

2016

**State of Utah, Plaintiff and Appellee. v. Dennis R. Atkinson,
Defendant and Appellant,**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee.

v.

DENNIS R. ATKINSON,
Defendant and Appellant,

Consolidated Case No. 20150640-CA

CONSOLIDATED BRIEF OF APPELLANT

ON APPEAL TO THE UTAH COURT OF APPEALS
FROM FIVE (5) JUDGMENTS ENTERED BY
THE FIFTH DISTRICT JUDICIAL COURT,
IN AND FOR IRON COUNTY, STATE OF UTAH

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ORAL ARGUMENTS/PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
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DENNIS R. ATKINSON,
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Consolidated Case No. 20150640-CA

CONSOLIDATED BRIEF OF APPELLANT

JURISDICTION

UTAH CODE ANN. §78A-4-103(2)(e) and UT. R. APP. P. 3 provide this Court with jurisdiction over this appeal from the *Judgment, Sentence and Commitment*, dated August 13, 2015, (Criminal No. 141500765; Appellate Case No. 20150640) (the “**20150640 Judgment**”); the *Judgment, Sentence and Commitment*, dated August 12, 2015, (Criminal No. 141500701; Appellate Case No. 20150641); (the “**20150640 Judgment**”; and collectively with the 20150641 Judgment; the 20150642 Judgment; the 20150704; and the 20150707 Judgment the “**Judgments**”) the *Judgment, Sentence, Commitment*, dated August 12, 2015, (Criminal No. 151500293; Appellate Case No. 20150642); (the “**20150640 Judgment**”; and collectively with the 20150641 Judgment; the 20150642 Judgment; the 20150704; and the 20150707 Judgment the “**Judgments**”) the *Judgment, Sentence, and Commitment*, dated August 12, 2015, (Criminal No. 141500700; Appellate Case No. 20150704); (the “**20150640 Judgment**”; and collectively with the 20150641 Judgment; the 20150642 Judgment; the 20150704; and the 20150707 Judgment the “**Judgments**”) and the *Judgment, Sentence, and Commitment*, dated August 12, 2015, (Criminal No. 151500294; Appellate Case No. 20150707) (the “**20150640 Judgment**”; and collectively

with the 20150641 Judgment; the 20150642 Judgment; the 20150704; and the 20150707 Judgment the “**Judgments**”); by the Honorable Keith C. Barnes of the Fifth District Court, Iron County, State of Utah. A copy of the 20150640 Judgment is attached hereto as Addendum “A” and incorporated herein by this reference. A copy of the 20150641 Judgment is attached hereto as Addendum “B” and incorporated herein by this reference. A copy of the 20150642 Judgment is attached hereto as Addendum “C” and incorporated herein by this reference. A copy of the 20150704 Judgment is attached hereto as Addendum “D” and incorporated herein by this reference. A copy of the 20150707 Judgment is also attached hereto as Addendum “E” and incorporated herein by this reference.

**STATEMENT OF ISSUES PRESENTED ON APPEAL, PRESERVATION AND
STANDARD OF REVIEW**

ISSUE I: *Did the trial court abuse its discretion in sentencing by improperly weighing mitigating and aggravating circumstances, particularly given the proximate cause of the crimes attributable to defendant’s physical disabilities where application of the American’s With Disabilities Act, (“**ADA**”) is non-discretionary for public entities providing services, in addition to extenuating family circumstances with defendant’s fiancée’s diagnosis with progressive cancer, and well as defendant’s sincere remorse and acceptance of accountability; instead giving greater weight to the number of crimes committed and that defendant’s brother was directly impacted?*

PRESERVATION: After pleading guilty to two (2) counts of DUI, one count of Identity Theft, one count of Forgery, and one count of Failure to Register as a Sex Offender, Atkinson addressed the court at the sentencing hearing held July 21, 2015. Atkinson addressed the trial court stating that his fiancé was unable to make it to his sentencing because she had been diagnosed with cervical cancer that had moved into her organs. R106:5. Atkinson asked for a chance so that he could be there for his fiancé and his family. *Id.* Atkinson admitted that he had made mistakes in the past but was committed to doing the right thing and to no longer put himself in those situations. *Id.* Atkinson indicated that he had recently been declared

disabled due to a back injury, needed shoulder surgery, and realized he was self-medicating with illegal substances. R106:6. In the Assessment presented to the court, Atkinson described his injuries as a “chronic medical problem which interferes with his life.” Atkinson indicated that his lower spine was deteriorating partly from a prior injury and also genetics. (20150641) R0012; (20150704) R0013. Atkinson referenced a car accident in which he had been involved that resulted in his suffering neck, shoulder, and knee injuries as well as damage to his spine and back. *Id.* Atkinson’s trial counsel, Jeffrey Slack, requested that Atkinson be allowed to serve county time on probation to a substance abuse treatment center. R106:4.

STANDARD OF APPELLATE REVIEW (UT. R. APP. P.9(d)(4)): “We will not overturn a sentence unless it exceeds statutory or constitutional limits, the judge failed to consider all legally relevant factors, or the actions of the judge were so inherently unfair as to constitute abuse of discretion.” *State v. Sotolongo*, 2003 UT App 214, ¶ 3, 73 P.3d 991 (citations and internal quotation marks omitted); *see also State v. Boyd*, 2001 UT 30, ¶ 31, 25 P.3d 985. “The decision whether to grant or deny probation rests ‘within the sound discretion of the judge who hears the case.’” *State v. Killpack*, 2008 UT 49, ¶ 59, 191 P.3d 17; *cited with approval State v. Erskine*, 2011 UT 49, ¶¶2, 4, 246 P.3d 1218. “An appellate court may only find abuse ‘if it can be said that no reasonable [person] would take the view adopted by the trial court.’” *Id.* (quoting *State v. Wright*, 893 P.2d 1113, 1120 (Utah App. 1995)); *see Erskine* at ¶ 4.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The following determinative constitutional and statutory provisions are attached hereto as Attachment “F” in accordance with UT. R. APP. P. 24(a)(6):

A. U.S. CONST. AMEND. VI

B. Rehabilitation Act, 29 U.S.C.A. §794(a) and (b)(1)(A) and (B)

C. ADA, 42 U.S.C.A. § 12102

D. ADA, 42 U.S.C.A. § 12131

E. ADA, 42 U.S.C.A. § 12132

F. UT. R. CRIM P. 22(a)

G. UTAH CODE ANN. §76-3-201(2)

H. UTAH CODE ANN. §77-18-1(2)(a)

STATEMENT OF CASE¹

On November 13, 2014, the State filed an *Information* charging Atkinson with one (1) count of Driving Under the Influence of Alcohol and/or Drugs, a Third Degree Felony; and one (1) count of Alcohol Restricted Driver, a Class B Misdemeanor under district court case number 141500701. (20150641) R001-2. The State issued a *Summons* for Atkinson to report to the Iron County Jail to be booked and released. (20150641) R007-8.

On November 13, 2014, the State filed a second *Information* charging Atkinson with one (1) count of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony; one (1) count of Alcohol Restricted Driver, a class B misdemeanor; (1) count of Failure to Stay in One Lane, a class C Misdemeanor; one (1) count of Open Container in a Vehicle, a class C misdemeanor; and one (1) count of Failure to Wear Safety Belt or Use Child Restraint, an infraction under district court case number 141500700. (20150704) R001-3. The State filed

¹ This appeal is a consolidation of five separate cases involving the same defendant. For purposes of this section, the records are identified separately by their appellate numbers.

a *Summons* for Atkinson to be booked into and released from the Iron County Jail. (20150704) R008-9.

On December 18, 2014, the State filed a third *Information* charging Atkinson with one (1) count of Failure to Register as a Sex Offender, a third degree felony; and one (1) count of Retail Theft, a class B Misdemeanor under district court case number 141500765. (20150640) R003-4.

On December 22, 2014, Atkinson's *Substance Use Disorder Assessment* (the "Assessment") was filed with the trial court. (20150641) R0011-4; (20150704) R0012-5. During the Assessment, Atkinson expressed that his main goal for treatment would be to "remain sober." Atkinson described his injuries as a "chronic medical problem which interferes with his life." (20150641) R0012; (20150704) R0013. Atkinson indicated that his lower spine was deteriorating partly from a prior injury and also genetics. Atkinson referenced a car accident in which he had been involved that resulted in his suffering neck, shoulder, and knee injuries as well as damage to his spine and back. (20150641)*Id.*; (20150704) *Id.*

In the *Substance Abuse Subtle Screening Inventory* (the "Screening Inventory") portion of the Assessment, Annie Yahne ("Yahne"), a Licensed Clinical Social Worker, noted the following:

Atkinson's scores indicate he is at a relatively high risk for legal problems and other types of norm violations. Since substance usage increased the likelihood of impulsive control problems, the treatment plan should include a component directed toward substance use, if there is any indication that the client is at a high risk for developing substance use problems. Structured, didactic, cognitive-behavioral interventions may be helpful.

(20150641) R0012-3; (20150704) R0013-4. At the end of Atkinson's Assessment, Yahne recommended the following for Atkinson:

It is recommended that Atkinson receive Level 1.0 Outpatient Treatment. This will consist of psycho-educational classes such as Prime for Life to assist him in identifying the consequences of high-risk behaviors, as well as determining his risk factors due to genetics and the environment. Additionally, it is recommended that Atkinson receive a minimum of four individual mental health counseling sessions to address underlying issues that may be directly or indirectly contributing to his substance problems. These sessions should be held weekly or bi-weekly. Finally, it is recommended that Atkinson attend a minimum of four support groups specific to alcohol recovers such as AA or a 12 Step Recovery Group. As noted on the SATS Scale, due to his desire for a different lifestyle and the changes he is making to that end, he is likely to engage in treatment and seek out contact with a case manager or counselor. Atkinson has already looked into registering for a Prime For Life class which will provide psycho-education and access to information regarding community resources that may prove helpful in some manner. In the event that he receives any alcohol-related charges in the future, it would be appropriate for him to immediately begin a Level II. 1-Intensive Outpatient Counseling Program or higher.

(20150641) R0014; (20150704) R0015.

Atkinson initially appeared on January 6, 2015, for district court case numbers 141500765, 141500701, 141500700, at which time he was provided a copy of the *Information* and a preliminary hearing was scheduled for February 4, 2015. (20150640) R0015; (20150641) R0024; (20150704) R0020. Also during the initial appearance, Atkinson filled out an *Affidavit of Indigency*. The trial court appointed Jeffrey Slack (“**Slack**”) to represent Atkinson under district court case numbers 141500765 and 141500701. (20150640) R0020; (20150641) R0023. The trial court also appointed Jack Burns (“**Burns**”) to represent Atkinson under district court case number 141500700. (20150704) R0027.

On February 4, 2015, Slack moved for a continuance of the preliminary hearing in district court case numbers 141500765, 141500700 and 141500701 because Atkinson was not present. (20150640) R0034; (20150704) R0039; (20150641) R0036. The trial court granted the continuance and ordered Atkinson to pay witness fees prior to the next preliminary hearing

that was scheduled for February 11, 2015. (20150640) *Id.*; (20150704) *Id.*; (20150641) *Id.* On February 11, 2015, Atkinson's preliminary hearing was re-scheduled again due to a miscommunication that lead the State to call-off their witnesses who would be testifying under district court case number 141500765. (20150640) R0036. Atkinson had not paid the \$92.50 in witness fees, but committed to have the fee paid by the end of the week. (20150640) *Id.*

On February 11, 2015, Atkinson's preliminary hearing was held under district court case numbers 141500700 and 141500701. (20150704) R0041-2; (20150641) R0038-9. After the receiving of the evidence, the trial court found that the State had presented sufficient evidence regarding the crimes with which Atkinson had been charged and bound him over for trial. (20150704) R0042; (20150641) R0038.

On March 4, 2015, Atkinson waived his preliminary hearing under district court case number 141500765 and an arraignment hearing was scheduled for April 4, 2015. (20150640) R0038. On March 27, 2015, Burns stipulated to a trial continuance under district court case number 141500700, which was submitted by the State for the reason of witness unavailability (20150704) R0052-3.

On March 31, 2015, Atkinson entered a not-guilty plea under district court case number 141500701 and the trial court scheduled a one (1) day jury trial to be held May 22, 2015. (20150641) R0040-1.

On April 14, 2015, Atkinson entered a not-guilty plea under district court case number 141500765 and the trial court scheduled a one (1) day jury trial for June 4, 2015. (20150640) R0040. Also on April 14, 2015, Slack stipulated to a trial continuance under district court case

number 141500701, which was submitted by the State for the reason of witness unavailability. (20150641) R0052.

On May 22, 2015, the State filed a fourth *Information* charging Atkinson with one (1) count of Identity Fraud, a third degree felony; one (1) count of Forgery, a third degree felony; one (1) count of Obtaining a Prescription Under False Pretenses, a third degree felony; and one (1) count of Theft, a class B misdemeanor under district court case number 151500293. (20150642) R0001-3. Also on May 22, 2015, the State filed a fifth *Information* charging Atkinson with one (1) count of Identity Fraud, a second degree felony; one (1) count of Theft, a second degree felony; one (1) count of Forgery, a third degree felony; three (3) counts of Obtaining a Prescription Under False Pretenses, a third degree felony under district court case number 151500294. (20150707) R0001-3.

On May 26, 2015, Atkinson had an Initial Appearance under district court case numbers 151500293 and 151500294, at which time a preliminary hearing was scheduled for June 2, 2015. (20150642) R0014-5 and (20150707) R0012-4. During the Initial Appearance, Atkinson filled out an *Affidavit of Indigency* (20150642) R0007-1; (20150707) R0006-1. On the *Affidavit* under employer information, Atkinson listed that disability insurance was his sole source of income. (20150642) R0007; (20150707) R0006. The trial court found Atkinson to be indigent and appointed Slack to represent Atkinson under district court case number 151500293. (20150642) R0011. The trial court additionally appointed Burns to represent Atkinson under district court case number 151500294. (20150707) R0010.

On June 2, 2015, a consolidated change of plea hearing was held for all five (5) of Atkinson's cases. During the hearing, Atkinson plead guilty to one (1) count of Failure to

Register as a Sex Offender, a third degree felony under district court case number 141500765 (20150640, R0064); one (1) count of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony under district court case number 141500701 (20150641, R0065); one (1) count of Identity Fraud, a third degree felony, under district court case number 151500293 (20150642, R0023-4); one (1) count of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony under district court case number 141500700 (20150704, R0065); and one (1) count of Forgery, a third degree felony under district court case number 151500294. (20150707, R0025).

The trial court scheduled a consolidated sentencing hearing in all five (5) cases and ordered Adult Probation and Parole (“**AP&P**”) to prepare a pre-sentence report (“**PSI**”). The State filed five (5) separate *Amended Information* to reflect Atkinson’s guilty pleas in five (5) of his criminal cases. (20150640) R0051-2; (20150641) R0077-8; (20150642) R0025-6; (20150704) R0066-7; (20150707) R0037-8. Atkinson initialed and signed five (5) separate *Statement of the Defendant in Support of Guilty Plea and Certificate of Counsel, and Order*, which were filed with the trial court on June 2, 2015 (collectively referred to as the “**Plea Agreement**”). (20150640) R0054-3; (20150641) R0067-6; (20150642) R0027-6; (20150704) R0068-8; (20150707) R0027-6.

One PSI report was drafted for all five (5) of Atkinson’s cases and filed with the trial court on July 16, 2015. (20150640) R0067-8; (20150641) R0081; (20150704) R0080-1; (20150642) R0038-9; (20150707) R0042-9. AP&P recommended that Atkinson be sentenced according to statute to a term of zero (0) to five (5) years in the Utah State Prison and be ordered to pay a fine in the amount of \$5,000.00 under district court case numbers 141500700,

141500701, 141500765, 151500293 and 151500294. *Id.* AP&P further recommended Atkinson pay restitution in the amount of \$7,747.47 to Valley View Medical Center under district court case number 151500594. (20150640) R0068; (20150641) R0081; (20150642) R0039; (20150704) R0081; (20150707) R0043. The PSI report suggested that Atkinson's sentencing matrix was intermediate sanctions/prison and that Atkinson needed a substance abuse evaluation and treatment. (20150640) R0068-9; (20150641) *Id.*; (20150642) *Id.*; (20150704) R0081; (20150707) R0043-4.

Atkinson provided a handwritten statement to be included in his PSI report. In the statement, Atkinson referred to his two (2) Driving Under the Influence offenses and how he "was trying to self-medicate with alcohol for the pain [he] was in." Atkinson admitted that because of the choices he had made, his fiancé and other family members had been financially victimized. Atkinson also realized that he had taken advantage of his brother by using his name, and hoped that his brother would "find it in his heart to forgive [him] one day." Atkinson further stated that he had recently been declared disabled. Atkinson indicated that all of his offenses were "linked to [him] trying to self-medicate." Atkinson expressed to the trial court that having medical insurance would enable him to be properly treated. Atkinson expressed that he wanted to try to avoid making poor choices in his life. (20150640) R0076; (20150641) R0089; (20150642) R0047; (20150704) R0089; (20150707) R0051. AP&P did not list any aggravating or mitigating circumstances that could have been considered during sentencing. (20150640) R0084; (20150641) R0097; (20150642) R0055; (20150704) R0097; (20150707) R0059.

Atkinson submitted a letter to the trial court on July 17, 2015. (20150642) R0056-7. In the letter, Atkinson expressed remorse for the crimes that he had committed and apologized to the trial court and his family. (20150642) R0056. Atkinson indicated that he had recently been declared disabled by the State of Utah, Judge Patricia Lammi and that he could provide documentation to prove that fact. *Id.* Atkinson indicated that his fiancé had been diagnosed with cancer. *Id.* Atkinson expressed that the thought of not being able to be there for his fiancé in her time of need was a harsher punishment than any sentence the trial court imposed. *Id.* Atkinson requested a lenient sentence and indicated that having been declared disabled would allow him to receive the proper treatment that he needed. (20150642) R0057.

A consolidated sentencing hearing was held on July 21, 2015. Under district court case number 141500765, Atkinson was sentenced to Failure to Register as a Sex Offender, a third degree felony, and ordered to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison. (20150640) R0086-7. Atkinson was ordered to pay a court security fee in the amount of \$33. *Id.* Under district court case number 141500700, Atkinson was sentenced to Driving Under the Influence of Alcohol and/or Drugs, a third degree felony, and ordered to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison. (20150704) R0098-9. Atkinson was ordered to pay a court security fee in the amount of \$33. *Id.* Under district court case number 141500701, Atkinson was sentenced to Driving Under the Influence of Alcohol and/or Drugs, a third degree felony, and ordered to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison. (20150641) R0099. Atkinson was ordered to pay a court security fee in the amount of \$33. *Id.* Under district court case number 151500293, Atkinson was sentenced to Identity Fraud, a third degree felony, and

ordered to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison. (20150642) R0061. Atkinson was ordered to pay a court security fee in the amount of \$33. *Id.* Under district court case number 151500294, Atkinson was sentenced to Forgery, a third degree felony, and ordered to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison (20150707) R0062. Atkinson was ordered to pay a court security fee in the amount of \$33. *Id.* The trial court ordered that district court case numbers 141500701, 141500765, 141500700, and 141500294 run concurrently; however, district court case number 151500293 would run consecutively. (20150640) R0087; (20150704) R0099; (20150641) R0099; (20150642) R0061; (20150707) R0062.

A letter written by a correctional officer with the Iron County Jail was filed with the trial court on July 21, 2015. (20150640) R0085, (20150642) R0059; (20150641) R100; (20150704) R100; (20150707) R0060. The letter provided details of how Atkinson had rendered aid to the correctional officer without any regards to his own personal safety. (20150640) R0085, (20150642) R0059; (20150641) R100; (20150704) R100; (20150707) R0060.

On July 28, 2015, a restitution hearing was held under district court case number 151500294. (20150707) R0064. During the restitution hearing, the court ordered that Atkinson pay restitution to Valley View Medical Center in the amount of \$6,126.91 as a direct result of his criminal activity. (20150707) *Id.*

On July 31, 2015, five (5) separate *Notice of Order of Bail/Commitment/Release order of Transportation to Prison* were filed, which remanded Atkinson to the custody of the Iron County Sheriff pending the transportation to the Utah State Prison to serve a term zero (0) to five (5)

years in criminal case numbers 141500765, 141500701, 151500293, 141500700 and 151500294. (20150640) R0088; (20150461) R101; (20150642) R0062; (20150704) R101, (20150707) R0071. The *Order* also indicated that district court case numbers 141500765, 141500701, 151500294 and 141500700 would run concurrently and that district court case number 201500293 would run concurrent. (20150640), (20150461), (20150642), (20150704), (20150707) *Id.*

On August 3, 2015, Atkinson filed three (3) separate *Notice of Appeal and Notice of Substitution of Counsel and Withdraw* under district court case numbers 141500765, 141500701, 151500293. (20150640) R0089; (20150461) R102; (20150642) R0063. On August 4, 2015, Matthew Carling, filed his *Notice of Appearance of Counsel (Appellate Matter)* under district court case numbers 141500765, 141500701 and 151500293. (20150640) R0093; (20150641) R108; (20150642) R0069.

On August 5, 2015, an *Order of Restitution* was entered that indicated Atkinson must pay restitution in the amount of \$6,126.91 to Valley View Medical Center under district court case number 151500294. (20150707) R0072. On August 11, 2015, Matthew Carling filed his *Notice of Appearance of Counsel (Appellate Matter)* under district court case numbers 141500701, 151500293. (20150641) R108 and (20150642) R0069.

On August 12, 2015, the 20150641 Judgment, 20150642 Judgment, 20150704 Judgment, and the 20150707 Judgment were filed with the trial court. (20150641) R116-8; (20150642) R0077-9; (20150704) R107-9; (20150707) R0081-3. The 20150641 Judgment indicated that Atkinson had plead guilty to the offense of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony. (20150641) R117. The 20150642 Judgment

indicated that Atkinson had plead guilty to the offense of Identity Fraud, a third degree felony. (20150642) R0078. The 20150704 Judgment indicated that Atkinson had plead guilty to the offense of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony. (20150704) R108. The 20150707 Judgment indicated that Atkinson had plead guilty to the offense of Forgery, a third degree felony. (20150707) R0082. In each of the four (4) Judgments, Atkinson was sentenced to serve a term of zero (0) to five (5) years in the Utah State Prison and placed into the custody of the Utah Department of Corrections. (20150641) R117; (20150642) R0078; (20150704) R108; and (20150707) R0082. Atkinson was ordered to pay a total of \$33 for a court security fee in all three Judgments. (20150641), (20150642), (20150704), and (20150707) *Id.* The trial court ordered that the sentence imposed in the 20150641, 20150640, 20150642, and 20150704 Judgments be served concurrently and the sentence imposed in the 20150707 Judgment served consecutively. (20150641), (20150642), (20150704), and (20150707) *Id.*

On August 13, 2015, the 20150640 Judgment was filed with the trial court. (20150640) R101-3. The 20150640 Judgment indicated that Atkinson had plead guilty to the offense of Failure to Register as a Sex Offender, a third degree felony. (20150640) R101. Atkinson was sentenced to serve a term of zero to five (0-5) years in the Utah State Prison and placed into the custody of the Utah Department of Corrections. (20150640) R102. Atkinson was ordered to pay a total of \$33 for a court security fee. (20150640) R102. The trial court ordered that the sentence imposed be served concurrently with the sentences imposed in the 20150704, 141500701 Judgments and be served consecutively with the 20150707 Judgment. (20150640) R102.

On August 19, 2015, counsel herein filed a *Notice of Appeal* under district court case number 141500700. (20150704) R114. On August 25, 2015, Atkinson's attorney, Jack Burns, filed a *Notice of Substitution of Counsel* under district court case numbers 141500700 and 151500294. (20150704) R112 and (20150707) R0086. On August 25, 2015, counsel herein filed a *Notice of Appeal* under district court case number 151500294. (20150707) R0088. This Court consolidated the 20150640, 20150641, 20150642 and the 20150704 Judgments prior to briefing on September 8, 2015. (20150640) R107. The Court consolidated the 20150707 Judgment with the 20150640 Judgment on October 14, 2015.

STATEMENT OF FACTS²

A. Sentencing Hearing – July 21, 2015

Atkinson came before the trial court on July 21, 2015, for a consolidated sentencing on a total of seven (7) criminal cases under district court case numbers 141500765, 141500701, 151500293, 141500700, 151500018 and 151500097. R106:2. Slack had an opportunity to review the PSI report prior to sentencing. *Id.* The State indicated that Atkinson had five (5) cases before the court for sentencing with two (2) cases being dismissed. R106:3. The State stipulated to the recommendations outlined in the PSI report. *Id.* The State argued that Atkinson has had a "bad couple of years in terms of criminal activity," and recommended that some of his cases run consecutively. *Id.*

Slack argued that the underlying issue that needed to be addressed with Atkinson was his "substance abuse issue." *Id.* Slack further argued that in all of Atkinson's cases, his

² All transcript references herein are to Appellate Case No. 20150640, although the hearings were consolidated between the five matters.

substance abuse played a role in the behaviors he was exhibiting. Slack argued that the majority of the charges would not have existed but for Atkinson's underlying issue with substance abuse. R106:4. Slack sought that Atkinson be sentenced to probation and that Atkinson only be released from county time for the purpose of treatment, which he would be required to possess and obtain. *Id.* Slack sought for Atkinson to receive one (1) more final opportunity to prove that he was serious about treatment and to show that the underlying issue was his substance abuse. *Id.*

In the alternative, Slack requested Atkinson's sentences run concurrently and his substance abuse issues be taken into consideration if the trial court found that prison was the appropriate sentence. *Id.* Slack further requested that if prison was the trial court's option, that the judgment contain a statement that would admonish or exhort the Board of Pardons to ensure that Atkinson received the substance abuse treatment he needed. *Id.* Slack referred the trial court to a letter that had been written by a correctional officer on Atkinson's behalf. R106:5. The letter provided details of how Atkinson had acted selflessly and rendered aid to another individual. *Id.*

Atkinson addressed the trial court stating that his fiancé was unable to make it to his sentencing because she had been diagnosed with cervical cancer that had moved into her organs. *Id.* Atkinson asked for a chance so that he could be there for his fiancé and his family. *Id.* Atkinson admitted that he had made mistakes in the past but was committed to doing the right thing and to no longer put himself in those situations. *Id.* Atkinson indicated that he obtained a substance abuse evaluation from Jamie through Cedar Walk-In; however, it did not appear that the evaluation was presented in court. *Id.* Atkinson indicated that he had recently

been declared disabled due to a back injury, needed shoulder surgery, and realized he was self-medicating with illegal substances. R106:6. Atkinson indicated that he had recently provided proof of Medicaid. *Id.* Medicaid would allow Atkinson to receive the proper treatment so he could be there for his fiancé and her daughter. Atkinson desired to do the right thing and not appear in court again. *Id.*

The State further argued that Atkinson had been to prison and on parole before. *Id.* The State indicated that Atkinson had several violations while on probation and/or parole. *Id.* The State indicated that Atkinson had several institutional disciplinary actions while being incarcerated. The State felt that Atkinson was not amenable for county time nor probation. *Id.*

The trial court applauded Atkinson for his assisting others while incarcerated and stated “that is what we do as people.” R106:7. The trial court stated that “we help people out when they are in need, we try to be honest, and a productive member of society.” *Id.* The trial court expressed hope that Atkinson would make “better decisions down the road.” *Id.* The trial court indicated that it was “not acceptable” that Atkinson plead guilty to five cases that had occurred within the span of two years. *Id.* The trial court expressed that the number of offenses committed and the offenses themselves were concerning. *Id.* The trial court also expressed concern for the community being in harm’s way, particularly when one of the victims was Atkinson’s own brother. *Id.*

The trial court sentenced Atkinson to serve zero to five (0-5) years in the Utah State Prison and pay a court security fee in the amount of \$33 for the charge of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony under district court case number

141500700 (20150704). *Id.* The trial court sentenced Atkinson to serve zero to five (0-5) years in the Utah State Prison and pay a court security fee in the amount of \$33 for the charge of Driving Under the Influence of Alcohol and/or Drugs, a third degree felony under district court case number 141500701 (20150641). *Id.* The trial court sentenced Atkinson to serve zero to five (0-5) years in the Utah State Prison and pay a court security fee in the amount of \$33 for the charge of Failure to Register as a Sex Offender, a third degree felony under district court case number 141500765 (20150640). R106:7-8. The trial court sentenced Atkinson to serve zero to five (0-5) years in the Utah State Prison and pay a court security fee in the amount of \$33 for the charge of Identity Fraud, a third degree felony under district court case number 151500293 (20150642). *Id.* The trial court also sentenced Atkinson to serve zero to five (0-5) years in the Utah State Prison and pay a court security fee in the amount of \$33 for the charge of Forgery, a third degree felony under district court case number 15150094 (20150707). *Id.* The trial court ordered that district court case numbers 141500700 (20150704), 141500701 (20150641), 141500765 (20150640), and 151500294 (20150707) run concurrent; however, district court case number 151500293 (20150642) would run consecutively. *Id.* Atkinson was taken into the custody of the Department of Corrections to begin serving his sentence. *Id.*

The State indicated that under district court case number 151500294 (20150707), there was a restitution claim in the amount of \$7,747.74 to be paid to Valley View Medical Center. *Id.* Slack stated that Atkinson is disputing the amount of restitution. *Id.* The State requested a restitution hearing be held. *Id.* The trial court scheduled the restitution hearing. R106:9.

The trial court indicated that Atkinson had thirty (30) days from the sentencing date to perfect an appeal by filing the appropriate paperwork with the court. *Id.* The trial court

dismissed two (2) cases under district court case numbers 151500018 and 151500097 without prejudice. *Id.*

SUMMARY OF ARGUMENT

The trial court abused its discretion in weighing mitigating and aggravating factors for sentencing Atkinson. It gave weight only to the number of crimes Atkinson had committed in the prior two (2) years, and the fact that his brother was a victim of Atkinson's Identity Theft charge; however, there were mitigating circumstances that were required to be given significant weight. Atkinson's crimes were all a product to some degree of his disabilities, which rendered him eligible for accommodations under the ADA, having admitted to the fact that he was self-medicating while he was applying for disability benefits. Those benefits finally came through during the pendency of these charges, which would have enabled Atkinson to obtain the services and help needed. Further, Atkinson had extenuating family circumstances in that his fiancé was diagnosed with progressive cervical cancer and his family would face realistic decimation if he were to be incarcerated in prison for any significant period of time away from her. Atkinson was additionally sincerely remorseful for his actions, both orally in sentencing as well as in a letter submitted to the court from Atkinson. These circumstances favored either a downward departure after consideration thereof, or a suspended sentence with jail and/or probation, a suspended sentence in favor of probation to enable Atkinson to receive the care he needed for his disabilities, or a sentence of probation given that such was available for these charges. Instead, the trial court erroneously provided the maximum sentence on each charge, a decision that requires reversal and remand for resentencing.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING BY IMPROPERLY WEIGHING MITIGATING AND AGGRAVATING CIRCUMSTANCES.

UTAH CODE ANN. § 77-18-1(7) provides that “[a]t the time of sentence, the court shall receive any testimony, evidence, or information the defendant ... desires to present concerning the appropriate sentence.” UT. R. CRIM. P. 22(a) states in pertinent part that, “[b]efore imposing sentence the court shall afford the defendant an opportunity to make a statement to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.” UTAH CODE ANN. §76-3-201(2) then provides the following:

Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

- (a) to pay a fine;
- (b) to removal or disqualification from public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment;
- (e) on or after April 27, 1992, to life in prison without parole; or
- (f) to death.

“[A]ny mitigating or aggravating circumstances found by the trial court must be supported by evidence, and the proponent of the circumstances bears the burden of proving its existence by a preponderance of the evidence.” *State v. Moreno*, 2005 UT App 200, ¶13, 113 P.3d 992. A determination of aggravating or mitigating circumstances is a factual finding and will not be reversed unless clearly erroneous. *See id.* at ¶¶ 12-13. “This should not be read to mean that the trial court’s sentencing decision is beyond review. The trial court is charged with identifying, on the record, the aggravating and mitigating circumstances that affect its sentencing decision, because ‘[s]entencing should be conducted with full information and with

careful deliberation of all relevant factors.” *Moreno* at ¶10, *citing State v. Strunk*, 846 P.2d 1297 (Utah 1993). “Aggravating and mitigating factors are primarily concerned with the ‘nature and circumstances of the crime’ and the ‘defendant’s character, background [or] history.’” *State v. Agruelles*, 2003 UT 1, ¶105, 63 P.3d 731. Our Utah Supreme Court has stated that, “[a]lthough courts must consider all legally relevant factors in making a sentencing decision, not all aggravating and mitigating factors are equally important, and ‘[o]ne factor in mitigation or aggravation may weigh more than several factors on the opposite scale.’ Thus, several mitigating circumstances claimed by a defendant may be outweighed by a few egregious aggravating factors.” *State v. Killpack*, 2008 UT 49, ¶59, 191 P.3d 17 (alteration in original)(citation and internal quotation marks omitted).

“A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system.” *State v. Lindsey*, 2014 UT App 288, ¶ 12, 340 P.3d 176, *quoting State v. McClendon*, 611 P.2d 728, 729 (Utah 1980). UTAH CODE ANN. §76-3-402(1) states as follows:

If at the time of sentencing the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, and after having given any victims present at the sentencing and the prosecuting attorney an opportunity to be heard, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

Ibid. Information concerning the appropriate sentence should relate to factors courts may consider in making sentencing determinations, including “rehabilitation,” “deterrence, punishment, restitution, and incapacitation.” *State v. Sotolongo*, 2003 UT App 214, ¶ 5, 73 P.3d 991, *quoting State v. Rhodes*, 818 P.2d 1048 (Utah App 1991). “So long as a statute clearly

specifies the maximum allowable penalty, it is not unconstitutional for sentencing judges to exercise their discretion in offering leniency.” *State v. Perea*, 2013 UT 68, ¶114, 322 P.3d 624, citing *State v. Shelby*, 728 P.2d 987, 988 (Utah 1986).

This Court “will not overturn a sentence unless it exceeds statutory or constitutional limits, the judge failed to consider all the legally relevant factors, or the actions of the judge were so inherently unfair as to constitute abuse of discretion.” *State v. Post*, 2015 UT App 162, ¶ 2, 354 P.3d 810, quoting *State v. Sotolongo*, 2003 UT App 214, ¶ 3, 73 P.3d 991 (citations and internal quotation marks omitted). “[T]he exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court.” *State v. Wright*, 893 P.2d 1113, 1120 (Utah 1995), citing *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978) (citing *State v. Harris*, 10 Wash.App. 509, 518 P.2d 237 (1974)). “The overriding consideration is that the sentence be just.” *Id.*

A Utah district court gave an insightful summation that “[p]robation ‘is for people who admit their guilt, acknowledge the enormity of what they have done and want to be helped.’” *State v. Ashcroft*, 2014 UT App 253, ¶ 6, 338 P.3d 247. “A defendant is not entitled to probation, but rather the [trial] court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interest.” *State v. Ashcroft*, 2014 UT App 253, 338 P.3d 247, citing *State v. Valdovinos*, 2003 UT App 432, ¶ 23, 82 P.3d 1167 (alteration in original) (citation and internal quotation marks omitted). “The granting or withholding of probation involves considering intangibles of character, personality and attitude, of which the cold record gives little inkling. These matters which are to be

considered in connection with the prior record of the accused, are of such nature that the problem of probation must of necessity rest within the discretion of the judge who hears the case.” *State v. Rhodes*, 818 P.2d 1048, 1049 (Utah App 1991), *quoting State v. Silbert*, 310 P.2d 388, 393 (1957). However, the “legal restriction” on such authority continues to exist, that “the trial court not exceed the bounds of discretion.” *Id.*

A. THE PROXIMATE CAUSE OF THE CRIMES WAS ATTRIBUTABLE TO DEFENDANT’S PHYSICAL DISABILITIES, AND APPLICATION OF THE AMERICAN’S WITH DISABILITIES ACT (“ADA”) IS NON-DISCRETIONARY ON THE COURT AS A PUBLIC ENTITY PROVIDING A SERVICE.

“The Federal Constitution is the ‘supreme law of the land’, and the obligation to guard and enforce every right secured by that constitution rests on the state courts equally with the federal courts.” *Smith v. O’Grady*, 312 U.S. 329, 61 S. Ct. 572, 85 L. Ed. 859 (1941); *State v. Briggs*, 2008 UT 83, ¶26, 199 P.3d 935. The Americans With Disabilities Act (“ADA”) is based in equality and states that, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” ADA, 42 U.S.C.A. § 12132. The ADA’s purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” as well as provide “enforceable standards” and “to invoke the sweep of congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities.” 42 U.S.C.A. §12101(b)(1), (2), and (4). Similarly, under 29 U.S.C.A. §794(a) and (b)(1)(A) and (B) of the Rehabilitation Act, it states as follows:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means *all of the operations of—*

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local governmental entity) to which the assistance is extended, in case of assistance to a State or local government; ...

...

any part of which is extended Federal financial assistance.

"[P]ublic entity" includes "(B) any department, agency, ... of a State or States or local government;" 42 U.S.C.A. § 12131. Our Utah Supreme Court recently acknowledged that Utah state agencies and Utah courts are both considered "public entities" under this provision of the ADA. *See, State In Interest of K.C.*, 2015 UT 92, ¶ 16, 362 P.3d 1248. Although the state agency in *K.C.* was the Division of Child and Family Services, their role is strikingly similar to a probation officer. Probation is a public service provided by the Utah Department of Corrections, Adult Probation & Parole, which public entity specifically lists the services provided to the public as "acting in the role of a police officer, court adviser, mentor and social worker" with duties that include "ensuring that they comply with conditions of probation ... assist[ing] offenders with obtaining the basic essentials to survive ... includ[ing] housing, employment, school, training, food, treatment, therapy and counseling." http://corrections.utah.gov/index.php?option=com_content&view=article&id=845:adult-probation-parole&catid=10&Itemid=262, accessed March 4, 2016; *see also* UTAH CODE ANN. §77-18-1(8)(a)(viii)(listing payment for probation services as a possible condition of

probation). Probation is commonly referred to by the courts as a “program.” See, e.g., *State v. Robinson*, 2014 UT App 114, ¶ 15, 327 P.3d 589 (defendant failed to abide by his “zero-tolerance probation program”); *State v. Ferree*, 784 P.2d 149, 151 (Utah 1989)(analyzing liability of corrections officials to public under “parole and probation programs”), *overruled on other grounds by Scott v. Universal Sales, Inc.*, 2015 UT 64, 356 P.3d 1172; *State v. LA.*, 2010 UT App 356, ¶2, 245 P.3d 213 (trial court referring to probation as “probation program” in its order). A federal district court has indicated that both the management of state prisons and the management of the court system are state or local responsibilities “of great importance” stating that “all of these functions are routinely understood to be covered by the Rehabilitation Act and the ADA notwithstanding that these functions are not expressly referred to in either of the statutes.” *Saunders v. Horn*, 960 F.Supp. 893, 899 (E.D. Pa. 1997). In analysis of the ADA, our United States Supreme Court stated that, “[a]s we have said before, the fact that a statute can be ‘ ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’ ’ ” *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215 (1998) *citing Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985) (citation omitted).

Although the ADA does not define the meaning of “services, programs or activities of a public entity,” the Rehabilitation Act defines a “program or activity” as “all of the operations of ... a local government.” *Frame v. City of Arlington*, 657 F.3d 215, 225 (5th Cir. 2011), *citing* 29 U.S.C. §794(b)(1)(A). The 10th Circuit in *Frame* further stated that “the Rehabilitation Act prohibits disability discrimination by recipients of federal funding. Like Title II, § 504 provides that no qualified individual with a disability ‘shall, solely by reason of her or his disability, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.’ The ADA and the Rehabilitation Act generally are interpreted *in pari materia*” *Id.* at 223, *citing* 29 U.S.C. §794(a).

Our highest court found that ADA’s Title II contains an “affirmative obligation to accommodate” as a “reasonable prophylactic measure, reasonably targeted to a legitimate end.” *Tennessee v. Lane*, 541 U.S. at 532-33, 124 S.Ct. 1978, 158 L.Ed. 820 (2004). In *Frame v. City of Arlington*, the 5th Circuit Court of Appeals analyzed this “affirmative obligation to accommodate” under the ADA by holding that, “[d]rawing from the text of §12132, an injury occurs (and a complete and present cause of action arises) under Title II when a disabled individual has sufficient information to know that he has been denied the benefits of a service, program, or activity of a public entity” however, “[t]he key point ... is that a ... wrongful act and a disabled individual’s injury need not coincide.” *Ibid.*, 657 F.3d 215 (5th Cir. 2011). The Court found that this would not create “unlimited potential ... liability” for the public entity since that public entity could “avoid liability whenever it chooses simply by [providing ADA protection] right the first time, or by fixing its original unlawful [violation].” *Id.*

In a recent federal district case from Illinois, the Court undertook the following analysis of the ADA:

Although the Rehabilitation Act and ADA do not explicitly address accommodations, their implementing regulations require public entities to make certain reasonable modifications for disabled individuals. *See* C.F.R. § 35.130(b)(7). Accommodations are “only ... required when necessary to avoid discrimination on the basis of a disability.” *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 751 (7th Cir.2006); 28 C.F.R. § 35.130(b)(7). Necessary means that “the desired accommodation will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability.” *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir.2002) (internal citations and quotations omitted). Accommodations must also be

“reasonable,” 28 C.F.R. § 35.130(b)(7), meaning that “it is both efficacious and proportional to the costs to implement it.” *Oconomowoc Residential Programs*, 300 F.3d 775 at 784 (citing *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir.1995)). A particular accommodation is considered unreasonable if the public entity “can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

Novak v. Hall, --- F.Supp.3d ---, 2015 WL 5768569 (N.D. Illinois 2015).

To prevail on a ADA claim an individual “must establish: (1) that he ... is a qualified individual with a disability; (2) that he ... was either excluded from participation in or denied the benefits of some public entity’s services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of [his] disability.” *Rohan v. Boseman*, 2002 UT App 109, ¶25, 46 P.3d 753, citing *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir.1999)(quoting *Tyler v. City of Manhattan*, 849 F.Supp. 1429, 1439 (D.Kan.1994)). As to qualifications for application of the ADA, the ADA provides the following definitions:

(1) Disability

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C.A. § 12102. In *Ball v. LeBlanc*, the Fifth Circuit Court stated that a person can be classified as disabled if he has a “physical or mental impairment that substantially limits one or more major life activities. *Id* at 792 F.3d 584, 596-7 (5th Cir. 2015). The Court went on to further state as follows:

The statute defines a major life activity in two ways. First, major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. *Id*. § 12102(2)(A). Second, a major life activity includes “the operation of a major bodily function.” *Id*. § 12102(2)(B). Such functions include, but are not limited to: the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Ibid at 597. “The ADA’s protections extend to persons recovering from drug or alcohol addiction.” *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), *citing* 42 U.S.C.A. § 12132.

“There are more than 54 million people in the United States who experience a form of disability.” *Disabled World*, “Substance Abuse and Persons with Disabilities”, July 22, 2013, <http://www.disabled-world.com/medical/pharmaceutical/addiction/serious.php>. “People with disabilities experience many risks that increase their chances for substance abuse negatively affecting their lives” such as societal enabling, health and medication issues, a lack

of identification of possible issues, and a lack of appropriate and accessible prevention and treatment services. *Id.* “As many as 1.5 million individuals with disabilities may need treatment for substance abuse disorders in any given year.” *See*, “Physically and Developmentally Disabled: Specialty Program for Physically and Developmentally Disabled Patients”, <http://wvadsinc.com/service/specialty-program-for-physically-and-developmentally-disabled-patients/>, accessed March 4, 2016, citing United States Department of Health and Human Services. “Persons with any type of disability experience substance abuse at rates 2 to 4 times greater than the general population.” *Id.* That number substantially increases when the person suffers spinal cord injuries, with the number approaching or exceeding 50%. *Id.* “[S]ubstance abuse prevention, intervention and treatment services are not attitudinally, physically, financially, or cognitively accessible to people with disabilities for a variety of reasons.” *Disabled World* (2013). The Social Security Administration released its *Average Wait Time Until Hearing Held Report (For the Month of January 2016)* with regard to obtaining disability benefits. *See*, https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html, accessed March 4, 2016. While one office in the United States had an average as low as 11 months, the longest wait time was 22 months. *Id.* The office located in Salt Lake City, Utah, reported an average wait time of 17 months from the hearing request date. *Id.* During this interim, many struggle with maintaining employment and lack the benefits necessary to obtain treatment for their disabilities. “[P]eople with disabilities often turn to drugs or alcohol as a means of coping with or self-medicating their problems.” *See*, “Substance Abuse and the Disabled”, <http://recoveryfirst.org/substance-abuse-and-the-disabled.html/>.

In an article titled “Jail Doesn’t Help Addicts. Let’s Stop Sending Them There” dated October 17, 2014, Kara Dansky, who is Senior Counsel for the American Civil Liberties Union Center for Justice wrote of a woman named Misti Barrickman, who was disabled by scoliosis who started taking Oxycontin to help with the pain and became addicted. <https://www.aclu.org/blog/jail-doesnt-help-addicts-lets-stop-sending-them-there>, accessed March 4, 2016. Unable to find large quantities of that drug, she eventually turned to what was readily available in order to self-medicate her pain: heroin. *Id.* She struggled with addiction over the next seven years, living between a tent and a jail cell where she racked up charges for possession and prostitution. *Id.* Law enforcement in Seattle, Washington, created the Law Enforcement Assisted Diversion program that focused on connecting people with drug addictions directly with treatment and services rather than jailing them. *Id.* Misti Barrickman no longer lives in a tent and has been sober as of the date of the article for two (2) years. *Id.*

Dansky noted that, “[f]or decades, this country has been waging a failed war on drugs. Drug use hasn’t gone down. Drugs are just as available as they used to be. Instead of solving our drug problem, we’ve become a society that seemingly disregards millions of lives...” *Id.* She wrote further that, “[d]rug addiction has become one of the many social problems that we’ve relegated to the criminal justice system. But as with homelessness and mental illness, handcuffs and jail cells haven’t made things better and have cost much more than the treatment and services that can. It doesn’t have to be this way. America can safely reduce our reliance on incarceration.” *Id.*

Attorney discipline proceedings as well as military court-marshal proceedings both provide helpful insight into the way in which an offense that is the product of a disability

should be weighed. In the military court-marshaling case of *United States v Cooley* (No. 18,841), it was held as follows:

When one's physical condition is such as actually to ... cause the commission of an offense, the question is not one of reasonableness, but whether the accused's illness was the proximate cause of his crime. This case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by his condition, and the question whether he acted reasonably does not enter into the matter.

Ibid., 16 USCMA 24, 36 CMR 180 (1966). The Office of the Presiding Judge of the Supreme Court of Colorado quoted the following caution taken from the American Bar Association comment to *Standard 9.3*:

Issues of physical and mental disability or chemical dependency [sic] offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantially contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight.

People v. Bendinelli, 329 P.3d 300, 316-317 (Colo. O.P.D.J. 2014).

The trial court was well informed through submitted evidence that Atkinson was disabled prior to his sentencing that occurred on July 21, 2015. On December 22, 2014, Atkinson's Assessment was filed with the trial court. R0011-4 and R0012-5. The Assessment provided details of a car accident that Atkinson had been involved in where he sustained injuries to his neck, shoulder, knees and damage to his spine and back. R0012 and R0013. Atkinson also indicated that his lower spine was deteriorating from prior injury and genetics. *Id.* Atkinson indicated that his injuries were a "chronic medical problem [that] interfered with

his life.” *Id.* The PSI report was filed with the trial court on July 16, 2015, which contained a handwritten statement from Atkinson stating that he had recently been declared disabled. R0076, R0089, R0047, R0089, and R0051. On July 17, 2015, Atkinson submitted a letter to the trial court where he stated that he had recently been declared disabled by the State of Utah, Judge Patricia Lammi. R0056.

During his sentencing, Atkinson again informed the trial court that he had been declared disabled due to a back injury and was in need of surgery on his shoulders. R106:5-6. Atkinson also informed the trial court that he had recently provided proof of Medicaid. *Id.* Atkinson expressed that obtaining disability would allow him to receive the treatment he needed for his substance abuse issue. *Id.* Atkinson realized that he had been self-medicating with illegal substances from injuries sustained to his back and shoulder. *Id.*

Slack argued during sentencing that Atkinson’s underlying issue was his “substance abuse issue.” R106:3. Slack requested the trial court sentence Atkinson to probation and that he be released from county time for the purpose of substance abuse treatment, treatment which he would be required to possess and obtain. R106:4. Slack argued that the majority of the charges would not have existed but for Atkinson’s underlying issue with substance abuse. *Id.* The trial court sentenced Atkinson to the maximum sentence. R106:7-8.

As a “public entity,” the district court herein was under the obligation to guard and enforce every right secured by Atkinson, including application of the ADA to his sentencing proceedings and determination of whether he was eligible for probation. *O’Grady*, 312 U.S. 329, 61 S. Ct. 572; *Briggs* at ¶26; 42 U.S.C.A. § 12131; *K.C.* at ¶ 16. The ADA and Rehabilitation Act prohibited the district court from denying or discriminating against Atkinson, who is a

qualified disabled individual having been approved for disability, with regard to his receiving the benefits of its services and programs, including probation. *See*, 42 U.S.C.A. §12101(b)(1), (2), and (4); 42 U.S.C.A. § 12132; Rehabilitation Act, 29 U.S.C.A. §794(a) and (b)(1)(A) and (B).

Atkinson's charges to which he plead were two (2) counts of DUI, Identity Theft, Forgery, and Failure to Register as a Sex Offender. Each of these were eligible for a downward departure, jail time, or probation. The probation services as a sentencing option by the district court and as overseen by AP&P are generally accepted as either "services" or "programs", directly falling under the ADA as a product of court proceedings and supervised by the State agency, requiring application of the ADA to Atkinson as a qualified individual thereunder. *See, e.g.*, UTAH CODE ANN. §77-18-1(8)(a)(viii); *Robinson* at ¶ 15; *Ferree* at 151; *L.A.* at ¶2; *Saunders* at 899; *Yeskey*, 524 U.S. at 210, 118 S. Ct. at 1955, *citing Sedima, S.P.R.L.*, 473 U.S. at 499, 105 S.Ct. at 3286. The Rehabilitation Act and ADA interpreted *in pari materia* encompass all operations of the court and/or AP&P with regard to probation. *Frame* at 223, *citing* 29 U.S.C. §794(a).

The district court herein maintained an "affirmative obligation to accommodate" in sentencing Atkinson based on its knowledge of his disabilities, particularly given that his disabilities directly impacted the crimes for which he was convicted. *Lane*, 541 U.S. at 532-33, 124 S.Ct. 1978. Atkinson's injury did not occur until after he was sentenced; however, the district court maintained an affirmative obligation to accommodate him during that sentencing under the ADA. Atkinson should have received leniency as an accommodation, with the district court exploring further options of a downward departure, jail time or probation rather

than the harshest sentence for each of the crimes and an order of prison time, which gave no accommodation at all to the fact that his crimes herein were a direct result of his disabilities.

Frame, supra.

Although the Rehabilitation Act and ADA do not address accommodations, the trial court was well within its authority to provide a reasonable modification for Atkinson. *Novak, supra, citing* C.F.R. § 35.130(b)(7). To grant Atkinson probation or another more lenient sentence would not have fundamentally altered the nature of the sentencing or probation services or programs. *Novak, citing* 28 C.F.R. § 35.130(b)(7). Further, the accommodation of a modification to Atkinson's sentence was required to avoid discrimination based upon his disability. *Id., citing Wis. Cmty. Servs.* at 751; 28 C.F.R. § 35.130(b)(7). Atkinson's disabilities were present during the two-year span of the directly related criminal charges; however, the district court utilized this as an aggravating circumstance to erroneously avoid application of the ADA or Rehabilitation Act. It is a fact that Atkinson's prior criminal history indicated no substance abuse since his juvenile years, and that it began when he became disabled. With the average wait time in Utah being 17 months for a disability hearing, and Atkinson's admission that he realized he was self-medicating his disabilities, the district court should have recognized these circumstances to accommodate him with a more lenient sentence.

https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html, accessed March 4, 2016.

The district court could have affirmatively ameliorated the effects of Atkinson's disabilities in this case through leniency. *Novak, citing Oconomowoc Residential Programs* at 784. The accommodations would not have been unreasonable since all of Atkinson's charges were eligible for leniency and, in fact, it would have been both efficacious and proportional cost-

wise. *Id.*, citing 28 C.F.R. § 35.130(b)(7), *Oconomowoc Residential Programs* at 784 (citing *Vande Zande* at 543).

It was proper for Atkinson to raise his disabilities as consideration regarding the services being provided to him by the sentencing court. He is a qualified individual with a physical disability under 42 U.S.C.A. § 12102(1)(A)-(C), (2)(A), and (3)(A); see also *Ball* at 596-97. However, Atkinson likely also falls under the protection of the ADA with regard to his recovery from drug and/or alcohol addiction. *Pac. Shores Properties*, citing 42 U.S.C.A. § 12132. Atkinson was excluded from participation in or denied benefits of the sentencing and/or probation programs or services by the district court, and such exclusion was directly based on his disabilities given their proximate causation of the crimes to which he plead. *Roban* at ¶25, citing *Gohier* at 1219(quoteing *Tyler* at 1439).

Atkinson's case is unfortunately not unique—there are nearly 1.5 million disabled who currently need substance abuse treatment. While there is an increased chance for substance abuse among the disabled in general, Atkinson's spine and back injuries place him in the heightened category of individuals where half of all sufferers are substance abusers. Unfortunately, Atkinson and so many others are the product of an agency and court system that are equipped with, but are not utilizing their resources to help ameliorate the effects of the disabled who come under their authority. Courts frequently encounter individuals who are disabled and have been drawn into drug addiction in an attempt to cope with such disabilities while they await the very slow system of getting disability benefits. See, *Disabled World*, *supra*; and "Physically and Developmentally Disabled: Specialty Program for Physically and Developmentally Disabled Patients", *supra*; *Average Wait Time Until Hearing Held Report (For the*

Month of January 2016), *supra*; “Substance Abuse and the Disabled”, *supra*. These individuals, like Atkinson, are the product of a lack of appropriate and accessible substance abuse prevention and treatment services—services that are “not attitudinally, physically, financially, or cognitively accessible to people with disabilities.” *Id.*

Until such time as prevention services can be put in place, the courts will face an increasing number of these types of cases. Currently there is no regulation on how our courts should handle these circumstances other than through its discretion in sentencing; however, frequently such discretion is exercised without giving the disability sufficient weight as the causation of the substance abuse crimes. Instead, the courts are simply sentencing to jail or prison rather than helping the disabled get the help they need. Atkinson is a prime example with his record of offenses coinciding with his becoming disabled, his remorse at the paths he chose, and his desire to do better now that his disability benefits have finally been approved. However, Atkinson is instead in prison, continuing to suffer more consequences for circumstances affecting half the people in his precise situation.

As Dansky, Senior Counsel of the ACLU stated, jail does not help addicts, particularly those who became addicts due to disability, like Misti Barrickman and like Atkinson. *Ibid.*, *supra*. Law enforcement in Seattle, Washington created a program focused on connecting people with drug addictions directly with treatment and services rather than jailing them. *Id.* Interestingly, AP&P’s own website indicates that they do the same thing with probationers in Utah—it specifically lists the services provided to the public as “acting in the role of a police officer, court adviser, mentor and social worker” with duties that include “ensuring that they comply with conditions of probation ... assist[ing] offenders with obtaining the basic

essentials to survive ... includ[ing] housing, employment, school, training, food, treatment, therapy and counseling.” http://corrections.utah.gov/index.php?option=com_content&view=article&id=845:adult-probation-parole&catid=10&Itemid=262, accessed March 4, 2016. Although society has relegated drug addiction to the criminal justice system, our system is not without the capacity to handle it in a way that cost-effectively aids in rehabilitation. In reliance on Atkinson’s particular circumstances where his disabilities were the underlying cause of his substance abuse issues that were at the heart of all of the charges to which he plead herein, leniency in the form of ADA accommodation towards a downward departure, jail time or probation would have safely provided the proper services to Atkinson to ensure success.

Although weighing of circumstances for sentencing typically affords a trial court a heightened discretion, Atkinson’s particular circumstance herein does not appear to have been directly addressed by our courts in Utah. Where the offense is a product of an individual’s disability, other courts have indicated that the weighing of circumstances changes. In certain cases where the physical condition caused the commission of the offense, the question alters from reasonableness to physical impossibility to the extent of absolution. *Coolley*, 16 USCMA 24, 36 CMR 180. However, Atkinson’s case is not quite as clear cut at this one since Atkinson still bore a choice in the crimes he committed, as he indicated both in pleading and at sentencing. The American Bar Association provides interesting insight where it pertains to their own regulations over offenses, specifically setting out a careful analysis for issues of physical and mental disability. Where an offense is proven to be attributable solely to a disability or chemical dependency, it is to be given “the greatest weight.” *Bendinelli* at 316-317,

quoting ABA comment to *Standard* 9.3. Even if it is principally responsible, it should be given “very great weight”, or “if it is a substantially contributing cause of the offense, it should be given great weight.” *Id.* Herein, the trial court only gave Atkinson’s disabilities little weight, which was only as a “mitigating” factor—meaning not one directly related to the offense—rather than the heightened weight attributable to proximate causation.

There is a striking difference between those who are brought into the criminal system as a result of this societal issue of using substance abuse to cope with various physical and mental disabilities like Atkinson, and those who are users who are not disabled. However, our courts have been providing little if no accommodations for the disability causation, although the ADA clearly applies and the courts have an affirmative obligation to accommodate them. Atkinson’s disabilities should have been given much greater weight in determining his sentence, weighing in favor of a downward departure, jail time or probation. This is particularly true when considering the other factors argued further below.

B. THERE WERE EXTENUATING FAMILY CIRCUMSTANCES WITH DEFENDANT’S FIANCÉE’S DIAGNOSIS WITH PROGRESSIVE CANCER.

In *U.S. v. Hernandez-Castillo*, the defendant requested a variance in sentencing based upon his extraordinary and unique family circumstances—he was an illegal alien having been previously deported and his wife was a United States citizen but was ill and had undergone several surgeries. *Ibid.*, 2007 WL 1302577 (D.N.M.). Therein it analyzed the following case:

[I]n *United States v. Spedden*, 917 F.Supp. 404 (E.D.Va.1996), the Honorable James C. Cacheris, United States District Judge for the Eastern District of Virginia, granted a downward departure in a case where the defendant had presented evidence that both his wife and his nine year old daughter suffered from life-threatening medical conditions. *See id.* at 406-07. In granting a departure, Judge Cacheris reasoned that the defendant’s case presented

“extraordinary and unique family circumstances,” because “the actual family structure stands to be utterly decimated by the realistic possibility of the death of not one, but two immediate family members while the Defendant is incarcerated and unable to provide any normal, day-to-day parental assistance to sustain his family.” *Id.* at 408. Judge Cacheris opined in *United States v. Spedden* that “the cumulative nature of two extraordinary medical hardships in the Defendant’s immediate family makes this a case of sufficient importance and magnitude to justify a downward departure.” *Id.* (internal quotation omitted).

Id. In *U.S. v. Spedden*, the court found that “extraordinary and unique family circumstances justify a downward departure and that a sentence different from the guidelines ‘should result.’” *Ibid.*, 917 F. Supp 404, 408 (E.D. VA. 1996). Although the *Hernandez-Castillo* case differentiated its facts from the cases cited therein to ultimately decline the relief requested, it did not specifically differentiate *Spedden*’s holdings. *Id.* at *6-7. It found that “all families suffer and there is hardship whenever a sentence is imposed.” *Id.* at *6. Further, “[t]he Court believe[d] that the focus ... is on the loss of caretaking and financial support for the defendant’s family that a defendant’s incarceration would cause. ... support for an ill family member may manifest in forms other than, or in addition to, financial assistance.” *Id.*

Atkinson’s fiancé was diagnosed with progressive cervical cancer. Atkinson expressed that the thought of not being able to be there for his fiancé in her time of need was a much harsher punishment than any sentence imposed. R0056. Atkinson requested a lenient sentence so he could be there for his fiancé, his family and receive the proper treatment. R0057. Nonetheless, the trial court sentenced Atkinson to the maximum sentence. R106:7-8.

Atkinson was not technically seeking a variance, but rather exercise of the court’s authority to apply a more lenient sentence that was available. However, his circumstances likely would have supported a variance or a downward departure, the latter of which is always available to a judge in sentencing determinations. *See, Hernandez-Castillo; Spedden; UTAH CODE*

ANN. §76-3-402(1). Atkinson presented evidence that his fiancé was suffering a life-threatening medical condition. As argued *supra*, he also presented information that he was physically disabled, with “chronic medical problem[s] [that] interfered with his life.” R0013. These were “extraordinary and unique family circumstances” because “the actual family structure [stood] to be utterly decimated by the realistic possibility” of the death of an immediate family member while Atkinson was incarcerated and unable to provide day-to-day assistance to sustain his family. *Spedden* at 408. The cumulative nature of both Atkinson’s disabilities and his fiancé’s progressive cancer diagnosis—two extraordinary medical hardships in Atkinson’s immediate family—should have justified leniency in the form of a downward departure, jail time or probation. *Id.*

Although all families suffer hardship, the loss of Atkinson’s presence in the home through his prison sentence is likely to bring about the realistic decimation of his family while he is incarcerated. *Id.* By serving the maximum sentence, Atkinson would not be able to be there for his fiancé in her time of need. Atkinson would not be able to provide any day-to-day care, be a shoulder to lean on, or to act as support system for her during treatments and/or necessary procedures that may have been required with a progressing disease. If Atkinson’s fiancé’s condition were to worsen, Atkinson would not be able to say final goodbyes or create that one last opportunity for a lasting memory. Also, by serving the maximum sentence, Atkinson could be denied the opportunity to marry his fiancé and live a happy life together as husband and wife. Atkinson asked the trial court for a chance so that he could be there for his fiancé and his family.

Atkinson and his family are presently enduring hardships with him having to serve the maximum sentence. Atkinson's fiancé had a daughter to support. R106:6. Atkinson's fiancé's health was failing. Atkinson needed to be a caregiver for his fiancé and her daughter, but cannot do so from behind the prison walls. The trial court did not give adequate weight to Atkinson's family needs during his sentencing. When combined with its failure to afford sufficient weight to Atkinson's disabilities, it is clear that the trial court abused its discretion.

C. DEFENDANT'S SINCERE REMORSE AND ACCEPTANCE OF ACCOUNTABILITY SUPPORTED MITIGATION.

A Utah district court gave an insightful summation that "[p]robation 'is for people who admit their guilt, acknowledge the enormity of what they have done and want to be helped.'" *State v. Ashcroft*, 2014 UT App 253, ¶ 6, 338 P.3d 247. Timely remorse, recognition and affirmative acceptance of personal responsibility for the offense are factors contained in the federal sentencing guidelines as to whether a reduction of the level of offense should occur. *See, e.g., U.S. Spedialieri*, 910 F.2d 707 (10th Cir. 1990) ("Whether a defendant should be granted a two-level adjustment for acceptance of responsibility depends upon whether the defendant 'clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct.'" (citing U.S.S.G. § 3E1.1(a), with the burden of proof established as preponderance of the evidence); *U.S. v. Wach*, 907 F.2d 1038, 1039-40 (10th Cir. 1990) ("[A] defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsible for the offense ... *in a timely fashion* ... is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.").

Atkinson provided a letter to the trial court where he expressed how remorseful he was and also apologized to the trial court and to his family for the crimes that he had committed.

R0056. Atkinson personally addressed the trial court during sentencing admitting he had made mistakes. R106:5. Atkinson sought forgiveness from the court and his family. R0056. Atkinson wanted to be helped and expressed a strong desire to receive treatment. Atkinson also admitted that he had been self-medicating with illegal substances.

Atkinson was amenable to probation given the extenuating circumstances listed above. Further, he admitted his guilt by pleading guilty to five (5) crimes, acknowledged the enormity of what he had done and asked for help from the court by way of sentencing that would provide him the ability to seek the care he needed while being there for his family in their time of need as well. *Ashcroft* at ¶ 6. His timely remorse, recognition and affirmative acceptance of personal responsibility met the preponderance standard and should have weighed in favor of a downward departure, jail time or probation. *Spedialieri* (citing U.S.S.G. § 3E1.1(a)). It would have been appropriate for the court to give Atkinson a lesser sentence than a defendant who had not demonstrated sincere remorse; however, having been given the maximum sentence for each charge, it is clear that he received the same sentence as those who had no disability, no extenuating family circumstances, and no sincere remorse for the crimes committed. *Wach* at 1039-40. The district court erred in weighing the circumstances and not granting a downward departure, jail time, or probation to Atkinson.

D. THE COURT ERRED IN GIVING GREATER WEIGHT TO THE NUMBER OF CRIMES COMMITTED AND THAT DEFENDANT WAS A THREAT TO THE PUBLIC.

Atkinson was afforded his opportunity to address the district court and present information in mitigation of his punishment or sentence. UTAH CODE ANN. § 77-18-1(7); UT. R. CRIM. P. 22(a). As mentioned *supra*, the Court had various sentencing options available to

it, being able to *sua sponte* grant a downward departure, order jail time in a suspended sentence, or order probation either through suspended sentence or as the sentence itself. UTAH CODE ANN. §76-3-201(2) and §76-3-402(1).

The district court's oral findings relied entirely on two factors in aggravation: that Atkinson had numerous crimes committed all within a two (2) year period of time; and that he may present a threat to society since one of the victims of one of his crimes was his own brother (Identity Theft). However, as mentioned *supra*, the time frame in which the crimes were committed coincides with the time frame following Atkinson becoming disabled and up until he was granted disability and benefits to enable him to obtain assistance for his disabilities. His recent criminal history also coincided. As he admitted, he was self-medicating during this time, but exhibited sincere remorse at the choices he had made, particularly with regard to his brother. The factual determination of the district court erroneously failed to fully consider Atkinson's circumstances, which is evidence from the Court's statement that the numerous crimes were "not acceptable" and thus supported no leniency. *Moreno* at ¶¶ 12-13.

The district court's sentencing decision is subject to review by this court. *Moreno* at ¶10, *citing Strunk*. The district court identified the aggravating circumstances on the record, but failed to articulate what it considered to be mitigating circumstances that affected its sentencing decision. *Id.* However, since Atkinson presented the information regarding his disabilities, his fiancée's condition, and the remorse he felt for what he had done, it can be presumed that the trial court considered these legally relevant factors. However, it appears to have lacked full information and did not undertake the decision with careful deliberation of

the relevancy of these factors. *Moreno* at ¶10, *citing Strunk*. Atkinson's character, background and history should have been given greater weight as argued *supra*. *Agruelles* at ¶105.

Not all aggravating and mitigating factors are equally important, however, the ones cited herein by Atkinson are significant. *Killpack* at ¶59. His disabilities should have been given greater weight, as should his extenuating family circumstances and remorse. Instead, these were set aside due to the number of crimes at issue (although all of them were attributable to some extent to the disabilities) and the concern about his impact on society (although society favors rehabilitating drug users, particularly where it is more cost-effective in the long run). The aggravating listed by the district court were insufficient to outweigh the numerous significant mitigating circumstances. *Killpack* at ¶59.

Atkinson's sentence was not appropriate for him in light of his background and the crimes committed. *Lindsey* at ¶ 12, *quoting McClendon* at 729. As argued *supra*, it did not serve the interests of society underlying the criminal justice system since society favors rehabilitating those who abused substances as a direct result of their disabilities while awaiting approval for benefits. *Id.* Given the nature and circumstances, the sentencing court should have concluded it was unduly harsh to record the convictions for the degree established by statute, and should have entered a judgment for the next lower degree in favor of rehabilitation and based on incapacitation. UTAH CODE ANN. §76-3-402(1); *Sotolongo* at ¶ 5, *quoting Rhodes*. The district court maintained authority to offer leniency, but erroneously chose not to do so at all. *Perea* at ¶114, *citing Shelby* at 988.

While the sentence did not exceed statutory or constitutional limits, the district court did fail to fully consider all legally relevant factors by improperly minimizing Atkinson's

disabilities that directly impacted commission of the crimes, as well as his extenuating family circumstances and remorse. *Post* at ¶ 2. This resulted in a sentence that was so inherently unfair as to constitute an abuse of discretion. *Id.*, quoting *Sotolongo* at ¶ 3. No reasonable person would take the view that Atkinson should receive the harshest sentence on each crime given the circumstances argued herein. *Wright* at 1120, citing *Gerrard* at 887(citing *Harris*). Atkinson's sentence was unjust. *Id.*

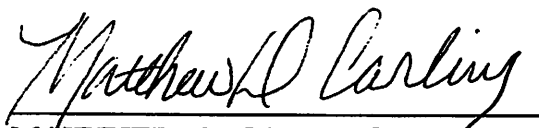
Atkinson was more appropriately situated for probation given these circumstances. *Ashcroft* at ¶ 6. The trial court was empowered to place Atkinson on probation to serve the ends of justice and comport with the public interest. *Id.*, citing *Valdovinos* at ¶ 23. This record gives more information on Atkinson's character, personality and attitude than most, providing sufficient information for the district court and this Court to determine that he was amenable to probation. *Rhodes* at 1049, quoting *Silbert* at 393. The district court thus exceeded the bounds of its discretion and the Judgments should be reversed, with the matter remanded for resentencing with the proper weight given to the circumstances raised herein.

CONCLUSION

WHEREFORE, based upon the foregoing, Atkinson respectfully requests that this Court reverse the Judgments and remand for re-sentencing to give proper weight to Atkinson's disability, extenuating family circumstances, and remorse.

DATED this 7th day of March, 2016.

CARLING LAW OFFICE, PC


MATTHEW D. CARLING
Attorney for Appellant Dennis R. Atkinson

RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

Counsel herein certifies that this brief is in compliance with the type-volume limitations contained in UT. R. APP. P. 24(f)(1) in that it contains 13,528 words, as evidenced by use of a Microsoft Word 365 system.

CARLING LAW OFFICE, PC



MATTHEW D. CARLING

Attorney for Appellant Dennis R. Atkinson

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Brief of Appellant*, with attachments, on this 7th day of March, 2016, to the following:

Utah Attorney General's Office
Attn. Criminal Appellate Division
160 East 300 South
P.O. Box 140854
Salt Lake City, Utah 84114-0854



Addendum ~A~

Judgment, Sentence and Commitment, dated August 13, 2015
(Criminal No. 141500765; Appellate Case No. 20150640)
(the “**20150640 Judgment**”)

The Order of Court is stated below:

Dated: August 13, 2015
10:30:54 AM

/s/ KEITH C BARNES
District Court Judge



TROY A. LITTLE - USB #9061
Chief Deputy Iron County Attorney
82 North 100 East, Suite #201
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 865-5310
Telecopier: (435) 865-5329

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DENNIS R. ATKINSON,
03/31/1974

Defendant.

**JUDGMENT, SENTENCE, and
COMMITMENT**

Criminal No. 141500765

Judge Keith C. Barnes

The Defendant, DENNIS R. ATKINSON, having entered a plea of guilty to the offense of Failure to register as a Sex Offender, a Third-Degree Felony, on June 2, 2015, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the matter having been called on for sentencing on July 21, 2015, in Cedar City, Utah, and the above-named Defendant, DENNIS R. ATKINSON, having appeared before the Court in person together with his attorney of record, Jeffery E. Slack, and the State of Utah having appeared by and through Chief Deputy Iron County Attorney Troy A. Little, and the Court having reviewed the sentencing recommendation and having further reviewed the file in detail and thereafter having heard

statements from the Defendant, his attorney, and the Chief Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DENNIS R. ATKINSON has been convicted upon his/her plea of guilty to the offense of Failure to register as a Sex Offender, a Third-Degree Felony, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, DENNIS R. ATKINSON, and pursuant to his conviction of Failure to register as a Sex Offender, a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison.

IT IS FURTHER ORDERED that the Defendant, DENNIS R. ATKINSON, pay a thirty-three dollar (\$33) Court Security Fee for his conviction of the offense.

IT IS FURTHER ORDERED that the sentence imposed herein shall be served concurrently with the sentences imposed in Criminal Case Nos. 141500700, 141500765 & 151500701, but run consecutively with Criminal Case No. 151500294.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, DENNIS R. ATKINSON,
and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in
accordance with the above foregoing Judgment, Sentence, and Commitment.

END OF ORDER

(If approved, court signature will appear at top of first page of this document)

Addendum “B”

Judgment, Sentence and Commitment, dated August 12, 2015
(Criminal No. 141500701; Appellate Case No. 20150641)
(the “**20150640 Judgment**”)

The Order of Court is stated below:

Dated: August 12, 2015
04:19:03 PM

/s/ KEITH C BARNES
District Court Judge



TROY A. LITTLE - USB #9061
Chief Deputy Iron County Attorney
82 North 100 East, Suite #201
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 865-5310
Telecopier: (435) 865-5329

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

**JUDGMENT, SENTENCE, and
COMMITMENT**

vs.

DENNIS R. ATKINSON,
03/31/1974

Criminal No. 141500701

Judge Keith C. Barnes

Defendant.

The Defendant, DENNIS R. ATKINSON, having entered a plea of guilty to the offense of Driving under the Influence of Alcohol and/or Drugs, a Third-Degree Felony, on June 2, 2015, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the matter having been called on for sentencing on July 21, 2015, in Cedar City, Utah, and the above-named Defendant, DENNIS R. ATKINSON, having appeared before the Court in person together with his attorney of record, Jeffery E. Slack, and the State of Utah having appeared by and through Chief Deputy Iron County Attorney Troy A. Little, and the Court having reviewed the sentencing recommendation and having further reviewed the file in

detail and thereafter having heard statements from the Defendant, his attorney, and the Chief Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DENNIS R. ATKINSON has been convicted upon his/her plea of guilty to the offense of Driving under the Influence of Alcohol and/or Drugs, a Third-Degree Felony, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, DENNIS R. ATKINSON, and pursuant to his conviction of Driving under the Influence of Alcohol and/or Drugs, a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison.

IT IS FURTHER ORDERED that the Defendant, DENNIS R. ATKINSON, pay a thirty-three dollar (\$33) Court Security Fee for his conviction of the offense.

IT IS FURTHER ORDERED that the sentence imposed herein shall be served concurrently with the sentences imposed in Criminal Case Nos. 141500700, 141500765 & 151500293, but run consecutively with Criminal Case No. 151500294.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, DENNIS R. ATKINSON,
and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in
accordance with the above foregoing Judgment, Sentence, and Commitment.

END OF ORDER

(If approved, court signature will appear at top of first page of this document)

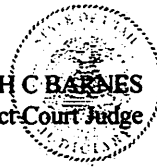
Addendum “C”

Judgment, Sentence, Commitment, dated August 12, 2015
(Criminal No. 151500293; Appellate Case No. 20150642)
(the “**20150640 Judgment**”)

The Order of Court is stated below:

Dated: August 12, 2015
04:18:40 PM

/s/ KEITH C BARNES
District Court Judge



TROY A. LITTLE - USB #9061
Chief Deputy Iron County Attorney
82 North 100 East, Suite #201
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 865-5310
Telecopier: (435) 865-5329

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

JUDGMENT, SENTENCE, and
COMMITMENT

vs.

DENNIS R. ATKINSON,
03/31/1974

Criminal No. 151500293

Judge Keith C. Barnes

Defendant.

The Defendant, DENNIS R. ATKINSON, having entered a plea of guilty to the offense of Identity Fraud, a Third-Degree Felony, on June 2, 2015, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the matter having been called on for sentencing on July 21, 2015, in Cedar City, Utah, and the above-named Defendant, DENNIS R. ATKINSON, having appeared before the Court in person together with his attorney of record, Jeffery E. Slack, and the State of Utah having appeared by and through Chief Deputy Iron County Attorney Troy A. Little, and the Court having reviewed the sentencing recommendation and having further reviewed the file in detail and thereafter having heard statements from the

Defendant, his attorney, and the Chief Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DENNIS R. ATKINSON has been convicted upon his/her plea of guilty to the offense of Identity Fraud, a Third-Degree Felony, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, DENNIS R. ATKINSON, and pursuant to his conviction of Identity Fraud, a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison.

IT IS FURTHER ORDERED that the Defendant, DENNIS R. ATKINSON, pay a thirty-three dollar (\$33) Court Security Fee for his conviction of the offense.

IT IS FURTHER ORDERED that the sentence imposed herein shall be served concurrently with the sentences imposed in Criminal Case Nos. 141500700, 141500701 & 141500765, but run consecutively with 151500294.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, DENNIS R. ATKINSON,

and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in accordance with the above foregoing Judgment, Sentence, and Commitment.

END OF ORDER

(If approved, court signature will appear at top of first page of this document)

Addendum “D”

Judgment, Sentence, and Commitment, dated August 12, 2015
(Criminal No. 141500700; Appellate Case No. 20150704)
(the “**20150640 Judgment**”)

The Order of Court is stated below:

Dated: August 12, 2015
04:19:23 PM

/s/ KEITH C. BARNES
District Court Judge



TROY A. LITTLE - USB #9061
Chief Deputy Iron County Attorney
82 North 100 East, Suite #201
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 865-5310
Telecopier: (435) 865-5329

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

JUDGMENT, SENTENCE, and
COMMITMENT

vs.

DENNIS R. ATKINSON,
03/31/1974

Criminal No. 141500700

Judge Keith C. Barnes

Defendant.

The Defendant, DENNIS R. ATKINSON, having entered a plea of guilty to the offense of Driving under the Influence of Alcohol and/or Drugs, a Third-Degree Felony, on June 2, 2015, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the matter having been called on for sentencing on July 21, 2015, in Cedar City, Utah, and the above-named Defendant, DENNIS R. ATKINSON, having appeared before the Court in person together with his attorney of record, Jeffery E. Slack, and the State of Utah having appeared by and through Chief Deputy Iron County Attorney Troy A. Little, and the Court having reviewed the sentencing recommendation and having further reviewed the file in

detail and thereafter having heard statements from the Defendant, his attorney, and the Chief Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DENNIS R. ATKINSON has been convicted upon his/her plea of guilty to the offense Driving under the Influence of Alcohol and/or Drugs, a Third-Degree Felony, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, DENNIS R. ATKINSON, and pursuant to his conviction of Driving under the Influence of Alcohol and/or drugs, a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison.

IT IS FURTHER ORDERED that the Defendant, DENNIS R. ATKINSON, pay a thirty-three dollar (\$33) Court Security Fee for his conviction of the offense.

IT IS FURTHER ORDERED that the sentence imposed herein shall be served concurrently with the sentences imposed in Criminal Case Nos. 141500701, 141500765 & 151500293, but run consecutively with Criminal Case No. 151500294.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, DENNIS R. ATKINSON,
and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in
accordance with the above foregoing Judgment, Sentence, and Commitment.

END OF ORDER

(If approved, court signature will appear at top of first page of this document)

Addendum “E”

Judgment, Sentence, and Commitment, dated August 12, 2015
(Criminal No. 151500294; Appellate Case No. 20150707)
(the “**20150640 Judgment**”)

The Order of Court is stated below:

Dated: August 12, 2015
04:18:14 PM

/s/ KEITH C. BARNES
District Court Judge



TROY A. LITTLE - USB #9061
Chief Deputy Iron County Attorney
82 North 100 East, Suite #201
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 865-5310
Telecopier: (435) 865-5329

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

JUDGMENT, SENTENCE, and
COMMITMENT

vs.

DENNIS R. ATKINSON,
03/31/1974

Criminal No. 151500294

Judge Keith C. Barnes

Defendant.

The Defendant, DENNIS R. ATKINSON, having entered a plea of guilty to the offense of Forgery, a Third-Degree Felony, on June 2, 2015, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the matter having been called on for sentencing on July 21, 2015, in Cedar City, Utah, and the above-named Defendant, DENNIS R. ATKINSON, having appeared before the Court in person together with his attorney of record, Jack B. Burns, and the State of Utah having appeared by and through Chief Deputy Iron County Attorney Troy A. Little, and the Court having reviewed the sentencing recommendation and having further reviewed the file in detail and thereafter having heard statements from the

Defendant, his attorney, and the Chief Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DENNIS R. ATKINSON has been convicted upon his/her plea of guilty to the offense of Forgery, a Third-Degree Felony, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, DENNIS R. ATKINSON, and pursuant to his conviction of Forgery, a Third-Degree Felony, is hereby sentenced to a term of zero to five (0-5) years in the Utah State Prison.

IT IS FURTHER ORDERED that the Defendant, DENNIS R. ATKINSON, pay a thirty-three dollar (\$33) Court Security Fee for his conviction of the offense.

IT IS FURTHER ORDERED that the sentence imposed herein shall be served concurrently with the sentences imposed in Criminal Case Nos. 141500700, 141500701 & 141500765, but run consecutively with 151500293.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, DENNIS R. ATKINSON,

and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in accordance with the above foregoing Judgment, Sentence, and Commitment.

END OF ORDER

(If approved, court signature will appear at top of first page of this document)

Addendum “F”

Determinative Constitutional and Statutory Provisions

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. U.S. CONST. AMEND. VI states the following:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

B. Rehabilitation Act, 29 U.S.C.A. §794(a) and (b)(1)(A) and (B) state as follows:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means *all of the operations of—*

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local governmental entity) to which the assistance is extended, in case of assistance to a State or local government; ...

...

any part of which is extended Federal financial assistance.

C. ADA, 42 U.S.C.A. § 12102 states in pertinent part as follows:

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping,

walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

D. ADA, 42 U.S.C.A. § 12131 states that "[P]ublic entity" includes "(B) any department, agency, ... of a State or States or local government;"

E. ADA, 42 U.S.C.A. § 12132 states that, "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

F. UT R. CRIM P. 22(a) states in pertinent part as follows:

Before imposing sentence the court shall afford the defendant an opportunity to make a statement to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

G. UTAH CODE ANN. §76-3-201(2) states the following:

Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

- (a) to pay a fine;
- (b) to removal or disqualification from public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment;
- (e) on or after April 27, 1992, to life in prison without parole; or

(f) to death.

H. UTAH CODE ANN. §77-18-1(2)(a) states the following:

On a plea of guilty ... the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

- (i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;
- (ii) on probation with an agency or local government or with a private organization; or
- (iii) on bench probation under the jurisdiction of the sentencing court.