

2003

## Utah v. David J. Orr : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. : Case No. 20030574-CA  
 :  
 DAVID J. ORR, :  
 :  
 Defendant/Appellant. :

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BRIEF OF APPELLEE

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AN APPEAL FROM AN ORDER EXTENDING PROBATION  
IMPOSED ON CONVICTIONS FOR ATTEMPTED SECURITIES  
FRAUD, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH  
CODE ANN. § 61-1-1 (2000), AND UNLICENSED BROKER-DEALER,  
A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 61-1-3 & § 61-1-21 (2000), IN THE THIRD JUDICIAL DISTRICT  
COURT, SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE TIMOTHY R. HANSON, PRESIDING

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FILED  
UTAH APPELLATE COURTS

MAR 15 2004

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ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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**IN THE UTAH COURT OF APPEALS**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS .....	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES .....	2
STATEMENT OF THE CASE AND OF THE FACTS .....	3
SUMMARY OF ARGUMENT .....	9
ARGUMENT	
I. THE FILING OF THE PROGRESS/VIOLATION REPORT THREE DAYS BEFORE DEFENDANT’S PROBATION EXPIRED TOLLED THE RUNNING OF THE PROBATIONARY PERIOD; THE TRIAL COURT, THEREFORE, HAD JURISDICTION TO EXTEND DEFENDANT’S PROBATION .....	10
A. Under Utah Code Ann. § 77-18-1(11)(b), the timely filing of the violation report tolled the running of defendant’s probationary period. ....	11
B. Neither the tolling provisions of Utah Code Ann. § 77-18-1(11)(b), nor due process requires that a defendant be served before expiration of the original probation period. ....	16
II. A COURT HAS AUTHORITY TO EXTEND PROBATION UPON A FINDING THAT THE PROBATIONER HAS NOT COMPLETED THE TERMS OF HIS PROBATION, INCLUDING A FAILURE TO FULLY PAY COURT-ORDERED RESTITUTION .....	24
III. UTAH’S PROBATION STATUTE SETS A PRESUMPTIVE PROBATION TIME LIMIT OF 36 MONTHS; THEREFORE, THE TRIAL COURT’S ORDER SHOULD BE AMENDED TO EXTEND DEFENDANT’S PROBATION FOR 36 MONTHS .....	29
CONCLUSION .....	32

## ADDENDA

Addendum A - Utah Code Ann. § 77-18-1 (2003)  
Utah Code Ann. § 76-3-201.1 (2003)

Addendum B - States's Exhibits 1 and 2

Addendum C - Trial Court's Memorandum Decision

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983) .....	26, 27, 28
-------------------------------------------------------	------------

### STATE CASES

<i>Gilroy v. Lowe</i> , 626 P.2d 469 (Utah 1981) .....	12
<i>In re K.G.</i> , 2002 UT App 3, 2002 WL 23812 (Jan. 4, 2002) .....	15
<i>Raiser v. Buirley</i> , 2002 UT App. 277, 54 P.3d 650 .....	15, 16
<i>Smith v. Cook</i> , 803 P.2d 788 (Utah 1990) .....	11, 18, 19
<i>State v. Allendinger</i> , 565 P.2d 1119 (Utah 1977) .....	27, 28
<i>State v. Call</i> , 1999 UT 42, 980 P.2d 201 .....	21, 22, 23, 24, 29
<i>State v. Dickey</i> , 841 P.2d 1203 (Utah App. 1992) .....	28
<i>State v. Gamblin</i> , 2000 UT 44, 1 P.3d 1108 .....	12, 13
<i>State v. Grate</i> , 947 P.2d 1161 (Utah App. 1997) .....	2, 21
<i>State v. Green</i> , 757 P.2d 462 (Utah 1988) .....	2, 11, 17, 18
<i>State v. Harmon</i> , 956 P.2d 262 (Utah 1998) .....	26
<i>State v. Hodges</i> , 798 P.2d 270 (Utah App. 1990) .....	26, 27
<i>State v. Jarman</i> , 1999 UT App 269, 987 P.2d 1284 .....	26
<i>State v. Moya</i> , 815 P.2d 1312 (Utah App. 1991) .....	11
<i>State v. Nones</i> , 2000 UT App 211, 11 P.3d 709 .....	28, 29, 32
<i>State v. Palmer</i> , 777 P.2d 521 (Utah App. 1989) .....	16
<i>State v. Rawlings</i> , 893 P.2d 1063 (Utah App. 1995) .....	18, 19, 29
<i>State v. Reedy</i> , 937 P.2d 152 (Utah App. 1997) .....	9, 10, 11, 17, 19, 20

<i>State v. Robinson</i> , 860 P.2d 979 (Utah App. 1993) .....	30
<i>State v. Tueller</i> , 2001 UT App 317, 37 P.3d 1180 .....	14
<i>State v. Widdison</i> , 2001 UT 60, 28 P.3d 1278 .....	12
<i>Van Tassell v. Shaffer</i> , 742 P.2d 111 (Utah App. 1987) .....	12
<i>Wilcox v. Geneva Rock Corp.</i> , 911 P.2d 367 (Utah 1996) .....	12

## STATE STATUTES

1984 Utah Laws § 20 .....	18
1989 Utah Laws § 226 .....	19, 21
Utah Code Ann. § 61-1-1 (2000) .....	1, 3
Utah Code Ann. § 61-1-3, -21 (2000) .....	1, 3, 5, 6
Utah Code Ann. § 76-3-201.1 (2003) .....	2, 31
Utah Code Ann. § 77-18-1 (2003) .....	passim
Utah Code Ann. § 78-2a-3 (2002) .....	1
Utah R. Crim. P. 29 .....	14

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**IN THE UTAH COURT OF APPEALS**

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**STATE OF UTAH,** :

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**v.** : **Case No. 20030574-CA**

**DAVID J. ORR,** :

**Defendant/Appellant.** :

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**BRIEF OF APPELLEE**

-----

**JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS**

Defendant appeals from an order extending his probation imposed on convictions for one count of attempted securities fraud, a third degree felony, in violation of Utah Code Ann. § 61-1-1 (2000), and one count of unlicensed broker-dealer, a third degree felony, in violation of Utah Code Ann. § 61-1-3 & § 61-1-21 (2000). This Court has original appellate jurisdiction over all criminal appeals involving convictions for third degree felonies. *See* Utah Code Ann. § 78-2a-3(2)(e) (2002).

**STATEMENT OF ISSUES  
AND STANDARDS OF REVIEW**

**Issue No. 1:** Did the district court have jurisdiction to extend defendant's probation where a progress/violation report was filed three days before his original probation expired?



**Standard of Review:** Whether a court has jurisdiction to revoke or extend probation is a matter of statutory construction and, therefore, a question of law, which is reviewed for correctness. *See State v. Grate*, 947 P.2d 1161, 1164 (Utah App. 1997).

**Issue No. 2:** Is a finding that defendant had not fully paid his court-ordered restitution, a condition of his probation, a sufficient basis for extending defendant's probation?

**Standard of Review:** Statute governs under what circumstances a court may extend probation. *See State v. Green*, 757 P.2d 462, 463-64 (Utah 1988). Accordingly, this issue also presents a question of law, reviewed for correctness. *See Grate*, 947 P.2d at 1164.

**Issue No. 3:** May a district court extend probation beyond 36 months to the maximum amount of time that defendant could be incarcerated?

**Standard of Review:** See standard of review for Issues 1 and 2.

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

The text of the following statutes are reproduced in **Addendum A**:

Utah Code Ann. § 77-18-1 (2003);  
Utah Code Ann. § 76-3-201.1 (2003).<sup>1</sup>

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<sup>1</sup>Because defendant was sentenced in May 2000, the applicable code provisions are those in effect in 2000. Although Utah Code Ann. § 77-18-1 has been amended since then, none of the amendments relate to the subsections applicable to this case. Accordingly, unless otherwise stated, this brief will cite to the 2003 version of the code.

## STATEMENT OF THE CASE AND OF THE FACTS

### *The charges*

Defendant was charged in a February 1999 information with ten counts of securities fraud, second degree felonies, in violation of Utah Code Ann. § 61-1-1 (2000), and nine counts of unlicensed broker-dealer, third degree felonies, in violation of Utah Code Ann. § 61-1-3, -21 (2000). R2-6.

According to the presentence investigation report (PSI), the charges were based on, among other things, defendant's material misrepresentations and omissions to investors, his operation of a Ponzi or Pyramid scheme,<sup>2</sup> and his soliciting clients to invest in historic railroad bonds, which, as characterized by the Utah Division of Securities, was an "out and out fraud." PSI at 2-5.

### *The guilty pleas*

On March 23, 2000, defendant pled guilty to one count each of attempted securities fraud and unlicensed broker-dealer, both third degree felonies. R20. In exchange for the pleas, the State dismissed all remaining charges in this and another case, agreed to not file any other charges based on defendant's conduct before his pleas, and agreed to recommend that defendant receive probation with four months jail time. R9.

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<sup>2</sup>In a Ponzi or Pyramid investment scheme, earlier investors receive returns from money invested by later investors. See PSI at 3.

### *The sentences*

On May 12, 2000, the trial court sentenced defendant to two consecutive prison terms of 0-to-5 years. R22-23. The court suspended the prison terms and placed defendant on three years probation, on the condition that he serve six months in jail. R23. The court also ordered defendant to pay \$1850.00 in fines and to pay restitution to his victims as a condition of his probation. R23. The court directed defendant “to pay no less than \$1,000 per month towards restitution, or 25% of [his] income, under direction of AP&P.” R24. Defendant’s probation agreement incorporated the court’s restitution order and payment schedule as special conditions of probation. R28-29. After a hearing, the trial court set the total restitution amount at \$355,504.39. R119-21, 170-71.

### *Progress/Violation Reports*

**First report.** On January 2, 2001, AP&P filed a progress/violation report alleging that defendant had violated the terms and conditions of his probation by “being involved in an activity that involves money, investments or financial accounts” and “failing to be cooperative, compliant and truthful in all dealings with [AP&P].” R55-56, 98-99. Based on the allegations in the report, the trial court issued an order to show cause. R60.

On February 16, 2001, the parties reached an agreement in which the order to show cause was dismissed and a deadline set for AP&P to give an accounting of how much and to whom defendant’s restitution payments had been disbursed. R102-03. In this hearing, the trial court stated that “[p]robation will not terminate pending restitution being satisfied.” R102-03.

**Second report.** On July 1, 2002, AP&P filed a report with the court stating that defendant had been compliant with his probation agreement, including timely payment of \$1,080 per month towards his restitution and fines. R193-94. The report recommended that defendant remain on probation. R195.

**Third report.** On May 9, 2003, three days before defendant's probation was to expire by operation of law, AP&P filed a progress/violation report stating that the end of defendant's 36-month probation was approaching and that although he had so far paid \$34,553.20 toward his fines and restitution, he had not yet paid in full and was, therefore, in violation of his probation. R228-31; State's Exs. 1, 2 (reproduced in **Addendum B**). The report, which was supported by an affidavit, recommended revoking probation and requested that an order to show cause issue.<sup>3</sup> *Id.* The district court judge approved the order to show cause request on May 12, 2003, and the order to show cause was signed and issued by the court on May 13, 2003. R229, 232-33.

Although the original progress/violation report and supporting affidavit bore an electronic date stamp of May 9, 2003, someone had handwritten in ink the number 13 over the number 9. *See* R228-31; State's Ex. 1, 2; **Addendum B**. The probation officer served the order to show cause on defendant on May 19, 2003. R232-33; R481:22.

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<sup>3</sup>Although the written report recommended revocation of probation and commitment to prison, it was clear at the subsequent hearing that AP&P had no interest in revoking probation, but only wanted to extend probation for the purpose of ensuring defendant's on-going compliance with his restitution payments. R481:36-37.

### *Motion to dismiss*

Defendant moved to dismiss the order to show cause for lack of jurisdiction. R234. Defendant argued that his probation expired by operation of law on May 12, 2003, and that to continue his probation, AP&P had to file its report and serve him before that date. R238-42. Contending that the progress/violation report had been filed a day late on May 13, 2003, and that he had not been served until May 19, 2003, defendant argued that the district court had lost jurisdiction to revoke or extend his probation. *Id.*

Apparently anticipating that his probation would expire, defendant, on the advice of counsel, did not make his May and June 2003 restitution payments. R481:30.

At the June 23, 2003, hearing on defendant's motion to dismiss, the district court heard the testimony of Robert Egelund, defendant's probation officer. R481:10-23. Agent Egelund testified that he met with the judge in this case at about 1:30 p.m. on Friday, May 9, 2003, to discuss the approaching termination of defendant's probation. R481:15-18. Egelund specifically advised the court that defendant's 36-month probationary period would terminate the following Monday, on May 12. R481:17-18. Egelund and the court decided that a progress/violation report, affidavit, and order to show cause would be filed that very afternoon. R481:16.

In accordance with that decision, Agent Egelund returned to the court about two hours later with a progress/violation report, supporting affidavit, and order to show cause. R481:17-19; State's Exs. 1, 2. Agent Egelund testified that he date-stamped each of the documents using the court's electronic date-stamp and then placed the documents in the file

box located in the court's reception area. R481:16-20. The electronic date-stamp showed that the documents had been filed on Friday, May 9, 2003 at 3:41 p.m. State's Exs. 1, 2. Upon returning to his office, Egelund recorded on his computer that he had filed the report and supporting documents on May 9, 2003. R481:19-20.

Egelund also date-stamped and filed a copy of each document to be returned to him once the court had signed the order to show cause and set a date. R481:19-20. The copies of the report and affidavit that were returned to Egelund, like the originals in the court file, had the number 13 handwritten in ink over the electronically-stamped number 9. State's Exs. 1, 2. However, the copy of the order to show cause returned to Egelund still bore the unaltered date stamp of May 9, 2003. State's Ex. 1. Agent Egelund testified that he did not make the changes on the date stamps, nor did he know who had or why. R481:17-18.

***Trial court's ruling denying motion to dismiss and extending probation***

Relying on Utah Code Ann. § 77-18-1(11)(b) (2003), the trial court concluded that the filing of a violation report tolled the running of the probation period. R388-89. The court then found, based on "the credible testimony of Mr. Egelund" and the electronic date-stamp appearing on the report and supporting documents, that the progress/violation report had been filed on May 9, 2003, three days before expiration of the probation period. R388-90; R481:33-34. The court rejected defendant's argument that due process also required him to be served within the original probationary period. R391-92. The court reasoned that since the running of the probationary period had been tolled by the filing of the violation report,

service of the order to show cause ten days later, on May 19, 2003, was still within the probationary period. R391-92; R481:34.

Having found that it had jurisdiction, the trial court extended defendant's probation for the remaining seven years of his original ten-year sentence (two consecutive 0-5 year terms). R392-93. The trial court could find nothing in the probation statutes that expressly limited its ability to extend probation only in 36-month increments, as defendant argued. R392-93. The court then expressed its concern that defendant would not make his restitution payments unless he continued on formal probation:

The defendant's failure to pay the May and June installments of his restitution underscores the fact that the defendant is induced to repay his victims only when he is in the shadow of probation and the threat of incarceration is held over him. Because the defendant's only incentive to continue making restitution payments is to avoid his probation being revoked, the Court invokes the full scope of its discretion to extend the defendant's probation for the maximum length permissible, the remaining full term of his sentence of 10 years.

R393. The trial court then ordered defendant to make up the May and June 2003 restitution payments he had missed.<sup>4</sup> R481:39. (The trial court's Memorandum Decision is reproduced in **Addendum C**).

Defendant timely appeals the denial of his motion to dismiss for lack of jurisdiction and the order extending his probation. R395.

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<sup>4</sup>Less than two weeks after the trial court issued its written order, defendant convinced AP&P to recommend that his restitution payment be reduced from \$1,000 per month to \$300 per month. R399-405. The trial court ordered the reduction, although one of the victims subsequently objected. R405-06, 407.

## SUMMARY OF ARGUMENT

**Point I:** Utah Code Ann. § 77-18-1(11)(b) expressly tolls the running of the probation period upon the filing of a violation report. Here, the trial court found that the violation report was filed on May 9, 2003, three days before defendant's probation expired. Defendant has not shown that the trial court's finding was clearly erroneous. This Court has expressly rejected the argument that a defendant must be served before expiration of the probation period when a timely violation report has been filed. *See State v. Reedy*, 937 P.2d 152, 153 (Utah App. 1997). The trial court, therefore, had jurisdiction to extend defendant's probation.

**Point II:** The trial court extended defendant's probation based on his failure to fully pay restitution, an express condition of his probation. The trial court was not required to find that defendant's violation of his probation was wilful. To the contrary, applicable statutes and caselaw contemplate that a trial court be permitted to extend probation so as to allow the defendant to complete all the conditions of his probation, even when that failure is not wilful.

**Point III:** The State agrees that under Utah's probation statute, a trial court may only impose and extend probation terms for felonies in 36-month increments. The case should therefore be remanded for the trial court to enter an order extending probation for 36 months. However, should this Court determine that formal probation was improperly extended in this case, it should remand for the trial court to enter an order of bench probation for the purpose of enforcing the restitution order.



## ARGUMENT

### POINT I

#### **THE FILING OF THE PROGRESS/VIOLATION REPORT THREE DAYS BEFORE DEFENDANT'S PROBATION EXPIRED TOLLED THE RUNNING OF THE PROBATIONARY PERIOD; THE TRIAL COURT, THEREFORE, HAD JURISDICTION TO EXTEND DEFENDANT'S PROBATION<sup>5</sup>**

Defendant argues that the trial court lacked jurisdiction to extend his probation because the violation report was not filed until May 13, 2003, one day after his probation expired by law. Br. Aplt. 7-12. He alternatively contends that even if the violation report was timely filed, the court lost jurisdiction when he was not served with notice of the extension proceedings until 7 days after his probation expired by law. Br. Aplt. 12-21.

As the trial court correctly recognized, Utah Code Ann. § 77-18-1(11)(b) (2003) tolls the running of the probation period upon the filing of a violation report. The trial court found that the violation report was not filed on May 13, 2003, as defendant asserts, but on May 9, 2003, three days before defendant's probation expired. Defendant has not shown that the trial court's finding was clearly erroneous. This Court has expressly rejected the argument that a defendant must be served before expiration of the probation period when a timely violation report has been filed. *See State v. Reedy*, 937 P.2d 152, 153 (Utah App. 1997). Accordingly, the trial court correctly concluded that defendant's probation period was tolled before it expired and that the court had jurisdiction to extend probation.

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<sup>5</sup>This point responds to Points I and II of defendant's brief. *See* Br. Aplt. 7-21.

**A. Under Utah Code Ann. § 77-18-1(11)(b), the timely filing of the violation report tolled the running of defendant's probationary period.**

A trial court's power "to grant, modify, or revoke probation is purely statutory, and although a trial court has discretion in these matters, the court's discretion must be exercised within the limits imposed by the legislature." *Smith v. Cook*, 803 P.2d 788, 791 (Utah 1990). *See also State v. Green*, 757 P.2d 462, 463 (Utah 1988). Thus, whether a trial court has jurisdiction to revoke or extend probation is determined by statute. *See id.*

Utah Code Ann. § 77-18-1(10)(a)(i) provides that "[p]robation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions." Under this provision, probation for a felony automatically terminates at the end of 36 months unless revocation or extension proceedings are initiated before probation expires. *See Green*, 757 P.2d at 464-65 (interpreting 1984 version of § 77-18-1(10)(a)(i)); *State v. Moya*, 815 P.2d 1312, 1315-16 (Utah App. 1991) (same).

Subsection (11)(b) provides that "[t]he running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court." Utah Code Ann. § 77-18-1(11)(b). In other words, if a violation report is filed with the court before probation expires by law, the probation period is tolled. *See State v. Reedy*, 937 P.2d 152, 153 (Utah App. 1997). The question then is whether the violation report here was filed before or after defendant's probation would expire by law.

As stated, defendant was sentenced to 36 months probation on May 12, 2000. R22-23. Defendant asserts that his probation “technically terminated by law on May 11, 2003 at midnight” and that “May 12, 2003 was one day beyond thirty-six months.” Br. Appt. 7-8, 13. Defendant is incorrect. ““When the time period is measured in months or years from a certain date, the day from which the time period is to run is excluded and the same calendar date of the final month or year is included.”” *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367, 369 (Utah 1996) (quoting *Gilroy v. Lowe*, 626 P.2d 469, 471 (Utah 1981) and citing Utah Code Ann. § 68-3-7 and Utah R. Civ. Pro. 6(a)). *See also Van Tassell v. Shaffer*, 742 P.2d 111, 114 (Utah App. 1987). Under this rule, AP&P had until May 12, 2003 to file a violation report. *See Wilcox*, 911 P.2d at 369 (this rule “admittedly . . . allow[s] a plaintiff an extra day if we grant that he or she could file a complaint on the day of the event”).

The trial court found that Agent Egelund filed the violation report with the court on May 9, 2003. “A trial court's factual findings will not be reversed absent clear error.” *State v. Widdison*, 2001 UT 60, ¶ 60, 28 P.3d 1278. *Accord State v. Gamblin*, 2000 UT 44, ¶ 17 n. 2, 1 P.3d 1108. “To demonstrate that a finding of fact is clearly erroneous, the defendant ‘must first marshal all the evidence that *supports* the trial court’s findings. After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light *most favorable to the trial court's ruling*, the evidence is insufficient to support the trial court's findings.’” *Widdison*, 2001 UT 60, ¶ 60 (quoting *Gamblin*, 2000 UT 44, ¶ 17 n. 2) (emphasis in original).

Defendant has neither marshaled the evidence nor otherwise demonstrated that the trial court's finding was clearly erroneous. Although defendant briefly mentions that Agent Egelund testified he personally filed and date-stamped the violation report on May 9, 2003, he does not explain why this testimony was insufficient to support the trial court's finding. Indeed, defendant ignores the evidence corroborating Agent Egelund's testimony: (1) the violation report, affidavit, and order to show cause all bear an electronic date-stamp of May 9, 2003 at 3:41; (2) although the original date-stamps were altered by hand, the date-stamp on the order to show cause returned to Egelund was not altered; (3) Egelund denied making the changes himself; and (4) the trial court approved the order to show cause on May 12, 2003, thereby demonstrating that it was filed before May 13. This evidence not only supports Agent Egelund's testimony, but it also supports the trial court's finding that the violation report was in fact filed on May 9, 2003, and not on May 13, as contended by defendant.

Defendant suggests that the trial court's finding was impermissibly based on the judge's own memory of events and the judge's belief that a court clerk changed the electronic date-stamp to reflect the date she entered the report and order to show cause on the computer docket. Br. Aplt. 9-10. Defendant argues that because the judge and law clerk were not sworn or cross-examined, these factors were not a proper basis for finding that the violation report was filed on May 9. *Id.*

The trial court's finding, however, was not based on either the judge's memory or on whether the court clerk changed the date to reflect when the documents were entered on the computerized docket. While the judge did say he recalled Agent Egelund coming in to

discuss defendant's probation, he explained that he did not have "an independent recollection of the date" of that conversation. R481:9. Thus, the judge never suggested that his finding was based on his independent memory of events. Indeed, the court's written ruling expressly states that the finding is based solely on "the documentary evidence before the Court in light of Mr. Egelund's credible testimony."<sup>6</sup> R389-90.

Admittedly, the trial court stated in both its oral and written rulings that it believed the a court clerk made the changes to the date stamp to reflect the "apparent date that the documents were docketed." R389; R481:26-28. Ultimately, however, that observation was irrelevant to the court's finding that the violation report was filed on May 9. As stated, the trial court expressly based its finding on the "credible testimony" of Mr. Egelund, in conjunction with the documentary evidence. R389-90. It was undisputed below that someone had subsequently altered the original electronic date-stamp. Who had done so, and why, became irrelevant once the trial court determined that Agent Egelund was telling the truth when he testified that he filed the violation report on May 9 and that he was not the one who had made the alterations.

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<sup>6</sup>For the first time on appeal, defendant opines that "once the Judge determined during the course of the hearing that he had become a material witness, the Judge had an obligation to recuse himself from further proceedings associated therewith." Br. Aplt. 9-10 & n.2. As explained, the record does not support defendant's assertion that the trial court acted as a witness in this case, material or otherwise. In any event, if defendant believed that the trial judge was biased, it behooved him to move to recuse the judge under rule 29, Utah Rules of Criminal Procedure. His failure to do so precludes him from challenging the trial court's impartiality now. *See State v. Tueller*, 2001 UT App 317, ¶¶ 8-9, 37 P.3d 1180 (defendant waived appellate claim that judge was biased where he did not file motion under Utah R. Crim. 29 to recuse judge).

Defendant finally argues that the date a document is filed with the court “is determined almost exclusively by the date upon which [c]ourt records show the document was filed, and not by extrinsic testimony.” Br. Aplt. 11. In support, defendant cites to this Court’s prior holding that an appellate court is “bound by the filing date indicated on the notice of appeal transmitted to it by the trial court.” Br. Aplt. 11 (quoting *In re K.G.*, 2002 UT App 3, 2002 WL 23812, at \*1 (Jan. 4, 2002)). Defendant reasons that if this Court is bound by a date-stamp, the district court should also be bound by the date-stamp on the violation report. Br. Aplt. 11-12.

The unpublished decision defendant relies on is inapposite. In *K.G.*, the notice of appeal bore one date-stamp that showed the notice of appeal was untimely filed. 2002 UT App 3. Here, the violation report reflected two dates: (1) an electronic date-stamp showing that the report was timely; and (2) a hand-written change suggesting the report was untimely. The presence of the two dates raised a factual question regarding when the violation report was filed with the court. The trial court was obligated to resolve the factual issue in order to determine whether it had jurisdiction. It could only resolve that issue by taking extrinsic evidence.

Indeed, this Court considered extrinsic evidence under similar circumstances. In *Raiser v. Buirley*, 2002 UT App 277, 54 P.3d 650 (per curiam), this Court had dismissed Raiser’s appeal as untimely, holding that it was “bound by” the date-stamp appearing on the notice of appeal. *Id.* at ¶ 3. On a petition for rehearing, Raiser claimed that he had timely filed his notice of appeal with a money order for the filing fee, but that the court clerk had

returned the notice of appeal because the money order named the wrong payee. *Id.* at ¶¶ 3-4. This Court noted that Raiser’s allegations were supported by the original notice of appeal, which bore a date-stamp showing that it had been timely filed. *Id.* at ¶ 4. The original date-stamp had been crossed out in ink and initialed. *Id.* The notice of appeal bore a second date-stamp, which was not crossed out, but which showed an untimely filing date. *Id.* Under the circumstances, this Court accepted the first date-stamp as the correct one, deemed the notice of appeal timely filed, and reinstated the appeal.<sup>7</sup> *Id.* at ¶ 9.

In sum, defendant has not demonstrated that the trial court’s finding that the report was timely filed on May 9 was clearly erroneous. Thus, under the plain language of Utah Code Ann. § 77-18-1(11)(b), the running of defendant’s probation period was tolled by the filing of the violation report and the trial court had jurisdiction to extend his probation.

**B. Neither the tolling provisions of Utah Code Ann. § 77-18-1(11)(b), nor due process requires that a defendant be served before expiration of the original probation period.**

Notwithstanding the tolling provision of subsection (11)(b), defendant argues that even if the violation report was timely filed, due process requires that he be served with notice of the probation revocation or extension proceedings *before* probation expires as a

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<sup>7</sup>Defendant also relies on *State v. Palmer*, 777 P.2d 521 (Utah App. 1989) to support his claim that the trial court should not have accepted extrinsic evidence to determine the correct filing date. Br. Aplt. 11. *Palmer*, however, addressed only whether the Court should adopt the prison mailbox rule to make an otherwise untimely notice of appeal timely. *Palmer*, 777 P.2d at 522. That case only stands for the proposition that failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Id.* Here, no one disputes that an untimely violation report would have deprived the trial court of jurisdiction to extend probation. Rather, the pertinent question here is whether the violation report was in fact timely filed. *Palmer* does not help answer that question.

matter of law. Br. Aplt. 12-21. Defendant contends that since he was not served with the order to show cause until seven days after his probation was scheduled to expire, the trial court lost jurisdiction to extend probation. Br. Aplt. 12-13. Defendant cites several Utah cases in support of his argument.

As shown below, defendant's argument depends on cases that either interpreted earlier versions of section 77-18-1 that did not contain subsection (11)(b)'s express tolling provision, or that rested on other subsections not relevant here. Contrary to defendant's claim, none of those cases held that due process required notice of probation extension proceedings before expiration of probation; rather, they all expressly based their holdings on statutory construction. Indeed, the only case to directly address the effect of subsection 11(b) expressly rejected defendant's argument. *See State v. Reedy*, 937 P.2d 152 (Utah 1997) (*per curiam*).

In *Green*, 757 P.2d at 463-65, the Utah Supreme Court interpreted the 1984 version of section 77-18-1 to require that probation proceedings be initiated before expiration of the probation period. In so holding, the supreme court rejected the State's contention that the then statutory "eighteen-month term [was] 'tolled' when any violation occurs within the period and that there is no time limit for initiating a revocation action." *Id.* at 464. The *Green* court observed that the State's interpretation of the statute would create an "indefinite probationary term [that] could theoretically be revoked many years after the original imposition and suspension of sentence." *Id.* This, the court concluded, was contrary to "the



plain meaning” of the statute. *Id.* The 1984 version of section 77-18-1 did not include the tolling provision that currently appears in subsection (11)(b).<sup>8</sup>

In *Smith v. Cook*, 803 P.2d 788, 794-95 (Utah 1990), the supreme court interpreted the 1981 version of section 77-18-1 to require that a defendant also be served with notice of revocation proceedings before expiration or termination of his probation period, so long as the defendant was not “actively evading supervision.” Although *Smith* states that its statutory interpretation was in accord with due process concerns, it makes clear that its holding rests not on due process, but on the construction of the “relevant statutes.” *Id.* at 794-96. Indeed, the *Smith* court recognized that while some states held that filing a violation report was sufficient to retain jurisdiction over a probationer, this was matter of statutory construction. *Id.* at 794-95 & n.33. Nothing in the *Smith* opinion remotely suggests that due process requires notice, in addition to filing a report, during the probation period. Moreover, like the 1984 version addressed in *Green*, the 1981 provision also lacked express tolling provision of current subsection (11)(b).

In *State v. Rawlings*, 893 P.2d 1063, 1067-70 (Utah App. 1995), this Court, in interpreting the 1985 version of section 77-18-1, followed *Smith* and required notice of *extension*, as well as revocation, proceedings before probation expired. Observing that *Smith* “involved the statutory prerequisites to commencement of a probation *revocation*

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<sup>8</sup>Section 77-18-1 was amended effective March 29, 1984, to toll the probation period when a probationer evaded probation supervision or absented himself from the state without permission. *See* 1984 Utah Laws § 20 (77-18-1(11)). It was also amended to exclude time spent in or out of confinement after a violation and while awaiting a hearing or decision concerning revocation, unless the defendant was exonerated. *Id.*

proceeding,” the *Rawlings* court recognized that it too “must look to the applicable statutes to determine ‘which stage in the [extension] proceedings must be reached within the period of the probation for the court to retain its authority over probationers beyond the probation period.’” *Id.* at 1068-69 (quoting *Smith*, 803 P.2d at 794) (emphasis and brackets in original). After reviewing the pertinent statutory provisions, this Court concluded that jurisdiction to extend probation depended on service before expiration of the probation period. *Id.* Thus, *Rawlings*, like *Green* and *Smith*, held that this requirement was required, not by due process, but by statute.<sup>9</sup> Again, the 1985 version did not contain subsection (11)(b)’s express tolling provision.

Because the express tolling provision in subsection (11)(b) was not enacted until 1989, *see* 1989 Utah Laws § 226, neither *Green*, *Smith*, nor *Rawlings* addressed whether, under its provisions, a defendant would have to be served before expiration of probation if a timely violation report had been filed. This Court directly addressed that question in *State v. Reedy*, 937 P.2d 152 (Utah App. 1997). Relying on *Green* and *Smith*, Reedy, like defendant here, claimed that he was required to be notified of any revocation or extension

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<sup>9</sup>Quoting *Rawlings*, defendant argues that “[i]t is well settled that a probationer shall be accorded due process at revocation proceedings because revoking probation seriously deprives a person of his or her liberty.” Br. Aplt. 15. The due process discussion in *Rawlings*, however, related not to whether a defendant must be served *before his probation expires*, but to what notice and process a probationer was due *before his probation could be extended or revoked*. *See Rawlings*, 893 P.2d at 1066-68. As stated, this Court recognized in *Rawlings* that the prerequisites for continued jurisdiction were a matter of statutory construction, not due process. *Id.* at 1068-69. This Court concluded that *Rawlings*’ due process rights were violated because he had only been casually informed about the proceedings two days before the hearing and that this was insufficient notice to allow him to prepare to answer the allegations. *Id.* at 1070-71.

proceedings before his probation expired. *Id.* at 153. Quoting subsection (11)(b), this Court held that a violation report and an order to show cause issued before expiration of Reedy's probation period was sufficient to toll the probation period. *Id.* at 153. "The plain language of the statute does not require service of the notice, order, or warrant within the probation period as Reedy suggests." *Id.* This Court found Reedy's reliance on *Green* and *Smith* unhelpful because both cases "interpret[ed] earlier versions of Utah Code Ann. § 77-18-1, none of which contain[ed] the pertinent subsection [(11)(b)]." *Id.* at 153. Accordingly, this Court affirmed the trial court's revocation of Reedy's probation. *Id.*

Defendant's only discussion of *Reedy* appears in a footnote in which he asserts that its decision was based on the fact that defendant had "made service impracticable" by leaving the state. Br. Aplt. 21 n.4. A fair reading of *Reedy*, however, reveals that this observation was not necessary to the Court's decision, but was dicta. After holding that the plain language of subsection (11)(b) did not require service before expiration of the probation period, this Court pointed out that Reedy's reliance on *Green* and *Smith* was unavailing, not only because they interpreted earlier statutes, but because defendant had evaded service by leaving the jurisdiction. *Reedy*, 937 P.2d at 153. "[T]hus, even under the *Smith* analysis," this Court concluded, "it would not be necessary to serve him during the probation period." *Id.* In short, this part of the opinion was unnecessary to the Court's ruling and was included only to explain that Reedy would fail under either analysis.<sup>10</sup>

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<sup>10</sup>In any event, the legislature clearly did not intend to make the tolling provisions of current subsection (11)(b) dependent on whether the probation had made service impracticable. Before the 1989, subsection (11)(b) stated: "When any probationer,

Despite *Reedy*'s clear applicability to this case, defendant contends that this Court's subsequent decision in *State v. Grate*, 947 P.2d 1161 (Utah App. 1997) compels a different result. Br. Aplt. 17-21. In *Grate*, this Court reversed the revocation of the defendant's probation because he had not been served with the order to show cause before his probation expired, even though a violation report had been timely filed. *Id.* at 1164-66. Defendant asserts that "[t]he *Grate* court considered this tolling provision of Utah law [subsection (11)(b)] and determined that it had no force and effect because of the failure of the State of Utah to have served the defendant with the Order to Show Cause until several days after his probation was due to terminate." Br. Aplt. 21.

*Grate*, however, did not address subsection (11)(b). Rather, the Court expressly stated that it was "analyz[ing] this matter under the 1988 version of the statute." *Grate*, 947 P.2d at 1163 n.1. As stated, and as conceded by defendant, subsection (11)(b) was not enacted until 1989. See 1989 Utah Laws § 226; Br. Aplt. 20. Accordingly, *Grate* is inapposite.<sup>11</sup>

Defendant finally relies on *State v. Call*, 1999 UT 42, 980 P.2d 201, to support his argument that actual notice is required before expiration of the probation period. Br. Aplt.

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without authority from the court of the Department of Corrections, absents himself from the state, or avoids or evades probation supervision, the period of absence, avoidance, or evasion tolls the probation period." See 1989 Utah Laws § 226. The 1989 amendment replaced the foregoing with the current language tolling probation merely upon the filing of a violation report. *Id.* If the legislature had intended defendant's lack of evasion to be a prerequisite for tolling, it would have left that language in the statute.

<sup>11</sup>Defendant's description of *Grate* suggests that its decision was founded on due process. See Br. Aplt. 17-21. Even a cursory reading of *Grate* reveals that it, like *Green*, *Smith*, *Rawlings*, and *Reedy*, is grounded in statutory construction.

16-17. Like the other cases on which defendant relies, *Call* does not address subsection (11)(b) and whether, under its tolling provision, a defendant must be notified of extension proceedings before his probation terminates.

The defendant in *Call* was ordered, as a condition of his probation, to complete a sex offender treatment program. *Call*, 1999 UT 42, ¶ 3. Call entered such a program, but could not complete it before his probation would expire in early April 1995. *Id.* at ¶¶ 2-3. On March 20, 1995, Call, at the request of his probation officer, executed a “Waiver of Personal Appearance Before the Court,” in which he waived the right to a hearing and agreed to extend his probation one more year so that he could complete his treatment program. *Id.* at ¶ 3. However, AP&P did not file the signed waiver and a progress/violation report until April 5, 1995, which was arguably after his probation had expired.<sup>12</sup> *Id.* at ¶ 3. The trial court granted the extension the same day. *Id.*

Call argued on appeal that “felony probation terminates by [operation of] law after 36 months unless the probation period is tolled or the trial court acts to extend probation during the probation period.” *Id.* at ¶ 8. Citing to subsection (11)(b), Call argued that because “AP&P failed to file the progress/violation report or otherwise initiate the extension proceedings prior to [the expiration date], his probation was not tolled, but terminated as a matter of law.” *Id.*

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<sup>12</sup>The State and the defense disputed whether Call’s probation expired on April 3 or April 8, 1992. *Id.* at ¶¶ 2 & n.1. Ultimately, the supreme court’s disposition of the case did not require it to resolve that dispute.

The *Call* court, however, did not address whether subsection (11)(b) applied in that case. Instead, it decided the case under section 77-18-1(12)(a)(i), which provides that probation may not be modified or extended “except upon waiver of a hearing by the probationer *or* upon a hearing and a finding in court that the probationer has violated the conditions of probation.” *Id.* at ¶ 11 (quoting § 77-18-1(12)(a)(i)) (emphasis in opinion). The supreme court essentially held that under this provision, a trial court had jurisdiction to extend probation when a defendant signs a waiver of hearing before expiration of the probation period. *Call*, 1999 UT 42, ¶¶ 9-12.

Defendant nevertheless contends that *Call* held that due process requires notice prior to expiration of probation. Br. Aplt. 16-17. He gleans this argument from the fact that the *Call* court cited to both *Green* and *Smith*, and stated, “These cases instruct that if it is the intent of the State to extend the probationary period beyond its original term, the State must take definitive action to extend the term before the expiration date, and the probationer must be given notice of that intent.” *Id.* at 11. Contrary to defendant’s argument, that statement does not suggest that due process requires notice before expiration of the probation period. As stated, the holdings in both *Green* and *Smith* were based on the interpretation of the statutes in effect at that time. Neither case rested on due process concerns. More important, *Call* does not suggest, either expressly or implicitly, that its decision is grounded on due process.

At most, the foregoing statement is dicta because it was not necessary to the court’s decision. In any event, *Call* simply does not address whether prior service is necessary when

the probation period is tolled under subsection (11)(b) by the filing of a timely violation report. Rather, as explained, it stands only for the proposition that a trial court has jurisdiction to extend probation when a defendant signs a waiver of hearing before expiration of the probation period, even though the violation report is subsequently untimely filed. *Call*, 1999 UT 42, ¶¶ 9-12.

In sum, as this Court held in *Reedy*, the timely filing of a violation report tolls the running of the probation period under subsection (11)(b). Nothing in the plain language of subsection (11)(b) requires that notice of the proceedings be given to defendant before his probation was originally set to expire. Because the violation report was timely filed in this case, defendant's probation period was tolled and the trial court had jurisdiction to extend his probation.

## POINT II

### **A COURT HAS AUTHORITY TO EXTEND PROBATION UPON A FINDING THAT THE PROBATIONER HAS NOT COMPLETED THE TERMS OF HIS PROBATION, INCLUDING A FAILURE TO FULLY PAY COURT-ORDERED RESTITUTION<sup>13</sup>**

Defendant argues that the trial court could not extend his probation without first finding that he had willfully violated his probation. Br. Aplt. 22-23. Defendant contends that because the trial court made no such finding here, it had no basis for extending his probation.

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<sup>13</sup>This point responds to Point III of defendant's brief. Br. Aplt. 22-23.

Defendant is correct that “[p]robation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.” Utah Code Ann. § 77-18-1(12)(a)(i). However, “[u]pon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.” Utah Code Ann. § 77-18-1(12)(e)(ii).

In this case, the violation report alleged that defendant had violated his probation by not fully paying restitution, a condition of his probation. R232-33. Defendant does not now, nor did he below, dispute that he has not fully paid restitution. R232-33. Indeed, none of the facts regarding defendant’s payment of restitution were disputed by the parties. Everyone agreed that defendant had made regular monthly payments of \$1080.00 toward his fines and restitution. *See* R229 . They also agreed that defendant had paid a total of \$34,553.20, an amount far short of the \$355,504.39 he had been ordered to pay. R229. Finally, defendant admitted that, on the advice of counsel, he had not made his May and June 2003 payments. R481:30.

Although, the trial court did not expressly find that defendant had not fully paid his restitution, the court’s oral and written rulings made clear that the basis for extending defendant’s probation was because he had not fully paid restitution and the court had no confidence that he would unless “the threat of incarceration is held over him.” R393. *See also* R481:30 (Court: defendant “hasn’t paid a nickel on his restitution since he thought probation was over. That gives us a pretty good indication as to why I wanted to continue



this, doesn't it?"); R481:37, 39. Thus, contrary to defendant's argument, the court implicitly found that he had violated his probation because he had not completed one of the conditions of his probation: payment of restitution to his victims. *See State v. Jarman*, 1999 UT App 269, 987 P.2d 1284 (although written findings by court were absent from record, oral findings were sufficiently clear so as to allow appellate court to determine basis of trial court's decision); *see also State v. Harmon*, 956 P.2d 262, 271 (Utah 1998) (noting that while trial court had not made express finding that jury was not prejudiced, it had implicitly made that finding).

The real question, then, is whether a finding that a defendant has not fully paid his restitution, even though that failure is not willful, constitutes a "violation" for the purpose of extending probation. Relying on *State v. Hodges*, 798 P.2d 270 (Utah App. 1990), defendant argues that his probation could be extended only if his failure to pay full restitution was "wilful." Br. Aplt. 23. Defendant's reliance on *Hodges* is misplaced. The defendant in *Hodges* had his probation *revoked* because he was not making sufficient progress in his sex offender treatment program. *Hodges*, 798 P.2d at 271-73. This Court held that "as a general rule, in order to *revoke* probation for the violation of a condition of probation not involving the payment of money, the violation must be willful or, if not willful, must presently threaten the safety of society." *Id.* at 277 (emphasis added). In reaching that holding, this Court relied on *Bearden v. Georgia*, 461 U.S. 660, 662 (1983), which held that "in order to *revoke* probation for failure to make money payments, the sentencing court must either find that probationer was at fault *or that alternatives other than imprisonment are*

*inadequate* to meet the state’s interests in punishment and deterrence.” *Hodges*, 798 P.2d at 276 (emphasis added).

Both *Hodges* and *Bearden* stand for the proposition that a defendant’s probation may not be *revoked* and a defendant incarcerated unless failure to pay restitution is wilful. Neither case suggests that a non-wilful failure to pay restitution cannot be dealt with by extending probation to give the defendant more time to pay restitution. To the contrary, both cases seem to contemplate that extension of probation is an appropriate remedy to deal with a non-wilful failure to fully comply with the terms of probation. *See Bearden*, 461 U.S. at 668-69 (“if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through not fault of his own, it is fundamentally unfair to revoke probation automatically *without considering whether adequate alternative methods of punishing the defendant are available*”) (emphasis added); *Hodges*, 798 P.2d at 276 (same).

Under defendant’s argument, a trial court could never extend probation, even though the defendant has not fully complied with the conditions of his probation. This would subvert the rehabilitative purposes of granting probation. *See State v. Allendinger*, 565 P.2d 1119, 1121 (Utah 1977) (holding that obvious intent of probation statute is “to permit the court to rehabilitate an erring criminal and to make a useful citizen out of him”). For example, a defendant, ordered to complete sex offender treatment as a condition of probation, may not be able to complete the program within the probation period through no fault of his own. Under defendant’s analysis, this would not be a “violation” of probation and the trial

court would therefore lack authority to extend probation to ensure that the defendant is fully rehabilitated before being released unfettered into society.

Moreover, defendant's reasoning was rejected by *Hodges*, which expressly recognized that a showing of "fault is not necessary in every instance of probation revocation . . ." *Id.* at 276. *See also Bearden*, 461 U.S. at 668 n.9 (noting that "it may indeed be reckless" to continue probation for someone unable to control a problem, thereby posing a threat to the safety or welfare of society). If fault is not always required to *revoke* probation, it certainly cannot and should not be a prerequisite to *extend* probation.

That "violation" for purposes of extending probation does not necessarily mean "wilful" is also supported by this Court's decision in *State v. Dickey*, 841 P.2d 1203, 1207 (Utah App. 1992). There, this Court held that under the applicable probation and restitution statutes, the State "can enforce restitution *as both a condition of probation* pursuant to Utah Code Ann. § 77-18-1(8) [1992 version], and as *a separate and independent component* of the court's judgement and the defendant's original sentence . . ." *Id.* at 1207 (emphasis added). This suggests that the trial court has the discretion to continue formal probation solely for the purpose of ensuring complete payment of restitution as a term of probation, but that if probation has not been ordered, or has been terminated, the court nevertheless has independent authority to collect restitution. *See also State v. Nones*, 2000 UT App 211, ¶ 6, 11 P.3d 709 ("Because Nones's probation was not extended according to the terms for extending probation found in Utah Code Ann. § 77-18-1(8), (10) (Supp. 1992), independent

jurisdiction over enforcement of restitution orders must exist to enable use to affirm the trial court's decision"). *Id.* at ¶ 6.

In sum, defendant's non-wilful failure to fully pay restitution constituted a violation for purposes of extending his probation under Utah Code Ann. § 77-18-1(12)(e)(ii).<sup>14</sup> Because that fact was not disputed below, the trial court had authority to extend defendant's probation.

### POINT III

#### **UTAH'S PROBATION STATUTE SETS A PRESUMPTIVE PROBATION TIME LIMIT OF 36 MONTHS; THEREFORE, THE TRIAL COURT'S ORDER SHOULD BE AMENDED TO EXTEND DEFENDANT'S PROBATION FOR 36 MONTHS**

Defendant finally argues that the trial court exceeded its authority in extending his probation beyond 36 months to "the remaining term of the court's original sentence," (ten years minus the three years already served on probation). Br. Appt. 24. The State agrees that a fair reading of the relevant probation statutes supports this argument and that the case should be remanded for the trial court to amend the order to extend defendant's probation for 36 months.

As stated, section 77-18-1(10)(a)(i) provides, "Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months

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<sup>14</sup>Holding that a trial court could not extend probation without a finding of a wilfulness would substantially affect current practice in the trial courts, where it is not uncommon to extend probation so as to allow a defendant to complete the conditions of his or her probation. *See, e.g., State v. Call*, 1999 UT 42, ¶ 5, 980 P.2d 201; *State v. Rawlings*, 893 P.2d 1063, 1064 (Utah App. 1995).

probation in felony or class A misdemeanor cases . . . .” This Court has called the time frame in this provision a “maximum formal probation” period. *See State v. Robinson*, 860 P.2d 979, 982 (Utah App. 1993).

The question is whether in extending probation beyond the initial period, the trial court can impose more than an additional 36 months. As the trial court correctly recognized, the statutes do not expressly prohibit imposing a lengthier probation period. R392. However, neither do they expressly authorize it. Moreover, section 77-18-1(12)(e)(i) provides that upon finding that a defendant has violated the conditions of his probation “the court may order the probation revoked, modified, continued, *or that the entire probation term commence anew.*” This list of potential remedies suggests that the trial court may not impose a greater period of probation than 36 months, but can only restart the original term. This indicates that the legislature intended that probation be extended only increments of the presumptive statutory probation term. However, nothing in the statutes prohibit the trial court from continuing probation in 36-month increments until defendant has fully paid his restitution. To the contrary, the statutes appear to contemplate that this can be done. *See* Utah Code Ann. § 77-18-1(12)(e) (providing that court may order that the “entire probation term commence anew”).

The State therefore agrees that this matter should be remanded for the trial court to amend its order to extend probation 36 months.

\* \* \* \* \*

It is important to note that even if this Court were to rule that the trial court improperly extended defendant's formal probation, the trial court may retain bench probation over defendant until he fully pays his restitution. Section 77-18-1(1)(a)(ii)(A) provides, "If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable." Defendant concedes that this provision permits the trial court to continue bench probation no matter how long it takes for him to pay restitution. Br. Aplt. 25-26 n.7.

The trial court correctly found that this provision did not apply, by its plain language, because defendant's probation was extended before it had expired or terminated. R391. However, should this Court determine that formal probation was improperly extended in this case, it should nevertheless remand for the court to place defendant on bench probation as it was the trial court's clear intent to exercise jurisdiction over defendant as long as it could to ensure full payment of restitution.<sup>15</sup>

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<sup>15</sup>It should also be noted that there appears to be little practical difference between continuing defendant on formal probation or placing him on bench probation for the purpose of enforcing restitution. Either way, if defendant wilfully fails to pay his restitution, the trial court can incarcerate him. *See* Utah Code Ann. § 76-3-201.1(4) (2003) (providing that if defendant fails to make good faith effort "to make payments, the court may find defendant in contempt and "order the defendant committed until the criminal judgment account receivable, or a specified part of it, is paid"). Also, under both formal and bench probation, the trial court may order AP&P to continue to collect restitution from defendant at the payment schedule set by the court and to notify the court should defendant default on any of his payments. *See* Utah Code Ann. § 77-18-1(9)(b) (Department of Corrections to collect restitution during "probation period in cases for

## CONCLUSION

Based on the foregoing, the State respectfully requests the Court to affirm the trial court's extension of defendant's probation and to remand for the trial court to amend its order to limit the extension to the statutory 36 months.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of March, 2004.

MARK L. SHURTLEFF  
ATTORNEY GENERAL

  
LAURA B. DUPAIX  
ASSISTANT ATTORNEY GENERAL

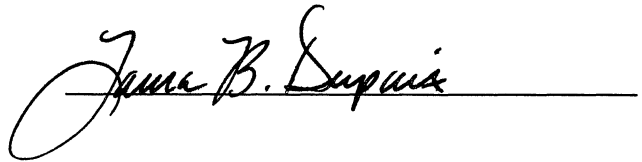
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which court orders supervised probation and *any extension of that period by the department in accordance with Subsection (10)''*). See, e.g., *State v. Nones*, 2000 UT App 211, ¶ 3 (trial court retained bench probation for collection of restitution, but ordered AP&P to monitor collection of remaining restitution).

## MAILING CERTIFICATE

I hereby certify that on this 15<sup>th</sup> day of March, 2004, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

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PO BOX 11008  
Salt Lake City, Utah 84147-0008

A handwritten signature in cursive script, reading "James B. Supina", is written over a horizontal line.



## **ADDENDUM A**

### **Statutes**

**Utah Code Ann. § 77-18-1 (2003)**

**Utah Code Ann. § 76-3-201.1 (2003)**

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

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

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

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

— Probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

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

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

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

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

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

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

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

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

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

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

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

(a) perform any or all of the following:

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

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

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

(iv) participate in available treatment programs;

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

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

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

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

(ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

- (A) a diagnosed learning disability; or
- (B) other justified cause.

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

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

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

(ii) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.

(b) (i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

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

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

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

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

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

- (ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.
- (c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.
  - (ii) The defendant shall show good cause for a continuance.
  - (iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.
  - (iv) The order shall also inform the defendant of a right to present evidence.
- (d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.
  - (ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.
  - (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.
  - (iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.
- (e) (i) After the hearing the court shall make findings of fact.
  - (ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.
  - (iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.
- (13) The court may order the defendant to commit himself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:
  - (a) the defendant is appropriate for and can benefit from treatment at the state hospital;
  - (b) treatment space at the hospital is available for the defendant; and
  - (c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).
- (14) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:
  - (a) ordered by the court pursuant to Subsection 63-2-202(7);
  - (b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;
  - (c) requested by the Board of Pardons and Parole;
  - (d) requested by the subject of the presentence investigation report or the subject's authorized representative; or
  - (e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

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

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

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

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

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

(i) the defendant to wear an electronic monitoring device at all times; and

(ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

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

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

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

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

**76-3-201.1. Collection of criminal judgment accounts receivable.**

- (1) As used in this section:
  - (a) "Criminal judgment accounts receivable" means any amount due the state arising from a criminal judgment for which payment has not been received by the state agency that is servicing the debt.
  - (b) "Accounts receivable" includes unpaid fees, overpayments, fines, forfeitures, surcharges, costs, interest, penalties, restitution to victims, third party claims, claims, reimbursement of a reward, and damages.
- (2) (a) A criminal judgment account receivable ordered by the court as a result of prosecution for a criminal offense may be collected by any means authorized by law for the collection of a civil judgment.
  - (b) (i) The court may permit a defendant to pay a criminal judgment account receivable in installments.
  - (ii) In the district court, if the criminal judgment account receivable is paid in installments, the total amount due shall include all fines, surcharges, postjudgment interest, and fees.
  - (c) Upon default in the payment of a criminal judgment account receivable or upon default in the payment of any installment of that receivable, the criminal judgment account receivable may be collected as provided in this section or Subsection 77-18-1(9) or (10), and by any means authorized by law for the collection of a civil judgment.
- (3) When a defendant defaults in the payment of a criminal judgment account receivable or any installment of that receivable, the court, on motion of the prosecution, victim, or upon its own motion may:
  - (a) order the defendant to appear and show cause why the default should not be treated as contempt of court; or
  - (b) issue a warrant of arrest.
- (4) (a) Unless the defendant shows that the default was not attributable to an intentional refusal to obey the order of the court or to a failure to make a good faith effort to make the payment, the court may find that the default constitutes contempt.
  - (b) Upon a finding of contempt, the court may order the defendant committed until the criminal judgment account receivable, or a specified part of it, is paid.
- (5) If it appears to the satisfaction of the court that the default is not contempt, the court may enter an order for any of the following or any combination of the following:
  - (a) require the defendant to pay the criminal judgment account receivable or a specified part of it by a date certain;
  - (b) restructure the payment schedule;
  - (c) restructure the installment amount;
  - (d) except as provided in Section 77-18-8, execute the original sentence of imprisonment;
  - (e) start the period of probation anew;
  - (f) except as limited by Subsection (6), convert the criminal judgment account receivable or any part of it to community service;
  - (g) except as limited by Subsection (6), reduce or revoke the unpaid amount of the criminal judgment account receivable; or
  - (h) in the district court, record the unpaid balance of the criminal judgment account receivable as a civil judgment and transfer the responsibility for collecting the judgment to the Office of State Debt Collection.
- (6) In issuing an order under this section, the court may not modify the amount of the judgment of complete restitution.
- (7) Whether or not a default constitutes contempt, the court may add to the amount owed the fees established under Subsection 63A-8-201(4)(g) and postjudgment interest.

- (8) (a) (i) If a criminal judgment account receivable is past due in a case supervised by the Department of Corrections, the judge shall determine whether or not to record the unpaid balance of the account receivable as a civil judgment.
    - (ii) If the judge records the unpaid balance of the account receivable as a civil judgment, the judge shall transfer the responsibility for collecting the judgment to the Office of State Debt Collection.
  - (b) If a criminal judgment account receivable in a case not supervised by the Department of Corrections is past due, the district court may, without a motion or hearing, record the unpaid balance of the criminal judgment account receivable as a civil judgment and transfer the responsibility for collecting the account receivable to the Office of State Debt Collection.
  - (c) If a criminal judgment account receivable in a case not supervised by the Department of Corrections is more than 90 days past due, the district court shall, without a motion or hearing, record the unpaid balance of the criminal judgment account receivable as a civil judgment and transfer the responsibility for collecting the criminal judgment account receivable to the Office of State Debt Collection.
- (9) (a) When a fine, forfeiture, surcharge, cost permitted by statute, fee, or an order of restitution is imposed on a corporation or unincorporated association, the person authorized to make disbursement from the assets of the corporation or association shall pay the obligation from those assets.
    - (b) Failure to pay the obligation may be held to be contempt under Subsection (3).
  - (10) The prosecuting attorney may collect restitution in behalf of a victim.



## **ADDENDUM B**

### **State's Exhibits 1 and 2**

**REPLY TO**  
STATE OF UTAH  
ADULT PROBATION AND PAROLE  
PROTECTED  
**REGION III**  
PROGRESS/VIOLATION REPORT

DEPUTY CLERK

**TO:** 3RD DISTRICT -  
Salt Lake City, Salt Lake County, Utah

**REGARDING:** ORR, David Jay

**ATTN:** Judge Timothy R. Hanson

**CASE NO.:** 001902772

**FROM:** Salt Lake AP&P

**OFFENSE:** Real Estate Broker/Agent With Out  
License, 3rd Degree Felony;  
Securities Fraud, 3rd Degree Felony

**DATE:** 05/09/2003

**OFFENDER #:** 139242

**PROBATION DATE:** 05/12/2000

**ADDRESS:** 5449 W SUNTREE (3350 S.) AVE,  
WEST VALLEY CITY UT 84120

**LEGISLATIVE DATE:** 05/11/2003

**EMPLOYMENT:** Mca-Mark/Consult/Agent,  
Y2 Marketing,  
1801 North Hampton #420,  
Desoto TX 75115

**DEFENSE ATTY:** Larry R. Keller

**COMMENTS:**

On 05/12/2000, the defendant was placed on probation with the following conditions:

1. Commit no further violations and/or crimes.
2. Obtain and maintain lawful, verifiable, full-time employment.
3. Submit truthful and detailed financial income reports to AP&P as directed.
4. Pay fine in the amount of \$1850.00, payable to the Court.
5. That the defendant avoid all activities involving investments or other financial transactions using assets belonging to persons outside of his immediate family or requiring professional licensing.
6. Serve 180 days in the Salt Lake County Jail, commencing on 05/12/00, with no credit for time served.
7. Have no contact with victims.
8. Pay restitution, in an amount to be determined, at a rate of \$1000 per month or 25% of monthly income.

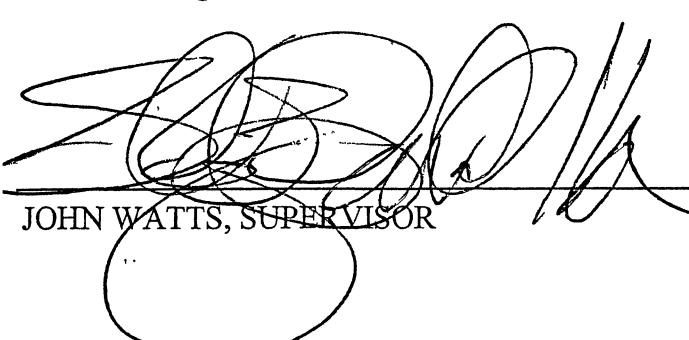
**PROBATION UPDATE:** The defendant has been indicted federally for Conspiracy To Commit Mail Fraud, Wire Fraud and Conspiracy To Defraud The United States, 18 U.S.C. 371. There is four other co-defendants indicted with the defendant. According to the indictment, the latest date the defendant is charged is in February 2000. The defendant was convicted of his probation case in March 2000 and placed on probation in May 2000, thus, the new federal charge occurred before the defendant's current Third District probation case.

**FINES/FEES:** The defendant has paid \$600 of the \$1,850 court fine. He is presently overdue \$150 on supervision fees. The Department Of Corrections accounting department has not correctly distributed the money received by the defendant. He has paid \$34,553.20 on this case for restitution and fines.

**RESTITUTION:** The defendant has made consistent monthly payments of \$1,000 towards restitution. After two Restitution Hearings, Dr. Tom Million is to be paid \$255,504. Additionally, Kurt Ostler is owed \$30,000, Jeff Ostler \$30,000 and Craig Grenier \$50,000.

**SUMMARY:** The defendant has not been found in any violation of his probation to date with the exception of paying in full the restitution amount. His 36-month probation period is approaching. He has pending federal charges.

**RECOMMENDATION:** It is recommended by Adult Probation and Parole that an Order To Show Cause Hearing be conducted at the Courts convenience.

  
\_\_\_\_\_  
JOHN WATTS, SUPERVISOR

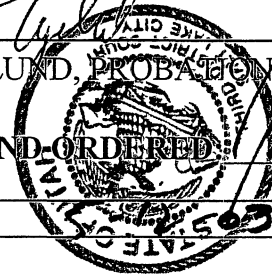
  
\_\_\_\_\_  
ROBERT EGELUND, PROBATION OFFICER

APPROVED AND ORDERED: 

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

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

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



W. J. Hanson

ISSUED

FILED  
DISTRICT COURT

IN THE 3RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY

IN AND FOR THE STATE OF UTAH

03 MAY 2003  
JUDICIAL DISTRICT  
SALT LAKE COUNTY

DEPUTY CLERK

THE STATE OF UTAH

:

Plaintiff,

:

VS

:ORDER TO SHOW CAUSE

ORR, David Jay

:COURT CASE NO: 001902772

Defendant,

:JUDGE: Timothy R. Hanson

:DEF ATTY: Larry R. Keller

UPON A READING of the Affidavit in Support of Order to Show Cause, the Court finds probable cause to believe that the defendant in this matter has violated the terms and conditions of his/her probation as set forth in the Affidavit, and that revocation or modification of defendant's probation is justified.

IT IS ORDERED that the defendant appear before the Honorable Timothy R. Hanson, Judge of the above-entitled Court, at the Judge's courtroom in SALT LAKE, Utah, on the 30 day of May, 2003, at the hour of 9:00 AM, then and there to show cause why probation of said defendant should not be revoked or modified by the Court based upon the allegations contained in the Affidavit on file with the Court.

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MAY 14 2003  
Court Services Unit

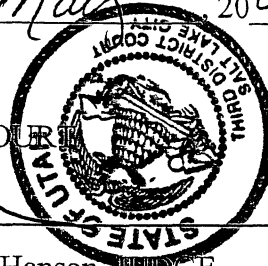
RE: ORR, David Jay

-2-

The defendant has a right to be represented by counsel at the above-described hearing and to have appointed to represent the defendant if the defendant is indigent. The defendant also has a right to present evidence as provided in the Utah Rules of Civil Procedure.

DATED THIS 13 day of May, 2003

BY THE COURT

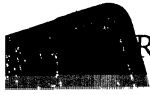


Timothy R. Hanson, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that this Order to Show Cause and Affidavit in support thereof, was personally served upon the defendant at \_\_\_\_\_, by showing the original and informing the defendant of its contents, and delivering a copy on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_; additional copies were delivered to \_\_\_\_\_ counsel for the defendant, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
ROBERT EGELUND, PROBATION OFFICER



RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY

IN AND FOR THE STATE OF UTAH

FILED  
DISTRICT CLERK  
**REPLY TO**  
08 MAY 73 PM 3:41  
**REGION III**

DEPUTY CLERK

THE STATE OF UTAH

Plaintiff, :AFFIDAVIT IN SUPPORT OF

VS :ORDER TO SHOW CAUSE

ORR, David Jay :COURT CASE NO: 001902772

Defendant, :JUDGE: Timothy R. Hanson

:DEF ATTY: Larry R. Keller

STATE OF UTAH )  
):ss  
COUNTY OF SALT LAKE ):


ROBERT EGELUND, being duly sworn upon an oath deposes and says that: He is a Probation Officer for the Utah State Department of Corrections; that on the 23rd day of March, 2000, the above-named defendant was adjudged guilty of the crime of Real Estate Broker/Agent With Out License, 3rd Degree Felony; Securities Fraud, 3rd Degree Felony, in the above-entitled Court and on the 12th day of May, 2000, was sentenced to serve a term of 0-5 years in the Utah State Prison; that the execution of the imposed sentence was stayed and the defendant was placed on probation under the supervision of the Department of Corrections; that the above-entitled defendant did violate the terms and conditions of the defendant's probation as follows, to-wit:

RE: ORR, David Jay

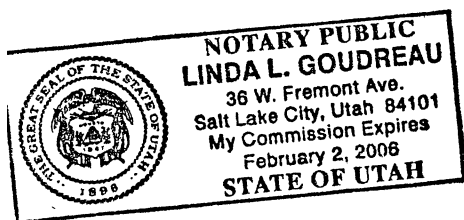
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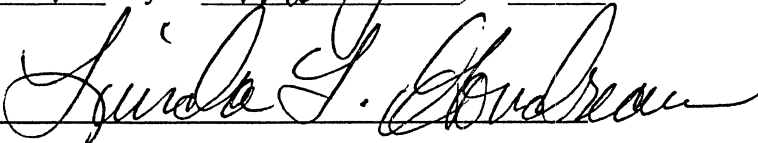
1. By having failed to pay restitution in full, as ordered, in violation of a special condition of the Probation Agreement.

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

  
\_\_\_\_\_  
ROBERT EGELUND, PROBATION OFFICER

Subscribed and sworn to before me this 9 day of May, 2003.



  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing: SLC, Utah  
Commission expires: 2-2-06

IN THE 3RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY

IN AND FOR THE STATE OF UTAH

---

THE STATE OF UTAH

:

Plaintiff,

:

VS

:ORDER TO SHOW CAUSE

ORR, David Jay

:COURT CASE NO: 001902772

Defendant,

:JUDGE: Timothy R. Hanson

:DEF ATTY: Larry R. Keller

---

UPON A READING of the Affidavit in Support of Order to Show Cause, the Court finds probable cause to believe that the defendant in this matter has violated the terms and conditions of his/her probation as set forth in the Affidavit, and that revocation or modification of defendant's probation is justified.

IT IS ORDERED that the defendant appear before the Honorable Timothy R. Hanson, Judge of the above-entitled Court, at the Judge's courtroom in SALT LAKE, Utah, on the 30 day of May, 2003, at the hour of 9:00 AM, then and there to show cause why probation of said defendant should not be revoked or modified by the Court based upon the allegations contained in the Affidavit on file with the Court.



RE: ORR, David Jay

-2-

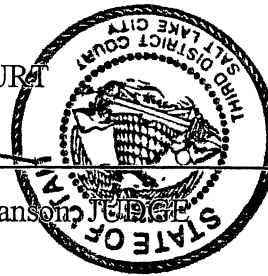
The defendant has a right to be represented by counsel at the above-described hearing and to have appointed to represent the defendant if the defendant is indigent. The defendant also has a right to present evidence as provided in the Utah Rules of Civil Procedure.

DATED THIS 13 day of May, 2003

BY THE COURT



Timothy R. Hanson, JUDGE



CERTIFICATE OF SERVICE

I hereby certify that this Order to Show Cause and Affidavit in support thereof, was personally served upon the defendant at \_\_\_\_\_, by showing the original and informing the defendant of its contents, and delivering a copy on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_; additional copies were delivered to \_\_\_\_\_ counsel for the defendant, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
ROBERT EGELUND, PROBATION OFFICER

## **ADDENDUM C**

### **Trial Court's Memorandum Decision**

JUL - 2 2003

SALT LAKE COUNTY  
By [Signature] Deputy Clerk

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

: MEMORANDUM DECISION AND ORDER

: CASE NO. 001902772

:

:

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This matter came before the Court for hearing on July 3, in connection with the defendant's Motion to Dismiss Order to Show Cause for Lack of Jurisdiction. The State elicited testimony from Mr. Egelund, the defendant's AP&P officer. The Court received into evidence two exhibits, consisting of Mr. Egelund's copies of the Progress/Violation Report and the Affidavit in Support of the Order to Show Cause (both of which were originally filed with the Court).

Following Mr. Egelund's testimony and oral argument, the prosecution and counsel for the defendant, the Court ruled from the bench that the defendant's Motion to Dismiss was denied and that he was to make up the May and June restitution payments. The Court

whether the defendant's restitution was extended to the limit or term of the original sentence. It also indicated to counsel that a more thorough review of the

Discussion of the Court's legal basis for denying the Motion to Dismiss would be included in the Memorandum Decision that the Court would issue. Having now again reviewed the defendant's Motion to Dismiss (the State did not file a response) and having considered counsel's arguments and Mr. Egelund's testimony, the Court rules as stated herein.

#### LEGAL ANALYSIS

In his Motion to Dismiss, the defendant contends that this Court lacks the jurisdiction to initiate probation extension proceedings against him because these proceedings were not initiated until after probation had already terminated by operation of law. The defendant's argument is based on an erroneous presumption that his probation terminated on May 12, 2003, and that the proceedings were not formally commenced until May 13, 2003, when he considers the Progress/Violation Report to have been filed.

The legal analysis of whether this Court has the jurisdiction to extend the defendant's probation begins with an analysis of when the extension proceedings were initiated in this case and when the defendant's probation would have terminated. As an aside, the Court notes that the defendant takes issue with whether this Court is even permitted to consider an extension of his probation given that the filing of a Progress/Violation Report implies a potential revocation proceeding and possible incarceration. According to the

derendant, such a Report is an inappropriate vehicle for seeking an extension of his probation, even if it been timely filed.

The Court concludes that the styling of the report is important given that the Court has a wide latitude and determining whether probation should be revoked or possibility of extending the Court and not AP&P that fa to style the reports that it files with tion of appropriate remedy. In this case, the Court opted for extending defendant's probation, as opposed to revoking it together re, the Court will refer to these proceedings as probation proceeding. Having addressed the defendant's argument on this point, the Court proceeds to analyze the timing of the filings that initiated this probation extension proceeding.

Under Utah Code Annotated §77-18-1(11)(b), "[t]he running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court." The first issue therefore becomes when the Progress/Violation Report was filed and whether the running of the defendant's probation period under §77-18-1(11)(b).

The filing date for the Progress/Violation Report was established by the credible testimony of Mr. Egelund. Mr. Egelund testified that he met with the undersigned on May 9, 2003, and pursuant to that meeting, he returned to the Court on the same date for the purpose of filing the Progress/Violation Report and the Affidavit in Support of Order to Show Cause. Mr. Egelund specifically testified that on May 9, 2003, he brought copies of these documents to the Court, date-stamped them and left them in the intake basket for the Court's clerk. In support of this testimony, Mr. Egelund offered his copies of the Progress/Violation Report and the Affidavit in Support of Order to Show Cause (marked Exhibits 1 and 2). A review of these documents indicates hand-written changes to the May 9, 2003, date-stamp to reflect a date of May 13, 2003. However, the copy of Order to Show Cause attached to the Progress/Violation Report (Exhibit 1) has no such hand-written change. This copy of the Order to Show Cause clearly shows a date-stamp of May 9, 2003. Taking together the documentary evidence before the Court in light of Mr. Egelund's credible testimony, the Court finds that the Progress/Violation Report and the Affidavit were filed on May 9, 2003, but that for reasons that the Court need not delve into, hand-written changes were made to the date-stamp to reflect an apparent date that the documents were docketed. However, the pivotal date under §77-18-1(11)(b) is not the date of

docketing, but rather the date of filing. In this case, this date is easily determined by Mr. Egelund's testimony that he delivered these documents to the Court **for filing** on May 9, 2003, and that he date-stamped the documents himself with the date of May 9, 2003.

An alternative date for tolling the probationary period is the issuance of an order to show cause. The documents in this case reflect that the Court approved and authorized issuance of the Order to Show Cause on May 12, 2003. Having established the dates of May 9, 2003, or May 12, 2003, as potential dates for tolling the defendant's probationary period, the Court now proceeds to evaluate whether these dates occurred prior to the legislative termination of the defendant's probation.<sup>1</sup>

The defendant was placed on probation by this Court on May 12, 2000. The Court reasons that the first day of probation would have concluded 24 hours after the sentence was imposed or at the close of business on the following day, May 13, 2000. Therefore,

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<sup>1</sup>During oral argument, the State alluded to a statement made by the Court at a February 16, 2001, hearing, as providing the basis for concluding that the Court extended the defendant's probation at that time. Although the Court indicated at that hearing that the defendant's probation would not terminate pending restitution being satisfied, this statement was not intended as a suggestion that probation was extended or that a violation in probation had occurred. For these reasons, the Court does not rely on the February 16, 2001, date in its analysis.

the defendant's probation was set to expire by operation of law on May 13, 2003, the termination date of the defendant's 36-month probationary period. Accordingly, Mr. Egelund's filing of the Progress/Violation Report on May 9, 2003, and this Court's authorization to issue the Order to Show Cause on May 12, 2003, both occurred prior to the legislative termination of the defendant's probation. The defendant's probation period was therefore tolled either on May 9, 2003, or at the latest, May 12, 2003.

The tolling of the defendant's probation period prior to its legislative termination sounds a death knell to two of the defendant's principal arguments. First, the defendant argues that under §77-18-10(a)(ii)(A), this Court can retain jurisdiction over him only under the form of a bench probation. However, this provision never comes into play because the defendant's probation did not expire or terminate under §77-18-10(a)(i), but was instead tolled under §77-18-1(11)(b).

Second, the defendant argues that the due process concerns of State v. Call, 980 P.2d 201 (Utah 1999), have been violated in this case because he was not notified of the State's intent to extend his probation before the expiration of his probation period. Once again, the holding in Call is not applicable to these facts because the defendant's probation did not expire, it was tolled.



Therefore, the service upon the defendant of the Order to Show Cause on May 19, 2003, was within the probationary period and was therefore appropriate under due process considerations.

Based on the foregoing, this Court concludes that it has jurisdiction to extend the defendant's probation because the probation extension proceedings were initiated prior to the legislative termination of the probation period and served to toll the probation period under §77-18-1(11)(b). The defendant's Motion to Dismiss is therefore denied.

Having concluded that the Court has jurisdiction to extend the defendant's probation period, the Court next considers the issue of whether the Court can extend the defendant's probation in 36-month intervals or for the full duration of his remaining 10-year sentence (two terms not to exceed 5 years, to run consecutively). The Court's own legal research has not yielded a case or statute addressing this precise issue. However, distilling the general law on the trial court's discretion in matters of sentencing and probation to its essence provides that while the Court has a large measure of flexibility, it must be exercised "within legislatively established limits." State v. Green, 757 P.2d 462, 464 (Utah 1988). Further, the Court can find no express limitation on the permissible length of probation; only that the probation, together

with any extensions, not exceed the legislatively established sentencing guidelines.

Applying these concepts to this case, the Court concludes that it has the discretion to extend the defendant's probation up to the remaining term of the Court's original sentence (equating to 10 years). The defendant's failure to pay the May and June installments of his restitution underscores the fact that the defendant is induced to repay his victims only when he is in the shadow of probation and the threat of incarceration is held over him. Because the defendant's only incentive to continue making restitution payments is to avoid his probation being revoked, the Court invokes the full scope of its discretion to extend the defendant's probation for the maximum length permissible, the remaining full term of his sentence of 10 years.

This Memorandum Decision will stand as the Order of the Court, denying the defendant's Motion to Dismiss and extending his probation in the manner indicated above.

Dated this 3 day of July, 2003.

  
TIMOTHY R. ANDERSON  
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 2 day of July 2003:

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