

2017

## **The State of Utah, Plaintiff/Appellee v. Todd Mulliner, Defendant/ Appellant.**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

TODD MULLINER,

Defendant / Appellant.

Case No: 20170552-CA

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**BRIEF OF APPELLANT**

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APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF  
UTAH, FROM A CONVICTION OF SALE OF UNREGISTERED SECURITY,  
THIRD DEGREE FELONY, AND SECURITIES FRAUD, THIRD DEGREE  
FELONY, BEFORE THE HONORABLE JUDGE THOMAS LOW

---

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**ORAL ARGUMENT REQUESTED**

Appellant is currently incarcerated on this ~~case~~  
UTAH APPELLATE COURTS

OCT 24 2017

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**BRIEF OF APPELLANT**

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**JURISDICTION OF THE UTAH COURT OF APPEALS**

The Court of Appeals has appellate jurisdiction in this matter pursuant to the provisions of Utah Code §78A-4-103(2)(e) as an appeal from a court of record in a criminal case not involving a first degree or capital felony.

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

Whether the district court erred when it ruled on Mulliner's motion to correct an illegal sentence. "Whether a sentence is illegal 'presents a question of law that [the appellate court will] review for correctness.'" *State v. Vaughn*, 2011 UT App 411, ¶9, (quoting *State v. Dana*, 2010 UT App 374, ¶3, 246 P.3d 756). This issue was preserved in the district court by Mulliner's motion to correct an illegal sentence and the arguments made in support. R.138; R.248-278.

**CONTROLLING STATUTORY PROVISIONS**

All controlling statutory provisions are set forth in full in the Addenda.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Defendant, Todd Mulliner, appeals from the judgment, sentence, and commitment on one count of Sale of Unregistered Security, a third degree felony, and one count of Securities Fraud, a third degree felony. Specifically, Mulliner appeals from the 2nd Corrected Sentence, Judgment, and Commitment order issued by Judge Low on June 26, 2017, following Mulliner's motion to correct an illegal sentence.

### **B. Trial Court Proceedings and Disposition**

On November 18, 2003, Todd Mulliner was charged by information with two counts of Sale of Unregistered Securities, third degree felonies under Utah Code §61-1-7 and §91-1-21, two counts of Securities Fraud, third degree felonies under Utah Code §61-1-1, and two counts of Sale of Security by Unlicensed Broker-Dealer, third degree felonies under Utah Code §61-1-3. R.001-02. During the time of the prosecution in this case, Mulliner was in the custody of the Utah Department of Corrections and serving a prison sentence at the Utah State Prison on a case from St. George. R.007; R.013; R.018, etc.

After waiving his preliminary hearing, Mulliner plead no contest to Counts 1 and 2, and the remaining counts were dismissed. R.018-19; R.020-29. The written statement in advance of plea characterized the "plea bargain" as follows: "Defendant agrees to pay \$3,000 in Restitution." R.024. No other agreements or sentencing recommendations are contained within the plea statement.

On March 17, 2004, Mulliner was sentenced to serve “an indeterminate term of not to exceed five years in the Utah State prison” on each count. R.031. Judge Schofield’s order required one count to run concurrent and one count consecutive.<sup>1</sup>

On April 17, 2013 the court filed a letter from Mulliner wherein he complained that the court clerk “wrote up the sentence and commitment orders incorrectly”. R.037. It doesn’t appear that the court did anything with this letter.

Two years later, on October 23, 2105, Mulliner filed his “Rule 22(e) Motion to Correct an Illegal Sentence.” R.040. Attached as an exhibit to the memorandum, Mulliner provided a typed transcript of the sentencing hearing prepared by Mulliner’s brother.<sup>2</sup> The State responded and argued that the sentence was not illegal because, although Judge Schofield was not explicit, the court meant to order Count 1 and Count 2 would run concurrently, and therefore his concurrent sentences on Counts 1 and 2 had already been served. R.057-58. Judge Laycock held oral argument on February 3, 2016. R.074, R.103-26. The court acknowledged that the sentence contained a clerical error and was illegal for failing to designate whether Count 1 and 2 were concurrent or consecutive. R.122-23. The court issued a corrected sentencing order. R.078-79.

Two days later, Mulliner filed a pro se “New Motion to Correct the New

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<sup>1</sup> The record of Judge Schofield’s oral order was either unclear or contradictory on this point for reasons explained below.

<sup>2</sup> Judge Laycock “accept[ed] the transcript prepared by the defendant’s brother.” R.075. See also R.121-22 (“with the State’s acquiescence I’m going to take the defendant’s brother’s transcript of the video tape at face value.”).



Illegal Sentence, Rule 22(e) and Rule 30(b)”. R.082-84. In this motion, Mulliner explained that the corrected sentence was illegal because Count 1 and Count 2 were ordered to run concurrently while Count 1 was to run concurrent to the St. George case and Count 2 was to run consecutive to the St. George case. R.082. According to Mulliner’s motion, this would require the sentence on Count 2 to run twice. R.082. On February 22, 2016, Judge Laycock denied the new motion because it “contains no arguments that have not already been considered by the court.” R.087. Judge Laycock found that “[n]othing in the Utah statutes or case law prohibits this court’s interpretation of Judge Schofield’s original order or this court’s correction of his flawed order.” R.090. Judge Laycock characterized her ruling as “a final order from which the defendant can file a notice of appeal within the next 30 days.” R.090.

On March 11, 2016, Mulliner filed a pro se Notice of Appeal. R.092. The appeal was numbered by this Court as 20160190-CA but was summarily affirmed without briefing because the Court characterized Mulliner’s “New Motion” as a motion to reconsider, which did not toll the time to file a notice of appeal from Judge Laycock’s February 3, 2016 ruling. R.098-99. Because Mulliner’s notice of appeal was filed within 30 days of Judge Laycock’s second order, but not filed within 30 days of the February 3 ruling, his appeal was dismissed as untimely.

On April 12, 2017, Mulliner, now represented by the Utah County Public Defender Association, filed another Motion to Correct an Illegal Sentence, this time to Judge Thomas Low, as Judge Laycock had retired. R.138-50. In that motion

Mulliner claimed that the sentence issued by Judge Laycock was illegal because it was internally contradictory and that the sentence should be corrected to be legal and consistent with Judge Schofield's original sentence. The State did not respond to Mulliner's written motion and he filed a notice to submit along with a proposed order (R.200, 202), but Judge Low set the case for oral argument on June 7, 2017. Mulliner objected to the State presenting any arguments because it had not responded to the motion. R.250. Judge Low denied the objection because he had "to do the right thing" and wanted "as much help" and he could get. R.251.

On June 26, 2017, Judge Low granted Mulliner's motion insofar as he found Judge Laycock's order was internally contradictory. However, Judge Low did not adopt Mulliner's proposed solution, and instead issued the 2nd Corrected Sentence, Judgment, Commitment order requiring Count 2 to run consecutive to Count 1, while Count 1 runs concurrent with the St. George case, and Count 2 runs consecutive to the St. George case. R.217.

On July 12, 2017, Mulliner filed timely notice of appeal from Judge Low's June 27, 2017 order. R.232.

## **STATEMENT OF RELEVANT FACTS**

### **Judge Schofield's initial sentencing order**

After Mulliner no contest one count of third degree felony Sale of Unregistered Security and one count of third degree felony Securities Fraud, his case was referred to Adult Probation and Parole for a presentence investigation report. R.018-19. The court ordered "[a] short report to be prepared in regards to

consecutive vs. concurrent.” R.019. The presentence investigation report prepared and filed by AP&P did not make any explicit recommendation “in regards to consecutive vs. concurrent”, and instead only recommended “the subject be sentenced to serve an indeterminate term of not to exceed five years in the Utah State Prison...” R.296. At sentencing on March 14, 2004, Judge Schofield orally pronounced Mulliner’s sentence as follows:

In the matter number 20 on the calendar on each of the third degree felonies it will be the order of the Court that this defendant server (sic) an indeterminate term of not more than five years in the Utah State Prison, an an (sic) order additionally you pay restitution in the sum of \$2975, that you not hold any positions of fiduciary responsibility. I am going to order that Count 1 of the matter run concurrent to the other time you are serving and that Count 2 run consecutive so that you will have one concurrent and one consecutive sentence so that there is some modicum of separate accountability. (Inaudible...) Board of Pardon will figure out what to do with that (Inaudible...).

R.153-54.<sup>3</sup> The written sentencing order did not accurately describe Judge Schofield’s oral sentence in that it transposed the language for Count 1 with the language for Count 2. “The sentence for count 1 is to run consecutive to the time the defendant is now serving. Count 2 is to run concurrent with the time the defendant is now serving.” R.031.

### **Judge Laycock’s corrected sentencing order**

After receiving Mulliner’s pro se motion to correct the illegal sentence, wherein Mulliner claimed Judge Schofield’s sentence was illegal because it failed

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<sup>3</sup> Note that Judge Schofield otherwise followed AP&P’s recommendation exactly by ordering \$2975.00 in restitution and ordering Mulliner not hold any positions of fiduciary responsibility. R.296.

to address how Count 1 and Count 2 would relate to each other and it contained clerical errors because the 2 counts had been switched, Judge Laycock agreed and orally issued the following order:

So I have two counts here. One is a sale of unregistered security, a third degree felony. I will order that -- and I'm giving you the benefit under part (a), because Judge Schofield didn't address it, I think the only fair thing at this point is to do is to assume that he meant concurrent. I think to do otherwise is not fair to you. So I'm going to make it concurrent. So I will order that those two zero to fives will run concurrent with each other. That takes care of part (a).

Under part (b) I will do what I think was his intent. That Count I, which is sale of unregistered security, will run concurrently with the St. George case, and hang on, I want to put that exact number -- have to find it...

Okay, it will run concurrently with case No. 991500379. That's Count I. County II will run consecutively to case No. 991500379. What I'm going to do, I'm going to make this an amended sentencing.

R.124-25. The relevant portion of Judge Laycock's written amended sentencing recorded these matters as follows:

Court orders the defendant serve no more than five years on each third degree felony, concurrently with each other.  
Count 1 will run concurrently with the St. George matter, #991500379. Count 2 will run consecutively to case #991500379.

R.075.

### **Judge Low's 2nd corrected sentencing order**

Following Mulliner's motion to correct Judge Laycock's sentence Judge Low issued a written ruling and a 2nd amended sentencing order. In the ruling Judge Low decided to "simply restore Defendant's original sentence" and vacate Judge Laycock's amended sentence R.224, 228. Judge Low found Judge Schofield's

original sentence was “not ambiguous” and that it “was clearly the court’s intention to require one of the counts in this case to run consecutively to Defendant’s previous sentence.” R.225. Apparently, according to Judge Low, Judge Schofield’s lack of clarity was due to a “grammatical parallelism.” R.225. Judge Low found that the only correction to Judge Schofield’s initial sentence was necessary, that being to order Count 1 and Count 2 to run consecutively, because, according to Judge Low, “[t]here is simply no other way for count 1 to run concurrently with Defendant’s previous sentence and for count 2 to run consecutively to it.” R.227-28. Judge Low’s ruling ordered as follows:

Defendant’s sentence is corrected to require that he serve zero to five years in the Utah State Prison on each of the two third-degree felonies in this case, that Count 2 run consecutively to count 1, that count 1 run concurrently with Defendant’s sentence in case number 991500379, and that count 2 run consecutively to Defendant’s sentence in case number 991500379.

R.229-30. Judge Low also issued a 2nd Corrected Sentence, Judgment, Commitment order describing the amended sentence as:

The prison time on count two is to run consecutively to count one. The prison time on count one is to run concurrently with the prison time on case number 991500379. The prison time on count two is to run consecutively to the prison time on case 991500379.

R.217.

## **SUMMARY OF ARGUMENT**

The district court erred in attempting to correct Judge Laycock’s illegal sentence. Judge Low’s 2nd Corrected Sentence, Judgment, Commitment order is illegal because it is ambiguous, internally contradictory, and defies the meanings

of the words it purports to use. Count 1 and Count 2 can be neither consecutive nor concurrent while Count 1 is concurrent to the St. George matter and Count 2 is consecutive to the St. George matter. Judge Low's attempt to "restore" an illegal sentence created yet another illegal sentence.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN CORRECTING AN ILLEGAL SENTENCE**

#### **A. Rule 22(e) and Illegal Sentences**

In April of 2017, when Mulliner filed his second Motion to Correct an Illegal Sentence, Rule 22(e) of the Utah Rules of Criminal Procedure provided that "[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." UTAH R. CR. P. 22(e) (2016).<sup>4</sup> An illegal sentence, or a sentence imposed in an illegal manner, has been interpreted as "one which is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize." *State v. Yazzie*, 2009 UT 14, ¶13, 203 P.3d 984 (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)).

Mulliner's claims of illegality have changed as the various versions of his sentence have been issued. For example, initially, when he challenged Judge

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<sup>4</sup> The Utah Supreme Court later amended Rule 22 to limit the specific instances when the court can correct a sentence and included a timing element to several kinds of corrections. That amendment became effective May 1, 2017. See UTAH R. CR. P. 22 (2017).



Schofield's written order, Mulliner claimed the sentence must be corrected because it failed to designate the relationship between Count 1 and Count 2, as required by §76-3-401(1), and that it contained a clerical error by confusing what Judge Schofield said about Count 1 with Count 2, and vice versa. See R.041-42; R.061-63. After Judge Laycock issued her amended sentence, Mulliner's claims of illegality then addressed the internal contradiction between having Count 1 and Count 2 run concurrently, while having Count 1 run concurrent with the St. George case and Count 2 run consecutive to the St. George case. See R.

Now that Judge Low has amended Judge Laycock's order, Mulliner claims his sentence is illegal because it is again internally contradictory (in a new way) or because it is ambiguous as to the time and manner in which it is to be served.

**B. This sentence is both ambiguous and internally contradictory**

The terms "concurrent" and "consecutive" are not defined in the relevant statute by the legislature. See Utah Code §76-3-401. Merriam-Webster online defines the word *consecutive* as "following one after the other in order; successive".<sup>5</sup> This definition gains meaning when compared to the dictionary definition of the word *concurrent*, which is "operating or occurring at the same time" and "running parallel".<sup>6</sup> Another helpful comparison is found in Black's Law which defines *consecutive sentences* as:

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<sup>5</sup> See <https://www.merriam-webster.com/dictionary/consecutive> (last accessed October 21, 2017).

<sup>6</sup> See <https://www.merriam-webster.com/dictionary/concurrent> (last accessed October 21, 2017).

“[t]wo or more sentences of jail time in sequence. For example, if a convicted criminal receives consecutive sentences of 20 years and 5 years, the total amount of jail time is 25 years. -- Also termed *cumulative sentences*; *back-to-back sentences*; *accumulative sentences*.”

*Consecutive sentences*, Black’s Law Dictionary (10th ed. 2014). Black’s Law defines *concurrent sentences* as:

“[t]wo or more sentences of jail time to be served simultaneously. For example, if a convicted criminal receives concurrent sentences of 5 years and 15 years, the total amount of jail time is 15 years.”

*Concurrent sentences*, Black’s Law Dictionary (10th ed. 2014).

The Utah Code does provide some information about how concurrent sentences are to be treated. For example, Utah Code §76-3-401(9) provides that “[w]hen a sentence is imposed or sentences are imposed to run concurrently with the other or with a sentence presently being served, the term that provides the longer remaining imprisonment constitutes the time to be served.” This statute could be more clear about when a concurrent sentence begins running, but perhaps that question is so obvious, it needs not be explicitly described by the legislature. Mulliner asserts that if a sentence is ordered to run concurrently with a sentence that is already being served, the new sentence begins running the moment it is issued. This idea is supported in many cases from around the country.

For example, the Colorado Supreme Court noted that “[w]hen two sentences run concurrently, it merely means that, for each day in custody while serving both sentences, the inmate receives credit toward each sentence.” *Bullard v.*

*Department of Corrections*, 949 P.2d 999, 1002 (Col. 1997).<sup>7</sup> This idea is expanded upon by the Ohio Court of Appeals; “where a sentence is imposed *concurrently* with a sentence that has already been imposed, and which the defendant has already begun serving, the defendant is given the comparative luxury of serving each day of his second sentence, beginning with the first day, concurrently with a day served on the first sentence. Thus, if the new sentence is imposed and put into execution on the 100th day of the old sentence, the defendant is allowed to serve the first day of his new sentence while, at the same time, serving the 100th day of the old sentence.” *Ohio v. Ways*, 2013-Ohio-293, ¶10 (Ohio App. 2013).<sup>8</sup>

In contrast, “[w]here a sentence is imposed *consecutively* to a sentence that has already been imposed, and which the defendant has already begun serving, the defendant must complete the first sentence before he can begin serving day one of the second sentence.” *Ways*, 2013-Ohio-293, ¶10.

Several principles important to this case emerge from these definitions and cases. First is the principle that consecutive sentences must be performed in orderly succession and in sequence. There can be no break between consecutive sentences, they run back-to-back where the first sentence ends at the end of its last

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<sup>7</sup> See also *Brinklow v. Riveland*, 773 P.2d 517, 520 (Colo. 1989) (“A concurrent sentence is one which runs simultaneously, in whole or in part, with another sentence... The fact that sentences run concurrently merely means that the prisoner is given the privilege of serving *each day* a portion of each sentence.”) (emphasis added); *People v. Taylor*, 7 P.3d 1030, 1-32 (Colo. App. 2000); *Fleming-Pancione v. Menard*, 2017 VT 59, ¶¶16-17.

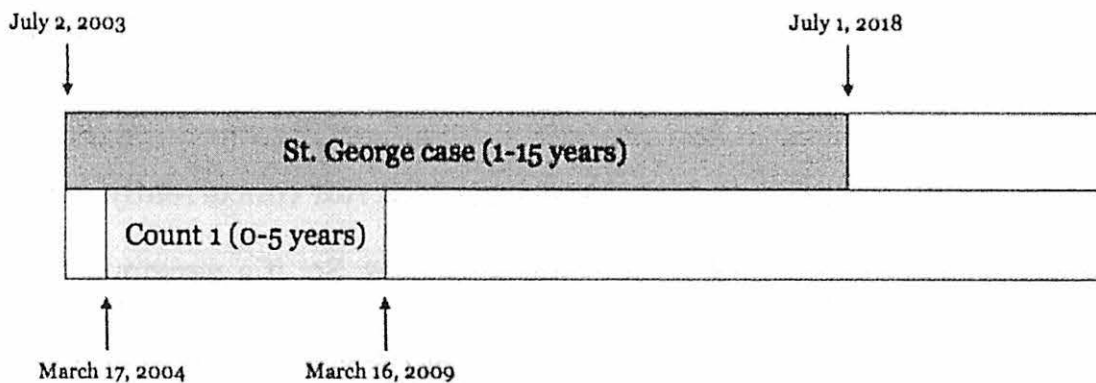
<sup>8</sup> See also *Washington v. Arizona*, 456 P.2d 415, 417 (Ariz. App. 1969) (concurrent sentences run simultaneously, the second sentence begins the day it is issued).

day and the second sentence begins at the start of the next day. When the first sentence in a consecutive pair ends, the next immediately begins, otherwise, they are not consecutive.

The second principle is that when sentences run concurrently, every day served counts as credit against each of the sentences. So, if a person is serving 5 years on one sentence and concurrently serving 15 years on a second, he gets credit against the 5 year sentence for each day during the first five years, and then that 5 year sentence is finished and the 15 year sentence continues on its own. After both sentences have been issued, every single day counts against each concurrent term. And although one sentence may end before the other, both sentences are active from the beginning.

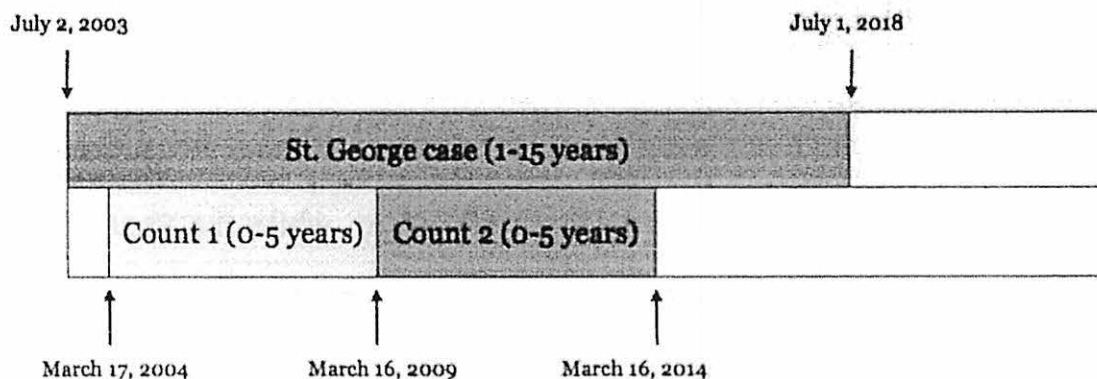
These principles demonstrate why Judge Low's sentence is problematic, why it is ambiguous or internally contradictory; these principles demonstrate why it is illegal. The first portion of Judge Low's order is that Count 1 was ordered to run concurrent to the St. George case. R.230. According to the definition of concurrent sentences and the cases interpreting that term, Count 1 began to run on March 17, 2004 (the day it was imposed), for a maximum of 5 years, along with the St. George case, which had already begun on July 2, 2003. In practical terms, because Count 1 was issued on March 17, 2004 and it was for not more than 5 years, the sentence in Count 1 ended, at the latest, on March 16, 2009, while the St. George case continued on until, at the latest, July 1, 2018. See Table 1 below for a visual representation of the relationship between Count 1 and the St. George case.

Table 1.



According to the second portion of Judge Low's order, Count 1 and Count 2 were ordered to run consecutively. R.230. And according to the definition of consecutive sentences, Count 2 began to run immediately after Count 1 ended. As mentioned above, Count 1 ended, at the latest, on March 16, 2009. Therefore, in order to be consecutive with Count 1, to run back-to-back, Count 2 began, at the latest, on March 17, 2009 and ran no more than 5 years. Because Count 2 is ordered to run consecutive to Count 1, the latest Count 2 could end was March 16, 2014. See Table 2 below for a visual representation of the relationship between Count 1 and Count 2.

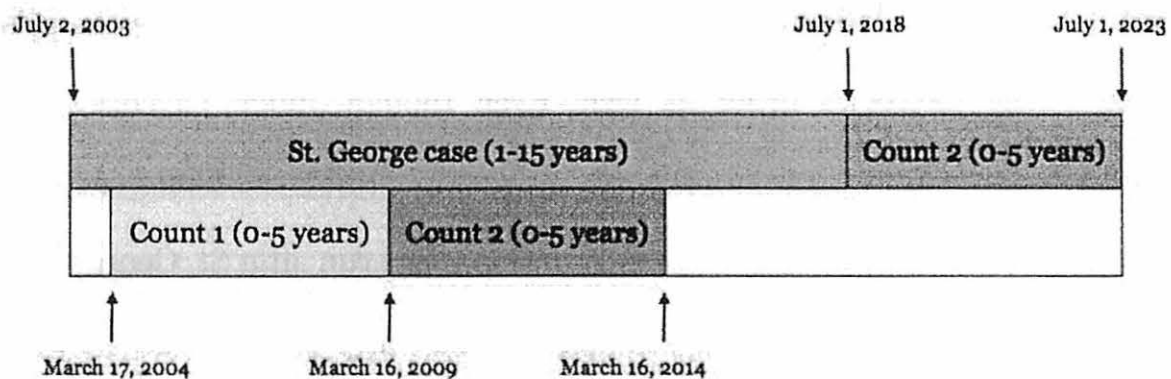
Table 2.





Here's where the problem begins. Judge Low also ordered Count 2 and the St. George case to run consecutively. R.230. Again, according to the definition of consecutive sentences, Count 2 cannot begin to run until immediately after St. George sentence ends. If the St. George sentence runs the entire 15 years, it is set to end July 1, 2018. In order for Count 2 to be consecutive to the St. George sentence, Count 2 will not begin until immediately after the St. George sentence ends, or at the latest, on July 2, 2018. See Table 3 below for a visual representation of the relationship between Count 2 and the St. George case, combined with the relationships between the other counts.

Table 3.



But as Table 3 makes clear, Count 2 is running twice, and this is illegal. Count 2 cannot have begun on March 17, 2009 and ended on March 16, 2014 only to be resurrected and begin again on July 2, 2018. And yet, according to Judge Low's order, it is required to do so. According to Judge Low's order, Count 2 must be consecutive to Count 1 while also being consecutive to the St. George sentence,



all the while, Count 1 and the St. George sentence ran concurrently, with Count 1 beginning on March 17, 2004. Thus, Judge Low's sentence is either ambiguous, meaning that it is subject to multiple interpretations because either Count 2 begins on March 17, 2009 or it begins on July 2, 2018, or it is internally inconsistent because it orders Count 2 to begin and after it has already ended.

Given Judge Low's order, the Department of Corrections has to decide whether it will follow the portion of the order that requires Count 2 to begin immediately after Count 1 ends, or instead to follow the portion of Judge Low's order that requires Count 2 to begin immediately after the St. George sentence ends. It may come as no surprise that the Board of Pardons had decided honor the part of Judge Low's sentence requiring Count 2 to run consecutive to St. George, ignoring Count 2's relationship with Count 1. This was also true when the prison applied Judge Laycock's order as well. Even though Judge Laycock's order explicitly required Count 2 to run concurrently with Count 1, the Board of Pardons ignored that portion of the order to make sure Count 2 run after St. George. These examples demonstrate the illegality of the sentence, they demonstrate how these sentences are either ambiguous as to the time and manner of service, or how the sentences are internally contradictory.

The State is likely to claim this sentence is no different than a hypothetical case where the defendant is convicted on 3 counts in one case, and each count is ordered to run consecutive to each other count. Presumably, such an order creates no ambiguity or contradiction. In that case the first sentence would run until it

ends, then the second sentence would immediately begin and run until it ends, then the third sentence would immediately begin and run until it ends. The State might argue that the first sentence and the third sentence are still consecutive to each other even though they are not back-to-back. The State may suggest that because that order is not illegal, neither is the sentence in this appeal illegal. But there is a significant distinction between these two scenarios,

**C. This Court should correct the illegal sentence**

Rule 22(e) authorizes this Court to correct the illegal sentence, rather than remanding to the district court for resentencing. After all, this Court is on equal footing with the current district court with respect to how to issue a legal sentence, because the original sentencing court has been retired for years. Both the current district court and this Court would review the same record, the same statutes, and the same case law. Therefore, for the sake of judicial efficiency this Court should correct Mulliner's sentence.

The proper way to construe Judge Schofield's sentencing order, which follows the law, accounts for the meaning of each of terms used and the logical relationships between, and which does not result in an illegal sentence, is to amend the sentencing order as follows:

Count 1 and Count 2 will run consecutive to each other, beginning on March 17, 2004. The sentences in this case will run concurrent with the sentence in Case 991500379 (St. George case).

As argued to Judge Low below,<sup>9</sup> this constructions accounts for all of Judge Schofield's terms, follows the statute and meanings of the relevant terms, and does not created an illegal sentence. Therefore, this should be the sentence.

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Because Judge Low's sentence is illegal it must be corrected. In light of the meaning of the relevant terms, statutes, and case law, as well as Judge Schofield's initial oral order, the sentence should be corrected as described above.

RESPECTFULLY SUBMITTED this 24th day of October, 2017.

/s/ Douglas Thompson  
Appointed Appellate Counsel

### **CERTIFICATE OF COMPLIANCE WITH RULE 24(f)**

I certify that this brief complies with the type-volume limitation of Rule 24(f) of the Utah Rules of Appellate Procedure. The total word count of this brief is 5,049. It was prepared in Microsoft Word.

/s/ Douglas Thompson

### **CERTIFICATE OF MAILING**

I certify that I emailed a copy of the foregoing brief and mailed two paper copies, postage prepaid, to the Utah State Attorney General, Appeals Division, [criminalappeals@agutah.gov](mailto:criminalappeals@agutah.gov), P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 24th day of October, 2017

/s/ Douglas Thompson

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<sup>9</sup> See R.259 ("We think Count 1 and Count 2 should be consecutive to each other and concurrent with the other case. That would give effect to all of the language in Judge Schofield's initial order and make a, a sentence that is not illegal. I don't think any other construction of this sentence can do that, can make it, can account for the language and not make an illegal sentence.").

## **ADDENDA**

Addendum A – Utah Code §76-3-401

Addendum B – R.044-46 Transcript of March 17, 2004 sentencing hearing

Addendum C – R.030-31 March 17, 2004 Sentence, Judgment, Commitment order

Addendum D – R.078-80 February 3, 2016 Sentence, Judgment, Commitment order

Addendum E – R.220-30 June 27, 2017 Ruling and Order

Addendum F – R.217-18 June 27, 2017 Sentence, Judgment, Commitment order

Addendum A – Utah Code §76-3-401

**76-3-401 Concurrent or consecutive sentences -- Limitations -- Definition.**

- (1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. The court shall state on the record and shall indicate in the order of judgment and commitment:
  - (a) if the sentences imposed are to run concurrently or consecutively to each other; and
  - (b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving.
- (2) In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.
- (3) The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate.
- (4) If a written order of commitment does not clearly state whether the sentences are to run consecutively or concurrently, the Board of Pardons and Parole shall request clarification from the court. Upon receipt of the request, the court shall enter a clarified order of commitment stating whether the sentences are to run consecutively or concurrently.
- (5) A court may impose consecutive sentences for offenses arising out of a single criminal episode as defined in Section 76-1-401.
- (6)
  - (a) If a court imposes consecutive sentences, the aggregate maximum of all sentences imposed may not exceed 30 years imprisonment, except as provided under Subsection (6)(b).
  - (b) The limitation under Subsection (6)(a) does not apply if:
    - (i) an offense for which the defendant is sentenced authorizes the death penalty or a maximum sentence of life imprisonment; or
    - (ii) the defendant is convicted of an additional offense based on conduct which occurs after his initial sentence or sentences are imposed.
- (7) The limitation in Subsection (6)(a) applies if a defendant:
  - (a) is sentenced at the same time for more than one offense;
  - (b) is sentenced at different times for one or more offenses, all of which were committed prior to imposition of the defendant's initial sentence; or
  - (c) has already been sentenced by a court of this state other than the present sentencing court or by a court of another state or federal jurisdiction, and the conduct giving rise to the present offense did not occur after his initial sentencing by any other court.
- (8) When the limitation of Subsection (6)(a) applies, determining the effect of consecutive sentences and the manner in which they shall be served, the Board of Pardons and Parole shall treat the defendant as though he has been committed for a single term that consists of the aggregate of the validly imposed prison terms as follows:
  - (a) if the aggregate maximum term exceeds the 30-year limitation, the maximum sentence is considered to be 30 years; and
  - (b) when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.
- (9) When a sentence is imposed or sentences are imposed to run concurrently with the other or with a sentence presently being served, the term that provides the longer remaining imprisonment constitutes the time to be served.
- (10) This section may not be construed to restrict the number or length of individual consecutive sentences that may be imposed or to affect the validity of any sentence so imposed, but only to limit the length of sentences actually served under the commitments.



- (11) This section may not be construed to limit the authority of a court to impose consecutive sentences in misdemeanor cases.
- (12) As used in this section, "imprisoned" means sentenced and committed to a secure correctional facility as defined in Section 64-13-1, the sentence has not been terminated or voided, and the person is not on parole, regardless of where the person is located.

Amended by Chapter 129, 2002 General Session

Addendum B – R.044-46 Transcript of March 17, 2004 sentencing hearing

State of Utah

Vs.

Todd D Mulliner

Case # 031404403

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Transcript of the above captioned Hearing that took place on 3/17/2004 in the Fourth Judicial District Court with Judge Haycock presiding is as follows:

Judge: "Number 20, Todd Mulliner. This matter is before the Court for sentencing. I have reviewed the pre-sentencing report for you Todd is there anything you wish to say?"

Attorney for Mulliner: "We do not find any errors in the report other than they have his plea as guilty, not no contest.

Judge: "It was a no contest, ok.

Attorney for Mulliner: "Your Honor, as for the recommendation, they are recommending that he server zero to five. (Inaudible . . .) " we recommend that he serve concurrent with what he is already serving. Right now in prison he is a tutor, a math and science tutor. He has attended all of the classes he has been asked to do. And he is also in group therapy. He is basically doing everything he can do to learn everything he can from the system before he gets out. He has lots of skills. He knows he can be a productive member of society. He has a college degree. He has the ability to get a very good job. We request that this run concurrent so that when he gets out he can get out sooner and that he can start paying the restitution amount. We do not object to the restitution amount. We don;t object to anything else in the report."

Attorney for the State of Utah: "Your Honor, we would request consecutive sentences. The Defendant is already in custody on previous matters and in order to get a consequence for this case we feel like consecutive sentences would be appropriate. So, that is the only difference we have."

Judge: "Anything you want to say Mr. Mulliner before I impose a sentence today?"

Mr. Mulliner: "Yes your honor. I appreciate the opportunity. (Inaudible, ..) "with number two, having no fiduciary responsibility. I'll tell you what, I couldn't agree more with that. I don't want any fiduciary responsibility. (Inaudible . . .) Regarding restitution, as my attorney has properly represented, not only is it my extreme desire to do so, I have willingness and capability are sometimes two different things but I will be highly capable of making restitution in all of my matters. My criminal past is very sad. If there is anyone in here (Inaudible . . .) I am very sorry about that. (Inaudible . . .) My desire to not make any excuse whatsoever and to take full responsibility. And, ah, I pray the Court will see the wisdom (inaudible . . .). Just a quick note, I have a fiance, we have discussed in detail, in fact we have a written financial plan in place, a six or seven year type plan, which is the reason why I am so confident in my ability to pay restitution because it involves her heavily. She is currently financially stable and self-sustaining and for the most part will remain that way. In our family life she would be the main provider to the family (Inaudible . . .)

Anyway, other than my extreme sorrow, and in this particular case, again, at the risk of sounding like I'm mitigating, it was actually a sincere effort on my part, when I went to prison, when I was remanded to prison in July of last year, it was that specifically which caused these people to have heartache over what was going on. Though it is was against the law I understand now but at the time my intention was sincere, it wasn't a complaint or problem until I disappeared that the issue surfaced (Inaudible ....)

Judge: "In the matter number 20 on the calendar on each of the third degree felonies it will be the order of the Court that this defendant server an indeterminate term of not more than five years in the Utah State Prison, an an order additionally you pay restitution in the sum of \$2975, that you not

hold any positions of fiduciary responsibility. I am going to order that Count 1 of the matter run concurrent to the other time you are serving and that Count 2 run consecutive so that you will have one concurrent and one consecutive sentence so that there is some modicum of separate accountability. (Inaudible . . . ) Board of Pardons will figure out what to do with that (Inaudible . . . )

Mr Mulliner: "Thank you your Honor"

Addendum C – R.030-31 March 17, 2004 Sentence, Judgment, Commitment order



4TH DISTRICT COURT - PROVO  
UTAH COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 031404403 FS
TODD MULLINER,	:	Judge: ANTHONY W. SCHOFIELD
Defendant.	:	Date: March 17, 2004

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PRESENT

Clerk: jennyc  
Prosecutor: KELLY, DONNA M  
Defendant Present  
Defendant's Attorney(s): JARVIS, GUNDA

DEFENDANT INFORMATION

Date of birth: June 15, 1964  
Video  
Tape Number: 11 Tape Count: 10:18

CHARGES

1. SALE OF UNREGISTERED SECURITY - 3rd Degree Felony  
Plea: No Contest - Disposition: 02/04/2004 No Contest
2. SECURITIES FRAUD - 3rd Degree Felony  
Plea: No Contest - Disposition: 02/04/2004 No Contest

HEARING

This matter comes before the court for sentencing. The defendant is present in custody from the prison. Counsel addresses as to the recommendation.

SENTENCE PRISON

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Case No: 031404403 Date: Mar 17, 2004

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Based on the defendant's conviction of SECURITIES FRAUD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the UTAH County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The sentence for count 1 is to run consecutive to the time the defendant is now serving. Count 2 is to run concurrent with the time the defendant is now serving.

SENTENCE RECOMMENDATION NOTE

The defendant is not to have any fiduciary responsibility.

SENTENCE TRUST

The defendant is to pay the following:

Restitution: Amount: \$2975.00 Plus Interest

Pay in behalf of: VICTIM C/O STATE OF UTAH

The amount of Restitution

Date: \_\_\_\_\_

\_\_\_\_\_  
ANTHONY W. SCHOFIELD  
District Court Judge

Addendum D – R.078-80 February 3, 2016 Sentence, Judgment, Commitment order



4TH DISTRICT COURT - PROVO  
UTAH COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 031404403 FS
TODD MULLINER,	:	Judge: CLAUDIA LAYCOCK
Defendant.	:	Date: February 3, 2016

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PRESENT

Clerk: joyc  
Prosecutor: RAGAN, SHERRY E  
Defendant

DEFENDANT INFORMATION

Date of birth: June 15, 1964  
Audio  
Tape Number: 16-201 Tape Count: 10:24

CHARGES

2. SECURITIES FRAUD - 3rd Degree Felony  
Plea: No Contest - Disposition: 02/04/2004 No Contest  
1. SALE OF UNREGISTERED SECURITY - 3rd Degree Felony  
Plea: No Contest - Disposition: 02/04/2004 No Contest

HEARING

This matter comes before the Court for Oral Argument re: defendant's motion to correct illegal sentence. The defendant appears pro se.

The Court summarizes the matter.

Mr. Mulliner addresses the Court stating argument in support of motion.

10:37 Ms. Ragan states argument in opposition of an illegal sentence.

10:45 Mr. Mulliner with closing.

10:47 The Court accepts the transcript prepared by the defendant's brother. The Court finds there was a clerical error.

The Court, under Rule 30(b), corrects the clerical error. The Court also grants the Rule 22(e) motion and corrects the original sentence/commitment.

Court orders the defendant serve no more than five years on each third degree felony, concurrently with each other.

Count 1 will run concurrently with the St. George matter, #991500379. Count 2 will run consecutively to case #991500379.

The Court orders the same restitution as before, \$2975.00, payable to the victim. The Court orders the defendant not to obtain any employment where he would have any fiduciary responsibilities.

The defendant is remanded back to the custody of the Department of Corrections.

end time: 10:57

#### SENTENCE PRISON

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the UTAH County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 031404403 Date: Feb 03, 2016

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SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Count 1 to run concurrently with case #991500379. Count 2 to run consecutively to 991500379.

Restitution Amount: \$2975.00 Plus Interest  
Pay in behalf of: C/O STATE OF UTAH VICTIM

CUSTODY

The defendant is present in the custody of the Department of Corrections Utah State Prison - Draper.

End Of Order - Signature at the Top of the First Page

Case No: 031404403 Date: Feb 03, 2016



Addendum E – R.220-30 June 27, 2017 Ruling and Order

JUN 27 2017

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTYIN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DEPARTMENT

STATE OF UTAH,

Plaintiff,

v.

TODD MULLINER,

Defendant.

RULING and ORDER on  
DEFENDANT'S MOTION TO  
CORRECT AN ILLEGAL  
SENTENCE

Case No. 031404403

Judge Low

THE ABOVE-ENTITLED MATTER comes before the court on Defendant's motion to correct an illegal sentence. Oral arguments were held on June 7, 2017, at 8:00 a.m., Adam Pomeroy representing Plaintiff and Douglas Thompson representing Defendant.

**RULING**

On March 17, 2004, the court, Judge Anthony Schofield presiding, sentenced Defendant. Defendant had previously been sentenced to prison for 1 to 15 years on a second degree felony in case number 991500379. In sentencing Defendant on the present case, Judge Schofield said,

In the matter number 20 on the calendar on each of the third degree felonies it will be the order of the Court that this defendant serve an indeterminate

term of not more than five years in the Utah State Prison . . . . I am going to order that Count 1 of the matter run concurrent to the other time you are serving and that Count 2 run consecutive so that you will have one concurrent and one consecutive sentence so that there is some modicum of separate accountability.

The court then indicated that the "Board of Pardons will figure out what to do with that."

The written order prepared after the hearing switched the counts so that count one, instead of count two, ran consecutively.

On October 23, 2015, Defendant filed a motion to correct the March 17, 2004, sentence. Defendant argued that the court failed to address whether the counts in this case should run consecutively or concurrently with each other as required by Utah Code § 76-3-401(1)(a). On February 3, 2016, the court, Judge Claudia Laycock presiding, granted the motion by correcting the clerical error regarding which count was to run consecutively with the previous case and also by ordering the two counts in this case to run concurrently with each other.

On April 12, 2017, Defendant filed another motion, this time to correct the 2016 sentence. He argues that the 2016 sentence is still illegal because it orders that the two counts in this case run concurrently with each other but only orders one of them to run consecutively with Defendant's previous sentence. This, Defendant notes, is impossible.

When a district court imposes an illegal sentence, it retains jurisdiction until a

valid sentence is imposed. *Yazzie*, 2009 UT 14 at ¶ 17.<sup>1</sup> The corrected sentence may be more severe than the previously imposed illegal sentence. *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995). This is because, “[a]s a rule, illegal sentences are void and neither create rights nor impair or affect any rights.” *Yazzie*, 2009 UT 14 at ¶ 17. However, “there may be circumstances under which even a corrected illegal sentence may be fundamentally unfair, and thus violative of due process.” *Id.* at ¶ 14 (internal quotation marks omitted). “Thus, when a district court corrects an illegal sentence, it must avoid any actions that may have a real, rather than very speculative, chilling effect on the constitutional right to appeal.” *Id.* (internal quotation marks omitted). “Nor may vindictiveness play a part in a new sentence that a defendant receives after successfully challenging an illegal sentence.” *Id.*

In 2009, our supreme court cited, with approval, the Tenth Circuit’s definition of

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<sup>1</sup> Rule 22(e), prior to May 1, 2017, stated, “The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.” It was modified on May 1, 2017, to incorporate case law differentiating between “manifestly” illegal sentences that can be corrected at any time, and ordinary “run of the mill” errors in sentencing that can be reviewed only on appeal. This distinction evolved in order to curb abuses and prevent endless litigation of sentences. *See e.g., State v. Thorkelson*, 2004 UT App 9, ¶ 15, 84 P.3d 854 (“While rule 22(e) allows a court to review an illegal sentence at any time, it must be narrowly circumscribed to prevent abuse” and should only be applied to “patently” illegal sentences, not “ordinary or ‘run-of-the-mill’ errors that should only be reviewed on appeal under rule 4(a) of the Utah Rules of Appellate Procedure.”).

an illegal sentence: "An illegal sentence is one which is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize." *State v. Yazzie*, 2009 UT 14, ¶ 13, 203 P.3d 984. The next year, it confirmed that *Yazzie's* definition was a good one. *State v. Candedo*, 2010 UT 32, ¶ 12, 232 P.3d 1008. And finally, it incorporated *Yazzie's* language into the current version of rule 22(e).

Defendant argues that both the 2004 sentence and the 2016 attempt at correcting it are illegal because they are ambiguous with respect to the time and manner in which they are to be served and because they are internally contradictory. The state concedes that the 2016 sentence is internally contradictory. The court agrees: the two counts are now explicitly ordered to run concurrently with each other, but only one of them is to run consecutively to Defendant's previous sentence, making it impossible for them to actually run concurrently with each other.

In *Yazzie*, the trial court originally failed to indicate whether the defendant's sentence would run concurrently with or consecutively to another case for which he had already been sentenced. Later, after the defendant violated probation, the court corrected the omission by ordering that his sentence run consecutively. This was held neither to

chill the defendant's rights to appeal nor to be vindictive, and it was upheld by the supreme court even though the district court—by the time it corrected the sentence—possessed, and likely considered, the defendant's behaviors committed after his original sentence. *See id.*, ¶ 23 (concurring opinion of Chief Justice Durham).

Like in *Yazzie*, Defendant's 2004 sentence failed to explicitly address whether the two sentences in the present case would run concurrently with or consecutively to each other. Defendant asked the court to correct that and it did, in 2016, by ordering them to run concurrently with each other. But by correcting one error, the court created another: the two counts *cannot* run concurrently with each other as long as only one of them runs consecutively to his previous sentence. Defendant, therefore, now asks the court to undo the 2016 correction and correct the 2004 sentence in a manner that would run the two counts in this case consecutively to each other and concurrently with his previous sentence. This would reduce his total maximum sentence, for both cases, by five years. The state, on the other hand, asks the court to keep the 2016 correction and remove its internal contradiction by ordering that *both* counts in this case run consecutively to Defendant's previous sentence. This would leave Defendant's maximum sentence at its current 20 years.

The court will do neither and simply restore Defendant's original sentence.



Defendant argues that the 2004 sentence was ambiguous and asks the court to adopt the interpretation that would reduce his sentence. Judge Schofield stated, "I am going to order that Count 1 of the matter run concurrent to the other time you are serving and that Count 2 run consecutive." Defendant avers that this statement is not clear as to what count 2 was to run consecutively to: it could mean that count 2 was to run consecutively to count 1 or that it was to run consecutively to the sentence he received in case number 991500379. So he asks for the benefit of the doubt and requests that the court now order that count 2 run consecutively to count 1 and *not* to his sentence in case number 991500379. Again, reading this statement in this fashion would reduce his maximum sentence by 5 years because the sentences in this case would be completely subsumed within the one to 15 year sentence he received in case number 991500379.

The 2004 sentence is not ambiguous. It was clearly the court's intention to require one of the counts in this case to run consecutively to Defendant's previous sentence. The statement, "I am going to order that Count 1 of the matter run concurrent to the other time you are serving and that Count 2 run consecutive" is a grammatical parallelism. Such grammatical structures are used to avoid the unnecessary repetition of words without

sacrificing meaning.<sup>2</sup> In other words, it is clear that Judge Schofield meant, “I am going to order that Count 1 of the matter run concurrent to the other time you are serving and that Count 2 run consecutive [to the other time you are serving].” The proper interpretation of the court’s statement was previously conceded by Defendant in a memorandum he filed with the court, *pro se*, on October 23, 2015. Citing to the 2004 sentence, he stated, “To run Count 1 concurrent to the other time Mr. Mulliner was already serving and then Count 2 consecutive *to the other time Mr. Mulliner was already serving* results in Counts 1 and 2, the only offenses before this court, to run disparately—neither concurrent nor consecutive.” *Memorandum in Support of Rule 22(e) Motion* at 2 (emphasis added). Thus Defendant recognized the plain meaning of the court’s parallel grammatical phrasing and accurately re-stated what count 2 was supposed to run consecutively to while simultaneously complaining that the court did not specify whether counts 1 and 2 would run concurrently or consecutively as to each other. Therefore, the 2004 sentence was not ambiguous about the sentence that count 2 was to

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<sup>2</sup> Parallel grammatical structure means “using the same pattern of words to show that two or more words or ideas are of equal importance and to help the reader comprehend what is being written.” [Http://examples.yourdictionary.com/parallel-structure-examples.html](http://examples.yourdictionary.com/parallel-structure-examples.html) (last visited on 6/9/2017). For example, if one were to say, “Alice ran up the hill, and Brian didn’t,” the obvious meaning is that Brian did not run up the hill, not that he didn’t like raspberries. The parallel construction lets any reasonably attuned listener know that Brian and Alice are being evaluated in relation to the same activity.

run consecutively to. It was to run consecutively to “the other time [Defendant was] serving”; namely, case number 991500379.

Other than supplying alternative interpretations of Judge Schofield’s original sentence, Defendant offers no other basis for correcting his sentence to achieve any other purpose. He offers no evidence of anything he has done since his original sentence was imposed, and at oral arguments he objected to the court’s inquiry into the underlying facts of either this case or the case for which he was previously sentenced. Therefore, the court has insufficient information to evaluate his motion on any basis other than effectuating Judge Schofield’s original intent.

Defendant’s 2004 sentence, imposed by Judge Schofield, ordered count 1 to run concurrently with his previous sentence and count 2 to run consecutively to his previous sentence. The only correction it needed, if anything, was an indication as to whether the two counts in this case were to run concurrently or consecutively as to each other. Utah Code § 76-3-401(1)(a) (“The court shall state on the record and shall indicate in the order of judgment and commitment: (a) if the sentences imposed are to run concurrently or consecutively to each other”). While the 2004 sentence was admittedly silent on this question, the answer inexorably follows from what *was* said: count 2 had to run consecutively to count 1. There is simply no other way for count 1 to run concurrently

with Defendant's previous sentence and for count 2 to run consecutively to it. Therefore, if the 2004 sentence ever did require correction, the court could have, and should have, merely inserted the omitted—but implied—term that count 2 was to run consecutively to count 1. By ordering counts 1 and 2 to run concurrently with each other, the 2016 sentence created a full-fledged internal contradiction and a legal impossibility not present in the 2004 sentence. Therefore, the court will vacate it.

While the 2004 sentence is unusual, it is not prohibited. Utah Code section 76-3-401(1) requires the court to state on the record whether sentences are to run concurrently or consecutively as to each other and whether the sentences before the court are to run concurrently or consecutively as to any other sentences the defendant is already serving. The statute does not require different counts to be treated similarly; in other words, one count can run concurrently with a previous sentence and another can run consecutively to that same sentence. Therefore, the 2004 sentence was a lawful sentence. It may have omitted a term, but that term was inescapably implied. The court will restore Defendant's original sentence and, like in *Yazzie*, correct it to include the omitted term.

While it would be difficult to argue that this is a vindictive result, or that it may chill Defendant's right to appeal, the court will nevertheless address these potential concerns. It is neither vindictive nor chilling. First, it faithfully gives effect to Judge

Schofield's original intent to add five years, and no more than five years, to Defendant's maximum term. Second, Defendant conceded at oral arguments that both resolutions—the one he suggests and the one the court adopts today—result in the same recommended release date under the matrix adopted by the Sentencing Commission. Third, Defendant concedes that the parole board has already interpreted the 2004 and 2016 sentences to add five years to his maximum term. And fourth, while Defendant is entitled to a corrected sentence, he is not entitled to a reduced one.

In light of the foregoing, the court will order Defendant's sentence to be corrected, once again, to undo the 2016 correction and to explicitly order what was already implied in the 2004 sentence; namely, that count 2 run consecutively to count 1. While it has taken 13 years and two motions, Defendant's sentence is now unambiguous with respect to the time and manner in which it is to be served; it is internally consistent; it includes all the terms required to be imposed by statute; it is certain; and it is a sentence that is authorized by the judgment of conviction. *Yazzie*, 2009 UT 14 at ¶ 13. In short, it is a lawful sentence.

### ORDER

For the foregoing reasons, the court enters the following order:

1. Defendant's sentence is corrected to require that he serve zero to five years

in the Utah State Prison on each of the two third-degree felonies in this case, that count 2 run consecutively to count 1, that count 1 run concurrently with Defendant's sentence in case number 991500379, and that count 2 run consecutively to Defendant's sentence in case number 991500379.

2. This is the order of the court. No additional order is necessary. Defendant is advised that any appeal of this order must be filed within 30 days.

DATED this 26 day of June

BY THE COURT:



JUDGE LOW



[MAILING CERTIFICATE ON FOLLOWING PAGE]



Addendum F – R.217-18 June 27, 2017 Sentence, Judgment, Commitment order

The Order of the Court is stated below:

Dated: June 27, 2017  
10:13:31 AM

At the direction of:  
/s/ Thomas Low  
District Court Judge  
by  
/s/ ROSE WELLS  
District Court Clerk

4TH DISTRICT COURT - PROVO  
UTAH COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	2ND CORRECTED SENTENCE, JUDGMENT,
	:	COMMITMENT
	:	
vs.	:	Case No: 031404403 FS
TODD MULLINER,	:	Judge: THOMAS LOW
Defendant.	:	Date: June 26, 2017

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Clerk: rosew

DEFENDANT INFORMATION

Date of birth: June 15, 1964

Audio

CHARGES

2. SECURITIES FRAUD - 3rd Degree Felony

Plea: No Contest - Disposition: 02/04/2004 No Contest

1. SALE OF UNREGISTERED SECURITY - 3rd Degree Felony

Plea: No Contest - Disposition: 02/04/2004 No Contest

SENTENCE PRISON

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The prison time on count two is to run consecutively to count one. The prison time on count one is to run concurrently with the prison time on case number 991500379. The prison time on count two is to run consecutive to the prison time on case 991500379.

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The sentence is corrected based on the Ruling and Order on Defendant's Motion to Correct Illegal Sentence.

End Of Order - Signature at the Top of the First Page