<sup>[2]</sup> will be imposed on the basis of the challenged conviction,’ ” *Duran*, 635 P.2d at 45 (quoting *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)).

<sup>2</sup> While the collateral consequences exception is usually applied in criminal cases, it has also been applied (albeit, more rarely) in civil cases. *See, e.g., Towner v. Ridgway*, 2012 UT App 35, ¶¶ 7–11, 272 P.3d 765 (applying the collateral consequences doctrine to dismiss as moot a challenge to an expired civil stalking injunction).

¶12 The parties disagree over whether the collateral consequences exception applies. The State argues that Legg’s appeal does not fall within the collateral consequences exception and that we must dismiss. In particular, \*364 the State argues that “under both Utah and federal law, the courts presume that a *conviction* will result in ... negative collateral legal consequences” but that courts do not presume “that a challenge to a parole revocation or any other sentence (such as probation) will result in negative collateral legal consequences.” (Emphasis in original.) The State contends that our precedent has distinguished between those collateral consequences that are imposed as a matter of law and those that merely come about through discretionary decisions by others, such as future courts and employers,

and that while convictions carry actual legal consequences, probation revocations do not necessarily do so, apart from the specific consequences imposed by the revoking court. As a result, the State asserts that “when a Defendant challenges his sentence or probation or parole revocation, the case will be moot if his sentence has expired unless the Defendant can show a concrete injury-in-fact.” And in this case, the State contends that we must dismiss because we cannot presume that Legg will suffer collateral legal consequences from his probation revocation and Legg has not otherwise demonstrated that he has suffered, or will suffer, a concrete injury-in-fact if the probation revocation stands.

¶13 In this regard, the State argues that two of our recent decisions involving probation revocation challenges and collateral consequences—*State v. Allen*, 2015 UT App 163, 353 P.3d 1266, and *State v. Warner*, 2015 UT App 81, 347 P.3d 846—should not govern our decision in the present case because they are “anomalous” and controvert established Utah and federal case law. The appellants in *Allen* and *Warner* each challenged the validity of his probation revocation, not his underlying conviction, but by the time their cases were submitted on appeal, each appellant had served his respective jail sentence and been released. *See Allen*, 2015 UT App 163, ¶¶ 1, 4, 353 P.3d 1266; *Warner*, 2015 UT App 81, ¶ 1, 347 P.3d 846. Thus, both cases seemed to request relief—reversal of their respective probation revocations and, hence, of their jail sentences—that would be “of no legal effect.” *See Black*, 2015 UT 54, ¶ 10, 355 P.3d 981 (citation and internal quotation marks omitted). Consequently, both cases

seemed to present moot controversies on appeal that would require the demonstration of an applicable mootness exception to avoid dismissal; indeed, in both cases, the State argued that the controversies were moot and that the cases should be dismissed. However, in both cases, rather than dismiss, we concluded that each defendant would suffer collateral legal consequences from his probation revocation and proceeded to decide each case on its merits.

¶14 Prior to these two cases, it does not appear that we considered the question of whether we may presume collateral consequences in the exact context of a probation revocation challenge. Nonetheless, the State argues that we “misread relevant precedent” when we rejected the mootness arguments in each case and, as a consequence, failed to appropriately take into account the major qualitative difference that prior case law had recognized between the collateral consequences resulting from a criminal conviction and those resulting from a probation revocation—namely, that while convictions “almost always result[ ] in legally-imposed collateral consequences,” probation revocations do not. Consequently, the State urges that we “apply the collateral legal consequences exception as set forth in Utah Supreme Court case law and in this Court’s own pre-2015 case law, not as set forth in *Warner* and *Allen*.”

¶15 In contrast, Legg contends that his case does fall within the collateral consequences exception and is not moot. He asserts that he faces “very real” collateral consequences because the probation revocation constitutes a “blemish” on his record that could affect

the disposition of any “future difficulties with the law” that he may encounter and that even without the “real consequences” he asserts, mootness is “a matter of judicial policy” and we should address his claim to “eliminate the source of a potential legal liability.” He also asserts that *Allen* and *Warner* were correctly decided and that, in any event, the State “has not carried its burden to show why either case should be overruled.”

¶16 We agree with the State that *Allen* and *Warner* depart from the path of prior \*365 precedent and conclude that Legg’s case does not fit within a recognized exception to mootness. In so doing, we necessarily conclude that the mootness holdings in *Allen* and *Warner*, that suggest collateral legal consequences may be presumed in the context of probation revocation decisions, were erroneously decided. Thus, we first address the collateral consequences exception, and we then address the continuing viability of *Allen* and *Warner* and whether to dismiss this case.

### 1. The Law Regarding the Collateral Consequences Exception

<sup>[8]</sup>¶17 In its simplest form, the collateral consequences exception permits an appeal to survive dismissal on mootness grounds if, notwithstanding the fact that the direct and immediate consequences of a lower court decision have already occurred and cannot be directly remedied by an appellate decision, there are adverse “collateral legal consequences [that] will be imposed on the basis of the challenged” issue on appeal. See *Duran v. Morris*, 635 P.2d 43, 45 (Utah



1981) (citation and internal quotation marks omitted); *see also* *Spencer v. Kemna*, 523 U.S. 1, 7–8, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (stating that, to survive a mootness dismissal, “some concrete and continuing injury other than the now-ended incarceration or parole—some ‘collateral consequence’ of the conviction—must exist if the suit is to be maintained”); *In re Giles*, 657 P.2d 285, 286 (Utah 1982) (“Where collateral legal consequences may result from an adverse decision, courts have generally held an issue not moot and rendered a decision on the merits.”); *Towner v. Ridgway*, 2012 UT App 35, ¶ 6, 272 P.3d 765 (same, in the context of a civil stalking injunction).

<sup>191</sup>¶18 Generally, once mootness has been demonstrated, the party seeking to survive dismissal bears the burden of demonstrating that collateral legal consequences will flow from the challenged issue. In other words, under most circumstances, we will not presume that collateral consequences exist. *See Barnett v. Adams*, 2012 UT App 6, ¶ 9, 273 P.3d 378 (“When a party has not shown the existence of actual, adverse, collateral consequences[,] ... we will not presume that such collateral consequences exist.” (alteration and omission in original) (citation and internal quotation marks omitted)); *see also* *State v. Hooker*, 2013 UT App 91, ¶ 3, 300 P.3d 1292 (dismissing appeal from a probation revocation where the appellant “has not alleged, much less demonstrated, that any such exception is applicable”); *State v. Peterson*, 2012 UT App 363, ¶ 3, 293 P.3d 1103 (dismissing an appellant’s challenge to his sentence after he had been released from jail where, among other things, he “advances no argument that the

appeal is not moot”).

¶19 But not every asserted collateral consequence will prevent dismissal. Utah precedent, as well as precedent of the Supreme Court of the United States, has established that the demonstrated consequences must be actual and adverse, not speculative or hypothetical, for the case to fit within this exception. *See Towner*, 2012 UT App 35, ¶¶ 7–9, 272 P.3d 765 (concluding that the case was moot where the appellant pointed “to no actual, adverse legal consequences of denying his motion to vacate the underlying proceeding”); *Barnett*, 2012 UT App 6, ¶ 8, 273 P.3d 378 (“[A] litigant must show that the collateral consequences complained of are not merely hypothetical or possible but that they are probable and represent actual and adverse consequences.” (citations omitted)). In this regard, we have repeatedly dismissed cases as moot where the appellant was unable to show that the asserted consequences would be “imposed by law.” *See State v. McClellan*, 2014 UT App 271, ¶ 5, 339 P.3d 942 (dismissing case as moot where appellant’s asserted consequences of “prevent[ing] him from improv[ing] his living situation and support network in the community and from [being] a better father to his children” did “not qualify as collateral legal consequences” where they were “not imposed by law” (second alteration in original) (internal quotation marks omitted)); *Towner*, 2012 UT App 35, ¶ 9, 272 P.3d 765 (dismissing appeal as moot where appellant asserted only potential consequences, such as “harm to his reputation, family relationships, and employment prospects” that “are not ‘imposed by law’ ” and did “not identify any

legal harms” he would suffer if the expired injunction against him was not \*366 vacated (citation omitted)); *State v. Moore*, 2009 UT App 128, ¶ 17, 210 P.3d 967 (determining that appellant had not shown that he would suffer “actual, adverse collateral consequences” from his disciplinary segregation in prison where “Utah law provides no requirement that the parole board deny parole because of a prison disciplinary record”); *see also Spencer*, 523 U.S. at 14–16, 118 S.Ct. 978 (noting that the petitioner had failed to demonstrate that the “concrete injuries-in-fact” he asserted would follow from the revocation of his parole were more than speculative where it was unclear whether any legal consequence would follow). And an appellant cannot prevent dismissal by “simply list[ing] potential legal impairments that generally impact a person” in the same or similar situations. *See Barnett*, 2012 UT App 6, ¶ 9, 273 P.3d 378. Rather, the consequences must be actual, adverse consequences specifically applicable to the appellant. *See id.* (concluding that the appellant had alleged collateral consequences that were “merely speculative” where she did not assert “injuries that she has actually suffered or [would] even likely suffer” in the future); *Moore*, 2009 UT App 128, ¶¶ 13–14, 210 P.3d 967 (noting that the administrative action against defendant “entailed no collateral legal consequences of the kind that result from a criminal conviction” where, for example, the decision “to place [the defendant] in solitary confinement will have no bearing on his ability to vote, engage in certain businesses, or serve on a jury” and where failure to expunge the disciplinary action could have only a “hypothetical impact ... on a future parole hearing” he may

have (citations and internal quotation marks omitted)).

¶20 Along these lines, we have also followed the reasoning of the Supreme Court of the United States in dismissing cases as moot where the asserted collateral consequences are dependent on the discretion of potential future decision makers, such as whether the challenged action will affect a future case, employment prospects, or the appellant’s reputation. *See McClellan*, 2014 UT App 271, ¶ 5, 339 P.3d 942 (dismissing case as moot where the asserted consequences related to the appellant’s ability to improve his “living situation and support network in the community,” and citing *Spencer*, 523 U.S. at 16 note 8, 118 S.Ct. 978, for the proposition that “an injury to reputation or stigma resulting from a criminal conviction is not adequate alone to overcome mootness”); *Moore*, 2009 UT App 128, ¶ 14, 210 P.3d 967 (“[T]he hypothetical impact of the disciplinary record on a future parole hearing does not create a collateral legal consequence that prevents the conclusion that Moore’s claim is moot.”). Indeed, in *Spencer*, the Supreme Court dismissed a challenge to a parole revocation in part because

[t]he parole violations that remain a part of respondents’ records cannot affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole. Respondents themselves

are able—and indeed required by law—to prevent such a possibility from occurring. In addition, we rejected as collateral consequences sufficient to keep the controversy alive the possibility that the parole revocations would affect the individuals’ employment prospects, or the sentence imposed [upon them] in a future criminal proceeding. These nonstatutory consequences were dependent upon [t]he discretionary decisions ... made by an employer or a sentencing judge, which are not governed by the mere presence or absence of a recorded violation of parole, but can take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation.

523 U.S. at 13, 118 S.Ct. 978 (alterations in original) (citations and internal quotation marks omitted). The Court had earlier expressed a similar concern in *Lane v. Williams*, 455 U.S. 624, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982). There, the defendants challenged the parole components of their completed sentences, not their convictions, based on the failure of the trial courts to inform them before accepting their guilty pleas that their “negotiated sentence[s]

included a mandatory parole term.” *Id.* at 626, 630, 102 S.Ct. 1322. The Supreme Court held that the defendants had failed to demonstrate the kind of concrete collateral “civil disabilities” necessary to avoid dismissal \*367 for mootness, such as the inability to vote in an election or engage in certain businesses. *Id.* at 632–34, 102 S.Ct. 1322. Rather, the defendants faced “[a]t most, certain non-statutory consequences,” such as potential negative effects on future “discretionary decisions” related to “employment prospects” or a “sentence imposed in a future criminal proceeding,” that “are more directly influenced by[ ] the underlying conduct that formed the basis for the parole violation” than the fact of the parole violation itself, *id.* at 632–33, 102 S.Ct. 1322.

¶21 However, while we ordinarily will not presume the existence of collateral consequences where the direct consequences of a judicial decision have already played themselves out, we have consistently held that collateral consequences will be presumed in the narrow context of challenges to a criminal *conviction*. That is, where an appellant’s challenge to his underlying conviction is otherwise moot because his sentence has been served or his probation completed, we will presume that his case fits within the exception. This is because convictions nearly always carry continuing consequences that are imposed as a matter of either state or federal law, such as limits on a person’s ability to vote, “engage in certain businesses, or serve on a jury.” *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981); *see also Spencer*, 523 U.S. at 12, 118 S.Ct. 978 (“In the context of [a] criminal conviction, the presumption of

significant collateral consequences is likely to comport with reality.... [I]t is an ‘obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.’ ” (quoting *Sibron v. New York*, 392 U.S. 40, 55, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)); *North Carolina v. Rice*, 404 U.S. 244, 247 & n.1, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (noting the disabilities that various states “may attach to a convicted defendant even after he has left prison,” which may include being “disenfranchised,” “los[ing] the right to hold federal or state office,” “be [ing] barred from entering certain professions,” “be[ing] subject to impeachment when testifying as a witness,” and “be[ing] disqualified from serving as a juror”); *Sibron*, 392 U.S. at 55–56, 88 S.Ct. 1889 (noting that New York law “expressly provides by statute that [a defendant’s] conviction may be used to impeach his character should he choose to put it in issue at any future criminal trial, ... and that it must be submitted to a trial judge for his consideration in sentencing” (citation omitted)).

¶22 Indeed, in *Duran v. Morris*, 635 P.2d 43 (Utah 1981), the oft-quoted Utah collateral consequences case, our supreme court adopted and applied the mootness holding from *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), stating that “it is now clearly established that ‘a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.’ ” *Duran*, 635 P.2d at 45 (quoting *Sibron*, 392 U.S. at 57, 88 S.Ct. 1889). In *Duran*, a prison inmate petitioned for a writ of habeas corpus, alleging that “prison officials

violated his constitutional rights by temporarily placing him in administrative segregation.” *Id.* at 44, 88 S.Ct. 1889. Because the appellant was not challenging his criminal conviction, however, the court dismissed the case as moot. *Id.* at 46, 88 S.Ct. 1889. The petitioner had been released from administrative segregation during the course of the appeal, and the court determined, based on *Sibron*’s reasoning, that “[i]ntraprison administrative decisions ... entail no collateral legal consequences of the kind that result from a criminal conviction.” *Id.* at 45, 88 S.Ct. 1889. We have since applied the holding of *Duran* to dismiss similarly postured criminal cases as moot. *See, e.g., Hooker*, 2013 UT App 91, ¶ 3, 300 P.3d 1292 (dismissing appellant’s challenge to his probation revocation and the reinstatement of his jail sentence which had already been served); *Peterson*, 2012 UT App 363, ¶ 5, 293 P.3d 1103 (dismissing appellant’s challenge to the legality of his completed jail sentence); *Moore*, 2009 UT App 128, ¶¶ 6, 9–14, 210 P.3d 967 (dismissing appellant’s challenge to his temporary administrative segregation in jail); *State v. Martinez*, 925 P.2d 176, 177 (Utah Ct. App. 1996) (dismissing appellant’s request to be resentenced, even though she had been unrepresented at a hearing prior to sentencing, where she had “already completed the 60-day evaluation [that had been] \*368 ordered by the court” at that hearing and where she “had an opportunity to be represented by counsel at the ... sentencing hearing”).

<sup>[10]</sup>¶23 Thus, when a party challenges the validity of his *conviction* in an otherwise moot appeal, unless the party seeking dismissal shows that “there is *no possibility*

that any collateral legal consequences will be imposed,” *Duran*, 635 P.2d at 45 (emphasis added) (citation and internal quotation marks omitted), we retain jurisdiction to consider the appellant’s appeal on its merits. But where decisions from other kinds of proceedings are challenged, there is no such presumption; rather the burden is on the opponent of dismissal to demonstrate that actual, non-speculative consequences will flow from the decision despite the direct consequences having already played out. *See, e.g., Moore*, 2009 UT App 128, ¶ 17, 210 P.3d 967 (dismissing appeal of temporary administrative segregation in jail as moot where the defendant had “shown no actual, adverse, collateral consequences that have arisen from the failure to expunge his administrative record”). This is because the nature of the *consequences* flowing from a particular result or decision in a proceeding determines whether a case fits within the collateral consequences exception.

¶24 Viewed in this light, we presume that there will be legally cognizable collateral effects only in the context of criminal convictions or the equivalent. There are inescapable, long-term, legally-imposed consequences that will follow “a convicted defendant even after he has [served his sentence and] left prison.” *See Rice*, 404 U.S. at 247, 92 S.Ct. 402. In contrast, while a probation revocation may attract immediate consequences (such as the reinstatement of a prison sentence), it generally does not result in concrete, ongoing legal disabilities or barriers to certain rights or activities beyond that. Rather, the consequences that may follow, such as the revocation being used as a factor

in any future plea negotiation or sentencing decision or even an employment decision, are often wholly contingent upon the future decisions of the defendant himself and the discretion of a particular decision-maker. *See Spencer v. Kemna*, 523 U.S. 1, 13, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). In other words, the continuing legal effect of something like a probation revocation is in no way certain or even probable. At most, the effects are legally inchoate and dependent on future circumstances that may or may not arise. *Cf. Sibron*, 392 U.S. at 57–58, 88 S.Ct. 1889 (suggesting that it is the judgment of conviction, not the satisfied sentence itself, which survives). Consequently, in contexts other than a criminal conviction, it makes sense that we require the appellant seeking relief to demonstrate the existence of actual, adverse collateral legal consequences in order to avoid dismissal when a case has otherwise become moot.

¶25 In sum, it is evident that our cases before *Allen* and *Warner* had established three principles pertinent to the case before us. First, mootness does not provide the court with a choice of whether to proceed with an appeal or not; it is jurisdictional. *See Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 2012 UT 75, ¶ 24, 289 P.3d 582 (explaining that mootness is jurisdictional and directly “parallel” to the prohibition against issuing advisory opinions that are merely academic in nature). Second, to overcome the jurisdictional bar, the party seeking relief must demonstrate that a recognized exception applies. *See, e.g., State v. Hooker*, 2013 UT App 91, ¶ 3, 300 P.3d 1292 (dismissing appeal from a probation revocation where the appellant “has not

alleged, much less demonstrated, that any [mootness] exception is applicable”). Third, if the party relies on the collateral consequences exception, we will not presume that there are actual and adverse collateral consequences *unless* the party is challenging the validity of his or her criminal conviction. *See, e.g., State v. Peterson*, 2012 UT App 363, ¶¶ 3–5, 293 P.3d 1103 (explaining that an appellant “does not have a right to an advisory opinion” and that because the appellant “does not challenge his conviction ... the collateral consequences attendant to an unlawful conviction are not at issue”); *Towner v. Ridgway*, 2012 UT App 35, ¶ 7, 272 P.3d 765 (“Unless a party is challenging a criminal \*369 conviction, we will not presume that such collateral consequences exist.” (citation and internal quotation marks omitted)). Seen against this backdrop, the holdings of *Allen* and *Warner* indeed are anomalous.

## II. The Mootness Analyses of *Allen* and *Warner*

<sup>[11]</sup> <sup>[12]</sup>¶26 Generally, as a matter of “horizontal stare decisis, the first decision by a court on a particular question of law governs later decisions by the same court.” *State v. Tenorio*, 2007 UT App 92, ¶ 9, 156 P.3d 854 (citation and internal quotation marks omitted); *see also State v. Menzies*, 889 P.2d 393, 399 (Utah 1994) (stating that a court “will follow the rule of law which it has established in earlier cases” (citation and internal quotation marks omitted)). This is so because stare decisis is “crucial to the

predictability of the law and the fairness of adjudication.” *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993). As a consequence, “once a point of law has been decided, we will not overturn it lightly.” *Kuhn v. Retirement Board*, 2015 UT App 18, ¶ 15, 343 P.3d 316. Rather, to overturn our own precedent, we must be “convinced that there has been a change in the controlling authority, or that our prior decision was clearly erroneous.” *State v. Ingleby*, 2004 UT App 447, ¶ 7, 104 P.3d 657 (citing *Menzies*, 889 P.2d at 399 n.3); *see also Menzies*, 889 P.2d at 399 (stating that a court may “overrule prior precedent” only if it becomes “clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent” (citation and internal quotation marks omitted)).

¶27 In this regard, our supreme court has recently noted that “our presumption against overruling precedent is not equally strong in all cases.” *Eldridge v. Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553 (citing *Menzies*, 889 P.2d at 399). The court identified “two broad factors that distinguish between weighty precedents and less weighty ones: (1) the persuasiveness of the authority and reasoning on which the precedent was originally based, and (2) how firmly the precedent has become established in the law since it was handed down.” *Id.* It also noted that “[t]he second factor encompasses a variety of considerations, including the age of the precedent, how well it has worked in practice, its consistency with other legal principles, and the extent to which people’s reliance on the precedent would create injustice or hardship if it were overturned.”

*Id.* Based on an analysis of these factors, we are compelled to conclude that *Allen* and *Warner* ought not to govern our decision in this case.

A. The Authority and Reasoning of *Allen* and *Warner*

¶28 As discussed above, although we had not considered the precise question of whether collateral consequences could be presumed in the specific context of a probation revocation challenge before we decided *Allen* and *Warner*, we had repeatedly declined to presume collateral consequences in similarly-postured cases where the challenge was to some result or decision other than a conviction. *See supra* ¶¶19–25. The Utah Supreme Court had similarly declined to presume collateral consequences in a context other than a challenge to a conviction. *See, e.g., In re C.D.*, 2010 UT 66, ¶¶ 17–18, 245 P.3d 724 (dismissing a challenge to custody determinations as moot where the issue did not fit into the public interest mootness exception, and where “neither party ha[d] presented any evidence that the lower court’s decisions ... will have any collateral legal consequences on the parties”); *Cullimore v. Schwendiman*, 652 P.2d 915, 916 (Utah 1982) (dismissing a challenge to a driver license revocation as moot where the revocation time period had passed and the court had “not been made aware of any collateral legal consequences” (citation and internal quotation marks omitted)); *Duran v. Morris*, 635 P.2d 43, 45–46 (Utah 1981) (dismissing challenge to administrative segregation decision). And the Supreme Court of the United States has declined to

presume collateral consequences in similar contexts as well. *See, e.g., Spencer*, 523 U.S. at 8–16, 118 S.Ct. 978 (declining to presume collateral consequences in a parole revocation challenge); *Lane v. Williams*, 455 U.S. 624, 631–34, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982) (declining to presume collateral consequences in the context of challenges to \*370 petitioners’ sentences, not underlying convictions).

¶29 In *Allen* and *Warner*, however, neither appellant challenged his underlying conviction; instead both challenged the legality of their probation revocations and resulting incarcerations. Both defendants had been released from jail, having served their sentences, by the time their appeals were submitted for decision. Thus, both cases presented classic iterations of mootness that would seem to require the affirmative demonstration of a mootness exception to avoid dismissal. Nevertheless, we appear to have simply presumed the existence of collateral legal consequences and proceeded to consider the merits of each case.

1. *State v. Allen*

¶30 In *Allen*, the defendant pleaded guilty and was placed on probation. However, the defendant’s probation was revoked for failure to comply with probation conditions. *State v. Allen*, 2015 UT App 163, ¶¶ 2–4, 353 P.3d 1266. As a sanction, the district court imposed a jail sentence and terminated probation as unsuccessful. *Id.* ¶ 4. On appeal, the defendant challenged the district court’s decision to revoke his probation, claiming ineffective assistance of counsel.

*Id.* ¶ 1. But by the time his appeal was heard, he had served his jail sentence completely and had been released. *Id.* ¶ 4.

¶31 We resolved the issue of mootness in a footnote. We noted that despite the State’s arguments, the defendant contended that “his appeal [was] not moot because his *conviction* still affect[ed] his rights” despite the fact that the conviction itself was not the decision the defendant appealed. *Id.* ¶ 4 n.2 (emphasis added). We then simply quoted *Barnett* and *Duran* for the general proposition that collateral legal consequences, particularly those related to a criminal case in which the conviction creates continuing legal consequences, permits us to find an “issue not moot and render[ ] a decision on the merits.” *Id.* (citation and internal quotation marks omitted). In this respect, our reasoning seemed to conflate the consequences of Allen’s probation violations with those stemming from his conviction in order to reach the conclusion that his case was not moot: “We are not convinced that Allen faces no collateral legal consequences *as a result of his felony conviction and revoked probation terms.*” *Id.* (emphasis added). But the defendant did not appeal his conviction, only the revocation of his probation and the resulting incarceration pursuant to his original sentence. *See id.* ¶ 1 (“Allen appeals his sentence....”).

¶32 Further, we did not analyze any secondary consequences that the defendant contended he may have faced as a result of the probation revocation.<sup>3</sup> Rather, it appears that we simply presumed such consequences would ensue. In this regard, we made no attempt to differentiate between those

continuing legal consequences he may have suffered as a result of his probation revocation (the subject of his appeal) and those he may have been subject to as a result of his underlying conviction (not the subject of his appeal). *Cf. Sibron v. New York*, 392 U.S. 40, 58, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (noting that the appellant “has a substantial stake in the judgment of conviction *which survives the satisfaction of the sentence imposed on him*” (emphasis added) (citation and internal quotation marks omitted)). As a result, we failed to limit our mootness inquiry to the actual controversy and the relief that was requested on appeal—relief from the defendant’s revoked probation, not his underlying conviction.

<sup>3</sup> We note that the terms of Allen’s plea agreement included an agreement by the State that it would recommend reduction of Allen’s felony conviction to a misdemeanor conviction upon successful completion of his probation. *State v. Allen*, 2015 UT App 163, ¶ 2, 353 P.3d 1266. But although we noted that Allen asserted that “his appeal [was] not moot because his conviction still affects his rights,” *id.* ¶ 4 n.2, we did not address whether the loss of the State’s recommendation amounted to a legally cognizable collateral consequence. Instead, we seemed to presume without explanation that the loss of the promised recommendation was a collateral consequence. We express no opinion on that question here.

## 2. *State v. Warner*

¶33 In *Warner*, we dealt more directly with the nature of the consequences that an \*371 appellant must show in order to trigger a mootness exception. The trial court had suspended the defendant’s jail sentences in two consolidated domestic violence cases and placed him on probation. *State v. Warner*, 2015 UT App 81, ¶¶ 1, 5–7, 347



P.3d 846. At a subsequent order to show cause hearing, the trial court revoked the defendant's probation and reinstated his original jail sentences. *Id.* The defendant appealed, but just as in *Allen*, by the time his appeal was submitted, he had completed his sentences and been released from jail. *Id.* ¶ 1.

¶34 As in *Allen*, the State contended that Warner's challenge was moot because he had served the reinstated jail sentences. *Id.* The State argued that the collateral consequences Warner could suffer as a result of his revoked probation were "merely hypothetical or possible," rather than actual, arguing implicitly that collateral consequences could not be presumed. *Id.* ¶ 3. However, we reasoned that the State's "argument [was] based on the standard applicable to civil cases, not criminal cases," and we "decline[d] to extend the civil approach to collateral consequences to this criminal appeal." *Id.* We also pointed out that "the potentially hypothetical nature of the collateral consequences facing a criminal defendant has not prevented Utah courts from reaching the merits of an otherwise-moot criminal appeal." *Id.* We then concluded in a single sentence, as we did in *Allen*, "[W]e are not convinced that Warner faces no possible collateral consequences as a result of his revoked probation terms," and we suggested that mootness is merely "'a matter of judicial policy'" that "'technically ... rests in the discretion of this court.'" *Id.* (quoting *Ellis v. Swensen*, 2000 UT 101, ¶ 26, 16 P.3d 1233). We then proceeded to "reach the issues underlying Warner's appeal." *Id.*

a. Collateral Consequences in *Warner*

¶35 As with *Allen*, our mootness holding in *Warner* seems unpersuasive. First, even though the defendant challenged his probation revocation, not his underlying conviction, we simply stated that we were "not convinced" that no collateral consequences would attach to the defendant's probation revocation, without providing any analysis of specific adverse consequences that the defendant himself might suffer. Indeed, it is unclear from the decision what legal consequences, if any, the defendant claimed he would suffer if the merits of his appeal were not addressed. Instead, the only collateral consequences referenced in the decision were noted in passing and, significantly, were identified as "the effects [of] a conviction," not a probation revocation. *Id.* ¶ 2 ("In criminal cases, collateral legal consequences include the effects *a conviction* has on 'the petitioner's [ ] ability to vote, engage in certain businesses, or serve on a jury....'" (alteration in original) (emphasis added) (quoting *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981))). Thus, our analysis seemed to presume that the defendant would face collateral consequences "as a result of his revoked probation terms," without making an attempt to identify, analyze, or resolve the qualitative divide between the potential consequences of the defendant's revoked probation and those typical of a criminal conviction. In other words, the *Warner* decision failed to explain why it equated the legal consequences of a criminal conviction with those of a probation revocation.

¶36 This analytical approach is of particular concern because every Utah case cited in *Warner* regarding collateral consequences

suggests that only in the context of criminal convictions may collateral consequences be presumed. See *Warner*, 2015 UT App 81, ¶¶ 2–3, 347 P.3d 846 (citing *In re Giles*, 657 P.2d 285 (Utah 1982); *Duran*, 635 P.2d 43; *Towner v. Ridgway*, 2012 UT App 35, 272 P.3d 765; *Barnett v. Adams*, 2012 UT App 6, 273 P.3d 378; *Gardiner v. York*, 2010 UT App 108, 233 P.3d 500; *State v. C.H.*, 2008 UT App 404U, 2008 WL 4817192). For example, the case *Warner* relies on to suggest that there is a separate “civil standard” for collateral consequences in the mootness context expressly states that collateral legal consequences may be presumed only in the context of a challenge to a criminal conviction. See *Towner*, 2012 UT App 35, ¶ 7, 272 P.3d 765 (“Unless a party is challenging a criminal conviction, we will not presume that such collateral consequences exist.” (citation and internal quotation marks omitted)). Further, our statement that “the potentially hypothetical nature of the collateral consequences facing \*372 a criminal defendant has not prevented Utah courts from reaching the merits of an otherwise-moot criminal appeal” is supported by two cases involving convictions. See *Warner*, 2015 UT App 81, ¶ 3, 347 P.3d 846 (citing *In re Giles*, 657 P.2d at 287; *C.H.*, 2008 UT App 404U, para. 2). In *In re Giles*, for example, the supreme court applied a mootness exception by likening the appellant’s involuntary commitment to a mental institution to a conviction. 657 P.2d at 286–87 (“The doctrine of collateral legal consequences is chiefly applied in criminal cases.... However, the doctrine is equally applicable to patients of mental hospitals who face similar deprivations of liberty and whose commitment and hospitalization must stand

scrutiny on the merits when challenged.” (citations omitted)). And in *State v. C.H.*, a mother was appealing a criminal contempt ruling. 2008 UT App 404U, para. 2 (“[W]here Mother is still a resident of Utah, a record that includes *her conviction of criminal contempt* may negatively impact future decisions of DCFS with respect to Mother’s rights to parent her children. Thus, we hold that the issues raised by Mother are not moot.” (emphasis added)).

¶37 Finally, the Utah case *Warner* primarily relied on for the principle that collateral consequences could be presumed from Warner’s probation revocations, *Duran*, states that we will dismiss a criminal appeal as moot only if there is no possibility of collateral legal consequences being imposed “on the basis of the challenged conviction.” See *Warner*, 2015 UT App 81, ¶¶ 2–3, 347 P.3d 846 (emphasis added) (internal quotation marks omitted) (citing *Duran*, 635 P.2d at 45). *Duran* then declined to presume collateral consequences arising from an administrative segregation in jail that had ended. The other cases we cited in *Warner* to support the presumption of collateral consequences from a probation revocation are from other jurisdictions. But these few cases demonstrate no discernible pattern among other jurisdictions and weigh little against the long and uninterrupted line of Utah cases holding that collateral legal consequences are to be presumed only in the context of a moot challenge to a conviction and that for any other challenge, the party seeking to survive dismissal must demonstrate the existence of actual, adverse legal consequences.<sup>4</sup> See *supra* ¶¶ 19–25.

<sup>4</sup> We also note that much of the reasoning leading to our conclusion that Warner would suffer collateral legal consequences from his probation revocation was premised on a distinction between the application of the collateral consequences standard in civil cases as opposed to criminal cases. But we have found no case—civil or criminal—that differentiates between a “civil” and a “criminal” standard for presuming collateral consequences; indeed, even the case cited in *Warner* to support the proposition, *Towner v. Ridgway*, 2012 UT App 35, 272 P.3d 765, expressly adopts a universal standard for proof of collateral consequences. In *Towner*, we dismissed as moot an appeal from an expired civil stalking injunction. 2012 UT App 35, ¶ 11, 272 P.3d 765. In so doing, we applied the collateral consequences exception even though “[t]he doctrine of collateral legal consequences is chiefly applied in criminal cases.” *Id.* ¶ 7 (citation and internal quotation marks omitted). And we went on to acknowledge that the only situation in which collateral consequences may be presumed is when “a party is challenging a criminal conviction” and that in all other cases “a litigant must show that the collateral consequences complained of are not merely hypothetical or possible but that they are probable and represent actual and adverse consequences.” *Id.* (citations and internal quotation marks omitted).

#### b. Mootness in *Warner*

¶38 *Warner*’s suggestion that mootness is discretionary and a matter of “judicial policy” also seems to be a departure from precedent, given recent Utah Supreme Court statements on the subject. See *State v. Warner*, 2015 UT App 81, ¶ 3, 347 P.3d 846 (citing *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), and *Ellis v. Swensen*, 2000 UT 101, 16 P.3d 1233, as suggesting that we may “entertain[ ] moot controversies,” particularly where “mootness is a matter of judicial policy ... [that] rests in the discretion of this court” (first alteration in original) (citation and internal quotation marks omitted)). Our supreme court has unequivocally held that mootness, like standing, is not discretionary. *Utah Transit Auth. v. Local 382 of the*

*Amalgamated Transit Union*, 2012 UT 75, ¶ 18, 289 P.3d 582 (“This [mootness] doctrine is an element of the principles defining the scope of the ‘judicial power’ vested in the courts by the Utah Constitution. It is not a simple matter of judicial \*373 convenience or ascetic act of discretion.”).<sup>5</sup> On the contrary, our supreme court has held that the mootness doctrine directly implicates our constitutionally vested “judicial power,” and “when a court ascertain[s] that there is no jurisdiction in the court because of the absence of a justiciable controversy, then the court can go no further, and its immediate duty is to dismiss the action.” *Id.* ¶¶ 18–19 (alteration in original) (citation and internal quotation marks omitted); accord *State v. Steed*, 2015 UT 76, ¶ 6, 357 P.3d 547. Simply put, a court does not have jurisdiction to consider a moot case, unless some recognized exception is established by the party seeking to avoid dismissal. *Local 382*, 2012 UT 75, ¶¶ 17–28, 289 P.3d 582. And as discussed above, once mootness has been shown, the burden to demonstrate that an exception applies falls on the party seeking to avoid dismissal, except in the case of a challenge to a criminal conviction where adverse collateral consequences are readily presumed.

<sup>5</sup> We note that in *Utah Transit Authority v. Local 382 of the Amalgamated Transit Union*, 2012 UT 75, 289 P.3d 582, the Utah Supreme Court characterized the language in prior decisions, such as *Ellis v. Swensen*, 2000 UT 101, ¶ 26, 16 P.3d 1233, that suggested mootness was a discretionary matter of “judicial policy” as dicta. The “discretion and policy at stake ... are not a matter for standardless, case-by-case resolution, but instead are informed by the doctrine of mootness and its exceptions.” *Local 382*, 2012 UT 75, ¶ 19 n.3, 289 P.3d 582.

¶39 In this regard, by the time *Warner*

reached our court, the controversy presented for resolution—the challenge to the legality of Warner’s probation revocation and consequent imposition of his suspended sentences—had, as a practical matter, been resolved because he had already been released from jail. Thus, granting Warner his requested relief of reversing his probation revocations could not have addressed or resolved the direct legal consequence of the district court’s revocation decision—i.e., his incarceration. Yet our analysis in *Warner* seems to treat the mootness doctrine not as the jurisdictional fence that it is, but instead as simply another discretionary consideration that the judiciary may or may not employ to resolve a particular appeal. But this is precisely how our supreme court has declared the doctrine may not be treated. *See id.*

¶40 In sum, *Allen* and *Warner* failed to analyze and apply the collateral consequences exception to the mootness doctrine according to precedent. Both cases seem to have presumed the existence of collateral consequences related to the probation revocation challenges without analyzing whether or why that presumption was appropriate, given our precedent. Indeed, neither case acknowledged the distinction prior cases have made between collateral consequences in the context of convictions and in all other mootness challenges.

#### B. The Establishment of the Mootness

##### Holdings in *Allen* and *Warner*

¶41 We also conclude that neither case is firmly established. *See Eldridge v.*

*Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553 (explaining that the considerations for whether precedent is firmly established include “the age of the precedent, how well it has worked in practice, its consistency with other legal principles, and the extent to which people’s reliance on the precedent would create injustice or hardship if it were overturned”). To begin with, both cases are of recent vintage. *Warner* was issued on April 2, 2015, and *Allen* on June 25, 2015. Further, it appears that neither case has yet been cited or relied upon in subsequent appellate court decisions. In addition, as we have discussed, both cases appear to depart sharply from a long line of precedent. And we do not think that disavowing the anomalous mootness holdings of *Allen* and *Warner* portends any significant hardship to parties. Given the abundant precedent that suggests we presume collateral consequences only in the very narrow case of a challenge to a conviction, an appellant seeking to survive a mootness challenge should be well-advised that in the ordinary case he or she bears the burden of demonstrating that an exception applies and that we will not lightly presume one. In this regard, it is significant that neither *Allen* nor *Warner* discussed or even acknowledged the litany of cases that we have dismissed for that very reason.

\*374 ¶42 As a consequence, we conclude that it would be problematic to allow the mootness holdings of *Allen* and *Warner* to stand; rather, it seems prudent to take this early opportunity to straighten the path of precedent from which those cases departed. As the State points out, these two cases seem to have unintentionally put in doubt a principle that has otherwise been plainly

stated and applied time and again. *See Eldridge*, 2015 UT 21, ¶ 22, 345 P.3d 553 (explaining pertinent considerations for overruling precedent). Accordingly, for the reasons stated above, we conclude that the mootness holdings in *Allen* and *Warner* were “originally erroneous” when they were decided and that “more good than harm will come by departing from [the] precedent” they set. *See State v. Bennett*, 2000 UT 34, ¶ 8, 999 P.2d 1 (citation and internal quotation marks omitted). Thus, we disavow the mootness holdings in *Allen* and *Warner* and proceed to consider Legg’s appeal in light of established prior precedent.

### III. Legg’s Appeal

<sup>113</sup>¶43 Legg has challenged the district court’s decision to revoke his probation and reinstate his prison sentence. Legg was released from prison, and his sentence expired as of July 15, 2015. Thus, because the relief he requests—reinstatement of his probation—is “impossible or of no legal effect,” *State v. McClellan*, 2014 UT App 271, ¶ 4, 339 P.3d 942 (citation and internal quotation marks omitted), he must demonstrate that an exception to the mootness doctrine applies to survive dismissal, *see Duran v. Morris*, 635 P.2d 43, 45–46 (Utah 1981). Legg asserts that he will suffer collateral legal consequences if his challenge is not addressed. Because he has not challenged his underlying conviction, however, “we will not presume that such collateral consequences exist.” *State v. Moore*, 2009 UT App 128, ¶ 17, 210 P.3d 967. Rather, he must demonstrate the

existence of “actual, adverse collateral consequences that have arisen from the failure to expunge his ... record” of the probation revocation. *See id.*; *see also State v. Hooker*, 2013 UT App 91, ¶¶ 2–3, 300 P.3d 1292 (dismissing a challenge to a probation revocation where appellant did not attempt to demonstrate that his appeal “fit within a recognized exception to the mootness principle” (citation and internal quotation marks omitted)).

<sup>114</sup>¶44 Legg asserts that having the probation revocation on his record could affect a sentencing recommendation that AP & P would provide the court in a future criminal case against him. He contends this is because AP & P details “every single instance of a defendant’s prior probation revocations” in the pre-sentence investigation reports (PSR) they prepare, and a prior revocation is an “aggravating factor on a defendant’s criminal history assessment” detailed in the report. But while a district court may decide to follow the sentencing recommendation in a PSR, it is not bound to do so. Rather, “the recommendations of the prosecutor or any other party are not binding upon the court.” *State v. Moreau*, 2011 UT App 109, ¶ 11, 255 P.3d 689 (citation and internal quotation marks omitted). Thus, this sort of potential effect is not a disability imposed by law. Indeed, a decision whether to follow the recommendation of AP & P is not even a basis on which we may reverse a sentence for abuse of discretion. *See id.* ¶ 6 (“[A]n abuse of discretion will only be found if the district court fails to consider all legally relevant factors or if the sentence is clearly excessive, inherently unfair, or exceeds statutory or constitutional limits.”). Instead,

it is clear that this consequence is merely possible and therefore speculative, because a probation revocation is only one among many factors that could affect a court's discretionary sentencing decision, and that it is only a consequence if Legg again commits a crime—itself a contingent event. *See Spencer v. Kemna*, 523 U.S. 1, 13–14, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

<sup>[15]</sup> ¶45 Legg also asserts that prosecutors regularly refuse favorable offers of probation to those with prior probation revocations on their criminal records. Again, this is not a disability imposed by law. Instead, the decisions to negotiate the terms of a voluntary plea with a defendant and offer probation falls within “traditional prosecutor discretion,” which “allows prosecutors to plea- \*375 bargain with offenders in *some* cases, saving the public the expense of criminal prosecutions.” *State v. Martinez*, 2013 UT 23, ¶ 16, 304 P.3d 54 (emphasis added) (citation and internal quotation marks omitted). That a prior probation revocation is a disadvantage that generally follows those persons charged with crimes does not make it a legal consequence of the sort pertinent to the collateral consequence exception; rather, it is contingent and speculative. *See Barnett v. Adams*, 2012 UT App 6, ¶ 9, 273 P.3d 378 (declining to consider “potential legal impairments that generally impact a person” in like circumstances where no injury “actually suffered” or “even likely [to be] suffered” was demonstrated by appellant).

¶46 Thus, because Legg has not demonstrated the sort of collateral legal consequences related to this probation revocation that are necessary to invoke the collateral consequences exception to the mootness doctrine, he has not met the standard necessary to avoid dismissal. Accordingly, we dismiss his appeal as moot.


## CONCLUSION

¶47 We disavow that the mootness holdings regarding collateral consequences in the context of probation revocations from two of our prior cases, *State v. Allen*, 2015 UT App 163, 353 P.3d 1266, and *State v. Warner*, 2015 UT App 81, 347 P.3d 846. As a consequence, we follow precedent that preceded those two cases in concluding that Legg's appeal is moot and that he has failed to demonstrate that his case fits within a recognized mootness exception. Accordingly, because mootness is a jurisdictional bar, we have no alternative but to dismiss this appeal.

## All Citations

380 P.3d 360, 2016 UT App 168

## Addendum B

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by State v. Bilek, Utah App., March 2, 2017

324 P.3d 656  
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,  
v.  
John L. LEGG Jr., Defendant and  
Appellant.

No. 20120473–CA.

|  
April 10, 2014.

**Synopsis**

**Background:** State petitioned to revoke defendant's probation and impose original sentence on conviction for aggravated assault with a deadly weapon. The Third District Court, Salt Lake Department, Ryan M. Harris, J., granted petition and impose original sentence. Defendant appealed.

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

[1] remand was necessary for trial court to indicate the evidence relied on or the reasons for finding that defendant willfully possessed a controlled substance with knowledge of its narcotic character;

[2] trial court made the necessary indication on the record as to the evidence relied on or the reasons for finding that defendant had willfully failed to be cooperative, compliant, and truthful with his probation officer;

[3] remand was necessary for trial court to indicate the evidence relied on or the reasons for finding that defendant willfully violated the terms and conditions of his probation by failing to establish a place of residence or report his whereabouts on a daily basis; and

[4] counsel's failure to object to trial court's finding that defendant violated his probation by failing to be cooperative, compliant, and truthful with his probation officer was not ineffective assistance.

Affirmed in part, reversed in part, and remanded.

West Headnotes (17)

[1] **Criminal Law**

⚙️ Revocation of probation or supervised release

A trial court's decision to revoke probation is reviewed for an abuse of discretion.

1 Cases that cite this headnote

[2] **Criminal Law**

⚙️ Necessity of Objections in General



Plain error is established only if: (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, meaning, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, confidence in the verdict is undermined.

1 Cases that cite this headnote

<sup>[3]</sup> **Criminal Law**

↔ Counsel for accused

A claim of ineffective assistance of counsel, when raised on appeal for the first time, presents a question of law. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

<sup>[4]</sup> **Sentencing and Punishment**

↔ Violation of probation condition

**Sentencing and Punishment**

↔ Degree of proof

To revoke probation, the trial court must find a violation of the probation agreement by a preponderance of the evidence.

4 Cases that cite this headnote

<sup>[5]</sup> **Sentencing and Punishment**

↔ Violation of probation condition

**Sentencing and Punishment**

↔ Degree of proof

To revoke probation, the trial court must find, by a preponderance of the evidence, that the violation was willful, and not merely the result of circumstances beyond the probationer's control.

2 Cases that cite this headnote

<sup>[6]</sup> **Sentencing and Punishment**

↔ Violation of probation condition

A single violation of probation is legally sufficient to support a probation revocation.

2 Cases that cite this headnote

<sup>[7]</sup> **Controlled Substances**

↔ Elements in general

**Controlled Substances**

↔ Knowledge and intent

To prove possession of a controlled substance, the State must establish that the accused exercised dominion

and control over the drug with knowledge of its presence and narcotic character. West's U.C.A. § 58-37-8(2)(a)(i).

Cases that cite this headnote

Cases that cite this headnote

[8] **Criminal Law**  
⚙️ Probation

Before appellate court can properly address the issue of insufficient evidence in the context of an alleged violation of probation, it must first determine if the trial court revealed its reasoning and the evidence upon which it relied in a way that satisfies the due process requirements of a probation revocation hearing. U.S.C.A. Const.Amend. 14.

[10] **Sentencing and Punishment**  
⚙️ Necessity and purpose

When a probation revocation hearing is recorded, a written finding as to the evidence relied on and reasons for revoking probation is constitutionally required only if the transcript and record before the judge do not enable a reviewing court to determine the basis of the judge's decision to revoke probation.

Cases that cite this headnote

Cases that cite this headnote

[9] **Constitutional Law**  
⚙️ Notice and hearing; proceedings

The minimum due process protections applicable to probation revocation proceedings include a written statement by the fact finders as to the evidence relied on and reasons for revoking probation. U.S.C.A. Const.Amend. 14.

[11] **Criminal Law**  
⚙️ Sentence  
**Sentencing and Punishment**  
⚙️ Necessity and purpose

If the evidence relied on and the reasons for revoking probation are not revealed, then a remand for a rehearing is appropriate.

Cases that cite this headnote

[12] **Criminal Law**  
⚙️ Sentence

## **Sentencing and Punishment**

### **☛ Sufficiency**

Remand was necessary for trial court to indicate the evidence relied on or the reasons for finding that defendant willfully possessed a controlled substance with knowledge of its narcotic character, as was necessary to support revocation of defendant's probation; trial court originally found only that defendant had control of the substance, "whatever it was," and that, more likely than not, he was aware of its presence, and after defendant's trial counsel objected, trial court promptly revised its findings to meet the applicable legal requirement, but it failed to give any indication of its basis for doing so. West's U.C.A. § 58-37-8(2)(a)(i).

1 Cases that cite this headnote

[13] **Sentencing and Punishment**  
**☛ Sufficiency**

Trial court made the necessary indication on the record as to the evidence relied on or the reasons for finding that defendant had willfully failed to be cooperative, compliant, and truthful with his probation officer, as was necessary to support revocation of defendant's probation based on violation of that term or condition of probation; evidence and

statements contained in the record made the evidentiary basis for this finding sufficiently clear.

2 Cases that cite this headnote

[14] **Sentencing and Punishment**  
**☛ Defenses and objections**

If a defendant's failure to comply with terms and conditions of probation resulted from problems beyond his control, his probation cannot be revoked.

Cases that cite this headnote

[15] **Criminal Law**  
**☛ Sentence**  
**Sentencing and Punishment**  
**☛ Sufficiency**

Remand was necessary for trial court to indicate the evidence relied on or the reasons for finding that defendant willfully violated the terms and conditions of his probation by failing to establish a place of residence or report his whereabouts on a daily basis; trial court did not explain whether it found the violation to be the result of defendant's failure to establish a residence of record or whether it found the violation to be the result of

defendant's failure to call in with updated "residence" information every night, and a showing that defendant had the means to comply with the residence requirement was necessary to establish a willful violation.

Cases that cite this headnote

[16]

### **Criminal Law**

➡ Other particular issues

Trial counsel's failure to object to trial court's finding that defendant violated his probation by failing to be cooperative, compliant, and truthful with his probation officer by not calling his probation officer on most days was not ineffective assistance of counsel; the record and transcript supported trial court's finding on this point, meaning an objection would have been unavailing. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[17]

### **Criminal Law**

➡ Particular Cases and Issues

Failure to raise futile objections does not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend.

6.

1 Cases that cite this headnote

### **Attorneys and Law Firms**

\*658 Joanna E. Landau, for Appellant.

Sean D. Reyes and Jeanne B. Inouye, for Appellee.

Judge GREGORY K. ORME authored this Opinion, in which Judges J. FREDERIC VOROS JR. and STEPHEN L. ROTH concurred.

### **Opinion**

ORME, Judge:

¶ 1 John L. Legg Jr. appeals the trial court's decision to revoke his probation and impose the original sentence on his convictions for aggravated assault with a deadly weapon, a third degree felony, Utah Code Ann. § 76-5-103 (LexisNexis 2012), and for possession of a dangerous weapon by a restricted person, a third degree felony, *id.* § 76-10-503. Because of concerns we have with the revocation decision, we remand for further consideration by the trial court.

## BACKGROUND

¶ 2 In reviewing a revocation of probation, we recite the facts in the “light most favorable to the trial court’s findings.” *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). Here, the trial court’s findings were made orally from the bench and were relatively sparse. Thus, our recitation of the facts also includes findings implicitly made by the trial court and matters that are undisputed in the record.

¶ 3 The day he completed the jail term that was a component of his probation, Legg met with his probation officer to go over his probation agreement. Legg was particularly concerned about the requirement in the agreement that he establish a residence of record. He told the probation officer he was homeless and had no savings. The probation officer instructed Legg to check in by telephone every day until he established a residence. Legg claimed that he did not remember any such instruction, but it is undisputed that Legg failed to call on most days. After about a week, however, Legg showed up for a scheduled in-person interview with his probation officer and was arrested for suspected probation violations.

¶ 4 During a search incident to the arrest, Legg’s probation officer discovered a very small amount of cocaine—less than one-tenth of a normal dose—in the bottom of a pill bottle where Legg was storing his prescription medicine. A family member gave the pill bottle to Legg so he would have a more convenient method for storing his pills than in the bulky containers provided to him by jail personnel upon his release. He claimed to have never noticed

the thirty-four to thirty-six milligrams of white substance in the bottle even though, on a regular basis, he “dumped” the pills out to take them as prescribed and returned the remaining contents to the bottle. A drug test administered at the same time showed that Legg had not been using cocaine. Nevertheless, the State initiated a separate criminal proceeding against Legg for possession of a controlled substance. In the ensuing trial, the jury returned a verdict of not guilty.

¶ 5 During the subsequent evidentiary hearing to consider revoking Legg’s probation, which is the subject of this appeal, the trial court heard testimony from the probation officer and from Legg and considered the physical evidence of the cocaine. The trial court found, with our emphasis, that it was “more likely than not that [Legg] would know that there was a substance in there, *whatever it was*.” Legg’s attorney pointed \*659 out that, in order to find a violation, the court had to be convinced that Legg had knowledge of the narcotic character of the substance, not just that he had control over it and had knowledge of its presence, “*whatever it was*.” Without identifying any additional evidence, the trial court then immediately revised its finding: “I think at least by a preponderance I’m going to find that Mr. Legg knew that that was a controlled substance in the bottle[.]”

¶ 6 At the conclusion of the hearing, the trial court found that Legg had violated the terms of his probation in three ways: (1) he knowingly possessed a controlled substance; (2) he failed to be cooperative, compliant, and truthful with his probation officer; and

(3) he failed to establish a residence of record. In doing so, however, the trial court expressed concerns about revoking probation so quickly and opined that Legg's probation officer "had an awful quick trigger on Mr. Legg in this case."

## ISSUES AND STANDARDS OF REVIEW

<sup>[1]</sup> ¶ 7 Legg argues that the trial court did not properly focus on the requirement that probation violations must be willful and that the evidence was insufficient to support a finding that any violation of the probation agreement was willful. We review a trial court's decision to revoke probation for an abuse of discretion. *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990).

<sup>[2]</sup> ¶ 8 Legg did not preserve this issue for appeal but argues that the trial court was plainly in error in not focusing on the requirement of willfulness. Plain error is established only if: "(i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993).

<sup>[3]</sup> ¶ 9 Legg also asserts that he had ineffective assistance of counsel. A claim of ineffective assistance of counsel, when raised on appeal for the first time, presents a question of law. *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

## ANALYSIS

<sup>[4]</sup> <sup>[5]</sup> ¶ 10 To revoke probation, the trial court must find a violation of the probation agreement by a preponderance of the evidence. *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct.App.1994). In addition, the trial court must find, also by a preponderance of the evidence, that the violation was willful, *see State v. Maestas*, 2000 UT App 22, ¶ 24, 997 P.2d 314, and not merely the result of circumstances beyond the probationer's control, *see State v. Hodges*, 798 P.2d 270, 277 (Utah Ct.App.1990).

<sup>[6]</sup> ¶ 11 We recognize that a single violation of probation is legally sufficient to support a probation revocation. *See Jameson*, 800 P.2d at 804 ("The decision to grant, modify, or revoke probation is in the discretion of the trial court."). But considering the expressed qualms of the trial court about the revocation decision, it is appropriate to address each finding individually. And because it appears to have been the totality of the three violations found by the trial court that prompted the trial court's decision to revoke notwithstanding its misgivings, it is less than obvious in this case that the trial court would have exercised its discretion the same way if any one of the three violations was not properly established.

### I. Possession of a Controlled Substance

[7] ¶ 12 Legg argues that there was insufficient evidence to show that he knowingly possessed a controlled substance. To prove possession of a controlled substance in violation of Utah Code section 58-37-8(2)(a)(i), the State must establish “that the accused exercised dominion and control over the drug with knowledge of its presence and narcotic character.” *State v. Winters*, 16 Utah 2d 139, 396 P.2d 872, 874 (1964). *Accord State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct.App.1991).

¶ 13 The record is more than sufficient to show, at least by a preponderance of the evidence, that Legg exercised dominion and control over the substance in his pill bottle \*660 that later proved to be cocaine and that he had knowledge of its physical presence. He had exclusive control over the pill bottle for about a week, and the trial court did not exceed its discretion in inferring that by “dumping” out the pills on a regular basis it was more likely than not that Legg had knowledge of its presence. It is less clear, however, that Legg had knowledge of the substance’s narcotic character. This is an essential element of the violation. If Legg had no idea what the substance at the bottom of his pill bottle was, then it cannot be said that he *willfully* violated his probation agreement by possessing a controlled substance. Counsel below was correct in raising a timely concern with the court that it was not enough to find that Legg knew the substance, “whatever it was,” was in the pill bottle. Instead, the trial court needed to find that Legg also knew of the narcotic character of the substance in order to conclude that Legg violated the terms of his probation.

[8] ¶ 14 The trial court acknowledged this and amended its finding to include that Legg had the requisite knowledge, but it did so without any reference to evidence on which it may have relied or the rationale for its immediately revised reasoning. Legg’s argument about the insufficiency of the evidence in this regard is well taken. Most tellingly, at one point in the hearing, Legg’s counsel complained that there was no basis for assuming that Legg would be able to identify cocaine residue because “there has never been any evidence that he has a history with cocaine.” In response, the State conceded, “We didn’t bring that out in any of this.” However, before we can properly address the issue of insufficient evidence, we must first determine if the trial court revealed its reasoning and the evidence upon which it relied in a way that satisfies the due process requirements of a probation revocation hearing. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

[9] [10] [11] ¶ 15 In *Gagnon*, the United States Supreme Court held that the minimum due process protections applicable to probation revocation proceedings include “ ‘a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].’ ” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and extending *Morrissey*’s parole revocation rule to probation hearings). The Court has explained that the “written statement required by *Gagnon* ... helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by

the evidence.” *Black v. Romano*, 471 U.S. 606, 613–14, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985). But when a probation revocation hearing is recorded, a written finding is “constitutionally required only if the transcript and record before the judge do not enable a reviewing court to determine the basis of the judge’s decision to revoke probation.” *Morishita v. Morris*, 702 F.2d 207, 210 (10th Cir.1983). If the “evidence relied on and the reasons for revoking” probation are not revealed, then a remand for a rehearing is appropriate. *State v. Hodges*, 798 P.2d 270, 275 (Utah Ct.App.1990).

¶ 16 In *Hodges*, the record contained some evidence supporting probation revocation, but other evidence—letters from a social worker and a corrections supervisor—was absent from the record on appeal. *Id.* at 273. In its finding, the trial court in *Hodges* did not make it clear how much it had relied on the missing letters and how much it had relied on the other evidence. *Id.* at 274. We remanded because “[t]he record on review [did] not adequately reveal the evidence relied on by the court.” *Id.* at 275.

[12] ¶ 17 As in *Hodges*, the record and transcript available in this case do not readily reveal the evidence relied on or the reasons for finding that Legg willfully possessed a controlled substance with knowledge of its narcotic character. The trial court originally found only that Legg had control of the substance, “whatever it was,” and that, more likely than not, he was aware of its presence. After Legg’s counsel objected, the trial court promptly revised its findings to meet the applicable legal requirement, but it failed to give any

indication of its basis for doing so.

\*661 ¶ 18 The State directs us to a confidential competency evaluation ordered by a trial court in a previous matter as evidence of Legg’s familiarity with cocaine. During the court-ordered competency evaluation, Legg made potentially incriminating statements to a social worker. The trial court did not reveal if it relied on this evidence or not, although it apparently was among the voluminous materials before the court.

¶ 19 Because we cannot determine from the record what evidence, if any, the trial court relied on in finding that Legg had knowledge of the narcotic character of the substance in his pill bottle, we cannot conclude that Legg willfully violated his probation. We therefore remand to the trial court to identify the evidence it relied on and its reason for moving so quickly from a finding of “whatever it was” to a finding of knowledge that the substance was cocaine. *See Black*, 471 U.S. at 613–14, 105 S.Ct. 2254 (holding that without a finding from the trial court detailing the evidence relied on and the reasons for probation revocation, there will not be “an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence”).

## II. Failure To Be Cooperative, Compliant, and Truthful

¶ 20 Legg argues that the evidence is insufficient to show that he willfully failed



to be cooperative, compliant, and truthful with his probation officer. The probation officer testified that he instructed Legg to check in by telephone every day until he established a residence. Legg failed to do so. The State produced evidence that Legg could have called every day if he had wanted to do so. While it may have been inconvenient at times, Legg admitted that he did have access to telephones. It is also clear that Legg had the correct telephone number for his probation officer because he called and left two messages on the second day of his probation. The trial court found the probation officer's testimony to be more reliable and ruled that Legg's failure to call was a willful violation of his probation agreement.

<sup>[13]</sup> ¶ 21 Again, the trial court did not explicitly reveal the evidence relied on or its reasoning in reaching this conclusion, *see supra* ¶ 19, but on this issue the evidence and statements contained in the record make the evidentiary basis for this finding sufficiently clear. *See Morishita v. Morris*, 621 P.2d 691, 693 n. 2 (Utah 1980) (“[T]he transcript, in which many statements by the judge appear, reveals the judge’s thought process and the conclusions he drew from the evidence. An entry of formal findings of fact and conclusions of law would add nothing[.]”). Concerning the first prong of the plain error test, we do not conclude that the trial court made any error, plain or otherwise, in connection with this ruling. *See State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). The evidence was sufficient to reasonably conclude that Legg knew he was supposed to call, that he had the means to call, and that his failure to consistently do so was willful. *See State v. Brady*, 2013 UT

App 102, ¶ 7, 300 P.3d 778 (concluding that findings of willfulness in the probation revocation context can be implicit).

### III. Failure To Establish a Residence

<sup>[14]</sup> ¶ 22 Legg argues that the court plainly erred because the evidence was insufficient to show that he willfully failed to establish a residence of record. Legg argues that the trial court based its finding solely on the undisputed fact that Legg remained homeless after one week of probation. If this was, in fact, the trial court’s reasoning, then it may have plainly erred. If an “appellant’s failure ... resulted from problems beyond his control, his probation cannot be revoked.” *State v. Hodges*, 798 P.2d 270, 277 (Utah Ct.App.1990). On appeal, however, the State argues that the requirement to call every day was an accommodation to Legg that effectively replaced the requirement that he establish a residence of record. This allowed Legg to remain transient so long as he reported his temporary “residence of record” every night.

<sup>[15]</sup> ¶ 23 The trial court, however, did not explain whether it found the violation to be the result of Legg’s failure to establish a residence of record or whether it found the violation to be the result of Legg’s failure to call in with updated “residence” information every night. It certainly appears that it was \*662 the former, although the trial court cut short any opportunity to flesh out the basis for this claimed violation. The judge stated:

I think I can find based on

the evidence that has been presented today that Mr. Legg did fail to establish a residence of record and that ... he did fail to be cooperative, compliant and truthful with certain dealings.... So I'm going to make a finding without even hearing from you folks on argument ... that those two have been violated.

This finding leaves us without “adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.” *See Black v. Romano*, 471 U.S. 606, 613–14, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985). Accordingly, we remand to the trial court to identify the facts on which it relied in concluding that Legg willfully failed to establish a residence of record.

#### IV. Ineffective Assistance of Counsel

<sup>[16]</sup> <sup>[17]</sup> ¶ 24 Legg argues that he received ineffective assistance of counsel because his trial counsel failed to object to the trial court’s revocation of probation without sufficient evidence of the willfulness of Legg’s violations. We conclude that trial counsel’s failure to object to the finding that Legg violated his probation by failing to be cooperative, compliant, and truthful with his probation officer—i.e., by not calling his probation officer on most days—was not ineffective. As previously discussed, *see*

*supra* ¶ 21, the record and transcript support the trial court’s finding on this point, meaning an objection would have been unavailing. “Failure to raise futile objections does not constitute ineffective assistance of counsel.” *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546. As a result, we conclude that trial counsel was not ineffective in this regard. And because we have already remanded for reconsideration on the remaining issues, it is unnecessary to address the effectiveness of counsel with respect to those issues.

#### CONCLUSION

¶ 25 We affirm the finding that Legg willfully violated his probation agreement by failing to be cooperative, compliant, and truthful with his probation officer. But we are not confident that, standing on its own, the single violation that we affirm would have resulted in a revocation of probation. We remand on the issues of possession of a controlled substance and failure to establish a residence of record for further consideration and explanation by the trial court. On remand, the trial court must reassess whether, under all the circumstances, Legg’s probation should be revoked.

#### All Citations

324 P.3d 656, 758 Utah Adv. Rep. 17, 2014 UT App 80

State v. Legg, 324 P.3d 656 (2014)

758 Utah Adv. Rep. 17, 2014 UT App 80

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## Addendum C



State of Utah

GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

# Utah Department of Corrections

## Division of Institutional Operations

ROLLIN COOK  
*Executive Director*

LONDON STROMBERG  
*Deputy Executive Director*

JERRY POPE  
*Director, Division of Institutional Operations*

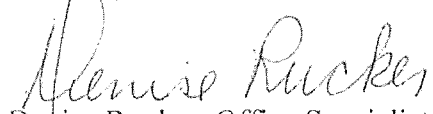
July 15, 2015

Re: John Lyle Jr Legg DOB: December 13, 1968 OFF# 43079

To Whom It May Concern:

This letter is to confirm that the above named individual was incarcerated under the jurisdiction of the Utah Department of Corrections. This inmate was most recently received on May 4, 2012. This inmate was Discharged on July 15, 2015

Sincerely,

  
Denise Rucker, Office Specialist  
Utah State Prison  
DIO Records Department