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Utah v. David J. Orr : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DAVID J. ORR, Defendant/Appellant.	Appellate Court No. 20030574-CA
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REPLY BRIEF OF APPELLANT

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UTAH APPELLATE COURTS

APR 14 2004

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Plaintiff/Appellee,

vs.

DAVID J. ORR,

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

**THE TRIAL COURT SHOULD BE BOUND BY THE DATE STAMP
ON THE FILING OF THE PROGRESS/VIOLATION REPORT AS A
MATTER OF LAW.**

It is significant that the State concedes in its Appellee's Brief that "... AP&P had until May 12, 2003 to file a violation report." Appellee Br. 12. Defendant argued in his opening brief that the date stamp on the official Progress/Violation Report (attached as Add. 1 herein) filed by Agent Egelund showed that it was not formally filed with the Court until May 13, 2003. However, Appellee argues in its responsive brief that the date it was actually filed is a question of fact and such question of fact will not be reversed absent clear error. Appellee Br. 12. Defendant Orr maintains that a date of actual filing with the Court is determined as a matter of law based upon the clerk of the court's date-stamp and the lower court's decision is considered for legal correctness. *State v. Parker*,

936 P.2d 1118 (Utah App. 1997) (attached as Add. 2 herein); *State v. Palmer*, 777 P.2d 521 (Utah App. 1989). Those cases, at least indirectly, stand for the proposition that the official date-stamp placed on a filed document will govern as a matter of law. In *Parker*, the Utah Court of Appeals noted:

The trial court entered its judgment on October 25, 1994. Defendant dated his notice of appeal November 18, 1994, and certified that he mailed the notice through the prison mail on November 19, 1994. The district court clerk did not date stamp his notice of appeal until nine days later November 28, 1994. With the notice of appeal, defendant included a Motion for Extension dated November 19, 1994, which also was date stamped on November 28th, but the trial court never acted on the motion. . . . This court dismissed defendant's appeal in an unpublished memorandum decision on October 19, 1995, concluding this court lacked jurisdiction to extend the time for filing a notice of appeal.

Defendant then filed a petition for rehearing, which the court granted.

...

(W)e affirm our prior ruling dismissing defendant's appeal for lack of jurisdiction.

936 P.2d at 1119, 1122. (See additional discussion *infra* p. 4, 5).

Clearly, the Utah Court of Appeals in *Parker* believed that the date-stamp was the critical date on which the filing of a document will be governed as a matter of law. This is not the date any third person places upon the document, but the date-stamp placed on the document by a court clerk's office itself. *See also State v. Palmer*, 777 P.2d at 521-523.¹

¹ "We conclude that the notice of appeal was not timely filed under any plausible interpretation of our rules." 777 P.2d at 522.

The case of *In re K.G.* 2002, UT App. 3, 2002 WL 23812 (January 4, 2002) also stands for the proposition that the date-stamp placed upon a document by the clerk's office is the date upon which the document was actually filed as a matter of law. The State attempts to distinguish the instant case by suggesting that in the *K.G.* case "the notice of appeal bore one date stamp that showed the notice of appeal was untimely filed." Appellee Br. 15. The attempted distinction is not factually appropriate in the instant case. The State argues that in the instant case "the violation report reflected two dates: (1) an electronic date-stamp showing that the report was timely; and (2) a hand-written change suggesting that the report was untimely." *Id.* However, a review of the Progress/Violation Report in the instant case (Add. 1) and the document entitled "Affidavit in Support of Order to Show Cause" and attached as Add. 2 to Appellant's opening brief shows that only one date-stamp appears. While there may be a hand-written change stating it was filed on May 13, 2003, that is the only date-stamp that appears on the face of the violation report.

The trial judge opined from the bench that the change was probably made by his clerk on the date that she officially filed the document, and no testimony or evidence under oath was taken to establish that fact in the Order to Show Cause hearing (R. 481, p. 26, l. 24, 25, p. 27, l. 1-11, p. 28, l. 6-20, p. 29, l. 1-5). Under the circumstances of the instant case then, there can be no distinction from the holding in the case of *In re K.G.*,

nor this case. The single date-stamp placed on the document by the clerk of the Court must prevail, as the Utah Court of Appeals held in the case of *In re K.G.*, *supra* at *1.²

In addition, the State quotes *Raiser v Buirley*, 2002 UT App. 277, 54 P.3d 650 (Utah App. 2002) (per curiam) as standing for the proposition that the Court could consider extrinsic evidence under “similar circumstances.” Appellee Br. 15. However, what the State fails to note is that the *Raiser* case was exceptional and a clear aberration from the normal rule where all courts are bound by the date-stamp on a filed document. In that case, the Utah Court of Appeals relied upon the case of *In re M.S.*, 781 P.2d 1287 (Utah Ct. App. 1989) (per curiam) for its initial dismissal of an appeal for lack of jurisdiction based upon an untimely notice of appeal where it had held that an “appellate court is ‘bound by the filing date indicated on the notice of appeal transmitted to it by the trial court.’ *Id.* at 1288” *Id.* at ¶2. Upon further review, this panel of the Utah Court of Appeals reversed its judgment based upon the fact that a timely filing of a notice of appeal had earlier been made although the court had rejected it for failure to timely pay the filing fee. The Court noted as follows:

Under the unique circumstances of this case, we deem the notice of appeal to have been filed on September 20, 2001, when it was first accepted and date-stamped by the district court clerk. The delay of one week in

² Although Agent Egelund testified he punched the date-stamp on the report himself at the clerk’s office, the State cites no authority allowing anyone other than the clerk of the Court to officially date-stamp a filed document. Allowing anyone else to do so and be recognized would be to open up the system to confusion and potential abuse, as in the instant case.

rejecting the notice of appeal and returning it to Raiser based upon the apparent failure to tender an acceptable filing fee was ineffective because the **timely notice of appeal had been accepted as “filed” by the clerk**. To deem the acceptance revokable would work an injustice because Raiser could reasonably rely upon either acceptance of the notice of appeal or its prompt rejection.

Id. at ¶9. (Emphasis added).

What was clear from the court’s decision in that case was that a set of “unique circumstances” had been presented to it, but those circumstances involved a clear and timely filing **and acceptance as filed by the clerk** which was then later rejected. The situation is quite different in the instant case. There is no date on the Progress/Violation Report except May 13, 2003. There was not a rejection of the document and return to the filer based upon some extrinsic matter such as payment of a fee. It is significant to note that the court in *Raiser* ruled the way it did because the clerk’s office had clearly accepted a timely notice of appeal as “filed” on a prior occasion and then later rejected it. Defendant suggests that this case is not inapposite as does the State, but rather it is support for the proposition that the date-stamp will be accepted by the court as a matter of law as the date an item is filed.

Furthermore, the *Raiser* case does not stand for the proposition that the court’s opinion in that case created a circumstance where the court was to consider the question of the official filing of the document as a matter of fact and not law. Therefore, the argument made by the State that “Defendant has not demonstrated the trial court’s finding that the report was timely filed on May 9th was clearly erroneous” is an incorrect

statement of the standard of review and must be disregarded by this Court. Furthermore, the Court is asked to specifically review the case of *State v. Parker, supra* (Add. 2) which makes clear that even under circumstances where the situation seems unfair, the date-stamp by the clerk's office is the official "filing" of the court as a matter of law for jurisdictional purposes. In that case, the trial court had entered a judgment on Defendant's guilty plea on October 25, 1994. Defendant dated his notice of appeal November 18, 1994, clearly within the 30 day filing requirement, and certified that he mailed the notice through the prison mail on November 19, 1994. The district court clerk did not date-stamp his notice of appeal until nine days later – November 28, 1994. *Id.* at 1118. The Court of Appeals noted that "... the reasoning of *Houston (Houston v. Lack, 487 US 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988))* and the policies underlying the prison delivery rule are compelling. . . . In holding the filing was timely, the *Houston* court emphasized that an incarcerated pro se defendant's lack of control over the filing of his or her notice of appeal is unique. . . . We understand why many of our sister states have decided to adopt *Houston's* interpretation of the federal rules to their own state rules of procedure . . ." *Id.* at 1120, 1121.

Despite its apparent feeling that there were unfair circumstances in *Parker*, the Court of Appeals declined to apply the prison delivery rule to correct what it seemed to be admitting was an injustice and felt that it was up to the Supreme Court, which had the ultimate authority for drafting Rules of Appellate Procedure, to draft the prison delivery

rule and correct this particular wrong. *Id.* at 1122. The date-stamp was official as a matter of law.

It is Defendant Orr's argument that if this issue is to be viewed as a matter of law, there can be no question that the Progress/Violation Report was not filed until May 13, 2003, one day after the State admits Defendant's probation terminated by operation of law. If such was the case, then the State's argument regarding Utah Code Ann. § 77-18-1(11)(b) tolling the running of the probation period upon the filing of a violation report is not valid and should be rejected by this Court in this case. The clerk of the court made a handwritten change to reflect the official date filed, despite the fact that it may have been punched with a date-stamp earlier by a third person who was not an official court clerk, Agent Egelund. It is the official date entered for filing by the clerk of the court, not the probation agent which should govern here.³

³ This Court is asked to take judicial notice of the Third District Court's formal official docketing record for the instant case which reflects the officially filed date for the Progress/Violation Report and Affidavit in Support of Order to Show Cause as May 13, 2003. (Add. 6, p. 13).

POINT II

DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER BOTH THE UTAH AND UNITED STATES CONSTITUTIONS WAS VIOLATED BECAUSE HE WAS NOT TIMELY SERVED WITH NOTICE THAT THE STATE WAS ATTEMPTING TO REVOKE, MODIFY OR EXTEND HIS PROBATION.

In his opening brief, Defendant Orr argued that his probation had ended by operation of law on May 12, 2003 and the Court lost jurisdiction over him at that time because he was not provided notice of the Court's action until May 19, 2003. Appellant cited, among others, the case of *State v. Rawlings*, 893 P.2d 1063 (Utah App. 1995) (attached as Add. 3) for this proposition. In its responsive brief, the State does not deny that Defendant was not provided formal notice of the Order to Show Cause in the trial judge's court until May 19, 2003, nor that the trial judge did not sign the Order to Show Cause until May 13, 2003, one day after Defendant's probation terminated by operation of law. *See* Add. 5.

Instead, the State attempts to distinguish the *Rawlings* case by suggesting the case holding, that jurisdiction to extend probation depended upon service before expiration of the probation period, was actually decided upon statutory grounds alone, and not by the constitutional concept of due process of law; and further, that the statute interpreted was prior to the tolling provision of 11(b) and so should not be used as precedent in the instant case. The State's assertion in this regard is incorrect and misleading. Although it is true that the court in *Rawlings* interpreted the 1985 provision of Utah Code Ann. § 77-18-1,

and the tolling provision 11(b) was not passed until 1989, it is simply not true that the concept of due process of law was not the determining factor, or at least the co-determining factor, in the *Rawlings* case.

In *Rawlings*, the Utah Court of Appeals cited the earlier case of *Smith v. Cook*, 803 P.2d 788 (Utah 1990) as precedent and quoted extensively from that opinion.⁴ Among the quotations the *Rawlings* court cited from that opinion was the following:

Furthermore, the court felt that its holding was appropriate because it “guarantee(d) the fundamental fairness embodied in the due process clause of the United States Constitution (which) entitle(s) probationers to written notice of the accusations against them.” *Id.* at 795. (parenthetical words and letters in original).

Rawlings at 1068.

Clearly then, the Utah Court of Appeals found that the due process clause of the United States Constitution was violated where petitioner did not receive written notice of the accusation against him prior to the date of expiration of the defendant’s probation in both *Smith* and *Rawlings*.

The State’s responsive brief, in attempting to reach for precedent which would cause this Court to avoid a due process analysis in the instant case, further makes the statement that “(N)othing in the *Smith* opinion remotely suggests that due process requires notice, in addition to filing a report, during the probation period . . .”. Appellee

⁴ “While *Smith* involved statutory prerequisites to commencement of a probation *revocation* proceeding, the same analysis is applicable to statutory prerequisites to commencement of probation *extension* proceedings. . . .” (Italics in original).

Br. 18. But, as noted above and as quoted in the later *Rawlings* case, the Utah Supreme Court in *Smith v. Cook* did indeed address directly “the fundamental fairness embodied in the due process clause of the United States Constitution (which) entitle(s) probationers to written notice of the accusations against them.” *Smith* at 795. In fact, in a footnote, the *Smith* court cited the decision of the United States Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L.Ed.2d 656 (1973) and its own earlier decision in the case of *State v. Cowdell*, 626 P.2d at 488 (Utah 1981) for this due process proposition.

The *Cowdell* case is particularly instructive and makes the due process analysis in *Smith v. Cook* (and later in *State v. Rawlings*) particularly relevant. In *Cowdell*, the Utah Supreme Court specifically held as follows:

The decision of a trial court to modify or revoke a probation is basically a discretionary matter, § 77-18-1, U.C.A., (1953 as amended). Nevertheless, in revoking a probation, a court may not ignore fundamental precepts of fairness protected by the due process clause. . . .

626 P.2d at 488.

Although the *Cowdell* case involved a revocation as opposed to an extension of probation, the principle of due process remains the same. In *Smith v. Cook*, *supra*, the Supreme Court of Utah noted “(T)he general nature of probation places significant restrictions on the liberty of the person placed on probation. The penal quality of probation is also clear from § 77-18-1(4)(Supp. 1981), which states that as a condition of probation the trial court can impose fines, require restitution, and impose jail sentences. . .

.” *Id.* at 793. The *Smith* court also noted in its holding as quoted previously: “(W)e hold that in situations where the probationer is not actively avoiding supervision, **in order for a trial court to retain its authority over the probationer beyond the period of probation, the probationer must be served with an order to show cause within the probationary period.**” *Id.* at 796. (Emphasis added).

Although the State would have this Court believe that *Smith* and *Rawlings* were not decided on due process grounds, clearly this Court can see otherwise. The State may also argue that the only thing that matters, even if due process is involved, is that such constitutional rights under both the Utah and United States Constitution should only be applied where there is a danger of **revocation** of probation rather than extension or modification. However, this argument completely overlooks the requirements of U.C.A. § 77-18-1 (as amended 2000) which specifically states “(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.” (emphasis supplied).

In *State v. Call*, cited in Appellant’s opening brief (Add. 4), the Utah Supreme Court was called upon to decide a case of extension of probation. After citing *State v. Green*, 757 P.2d 462 (Utah 1988) and *Smith v. Cook*, *supra*, the Utah Supreme Court held:

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.** Otherwise the probationer is left in a state of uncertainty, not knowing whether to continue to observe the terms of his probation.

Call, 1999 UT 42, 980 P.2d 201 at ¶11. (Emphasis added).

The court specifically noted that the State of Utah argued that § 77-18-1 (Supp. 1996) (11)(b) should be determinative of the case. However, the Utah Supreme Court did not determine that (11)(b) was determinative of the case but found that because the probation officer had approached *Call* well in advance of the termination date and he signed a waiver of a right to hearing and agreed to an extension of his probation for one more year, *Call* “. . . received actual notice that his term of probation would not expire at the conclusion of the statutory 36 month period.” *Id.* at ¶11. Therefore, it must be concluded that the Utah Supreme Court continues to affirm its prior holdings in *Smith* and *Rawlings* that a probationer must be served with a notice of his probation violation and upcoming court appearance **prior to the expiration of his probation period** before his right to due process of law has been effectively observed by a trial court.

It is understandable why the State does not want this Court to engage in a due process analysis in the instant case. This is because the due process holdings of *Smith*, *Rawlings*, *Call* and *State v. Grate*, 947 P.2d 1161 (Utah App. 1997) (quoted in Appellant’s opening brief) all clearly stand for the proposition that this Court and the Utah Supreme Court have always engaged in a due process analysis when looking at the

issue of a defendant receiving proper notice of probation violation proceedings. In the case of *State v. Grate*, the Utah Court of Appeals held:

Finally, our conclusion that the charging of a probation violation requires service of notice on a probationer of the actual accusations and of the need to prepare a defense not only removes the “danger of placing (probationers) in a state of perpetual limbo” which so concerned our Supreme Court in *Green* and *Smith*, but “is also in accord with the decisions of th(at) court, as well as the United States Supreme Court, holding that the **guarantees of fundamental fairness embodied in the due process clause of the United States Constitution entitle probationers to written notice of the accusations against them prior to their revocation hearings.**” *Smith*, 803 P.2d at 795 (footnote omitted).

947 P.2d at 1167. (Emphasis added).

Despite the State’s incorrect assertions otherwise, there simply can be no question that both this Court and the Utah Supreme Court have engaged in a significant due process analysis when it relates to the question of notice to probationers of the state’s intent to extend, modify or revoke probation.

The State further glosses over and attempts to disregard the fact that, the trial judge in this matter did not sign the Order to Show Cause until May 13, 2003, one day **after** the State admits Defendant’s probation would have terminated by operation of law. (See Add. 5 herein). In *State v. Rawlings*, the Utah Supreme Court in reviewing facts found in *Smith v. Cook, supra*, stated as follows:

. . . Three months before his probation expired, the plaintiff was again arrested and charged with two counts of sexual abuse of a child and sodomy upon a child. As a result of this arrest, an incident report and affidavit to show cause why the plaintiff’s probation should not be revoked were filed with the court before the expiration of the defendant’s probation. **However**

the court did not order the plaintiff to show cause why his probation should not be revoked until after the plaintiff's original term of probation had expired. Thus the plaintiff was first given notice of the probation revocation proceedings after his probation had expired. . . .

893 P.2d at 1067, 1068 citing *Smith* 803 P.2d at 789. (Emphasis added).

The *Smith* court had gone on with its due process analysis and indicated that the probationer's right to written notice of the accusations against him prior to the termination of the probation period by operation of law was "guarantee(d) (by) fundamental fairness embodied in the due process clause of the United States Constitution. . .". 803 P.2d at 795.

This Court is asked to reject the State's inappropriate and misleading argument suggesting that the *Rawlings* and *Smith* cases did not involve a due process analysis; and in this case, where the Judge didn't even sign the Order to Show Cause until one day after Defendant Orr's probation period terminated, find that Defendant Orr was denied his Utah and U.S. Constitutional rights to due process of law where he was served with the Judge's Order seven days after his probation terminated by operation of law.

The State cites the case of *State v. Reedy* as being "the only case to directly address the effect of subsection 11(b)" and further claims that case expressly rejected Defendant's argument herein. Appellee Br. 17.⁵ The State goes on to challenge Defendant's argument in his opening brief that *Reedy* was not dispositive of the instant matter due to the fact

⁵ Of course the state completely overlooks and/or intentionally disregards *State v. Call*, *supra* p. 10, 11 in boldly making this statement.

that the Court found that defendant had “made service impracticable since he left Utah without permission and was in California when he claims he should have been served.”

Defendant noted in his opening brief “Because this case was decided several months prior to the *Grate* case, and because it is clear that defendant had left the jurisdiction and could not be served with the court’s proposed action violating his probation, Defendant maintains that this case is inapposite and does not affect the dismissal requested by him.

Reedy’s due process rights were essentially waived by his evasion of supervision and leaving the state so he could not be located to be served. No such facts exist in the instant case. If it were otherwise, the *Grate* court surely would have relied on *Reedy* as precedent. *Reedy* was decided April 17, 1997 and *Grate* was decided October 30, 1997.”

Appellant Br. 21, n. 4.

Appellee states “a fair reading of *Reedy*, however, reveals that this observation was not necessary to the Court’s decision, but was dicta.” Appellant Br. at 20. Defendant asserts that Appellee’s analysis of *Reedy* is not correct. Defendant Orr continues to maintain that a “fair” reading of *Reedy* suggests that the issue of *Reedy* having evaded supervision and left the state was not dicta. Rather, Defendant Orr maintains that the appellate court in *Reedy* understood that due process and fundamental fairness were clear issues in the matter, as it discussed later in the *Grate* case. The court in *Reedy* did not need to become involved in an extensive due process analysis due to the fact that defendant had made service impracticable since he left Utah without permission and was

in California when he claims he should have been served. The court went on to review *Smith v. Cook* and the Utah Supreme Court's opinion therein. The *Reedy* court did not out of hand reject the *Smith* analysis simply on the basis that (11)(b) had not yet been enacted when the *Smith* court was considering the facts of that case, but cited the distinction made by the *Smith* court, then specifically stated:

... the *Smith* court concluded that the trial court lost jurisdiction to revoke probation because *Smith* was not served with notice of the revocation proceedings within the probation period. *Id.* at 795-796. The court noted that the rule might be different in a situation where a probationer avoided service or evaded supervision . . . *Reedy* evaded supervision by leaving Utah and failing to check in with probation authorities; thus, even under the *Smith* analysis, it would not be necessary to serve him during the probation period.

937 P.2d at 153.

Although the *Reedy* court does not specifically mention due process, it is clear from the foregoing and its entire review of the *Smith* case that it was referring to the due process analysis in the *Smith* case. Although the State would like this Court to ignore virtually the entire *Reedy* opinion and read it as simply holding that § 77-18-1(11)(b) is dispositive of the matter and nothing further need be said, the State's analysis of *Reedy* is incorrect and inappropriate. Defendant urges the Court to consider that the court in *Reedy* would have had to come to a different conclusion had the Defendant not evaded supervision and not been available to be served prior to the time of termination of probation based upon its analysis in the *Grate* case decided just six months later.

In the instant case, there is no evidence whatsoever nor any argument by the State either below or on appeal that Defendant Orr was not available to be served. Indeed, Defendant Orr's probation officer specifically testified that the only reason he waited until May 19, 2003, some seven days after Defendant's probation would have terminated by operation of law even by the State's admission, was because "(T)hat was the soonest I was going to see him." Mr. Egelund admitted that he did not make any extra effort to notify Defendant Orr of the Order to Show Cause hearing and the possibility that the Court would revoke, extend or modify his probation until May 19, 2003. (R. 481, p. 22, l. 8-20).⁶

The State also correctly notes that Defendant relies upon *State v. Call*, *supra* (Add. 4) for the proposition that (11)(b) does not affect a Defendant's right to notice and thus due process of law. However, the State rejects Defendant's argument and suggests that the *Call* Court's reliance on *Green* and *Smith* should be disregarded because "Neither case rested on due process concerns." Appellee Br. 23. Defendant has already rebutted the allegation that *Smith* did not rest on due process concerns and again notes to the Court the extent to which the State has gone to provide this misleading analysis to the Court.

⁶ The Court is reminded here, as stated in Defendant's opening brief at 14, that the probation officer testified below he notified Defendant he was recommending termination of the probation to the trial judge and allowing restitution to be handled by the civil process (R. 481, p. 22, l. 21-25, p. 23, l. 1-14). This was the only notice received by Defendant Orr until May 19, 2003, seven days after his probation ended by operation of law.

Although the State is correct that the court in *Call* did not explicitly decide that case on due process concerns, what it fails to note is that the statement made by the court:

(T)hese 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**. Otherwise the probationer is left in a state of uncertainty not knowing whether to continue to observe the terms of his probation. . . .

clearly must have been made based upon the due process analysis of the *Smith* and *Green* cases. *Call* at ¶11. (emphasis added). If such was not the case, why would the Utah Supreme Court have made such a blanket statement in 1999 analyzing a case which clearly occurred after (11)(b) was enacted in 1989, ten years earlier and was even cited by the court in its decision? *See Call* at ¶8. Perhaps the State would like to argue that our Supreme Court simply overlooked (11)(b), but such a conclusion would not be justified by the analysis contained therein. Defendant maintains that our Supreme Court has reiterated as late as 1999 that despite § 77-18-1(11)(a), two things must occur prior to the expiration date of a defendant's original probation term, and they are (1) the state must take definitive action to extend the term before the expiration date and (2) the probationer must be given notice of that intent before the expiration date. To suggest that the second prong of this statement is anything other than an opinion couched with a due process foundation as the State does in its responsive brief is to misunderstand and misread the prior decisions of this Court in *Cowdell*, *Grate*, *Smith v. Cook* and, as the court in *State v. Call* noted, *State v. Green*. *Call* at ¶11.

Defendant respectfully requests that this Court find that his right to due process of law under both the Utah and U.S. Constitutions were violated and the Court lost jurisdiction over him when the State failed to serve him with the Order to Show Cause for probation violation, extension or modification prior to the termination of his probation by operation of law.

POINT III

REPLY TO STATE'S RESPONSE IN POINT'S II AND III OF ITS BRIEF.

The State argues in Point II of its responsive brief that a court has authority to extend probation upon a finding that the probationer has not completed the terms of his probation, including fully paying court-ordered restitution. While Defendant in his opening brief and herein does not deny that a court has such authority, the real issue is whether or not the state is required to give the Defendant due process notice before the termination of the probation period in order to extend or modify, as well as revoke probation. Defendant cited the case of *State v. Hodges*, 798 P.2d 270 (Utah App. 1990) in arguing that his probation could be extended only if his failure to pay restitution was willful. Although the State correctly notes that the *Hodges* court involved a revocation of probation as opposed to an extension of probation, Utah law makes clear that probation may not be **modified or extended** except upon a waiver of a hearing by the probationer or upon a hearing and finding in court probationer had violated the conditions of probation. Utah Code Ann. § 77-18-1(12)(a)(i) (Supp. 2000). However, it is Defendant's

argument that the Court must find that the violation referred to in that statute was a “willful” violation.

The State’s assertion that the *Hodges* case involved a revocation of probation is correct as far as it goes; but it is Defendant’s position that *Hodges* stands for the proposition that where the alleged violation is a failure to pay a fine and/or restitution, the sentencing court must still find that probationer willfully violated the terms and conditions of his probation in order to extend, modify or revoke that probation. Where, as here, “(T)he defendant has made consistent monthly payments of \$1,000.00 towards restitution”, the State fails to show any willful violation of the Court’s restitution order. See Progress/Violation Report, Add. 1, second page under the heading “Restitution.”

In *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994) the Utah Court of Appeals specifically indicated that in the context of an alleged failure to pay restitution (i.e. as grounds for revocation/modification of probation), “a finding of wilfulness merely requires a finding that the probationer did not make *bona fide* efforts to meet the conditions of his probation.” No such finding was made by the trial judge in the instant matter. Without finding both a violation and wilfulness (i.e. the absence of *bona fide* efforts to pay restitution), the District Court had no basis for ordering an extension of his probation, even if this Court rules the District Court still had jurisdiction of Defendant Orr.

In Point III of its brief, the State admits that the trial court exceeded its authority in extending the Defendant's probation for ten years (seven years with credit for the three years previously served without violation). The State argues the matter should be remanded for the trial court to amend its Order to extend probation to 36 months. While Defendant appreciates the State's concession in this matter, Defendant still argues that his right to due process of law under both the Utah and United States Constitutions were violated because appropriate legal efforts to extend his probation were not made prior to its termination by operation of law, and he was denied his right to due process by not being served prior to his probation's termination by operation of law. However, the Defendant agrees that the very least this Court ought to do is remand the case for the Defendant to be resentenced for 36 months of probation beginning May 12, 2003.


CONCLUSION

Defendant urges this Court to consider the violation of his rights to due process of law under the circumstances of this case. He was not afforded "fundamental fairness" in that he was essentially lead to believe by his probation officer, as argued in his opening brief and not disputed by the State, that his probation would be terminated as of May 12, 2003. He was not served with notice until May 19, 2003 of the fact that the Court had decided to take further action against him.

For these and the other reasons outlined in Appellant's opening brief and this reply brief, it is respectfully requested that this Court order that Defendant be released from the custody of the trial court, with his probation having been terminated by operation of law.

Dated this 14 day of APRIL, 2004.

COHNE, RAPPAPORT & SEGAL, P.C.



LARRY R. KELLER
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 14th day of April, 2004, to:

Laura B. DuPaix
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Chantel Drown

ADDENDA TABLE OF CONTENTS

- ADDENDUM 1. Progress/Violation Report
- ADDENDUM 2. *State v. Parker*, 936 P.2d 1118 (Utah App. 1997)
- ADDENDUM 3. *State v. Rawlings*, 893 P.2d 1063 (Utah App. 1995)
- ADDENDUM 4. *State v. Call*, 980 P.2d 201 (Utah 1999)
- ADDENDUM 5. Order to Show Cause
- ADDENDUM 6. 3rd District Court Docketing Statement for *State v. Orr*

Tab 1

STATE OF UTAH
ADULT PROBATION AND PAROLE
PROTECTED
PROGRESS/VIOLATION REPORT

DISTRICT COURT
33 MAY 13 PM 3: 41
REGION III
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
DEPUTY CLERK

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

REGARDING: ORR, David Jay

FROM: 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 #: 119141

PROBATION DATE: 05/12/2000

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

REGISTRAR DATE: 05/11/2003

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

DEFENSE ATTY: Larry R. Keller

COMMENTS:

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

Commit no further violations and/or crimes.

Obtain and maintain lawful, verifiable, full-time employment.

Submit truthful and detailed financial income reports to AP&P as directed

Pay fine in the amount of \$1850.00, payable to the Court.

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

Serve 180 days in the Salt Lake County Jail, commencing on 05/12/00, with no credit for time served.

Have no contact with victims.

Pay restitution, in an amount to be determined, at a rate of \$1000 per month or 25% of monthly income.

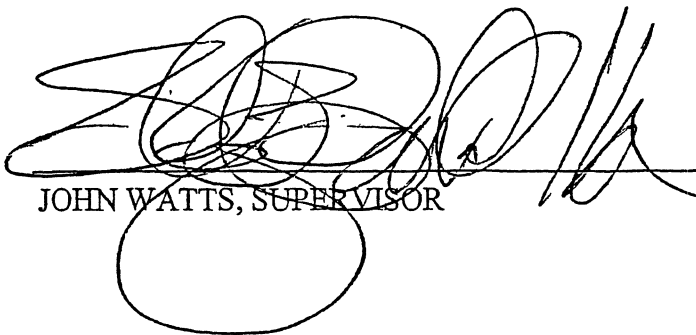
PROBATION UPDATE: The defendant has been indicted federally for Conspiracy To Commit Mail
fraud, Wire Fraud and Conspiracy To Defraud The United States, 18 U.S.C. 371. There is four other co-
defendants indicted with the defendant. According to the indictment, the latest date the defendant is
arrested 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
strict 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



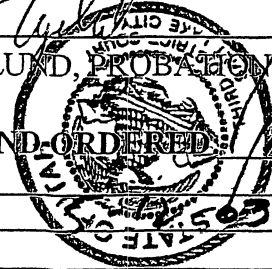
ROBERT EGELUND, PROBATION OFFICER

APPROVED AND ORDERED: 

DENIED: _____

DATE: _____

COMMENTS: _____



Tab 2

Under these specific circumstances, due process does not mandate that the violation report should have been sent to Byington before the hearing or that he must have been given additional time to review the report at the hearing. Thus, Byington's due process claim fails.

CONCLUSION

The record establishes that Byington fairly understood the nature of the probation revocation hearing and that counsel would be appointed for him if he chose. These basic understandings are enough to render Byington's waiver of his statutory right to counsel sufficient under the circumstances. Further, Byington has not demonstrated how his hearing was fundamentally unfair based on the fact that the violation report was not provided to him beforehand. We therefore affirm the trial court's revocation of Byington's probation.

JACKSON and ORME, JJ., concur.



STATE of Utah, Plaintiff and Appellee,

v.

Terence L. PARKER, Defendant
and Appellant.

No. 940735-CA.

Court of Appeals of Utah.

April 10, 1997.

Defendant was convicted in the District Court, Salt Lake Department, Tyrone Medley, J., of attempted burglary, and he appealed. The Court of Appeals dismissed defendant's appeal as untimely, and defendant filed petition for rehearing. On rehearing the Court of Appeals, Billings, J., held that prison delivery rule did not apply in deter-

mining whether defendant's notice of appeal was timely filed.

Affirmed.

Criminal Law §1081(4.1)

Prison delivery rule did not apply in determining whether defendant's notice of appeal was timely filed under rule requiring notice of appeal to be filed within 30 days; motion was filed when district court clerk received notice, not when it was delivered to prison authorities. Rules App.Proc., Rule 4(a).

Terence Lee Parker, West Jordan, Pro Se.

Jan Graham and Thomas B. Bruncker, Salt Lake City, for Plaintiff and Appellee.

Before WILKINS, Associate P.J., and
BILLINGS and ORME, JJ.

OPINION

BILLINGS, Judge:

Defendant Terence L. Parker seeks reversal of our prior ruling dismissing his appeal for lack of jurisdiction because his notice of appeal was filed with the district court clerk more than thirty days after entry of judgment. After considering his petition for rehearing, we dismiss defendant's appeal.

FACTS

Defendant pleaded guilty to attempted burglary. The trial court held the plea in abeyance pending defendant's compliance with certain conditions. Defendant failed to comply with one condition, and the trial court ruled that defendant had violated the terms of the plea-in-abeyance agreement and accepted defendant's guilty plea. Defendant was incarcerated at the Utah State Prison.

The trial court entered its judgment on October 25, 1994. Defendant dated his notice of appeal November 18, 1994, and certified that he mailed the notice through the prison mail on November 19, 1994. The district court clerk did not date stamp his notice of appeal until nine days later—November 28, 1994. With the notice of appeal,

defendant included a Motion for Extension dated November 19, 1994, which also was date stamped on November 28, but the trial court never acted on the motion.

Defendant timely filed with this court his Docketing Statement on December 21, 1994, and his brief on July 21, 1995. On September 13, 1995, the State moved, under Utah Rule of Appellate Procedure 10, to dismiss defendant's appeal for lack of jurisdiction because he filed his notice of appeal one day after the time limit.¹ This court dismissed defendant's appeal in an unpublished memorandum decision on October 19, 1995, concluding this court lacked jurisdiction to extend the time for filing a notice of appeal.

Defendant then filed a petition for rehearing, which this court granted. This court ordered the case remanded to the trial court for a ruling on defendant's timely motion to extend the time for appeal. On remand, the trial court denied defendant's motion to extend the time for appeal. Based on the trial court's denial of the motion, this court ordered plenary consideration of the issue now before us: Whether the "prison delivery rule" should be adopted and applied to interpret Rule 4 of the Utah Rules of Appellate Procedure, thereby making defendant's appeal timely.

ANALYSIS

Defendant argues this court should not have dismissed his appeal as untimely because we should adopt the "prison delivery rule," articulated by the United States Supreme Court in *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), to interpret our state rules of appellate procedure. In response, the State argues we have already rejected the prison delivery rule in *State v. Palmer*, 777 P.2d 521 (Utah Ct.App.1989) (per curiam).

1. Defendant's notice of appeal was due on Friday, November 25, 1994, which makes the date his notice was filed, Monday, November 28, 1994, one day past the thirty-day limit provided by Utah Rule of Appellate Procedure 4

2. Federal Rule of Appellate Procedure 4(a)(1) (amended 1993) provided.

In *Palmer*, this court summarily dismissed, in a per curiam opinion, a pro se prisoner's appeal because his notice of appeal was filed more than thirty days after entry of judgment. *See id.* at 523 (per curiam). The *Palmer* court concluded "the notice of appeal was not timely filed under any plausible interpretation of our rules." *Id.* at 522 (per curiam). The court reasoned that Rule 4 provides that a notice of appeal must be "filed" with the trial court, and that "[t]o hold that filing in the trial court is complete upon mailing is inconsistent" with the plain language of Rule 4. *Id.* (per curiam). However, the *Palmer* court did not discuss nor mention *Houston's* prison delivery rule. Therefore, we take this opportunity to specifically consider whether *Houston's* prison delivery rule should be adopted in Utah.

In *Houston v. Lack*, 487 U.S. 266, 268-69, 108 S.Ct. 2379, 2381, 101 L.Ed.2d 245 (1988), a pro se prisoner sought appellate review of a federal district court judgment dismissing his pro se habeas corpus petition. The prisoner deposited his notice of appeal with prison authorities three days before the deadline, but the notice was not filed by the district court clerk until one day after the deadline. *See id.* The United States Supreme Court held that an incarcerated pro se prisoner's notice of appeal was timely filed when the prisoner delivered it to prison authorities for forwarding to the district court clerk within the thirty-day period required by Federal Rule of Appellate Procedure 4(a)(1). *See id.* At the time of *Houston*, Federal Rule of Appellate Procedure 4(a)(1) was nearly identical to the current version of Utah Rule of Appellate Procedure 4(a).² *See Houston*, 487 U.S. at 276, 108 S.Ct. at 2385.

Because *Houston* was an interpretation of the federal rules, we are not bound by its holding. However, most states have considered *Houston* to be persuasive authority. *See, e.g., Mayer v. State*, 184 Ariz. 242, 908

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from....

P.2d 56, 58 (Ct.App.1995); *Commonwealth v. Hartsgrove*, 407 Mass. 441, 553 N.E.2d 1299, 1302 (1990); *Hickey v. Oregon State Penitentiary*, 127 Or.App. 727, 874 P.2d 102, 105 (1994). Similarly, in construing other procedural rules, Utah courts have recognized that when the Utah rule "is essentially similar" to the federal rule of procedure, "in addition to applicable Utah cases, we look to the abundant federal experience in the area for guidance." *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990); see also *Miller v. Brocksmith*, 825 P.2d 690, 693 (Utah Ct. App.1992) (recognizing when a federal and state rule of procedure "are substantively identical, 'we freely refer to authorities which have interpreted the federal rule'" (quoting *Gold Standard, Inc. v. American Barrick Resources Corp.*, 805 P.2d 164, 168 (Utah 1990))); *State v. Pearson*, 818 P.2d 581, 583 (Utah Ct.App.1991) ("While this issue is one of first impression in this state, it has been addressed by the federal courts. We may look to federal cases in interpreting the rules when the Utah and federal rules are identical.").

Utah Rule of Appellate Procedure 4(a) provides:

In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by rule 3 shall be filed with the clerk of the trial court within 30 days after **date** of entry of the judgment or order appealed from.

(Emphasis added.)

The plain language of Rule 4 provides that an appellant must file his or her notice of appeal in the district court within thirty days. When the language of a rule or statute is unambiguous, we have consistently held that a court must follow its plain meaning. See *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1020 (Utah 1995) ("When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." (citation omitted)); *Bonham v. Mor-*

gan, 788 P.2d 497, 500 (Utah 1989) (per curiam) ("Unambiguous language in the statute may not be interpreted to contradict its plain meaning."); *Allred v. Utah State Retirement Bd.*, 914 P.2d 1172, 1175 (Utah Ct. App.1996) (concluding that "[u]nless statutory language is 'unreasonably confused, inoperable, [] or in blatant contradiction to the express purpose of the statute,' this court applies the statute's literal wording" (citation omitted) (alteration in original)). Therefore, we decline to stretch the plain meaning of Rule 4 to encompass the prison delivery rule.

Our approach is consistent with that taken by other states faced with this issue. In *Talley v. Diesslin*, 908 P.2d 1173, 1175 (Colo. Ct.App.1995), the Colorado Court of Appeals refused to adopt the prison delivery rule in a case involving the timeliness of a prisoner's pro se complaint filed in district court, which sought review of a Department of Correction's disciplinary order. The court reasoned that if "the provision of the rule under consideration is unambiguous, we must apply the plain meaning rule of statutory construction and construe the rule as written." *Id.* Therefore, the court concluded the prison delivery rule was contrary to the plain language of its procedural rule. See *id.* Also, in *State ex rel. Tyler v. Alexander*, 52 Ohio St.3d 84, 555 N.E.2d 966, 967 (1990) (per curiam), the Ohio Supreme Court refused to adopt the prison delivery rule, concluding the plain language of "'filed in the court from which the case is appealed'" could not be construed to mean "'delivered to the prison mail room.'" *Id.*

Nevertheless, the reasoning of *Houston* and the policies underlying the prison delivery rule are compelling. If we were in a position to write appellate procedural rules, we might well conclude a rule for pro se prisoners—such as the current Federal Rule of Appellate Procedure 4(c), which incorporates the prison delivery rule³—makes sense.

3. Federal Rule of Appellate Procedure 4 was amended in 1993 to reflect the prison delivery rule. Thus, the prison delivery rule is now firmly established in the federal system. See Fed. R.App. P. 4(c) ("If an inmate confined in an

institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing.").

In holding the filing was timely, the *Houston* Court emphasized that an incarcerated pro se defendant's lack of control over the filing of his or her notice of appeal is unique. The Court's language is worth quoting at length:

Such prisoners cannot take steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30 day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least . . . follow [the notice's] progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to prison authorities, he can

never be sure that it will ultimately get stamped "filed" on time.

Houston, 487 U.S. at 270-71, 108 S.Ct. at 2382.

The Court noted "the rationale for concluding that receipt constitutes filing in the ordinary civil case is that the appellant has no control over delays between the court clerk's receipt and formal filing of the notice." *Id.* at 273, 108 S.Ct. at 2383-84. In applying that rationale to the context of a pro se prisoner, the Court concluded the time of filing should be the moment at which the pro se prisoner loses control over and contact with the notice of appeal—i.e., at the moment of delivery to prison authorities. *See id.* at 276, 108 S.Ct. at 2385.

Unskilled in law, unaided by counsel, and unable to leave the prison, [a pro se prisoner's] control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities.

Id. at 271, 108 S.Ct. at 2382-83.

Furthermore, the Court recognized that the rejection of the mailbox delivery rule in other contexts has been based, in part, on concerns of uncertainty over when filing occurred. *See id.* at 275, 108 S.Ct. at 2384. However, in the context of a pro se prisoner, there is not the same concern because a well-run prison will invariably keep a log of outgoing mail and/or date stamp the mail it receives from prisoners. Thus, the prison delivery rule is a "bright-line rule." 487 U.S. at 275, 108 S.Ct. at 2385.

We understand why many of our sister states have decided to adopt *Houston's* interpretation of the federal rules to their own state rules of procedure.⁴

4. The states adopting the prison delivery rule include Alabama, Arizona, California, Florida, Louisiana, Massachusetts, Nevada, Oklahoma, and Oregon. *See Holland v. State*, 621 So.2d 373, 375 (Ala.Crim.App.1993); *Mayer v. State*, 184 Ariz. 242, 908 P.2d 56, 59 (Ct.App.1995); *In re Jordan*, 4 Cal.4th 116, 13 Cal.Rptr.2d 878, 887, 840 P.2d 983, 992 (1992); *Haag v. State*, 591 So.2d 614, 617 (Fla.1992); *Tatum v. Lynn*, 637 So.2d 796, 799 (La.Ct.App.1994); *Commonwealth v. Hartsgrove*, 407 Mass. 441, 553 N.E.2d 1299, 1302 (1990); *Kellogg v. Journal Communications*, 108 Nev. 474, 835 P.2d 12, 13 (1992)

(per curiam); *Woody v. State*, 833 P.2d 257, 259 (Okla.1992); *Hickey v. Oregon State Penitentiary*, 127 Or.App. 727, 874 P.2d 102, 104-05 (1994).

The states rejecting the prison delivery rule include Arkansas, Delaware, Montana, New York, Ohio, and Pennsylvania. *See Key v. State*, 297 Ark. 111, 759 S.W.2d 567, 568 (1988) (per curiam); *Carr v. State*, 554 A.2d 778, 780 (Del. 1989) (per curiam); *O'Rourke v. State*, 782 S.W.2d 808, 809 (Mo.Ct.App.1990) (per curiam); *Espinal v. State*, 159 Misc.2d 1051, 607 N.Y.S.2d 1008 (Ct.Cl.1993); *State ex rel. Tyler v. Alexander*,

However, we conclude adoption of such a rule exceeds our authority and should be left to our supreme court, which has the ultimate authority for drafting our rules of appellate procedure. See *Talley*, 908 P.2d at 1175 (concluding "authority to adopt rules relative to review of decisions pursuant to [Colorado rules of procedure] is the sole function of [the state's] supreme court"); *Turner v. Commonwealth*, 137 Pa.Cmwlth. 609, 587 A.2d 48, 49 (1991) ("Even if this Court wished to follow *Houston*, it has no authority to adopt a rule which is in direct contravention with [a state appellate rule], a rule promulgated by our own Pennsylvania Supreme Court. Any such revision of that rule would have to come from the court which promulgated it.").⁵

52 Ohio St.3d 84, 555 N.E.2d 966, 967 (1990) (per curiam); *Turner v. Commonwealth*, 137 Pa. Cmwlth. 609, 587 A.2d 48, 49 (1991).

5. We note that we do not reach the issue of whether our strict application of Rule 4 violates a pro se prisoner's due process or equal protection rights because these issues have not been sufficiently briefed and the record before us precludes an adequate exploration of these impor-

CONCLUSION

We decline to adopt *Houston*'s prison delivery rule as it is not consistent with the plain language of Utah Rule of Appellate Procedure 4. Therefore, we affirm our prior ruling dismissing defendant's appeal for lack of jurisdiction.



tant issues. See *Gramlich v. Munsey*, 838 P.2d 1131, 1132 (Utah 1992); *State v. Yates*, 834 P.2d 599, 602 (Utah Ct.App.1992). However, we note that other courts have found application of similar appellate procedural rules violated pro se prisoners' equal protection rights in certain circumstances. See *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868, 872 (1947); *Haag*, 591 So.2d at 617.

Tab 3

1160 (Utah Ct.App.1994) (noting the protections of statutes of limitations).

In refusing to allow the revival of time-barred claims through retroactive application of extended statutes of limitations, this court has chosen to follow the majority rule. See, e.g., *Davis & McMillan v. Industrial Accident Comm'n*, 198 Cal. 631, 246 P. 1046, 1048 (1926); *Corbett v. General Eng'g & Mach. Co.*, 160 Fla. 879, 37 So.2d 161, 162 (1948); *Spitcaufsky v. Hatten*, 353 Mo. 94, 182 S.W.2d 86, 104 (1944), *overruled on other grounds*, *Director of Dep't of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens*, 555 S.W.2d 293, 297 (Mo. 977); *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E.2d 263, 265 (1949); *Dunham v. Davis*, 29 S.C. 29, 91 S.E.2d 716, 718-19 (1956). [T]he great preponderance of authority favors the view that one who has become released from a demand by the operation of the statute of limitations is protected against its revival by a change in the limitation law." 51 *Am.Jur.2d Limitation of Actions* § 44 (1970). Accordingly, "after a cause of action has become barred by the statute of limitations the defendant has a vested right to rely on that statute as a defense . . . which cannot be taken away by legislation . . . or by affirmative act, such as lengthening of the limitation period." *Id.* (emphasis added).

Accordingly, we conclude that as of December 1, 1976, when Roark turned eighteen years old, she had one year within which she could have brought a claim for assault and battery and four years in which to bring her claim for intentional infliction of emotional stress. Utah Code Ann. §§ 78-12-25(3), (4). Any claims arising out of the alleged sexual abuse had to be filed no later than December 1, 1980. Roark failed to do so. Consequently, her claims are barred by the inapplicable statutes of limitations. Because applying section 78-12-25.1 retroactively to the present claim would affect Crabbe's vested right to a defense of statute of limitations, the effects of this section are not merely procedural, and therefore, this section cannot be applied retroactively.

CONCLUSION

On the basis of the foregoing, we hold that the trial court correctly concluded that (1)

any and all causes of action which Roark may have had were time barred no later than December 1, 1980, and (2) Utah Code Ann. § 78-12-25.1 cannot be applied retroactively to revive Roark's time-barred claims. Accordingly, we affirm.

ZIMMERMAN, C.J., STEWART,
Associate C.J., and HOWE and DURHAM,
JJ., concur.



STATE of Utah, Plaintiff and Appellee,

v.

Rex RAWLINGS, Defendant
and Appellant.

No. 940262-CA.

Court of Appeals of Utah.

March 17, 1995.

The Fourth District Court, Utah County, Boyd L. Park, J., extended and subsequently revoked defendant's probation. Defendant appealed, and his appeal was consolidated with appeal of district court's denial of his habeas corpus petition. The Court of Appeals, 829 P.2d 150, affirmed denial of habeas petition, and remanded probation revocation order. On remand, the District Court, Sawaya, J., entered nunc pro tunc order extending probation, and Park, J., entered nunc pro tunc order revoking defendant's probation. Defendant appealed again. The Court of Appeals, Davis, Associate P.J., held that: (1) defendant was not given proper notice of probation extension proceedings, and (2) defendant did not waive right to proper notice of proceedings.

Reversed.

Jackson, J., concurred in result.

1. Constitutional Law ⚖️270(5)

Probationer shall be accorded due process at revocation proceedings because revoking probation seriously deprives person of his or her liberty. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77-18-1 (1985).

2. Constitutional Law ⚖️270(5)

Probationer is accorded measure of due process at probation extension proceeding and is thus entitled to available protections. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77-18-1(10)(c) (1985).

3. Constitutional Law ⚖️251.6

"Sufficient notice" to satisfy requirements of due process is informing parties of specific issues which they must prepare to meet and giving parties reasonable opportunity to know claims of opposing party and to meet them. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⚖️270(5)**Criminal Law** ⚖️982.7

Casual statement to probationer by aide at state hospital that extension proceedings regarding his probation were pending two days before hearing was not proper notice as required by due process for extension proceedings to have been properly initiated before original term of probation expired. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77-18-1(10)(c) (1985).

5. Constitutional Law ⚖️251.6

Under due process clause, defendant is entitled to have adequate notice imparted to him, that he might make intelligent and informed decision as to whether to waive his or her constitutional right to hearing. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⚖️43(1)**Criminal Law** ⚖️982.7

Probationer did not knowingly waive his due process right to proper notice of issues before court and right to hearing by giving consent to extension of probation to judge after arriving at courthouse after hearing and receiving advice from former counsel, where probationer was not advised that for-

mer counsel had begun working as prosecuting attorney, of effects of extension, of any possible alternatives, that he had right to proper notice of hearing, that he had right to hearing on matter, or that state failed to comply with probation extension statute. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77-18-1(10)(c) (1985).

7. Criminal Law ⚖️979(2)

Trial court lost jurisdiction to initiate probation extension proceedings against probationer upon expiration of probation. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77-18-1(10)(c) (1985).

Steven B. Killpack, Margaret P. Lindsay (argued), Utah County Public Defender Ass'n, Provo, for appellant.

Todd A. Utzinger (argued), Asst. Atty. Gen., Jan Graham, State Atty. Gen., Salt Lake City, for appellee.

Before BILLINGS, Associate P.J., and DAVIS and JACKSON, JJ.

OPINION

DAVIS, Associate Presiding Judge:

Defendant Rex Rawlings is before this court for the second time. Defendant is again appealing the trial court's initial order extending defendant's probation and its subsequent order revoking defendant's probation and is consequently challenging the post-remand proceedings. We reverse.

FACTS

On October 11, 1985, defendant pled guilty to a single count of attempted sodomy on a child, a first-degree felony, in violation of Utah Code Ann. § 76-5-403.1 (1985). Defendant was sentenced to five years to life in the Utah State Prison and placed on 18 months probation. A condition of defendant's probation was that he "enter and complete the long-term sex offender program [program] at the Utah State Hospital." If defendant failed to complete the program, "then execution [would] enter on the prison sentence." Defendant also signed a proba-

an agreement with Adult Probation & Parole (AP & P) which included the condition that he complete the "sex offender program." Throughout those proceedings, defendant was represented by Sherry Ragan, a public defender. Although Ragan subsequently changed positions from public defender to county prosecutor after the sentencing proceedings were completed, she never withdrew as defendant's counsel.

Defendant's probation was to expire by operation of law¹ on May 6, 1987. On or about April 13, 1987, AP & P generated a departmental memorandum directed to the trial court which stated that defendant "has progressed favorably in the program, but . . . needs to continue in treatment."² AP & P recommended that the court extend defendant's probation for an additional 18 months so that he could complete the program. No motion was filed or made by the court or prosecutor to extend defendant's probation.³ However, the court was apparently made aware of the recommendation and a hearing was scheduled for April 17, 1987.⁴ Defendant received nothing in writing of any nature from any source and learned of the hearing when advised thereof casually by a hospital aide two days before the hearing date.

At the hearing (which was characterized by the court as a "review"), Ragan appeared as counsel for the State; defendant was nei-

ther present nor represented by counsel. Ragan did not inform the court that she had initially represented the defendant at his sentencing proceedings. Some time after the proceedings had terminated, Ragan met defendant in the hall, told him the matter had already been heard and that his probation had been extended. Defendant claims that he asked Ragan whether the extension was in his best interest and she replied that it was.⁵ Ragan then proceeded to escort defendant into the courtroom to speak to Judge Park⁶ and, in reliance on Ragan's advice, defendant acquiesced to the extension. The following minute entry, dated April 17, 1987, was made by the trial court:

This matter came before the Court for review. Sherry Ragan, appeared as counsel for the State of Utah. The defendant was not present nor represented by counsel.

The Court reviewed the recommendation of Adult Probation and Parole Dept. requesting defendant's probation [be] extended for eighteen months in order for defendant to complete the Utah State Hospital Sex Offender Program. Court so ordered.

Later, Defendant appeared and concurred with the court's order.

Several months after his original term of probation would have expired, defendant

good cause shown." *Id.* (emphasis added). Rule 12 of the Utah Rules of Criminal Procedure requires that any motion "other than one made during a trial or hearing shall be in writing unless the court otherwise permits." In the case at bar, there was no motion, written or otherwise, filed or made to extend defendant's probation, nor is there anything in the record to suggest that the court's permission was obtained to waive the motion requirement.

The memorandum did not comply with Utah Code Ann. § 77-18-1(10)(b) (Supp.1985), which provided that "[t]he Department of Corrections shall notify the sentencing court in writing 30 days in advance in all cases where termination of supervision will occur by law." *Id.* (emphasis added). The memorandum was filed less than thirty days before the expiration of defendant's probation and also failed to inform the court that defendant's probation period was about to terminate by operation of law.

Utah Code Ann. § 77-18-1(10)(c) (Supp.1985) provided that "[a]t any time prior to the termination of probation the court may, after a hearing with proper notice, upon its own motion or the motion of the prosecutor, extend probation for

4. The April 13, 1987 memorandum from AP & P was not filed until April 21, 1987. The record does not reveal how the court received the recommendation from AP & P.

5. Ragan does not deny making this statement, but only states that she does not remember making it.

6. Whether defendant actually spoke with Judge Park or the courtroom clerk is a contested issue. There is no transcript of what occurred.

twice appeared before the trial court⁷ at which time the court admonished defendant for violating the program rules and ordered that defendant remain in and cooperate with the program.⁸ On March 15, 1988, AP & P filed a motion for an order to show cause, accompanied by an affidavit, requesting that the court require defendant to show why his probation should not be revoked. The affidavit alleged that defendant had violated the conditions of his probation by not completing the program and, on this basis, the court should revoke defendant's probation and impose the prison sentence. The order was issued by the trial court and the record reflects that defendant was properly served.

A hearing on the order to show cause was held June 3, 1988. Defendant was present with counsel. Because defendant had failed to complete the program at the Utah State Hospital, a condition of his probation, the trial court ordered on July 8, 1988 that defendant's probation be revoked and that his original sentence be imposed. Defendant appealed, arguing that the trial court lacked jurisdiction to revoke his probation because of procedural defects in his probation extension proceedings. However, because the trial court's minute entry extending defendant's probation was unsigned, this court in *State v. Rawlings*, 829 P.2d 150, 153 (Utah App.1992), determined that it lacked jurisdiction to consider the issue. Thus, the case was remanded for further proceedings to address both the propriety of the extension proceedings and the trial court's resulting jurisdiction over the revocation proceedings.

On remand, evidentiary hearings on the propriety of the extension proceedings were commenced before Judge Park⁹ and concluded before Judge Sawaya.¹⁰ Judge Sawaya found that, while it was unclear whether defendant was notified in writing, defendant

knew of the April 17, 1987 extension hearing and its purpose¹¹ and, therefore, had adequate and proper notice. Judge Sawaya further concluded that, based on defendant's need for additional time to complete the long-term sex offender program, a requirement of his probation, the court had good cause to extend defendant's probation. Thus, Judge Sawaya entered a nunc pro tunc order dated May 25, 1993 extending defendant's probation.¹²

Defendant's probation revocation proceedings were then returned to Judge Park so that the court could enter findings of fact and conclusions of law in support of the probation revocation order. Judge Park found that defendant had willfully violated the rules of the program and, hence, willfully violated the requirement of his probation agreement. As a result, a nunc pro tunc order dated February 3, 1994 was entered by Judge Park revoking defendant's probation.

Defendant appeals both the propriety of the original extension proceedings and the subsequent revocation proceedings.

ISSUE

Although defendant raises several issues on appeal, we need reach only one: whether defendant's probation was properly extended on April 17, 1987, or whether defendant's probation had expired on May 6, 1987, leaving the trial court without jurisdiction to revoke defendant's probation on July 8, 1988 or conduct any further proceedings in an effort to remedy errors.

STANDARD OF REVIEW

Whether the trial court had the authority to extend defendant's probation is a question of law. "[W]e accord a trial court's conclu-

respect to the April 17, 1987 extension proceedings.

7. The dates of these hearings were November 6, 1987 and February 5, 1988.

8. At these proceedings, defendant was represented by his new attorney, Gary Weight.

9. The date of this hearing was February 12, 1993.

10. Judge Park recused himself when it was determined that he may be called as a witness with

11. The record of defendant's May 18, 1993 extension hearing supports a finding that defendant knew of the purpose of the hearing only *after* its conclusion and his discussion with Ragan.

12. The "extension" hearing before Judge Sawaya was held on May 18, 1993, over six years from the date of the original extension proceedings.

ons of law no particular deference, review-
g them for correctness." *State v. Wilcox*,
8 P.2d 1028, 1031 (Utah 1991).

ANALYSIS

Defendant claims that the trial court
lacked the authority to extend his probation
cause the April 17, 1987 proceedings were
t conducted in accordance with the provi-
ns of Utah Code Ann. § 77-18-1 (Supp.
85), and in particular, because he was not
ven proper notice of the hearing.¹³ The
ate responds that defendant received ade-
ate notice of the extension proceedings
d, therefore, no procedural defects were
esent which would have rendered the April
, 1987 hearing ineffectual. The State con-
des, however, that had defendant not re-
ived proper notice of the hearing, the ex-
nsion proceedings were not "properly initi-
ed prior to the end of his probation [and,
erefore,] defendant would . . . be[] entitled
a reversal of the 1988 order revoking his
obation on the ground that the district
urt lacked jurisdiction over the matter."

[1] It is well settled that a probationer
all be accorded due process at revocation
oceedings because revoking probation seri-
sly deprives a person of his or her liberty.
Ignon v. Scarpelli, 411 U.S. 778, 782, 93
Ct. 1756, 1759-60, 36 L.Ed.2d 656 (1973);
nith v. Cook, 803 P.2d 788, 795 (Utah 1990);
ate v. Bonza, 106 Utah 553, 150 P.2d 970,
2 (Utah 1944). What is less clear is wheth-
due process attaches to probation exten-
on proceedings. Some courts have held,
thout reference to any statutory law, that
ie process protections do not attach to pro-
tion extension proceedings. Even so, be-
use of the high risk of prejudice to the
obationer when he or she is not given
tice of the extension hearing and the hear-
g is conducted ex parte, these courts have
voked their supervisory powers requiring
e necessary parties to (1) give the proba-
ner notice of the extension hearing; (2)
lvisive the probationer that he or she has a
ght to a hearing; and/or (3) advise the
obationer that he or she has the right to

. Defendant also claims that the trial court
lacked the authority to extend his probation
based on the absence of a proper motion before

the assistance of counsel. *Forgues v. United
States*, 636 F.2d 1125, 1127 (6th Cir.1980);
United States v. Cornwell, 625 F.2d 686, 689
(5th Cir.1980), *cert. denied Cornwell II v.
U.S.*, 449 U.S. 1066, 101 S.Ct. 794, 66
L.Ed.2d 610 (1980); *Skipworth v. United
States*, 508 F.2d 598, 602-03 (3d Cir.1975).
But see United States v. Carey, 565 F.2d 545,
547 (8th Cir.1977), *cert. denied* 435 U.S. 953,
98 S.Ct. 1582, 55 L.Ed.2d 803 (1978).

[2] We hold that a probationer in the
State of Utah is accorded a measure of due
process at a probation extension proceeding
and is thus entitled to the available protec-
tions. The language contained in section 77-
18-1 provides that "[a]t any time prior to the
termination of probation the court may, *after
a hearing with proper notice*, . . . extend
probation for good cause shown." Utah
Code Ann. § 77-18-1(10)(c) (Supp.1985) (em-
phasis added). Thus, section 77-18-1(10)(c)
creates an expectation on behalf of the pro-
bationer of notice of the extension proceed-
ings and a hearing, and it is this statutory
expectation to which due process protections
attach. *See Board of Pardons v. Allen*, 482
U.S. 369, 381, 107 S.Ct. 2415, 2422, 96
L.Ed.2d 303 (1987); *Greenholtz v. Inmates of
Nebraska Penal and Correctional Complex*,
442 U.S. 1, 11-12, 99 S.Ct. 2100, 2106, 60
L.Ed.2d 668 (1979); *cf. Hatch v. Deland*, 790
P.2d 49, 51 (Utah App.1990), *abrogated on
other grounds by Labrum v. Board of Par-
dons*, 870 P.2d 902 (Utah 1993).

In *Smith v. Cook*, 803 P.2d 788 (Utah
1990), the Utah Supreme Court addressed an
issue analogous to the one before this court
in the context of a revocation proceeding. In
Smith, the plaintiff was convicted of forcible
sodomy upon a child and was sentenced to a
prison term of five years to life. Execution
of the sentence was suspended, however, and
the plaintiff was placed on three years proba-
tion. Three months before his probation ex-
pired, the plaintiff was again arrested and
charged with two counts of sexual abuse of a
child and sodomy upon a child. As a result
of this arrest, an incident report and "affida-

the court, based on our holding, however, we
need not separately address this issue.

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vit to show cause" why the plaintiff's probation should not be revoked were filed with the court before the expiration of the defendant's probation. However, the court did not order the plaintiff to show cause why his probation should not be revoked until after the plaintiff's original term of probation had expired. Thus, the plaintiff was first given notice of the probation revocation proceedings after his probation had expired. At the hearing on the order to show cause, the plaintiff's probation was revoked and the prison sentence imposed. *Id.* at 789.

The plaintiff filed a petition for habeas corpus and argued that the trial court did not have the jurisdiction to revoke his probation because, "by the express terms of his probation order, his probation terminated prior to the time revocation proceedings were initiated." *Id.* at 793. Thus, the supreme court addressed the issue of "whether probation can be revoked when the revocation proceeding had been arguably initiated but not completed before the expiration of a judicially imposed probation period." *Id.*

The court held that trial courts are not statutorily required to complete revocation proceedings before the expiration of the probation period. *Id.* at 794. The court reasoned that allowing revocation proceedings to continue after the expiration of the probation period when the proceedings are properly initiated does not subject probationers to the "danger of placing them 'in a state of perpetual limbo[, where] although their probation would appear to have terminated ... defendants would actually be subject to a continued term of fictional supervision.'" *Id.* at 795 (quoting *State v. Green*, 757 P.2d 462, 464 (Utah 1988)). The court then addressed the related issue of "which stage in the revocation proceedings must be reached within the period of probation for the court to retain its authority over probationers beyond the probation period." *Id.* at 794.

The court in *Smith* began its analysis by looking at the applicable statutory law. The plaintiff's revocation proceedings were governed by Utah Code Ann. § 77-18-1(5)(a) (Supp.1981), which provided that probation may not be revoked "except upon a hearing in court and a finding that the conditions of

probation have been violated." *Id.* Furthermore, "[i]f the court determines that there is probable cause [to revoke a defendant's probation], it shall cause to be served on the defendant a copy of the affidavit and an order to show cause why his probation should not be revoked or modified." *Id.* § 77-18-1(5)(b). Because section 77-18-1(5)(b) specifically provided that a probationer was to be served with an order to show cause why his or her probation should not be revoked or modified before a court could actually revoke or modify the probation, the court determined that "in order for a court to retain its authority over a probationer who is not actively evading supervision, the probationer must be served with the order to show cause within the period of probation." *Smith*, 803 P.2d at 794. The probationer's right to notice is necessary because "all parties concerned would be aware of the proceedings ... at the time the probation terminates. Probationers could also be assured that no new proceedings or proceedings under different grounds could be brought against them once the probation period has ended." *Id.* at 795 (footnote omitted). Furthermore, the court felt that its holding was appropriate because it "guarantee[d] the fundamental fairness embodied in the due process clause of the United States Constitution [which] entitle[s] probationers to written notice of the accusations against them." *Id.* at 795. Even though revocation proceedings were commenced well before the expiration of probation, because the plaintiff was not given notice of the revocation proceedings before the probation period expired, the court held that the trial court lacked the authority to revoke the plaintiff's probation and his petition for habeas corpus was granted. *Id.* at 796.

While *Smith* involved statutory prerequisites to commencement of a probation revocation proceeding, the same analysis is applicable to statutory prerequisites to commencement of probation extension proceedings. As in *Smith*, this court must look to the applicable statute to determine "which stage in the [extension] proceedings must be reached within the period of probation for the court to retain its authority over proba-

tioners beyond the probation period." *Smith*, 803 P.2d at 794.¹⁴

At the time relevant to this appeal, the pertinent parts of section 77-18-1 provided that

(10)(a) Upon completion without violation of 18 months probation in felony . . . cases, . . . the offender shall be terminated from sentence, unless the person is earlier terminated by the court.

(b) The Department of Corrections shall notify the sentencing court in writing 30 days in advance in all cases where termination of supervision will occur by law. The notification shall include a probation progress report. . . .

(c) At any time prior to the termination of probation the court may, after a hearing with proper notice, upon its own motion or the motion of the prosecutor, extend probation for good cause shown, for one additional term of 18 months. . . .

Utah Code Ann. § 77-18-1 (Supp.1985).

Thus, among other things, section 77-18-1(10) specifically provides that the probationer is entitled to proper notice of the extension proceedings and a hearing before the court has the authority to extend probation. If no such notice is given and a hearing held, the court lacks the authority to extend the probation period because the trial court's discretion to extend probation "must be exercised within the limits imposed by the legislature." *Smith*, 803 P.2d at 791.

"Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983) (citations omitted); accord *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990); *W. & G. Co. v. Redevelopment Agency*, 802 P.2d 755, 761 (Utah App.1990). "[A]ll parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision." *Plumb*, 809 P.2d at 743. A defendant may be denied his or her right to due process under article I,

section 7, of the Utah Constitution if adequate notice has not been given. *Id.*; see also *Nelson*, 669 P.2d at 1212 (notice is "[a]n elementary and fundamental requirement of due process") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)). "Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him [or her] or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process." " *Plumb*, 809 P.2d at 743 (quoting *Cornish Town v. Koller*, 798 P.2d 753, 756 (Utah 1990) (quoting *Nelson*, 669 P.2d at 1212)); accord *W. & G. Co.*, 802 P.2d at 762.

[3] Sufficient notice is informing a party "of the *specific issues* which they must prepare to meet" and giving the party a "reasonable opportunity to know the claims of the opposing party and to meet them." *W. & G. Co.*, 802 P.2d at 761 (emphasis added) (citations and quotation omitted). The Utah Supreme Court has set forth the well-established requirements of adequate notice:

"[N]otice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance."

Nelson, 669 P.2d at 1212 (quoting *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657).

[4] In the case at bar, the uncontroverted evidence shows that defendant was not given proper notice of the extension proceedings. Defendant informally learned of the hearing through an aide at the Utah State Hospital, who apprised defendant "a couple of days before [he] was supposed to be there" that he needed to go to the courthouse for a "probation hearing," and that he was to go to Judge

14. Although additional time to complete the program is an adequate basis for extension of proba-

tion, it is noteworthy that, unlike the probationer

Ballif's courtroom at 10:00 a.m.¹⁵ At no time was defendant informed of the issues which were scheduled to be heard at the extension proceedings so that he could prepare to address them. We conclude that a casual statement to a defendant two days before a hearing is inadequate to reach the level of "proper notice" as contemplated by section 77-18-1(10)(c).¹⁶

Notwithstanding the impropriety of the prehearing notice, the State suggests that, to the extent defendant was entitled to and denied due process, the events that occurred after the hearing constituted a consent to the proceedings and waiver of any due process claim, and that all of the events through defendant's meeting with Judge Park constituted proper commencement of the extension proceedings.

[5] It is true that a defendant may waive his or her constitutional right to due process. However, "[u]nder the due process clause, [a defendant is] entitled to have [adequate notice] imparted to him [or her]; that he [or she] might make an intelligent and informed decision as to whether to waive his [or her] constitutional right to a . . . hearing." *Worrell v. Ogden City Fire Dep't*, 616 P.2d 598, 602 (Utah 1980). Thus, in order for defendant to have effectively waived his due process right to proper notice and a hearing on the extension issues, the waiver must be knowing.

[6] When defendant arrived at the courthouse for the hearing, he met Ragan, whom he still believed to be his counsel. Ragan informed defendant that the proceedings had

been completed and that his probation had been extended. Defendant testified that he asked Ragan if the extension was in his best interest and Ragan replied that it was. Ragan testified that she merely accompanied defendant into the courtroom to meet with Judge Park. Judge Park had no independent recollection of the event. Ragan escorted defendant back into the courtroom, where either the court clerk or the judge received defendant's consent to the extension. Although Judge Sawaya made no specific finding, it can be reasonably inferred that defendant's consent to the extension was the result of either his confidence in, or the advice of, Ragan, the State's attorney with interests adverse to those of defendant. At no time was defendant advised of (1) the fact that Ragan represented the State and no longer represented defendant; (2) the effects of the extension; (3) the available alternatives, if any; (4) the fact that he had a right to proper notice of the hearing; (5) the fact that he had a right to a hearing on the matter; or (6) the failure of the State to otherwise comply with the provisions of section 77-18-1. Based on these circumstances surrounding defendant's consent to the extension, it cannot be said that he knowingly waived his due process right to proper notice of the issues before the court and the right to a hearing.

[7] Of course the State could have remedied the defective proceedings by later properly commencing proceedings under section 77-18-1, see *State v. Jameson*, 800 P.2d 798, 802 (Utah 1990), as it purported to do some six years after the fact.¹⁷ However, in

in *Smuth*, Rawlings was not in default under the terms of the probation agreement.

15. Which was partially incorrect. The proceedings were actually before Judge Park, not before Judge Ballif.

16. We note that an amendment to § 77-18-1, effective April 27, 1987, provided that before probation could be extended, the probationer was entitled to a minimum of five days notice. Utah Code Ann. § 77-18-1(7)(c) (1987). It could be argued, therefore, that because the amendment is procedural in nature, it can be applied retroactively, hence applying to the case at hand. See *Smuth v. Cook*, 803 P.2d 788, 792 (Utah 1990).

17. Relying on *State v. Jameson*, 800 P.2d 798 (Utah 1990), the State contends that defendant received proper notice of the April 17, 1987 hearing and that any procedural defects were remedied by the 1993 hearings before Judge Sawaya and Judge Park. Although the holding in *Jameson* seems to support the State's argument, it is factually distinguishable from the case at hand. In *Jameson*, the defendant was taken into custody for violating the terms of his probation before the probation period expired. *Id.* at 803. At the time the defendant was taken into custody, section 77-18-1(11)(a) provided that "[a]ny time spent in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of the term of probation except in the case of exoneration at the hearing." Utah Code Ann. § 77-18-1(11)(a) (Supp 1985) Thus,

accordance with the holding in *Smith*, a court loses jurisdiction over a probationer when probation extension proceedings are not properly commenced before the probation term expires. To properly commence probation extension proceedings, the provisions of section 77-18-1 must be complied with, particularly, proper notice of the hearing must be given or waived by the probationer. *Smith*, 803 P.2d at 794. Because neither occurred in this case, the proceedings were never properly commenced, the trial court lacked the authority to extend defendant's probation, and its attempt to do so on April 17, 1987 is null and void. Further, because the failure to comply with section 77-18-1 and accord defendant due process was not corrected before defendant's probation expired on May 6, 1987, the trial court lost jurisdiction over defendant and, therefore, any subsequent proceedings are also null and void.¹⁸

CONCLUSION

A trial court retains jurisdiction over a probationer after the probation period expires for the purpose of extension proceedings if the proceedings are properly initiated before the probation period expires. In the case at bar, in order for extension proceedings to have been properly initiated, Utah Code Ann. § 77-18-1(10)(c) (Supp.1985) requires, among other things, that the probationer be given "proper notice." Proper notice means informing a probationer of the issues which will be addressed at the extension hearing and giving the probationer adequate time to address them. Because defendant was not given proper notice of the probation extension hearing before the probation period expired and his subsequent meeting with the trial judge did not constitute a

the defendant's probation had not expired by operation of law, but was suspended when he was taken into custody, and it was for this reason that the court retained its jurisdiction over the defendant, not, as the State suggests, because the revocation proceedings were initiated before the expiration of the probation period. Any question of the trial court's jurisdiction to revoke probation after the probation period expires was initially and explicitly addressed in *Cook*, and it is that case upon which we rely.

knowing waiver of this due process right, the trial court lacked the authority to extend defendant's probation. Further, because the defects were not corrected before defendant's probation expired, the trial court lost jurisdiction over defendant to conduct any future hearings. Accordingly, we reverse both the 1988 and 1994 orders revoking defendant's probation and conclude that defendant's probation expired on May 6, 1987.

BILLINGS, J., concurs.

JACKSON, J., concurs in result.



John DISTON, Plaintiff, Appellee
and Cross-Appellant,

v.

ENVIROPAK MEDICAL PRODUCTS,
INC. a Utah corporation, et al., Defen-
dants, Appellants and Cross-Appellees.

No. 940062-CA.

Court of Appeals of Utah.

March 27, 1995.

Prospective employee brought action against company to enforce alleged employment agreement to hire employee, entered into with company official. The District Court, Salt Lake County, David E. Roth and Frank G. Noel, JJ., found for employee and

18. A "nunc pro tunc" extension hearing conducted approximately six years after the defective proceedings raises due process concerns independent of the 1987 events. See *State v. Taylor*, 818 P.2d 1030, 1032 (Utah 1991) ("substantial lapse of time may raise due process concerns"), cert. denied, *Taylor v. Utah*, 503 U.S. 966, 112 S.Ct. 1576, 118 L.Ed.2d 219 (1992); cf. *State v. Kahl*, 814 P.2d 1151, 1153 (Utah App.1991) (revocation proceedings must be brought within a reasonable time), cert. denied, 843 P.2d 516 (Utah 1992). Because of our holding, however, we need not reach the issue.

Tab 4

I hold that Lopes was not denied any mental rights. I would affirm.

3 Chief Justice HOWE concurs in Justice LUSON'S dissenting opinion.



1999 UT 42

STATE of Utah, Plaintiff and Appellee,

v.

Leslie J. CALL, Defendant and Appellant.

No. 980047.

Supreme Court of Utah.

April 30, 1999.

The District Court, Salt Lake Division, Judge G. Noel, J., revoked probationer's probation for violation occurring after probation had been extended. Probationer appealed. The Court of Appeals certified case. The Supreme Court, Howe, C.J., held that: (1) probation was properly extended by probationer's agreement to one-year extension and waiver of personal appearance well before probation date, and (2) waiver was knowingly, voluntarily and intelligently made.

Affirmed.

Criminal Law §982.7

To extend probationary period beyond original term, State must take definitive action to extend term before the expiration date, and probationer must be given notice of intent. U.C.A.1953, 77-18-1(12)(a)(i).

Criminal Law §982.7

Probation was properly extended by probationer's agreement to one-year extension and waiver of personal appearance well before expiration date, even though State did not initiate extension proceedings.

The parties disagree on the date when Call's probation began. Call asserts that it began on April 3, 1992, the day the court orally sentenced him. The State, however, relies on *State v.*

proceedings prior to that date, as probationer had actual notice that his term of probation would not expire at conclusion of statutory 36-month period. U.C.A.1953, 77-18-1(12)(a)(i).

3. Criminal Law §982.7

Probationer knowingly, intelligently, and voluntarily waived his right to hearing on issue of whether his probation should be extended by signing waiver form that informed him of his right to appear and to be represented by counsel, as defendant was competent, read from, able to read form, and had reasonable understanding of proceedings. U.C.A.1953, 77-18-1(12)(a)(i).

Jan Graham, Att'y Gen., Barnard N. Madsen, Asst. Att'y Gen., Salt Lake City, for plaintiff.

Joan C. Watt, Scott C. Williams, Salt Lake City, for defendant.

HOWE, Chief Justice:

¶1 Defendant Leslie J. Call appealed to the Utah Court of Appeals from a district court order revoking his probation and ordering him to serve his sentence of two concurrent prison terms. However, after oral argument, but before rendering a decision, the court of appeals certified it to us pursuant to Utah Code Ann. § 78-2a-3(3) and rule 43 of the Utah Rules of Appellate Procedure.

BACKGROUND

¶2 On November 15, 1991, Call pleaded guilty to one count of burglary and one count of attempted forcible sexual abuse, both third degree felonies. The trial court sentenced him to serve two concurrent terms of zero to five years in prison but then suspended his sentence and placed him on probation for a period of three years. Although the court orally sentenced Call on April 3, 1992, it did not enter the written judgment and sentence until April 8, 1992.¹

Anderson, 797 P.2d 1114 (Utah Ct.App.1990), to argue that Call's probationary period did not begin until April 8, 1992, the day the court signed and entered the written judgment.

¶3 One of the terms of Call's probation required him to enter and complete a sex offender treatment program. He entered such a program but was unable to complete it by April 1995 when his probation would have initially terminated. On March 20, 1995, at the request of his probation officer, Call signed a "Waiver of Personal Appearance Before the Court," wherein he waived his right to a hearing and agreed to extend his probation for one more year so that he could complete his treatment program. *See* Utah Code Ann. § 77-18-1(12)(a)(i). On April 5, 1995, the Utah State Department of Corrections, Adult Probation and Parole ("AP & P") filed the signed waiver and a progress/violation report with the trial court and formally requested a one-year extension of Call's probation. The court granted the extension that same day.

¶4 Shortly after the extension of Call's probation, AP & P filed a second progress/violation report with the court which alleged that Call had been arrested and charged with residential burglary, criminal mischief, and assault. These charges arose from an incident in which Call allegedly broke into his ex-girlfriend's home, smashed several pieces of property, and physically assaulted her thirteen-year-old son. On April 28, 1995, the court revoked Call's probation but then reinstated it for another year with additional conditions.

¶5 On March 28, 1996, AP & P filed a third progress/violation report with the court. Although the report alleged that Call had violated his probation by failing to enter aftercare for the purpose of monitoring his ingestion of antabuse, failing to report to AP & P for one month, resuming to live with his ex-girlfriend, and consuming alcohol, it did not seek a revocation of his probation. Rather, the report requested a second extension of Call's probation so that he could complete his sex offender treatment program. In addition to the progress/violation report, AP & P filed a waiver of personal appearance that Call had signed, wherein he again waived his right to a hearing and requested another extension of his probation. The court granted the request and extended Call's probation for one more year.

¶6 In July 1996, AP & P filed a fourth progress/violation report with the court. This report alleged that Call had been arrested and charged with sexual abuse of a child, intoxication, and interfering with an arresting officer. The victim's father had reported to police that he found Call naked from the waist down and in bed with the two-year-old victim. In light of these allegations, the court issued a bench warrant and an order to show cause, ordering Call to appear and show why his probation should not be revoked.

¶7 While the hearing on the order to show cause was pending, Call moved to dismiss. He asserted for the first time that the court's "jurisdiction over [his] case terminated on April 3, 1995," two days before AP & P sought to extend it the first time by filing the progress/violation report and signed waiver of personal appearance with the court on April 5, 1995. He maintained that the court therefore lacked the authority to revoke his probation and that the court should dismiss the pending revocation proceedings. The trial court denied the motion and ultimately revoked Call's probation on December 11, 1996. Call now appeals.

¶8 Call contends that "[p]ursuant to Utah Code Ann. § 77-18-1 (Supp.1996), 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." He relies on the following subsections, which provide in relevant part:

(10)(a)(i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months [of] probation. . . .

....

(11)(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.

Utah Code Ann. § 77-18-1(10)(a)(i) & (11)(b). Call argues that since AP & P failed to file the progress/violation report or otherwise initiate the extension proceedings prior

April 3, 1995, his probation period was not terminated as a matter of law. The defendant contends that he did not "knowingly, voluntarily and without prejudice" waive his right to a hearing on the issue of whether [his] probation should be extended." He thus argues that even if AP & P had filed the report and progress/violation report before probation terminated, the waiver was nonetheless ineffective in extending his probation. We will consider these two contentions in order.

ANALYSIS

Over the past eleven years, we have had occasion to decide two significant cases dealing with the termination of probation. In the first case, *State v. Green*, 757 P.2d 462 (Utah 1988), we held that the trial court did not have authority to revoke a defendant's probation after the probationary period had expired by operation of law pursuant to section 77-18-1(10)(a), which at that time provided for automatic termination of probation after eighteen months with no probation violation. In that case, after the eighteen-month probationary period had expired, a probation officer discovered that the defendant was being charged with committing offenses during the eighteen-month probationary term of his probation. The officer filed an affidavit of probation violation with the trial court, and after a hearing, the court ordered the defendant to serve a prison term on his original conviction. We reversed the order sending him to prison and pointed out the indefiniteness of the trial court's ruling cre-

ating defendants would be left in a perpetual state of limbo; although their probation would appear to have been terminated, legally by entry of an order to that effect, defendants would actually be subject to a continued term of fictional supervision. The judges could pass and then, based upon the discovery of a probation violation which had occurred during the statutory probation period, a court could revoke a term of probation thought to have been terminated long ago.

464.

Two years later, in *Smith v. Cook*, 803 P.2d 788 (Utah 1990), the defendant was

on probation for a three-year period, starting on July 10, 1981, and ending July 9, 1984. Three months prior to the completion of his probation, the defendant was again arrested and charged with a crime. On May 15, 1984, an incident report and affidavit to show cause why his 1981 probation should not be revoked or modified was filed in the district court. Five months later, in December 1984, the court revoked his probation and ordered him to serve his sentence. We reversed the revocation, holding that in order for a trial court to retain its authority over the probationer beyond the period of probation, the probationer must be served with an order to show cause within the probationary period. See *Smith*, 803 P.2d at 796.

[1, 2] ¶ 11 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. Otherwise, the probationer is left in a state of uncertainty, not knowing whether to continue to observe the terms of his probation. In the instant case, a probation officer approached Call well in advance of the termination date and requested that he agree to a one-year extension of his probation so that he could complete the sex offender treatment program in which he was enrolled, thus fulfilling one of the terms of his probation. On March 20, 1995, Call signed a waiver of personal appearance, wherein he waived his right to a hearing and agreed to an extension of his probation for one more year. This action confirmed that Call received actual notice that his term of probation would not expire at the conclusion of the statutory 36-month period. Thus Call's probation was properly extended under section 77-18-1(12)(a)(i), which provides: "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." (Emphasis added.)

¶ 12 We conclude that Call acted to extend his probation for one year well in advance of the expiration of the original term

Cite in
Reply

and left him with no doubt that he remained obligated to the terms of his probation for another year. See *State v. Martin*, 976 P.2d 1224 (Utah Ct.App.1999) (holding that under section 77-18-1(12)(a)(i), probation may be extended in either of two ways provided for in that subsection). Since Call signed the written waiver well before both April 3, 1995, and April 8, 1995, it is immaterial for the purposes of this case on which of those two dates his original term of probation would have expired.

¶ 13 Call also contends that he did not "knowingly, intelligently and voluntarily waive his right to counsel, notice and a hearing on the extension issue." He has admitted, however, that he signed the waiver and that he was competent and able to read the words on the form before he signed it. Call did not testify at the hearing on his motion to dismiss the order to show cause why his probation should be revoked. The record on this issue consists solely of the uncontradicted testimony of his probation officer and the written waiver.

¶ 14 The probation officer testified that on March 20, 1995, he met with Call and discussed the probation conditions Call had not met and the possibility of an extension. Call did not object to extending his probation and did not ask for an attorney before making that decision. He read the waiver form and asked no questions before he signed it. The form stated that Call was willing to accept the extension of his probation without a hearing and acknowledged his right to be present at a hearing and to be represented by counsel. In *State v. Byington*, 936 P.2d 1112, 1116 (Utah Ct.App.1997), the court held that a probationer in a probation revocation hearing can waive the right to counsel "as long as the record as a whole reflects the probationer's reasonable understanding of the proceedings and awareness of the right to counsel." Under that standard, the written waiver corroborated by both the probation officer's testimony and Call's admission established that Call had a reasonable understanding of the proceedings and an awareness of his right to counsel. In denying Call's motion to dismiss, the trial court determined that Call knew what he was signing,

was competent, and understood and could read the document that he signed. The trial court did not err in this regard.

¶ 15 We conclude that the record fully supports that Call knowingly, intelligently, and voluntarily waived his right to a hearing on the issue of whether his probation should be extended. This conclusion is bolstered by the fact that one year later, in March 1996, Call again executed a "Waiver of Personal Appearance Before the Court" and requested another extension of his probation.

¶ 16 Order affirmed.

¶ 17 Associate Chief Justice DURHAM, Justice STEWART, Justice ZIMMERMAN, and Justice RUSSON concur in Chief Justice HOWE'S opinion.



1999 UT 50

STARWAYS, INC., Plaintiff and Appellee,

v.

Wesley D. CURRY and Bobbi Chase, aka
Roberta A Chase, dba Curry & Chase
Marketing, Defendants and Appellants.

No. 980025.

Supreme Court of Utah.

May 18, 1999.

Nevada corporation which had its principal place of business in Utah brought suit against California residents doing business in California for libel and intentional interference with existing and prospective business advantage. California residents moved to dismiss for lack of personal jurisdiction. The Fourth District Court, Utah County, Fred D. Howard, J., denied motion, and California residents took interlocutory appeal. The Supreme Court, Durham, Associate Chief Judge, held that: (1) defendants failed to specifically controvert jurisdictional allegations of complaint; (2) complaint allegations

Tab 5

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.

E: 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, 2013

BY THE COURT

Timothy R. Hanson



CERTIFICATE OF SERVICE

I hereby certify that this Order to Show Cause and Affidavit in support thereof, was personally served upon the defendant at B APP 36 W. FLETCHER AVE, by showing the original and informing the defendant of its contents, and delivering a copy on the 19 day of MAY, 2013; additional copies were delivered to COUNTY ATTORNEYS counsel for the defendant, on the 19 day of MAY, 2013

ROBERT EGELUND, PROBATION OFFICER

Tab 6

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH vs. DAVID J ORR

CASE NUMBER 001902772 State Felony

CHARGES

Charge 1 - 61-1-1 - SECURITIES FRAUD
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 2 - 61-1-1 - SECURITIES FRAUD
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 3 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 4 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 5 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 6 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 7 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 8 - 61-1-1 - ATTEMPTED SECURITIES FRAUD (amended)
3rd Degree Felony Plea: March 23, 2000 Guilty
Disposition: March 23, 2000 {Guilty Plea}
Charge 9 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 10 - 61-1-1 - SECURITIES FRAUD
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 11 - 61-1-1 - SECURITIES FRAUD
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 12 - 61-1-1 - SECURITIES FRAUD
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 13 - 76-10-1801 - COMMUNICATIONS FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 14 - 76-10-1801 - COMMUNICATIONS FRAUD
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 15 - 61-1-3 - UNREGISTERED SECURITIES AGENT

CASE NUMBER 001902772 State Felony

3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 16 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 17 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 18 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 19 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 20 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: March 23, 2000 Guilty
Disposition: March 23, 2000 {Guilty Plea}
Charge 21 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 22 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 23 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 24 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 25 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 26 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 27 - 76-10-1603 - PATTERN OF UNLAW ACTIVITY
2nd Degree Felony
Disposition: March 23, 2000 Dismissed
Charge 28 - 76-10-1603 - PATTERN OF UNLAW ACTIVITY
2nd Degree Felony
Disposition: March 23, 2000 Dismissed

CURRENT ASSIGNED JUDGE
TIMOTHY R. HANSON

PARTIES

Defendant - DAVID J ORR
Represented by: LARRY R. KELLER

Plaintiff - STATE OF UTAH
Represented by: HOWARD R LEMCKE

DEFENDANT INFORMATION

Defendant Name: DAVID J ORR
Date of Birth: February 27, 1961
Jail Booking Number:
Law Enforcement Agency: SECURITIES DIVISION
LEA Case Number:
Prosecuting Agency: SALT LAKE COUNTY
Agency Case Number: DAO 00003211
Sheriff Office Number:
Violation Date: December 07, 1994 SL COUNTY

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	606.75
	Amount Paid:	606.75
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: FINE

Original Amount Due:	1,850.00
Amended Amount Due:	288.53
Amount Paid:	288.53
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Nov 23, 2002	-1,561.47	Accounts Receivable accounted for by Adult Probation and Parole. Any outstanding payments should be made to AP&P.

REVENUE DETAIL - TYPE: INTEREST

Amount Paid:	311.47
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Jul 30, 2002	311.47	Interest Posted to Date

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	6.75
Amount Paid:	6.75

Amount Credit: 0.00
Balance: 0.00

CASE NOTE

DAO 00003213

PROCEEDINGS

02-11-00 Case filed
02-11-00 Note: CASE FILED BY DAVID WAYMENT UT DIV OF SECURITIES. DEF
NON-JAIL. WARRANT ACTIVATED.
02-11-00 Warrant ordered on: February 11, 2000 Warrant Num: 972102725
Bail Allowed
Bail amount: 50000.00
02-11-00 Warrant issued on: February 11, 2000 Warrant Num: 972102725
Bail Allowed
Bail amount: 50000.00
Judge: PAT B. BRIAN
Issue reason: Based on the probable cause statement.
02-14-00 Note: deft will surrender with larry keller
02-14-00 SURRENDER scheduled on February 15, 2000 at 09:30 AM in
Arraignment - S31 with Judge ARRAIGNMENT.
02-14-00 Judge ARRAIGNMENT assigned.
02-14-00 ARRAIGNMENT Cancelled.
02-14-00 ARRAIGNMENT scheduled on February 15, 2000 at 09:30 AM in
Arraignment - S31 with Judge ARRAIGNMENT.
02-15-00 ROLL CALL scheduled on March 02, 2000 at 02:00 PM in To Be
Determined with Judge ATHERTON.
02-15-00 Minute Entry - Minutes for Initial Appearance
Judge: RAYMOND S. UNO
PRESENT
Clerk: barbarrs
Prosecutor: LEMCKE, HOWARD R
Defendant
Defendant's Attorney(s): KELLER, LARRY

Video
Tape Number: 73 Tape Count: 900

INITIAL APPEARANCE

Defendant waives reading of Information.
Defendant is arraigned.
ROLL CALL is scheduled.
Date: 03/02/2000
Time: 02:00 p.m.
Location: To Be Determined
Third District Court
450 South State

Salt Lake City, UT 84111
Before Judge: JUDITH S. ATHERTON
02-15-00 Note: INITIAL APPEARANCE minutes modified.
02-15-00 Warrant recalled on: February 15, 2000 Warrant num: 972102725
Recall reason: Based on Court order
02-15-00 Note: MOTION OF HOWARD LEMCKE FOR STATE COURT ORDER WARRANT
RECALLED. DEFENDANT NOTIFIED AS BY SUMMONS BY NOTIFYING
ATTORNEY LARRY KELLER .
02-15-00 Note: REQUEST OF HOWARD LEMCKE CASE SET ON REGULAR ROLL CALL
AND IF REQUIRED LATER CASE TO BE SET ON SPECIAL SETTING.
02-18-00 Note: Bail remain \$250,000
03-02-00 Minute Entry - Minutes for Roll Call
Judge: RAYMOND S. UNO
PRESENT
Clerk: terryb
Prosecutor: HOWARD LEMCKE
Defendant
Defendant's Attorney(s): LARRY KELLAR
Interpreter: `

Video
Tape Count: off record

HEARING

Roll continued to 3/23 due to Plea Negotiations.
ROLL CALL.

Date: 3/23/2000
Time: 02:00 p.m.
Location: To Be Determined
Third District Court
450 South State
Salt Lake City, UT 84111

Before Judge: ROGER A. LIVINGSTON
03-06-00 Note: ROLL CALL calendar modified.
03-06-00 ROLL CALL scheduled on March 23, 2000 at 02:00 PM in To Be
Determined with Judge LIVINGSTON.
03-06-00 Note: JUDGE UNO TOOK THE BENCH FOR JUDGE ATHERTON
03-23-00 Judge HANSON assigned.
03-23-00 SENTENCING scheduled on May 12, 2000 at 09:00 AM in Fourth
Floor - N45 with Judge HANSON.
03-23-00 Note: Case Bound Over
03-23-00 Minute Entry - Minutes for Change of Plea
Judge: ROGER A. LIVINGSTON
PRESENT
Clerk: terryb
Prosecutor: HOWARD LEMCKE
Defendant
Defendant's Attorney(s): LARRY KELLAR

Video

Tape Number: video Tape Count: 2.37

Defendant waives the reading of the Information.

Court advises defendant of rights and penalties.

Defendant waives time for sentence.

A pre-sentence investigation was ordered.

The Judge orders Adult Probation & Parole to prepare a Pre-sentence report.

Upon states motion, Amend Count 8 to F3 - Attempted Securities Fraud. Defendant will plead guilty to amended count and Count 20 as charged. All remaining counts will be dismissed.

CASE BOUNDOVER

Defendant waived preliminary hearing, State consenting thereto.

This case is bound over. A Sentencing has been set on 5/12/00 at 09:00 AM in courtroom N45 before Judge TIMOTHY R. HANSON.

03-23-00 Note: CHANGE OF PLEA minutes modified.

05-12-00 Tracking started for Probation. Review date May 12, 2003.

05-12-00 Fine Account created Total Due: 1850.00

05-12-00 Minute Entry - Minutes for SENTENCE, JUDGMENT, COMMITME

Judge: TIMOTHY R. HANSON

PRESENT

Clerk: evelynt

Prosecutor: HOWARD R LEMCKE

Defendant

Defendant's Attorney(s): LARRY R. KELLER

Video

Tape Number: 5/12/00 Tape Count: 9:23/10:09

SENTENCE PRISON

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

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

The prison term is suspended.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

These sentences are to run consecutively.

SENTENCE FINE

Charge # 8 Fine: \$5000.00
 Suspended: \$4500.00
 Surcharge: \$425.00
 Due: \$925.00

Charge # 20 Fine: \$5000.00
 Suspended: \$4500.00
 Surcharge: \$425.00
 Due: \$925.00

 Total Fine: \$10000.00
 Total Suspended: \$9000.00
 Total Surcharge: \$850.00
 Total Principal Due: \$1850.00
 Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 3 year(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 1850.00 where the surcharge has been
added to the fine. Interest may increase the final amount due.
Pay fine to The Court.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult
Probation & Parole.

Violate no laws.

Pay restitution as determined by Probation Officer.

Serve 6 months in the Salt Lake County Jail, as a term of
probation, no credit for time served. Commitment is to issue
forthwith

Restitution is to be determined. Defendant is to pay no less than
\$1,000 per month towards restitution, or 25% of income, under
direction of APP. Restitution hearing may be set upon appropriate
application.

Have no contact with victims.

Not be involved in activities in which involves other persons
money, investment, or involving financial account.

06-21-00 Fee Account created Total Due: 311.47

08-02-00 Filed: Letter to Court from Bruce Bartlett

08-09-00 Filed: Letter from Court dated 8/8/00 to Bruce Bartlett

09-05-00 Filed: Memo from Bruce Bartlett to Court re: defendant. date
 mailed 8/14/00

09-13-00 Filed: Letter to Mr. & Mrs Ward from the Court, dated 9/12/00

12-05-00 Filed: Letter to Court from Thomas J. Million, D.M.D.
12-13-00 Filed: Letter to Dr. Million from Court
01-02-01 ORDER TO SHOW CAUSE scheduled on January 12, 2001 at 09:00 AM
in Fourth Floor - N45 with Judge HANSON.
01-02-01 Filed order: Progress/violation report: Approved and Ordered:
OSC shall issue probation violation
Judge thanson
Signed January 02, 2001
01-02-01 Filed: Affidavit in support of OSC
01-02-01 Issued: Order to Show Cause
Judge TIMOTHY R. HANSON
Hearing Date: January 02, 2001 Time: 09:00
01-10-01 Filed: Motion for Discovery
01-10-01 Filed: Motion for More Definite Statement or in the Alternative
Motion for Bill of Particulars and Motion to Strike
01-10-01 Filed: Memorandum in Support of Motion for More Definite
Statement or in the Alternative Motion for Bill of Particulars
and Motion to Strike
01-12-01 ORDER TO SHOW CAUSE scheduled on January 26, 2001 at 09 00 AM
in Fourth Floor - N45 with Judge HANSON.
01-12-01 Minute Entry - Minutes for Law & Motion
Judge: TIMOTHY R. HANSON
PRESENT
Clerk: kathrygw
Prosecutor: HOWARD R LEMCKE
Defendant
Defendant's Attorney(s): LARRY R. KELLER

Video

Tape Number: 1/12/01 Tape Count: 9:57/10:04

HEARING

This matter is re-set as indicated herein on Defendant's Motion.
APP is to provide a more specific statement and names of witnesses
to the defendant.

Copy to counsel, APP

ORDER TO SHOW CAUSE is scheduled.

Date: 01/26/2001

Time: 09:00 a.m.

Location: Fourth Floor - N45

THIRD DISTRICT COURT

450 SOUTH STATE

SLC, UT 84111-1860

Before Judge: TIMOTHY R. HANSON

01-17-01 Filed order: Order granting defendant's motion for bill of
particulars

Judge thanson

Printed: 04/14/04 10:00:06

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CASE NUMBER 001902772 State Felony

Signed January 17, 2001

01-17-01 Filed order: Order granting defendant's motion for discovery

Judge thanson
Signed January 17, 2001

01-22-01 Filed: Certificate of Service (def's motion for discovery and
order granting def's motion for bill of particulars)
01-26-01 EVIDENTIARY HEARING scheduled on February 16, 2001 at 02:00 PM
in Fourth Floor - N45 with Judge HANSON.
01-26-01 Minute Entry - Minutes for ORDER TO SHOW CAUSE
Judge: TIMOTHY R. HANSON
PRESENT
Clerk: kathrygw
Prosecutor: JOY ONTON
Defendant
Defendant's Attorney(s): LARRY R. KELLER

Video
Tape Number: 1/26/01 Tape Count: 9:05/9:08

HEARING

The Defendant denies the 2 allegations in the Order to Show Cause.
This matter is set for evidentiary hearing as indicated herein.
Copy to counsel/APP
Martene Mackay is present on behalf of APP.
EVIDENTIARY HEARING is scheduled.

Date: 02/16/2001
Time: 02:00 p.m.
Location: Fourth Floor - N45
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84111-1860

Before Judge: TIMOTHY R. HANSON

01-30-01 Filed order: Progress/violation report- Hearing set (1/26/01)
to address probation violations
Judge thanson
Signed January 30, 2001

02-16-01 Minute Entry - Minutes for Order to Show Cause
Judge: TIMOTHY R. HANSON
PRESENT
Clerk: evelynt
Prosecutor: LEMCKE, HOWARD R
Defendant
Defendant's Attorney(s): KELLER, LARRY R.

Video
Tape Number: 2/16/01 Tape Count: 2:21/2:40

HEARING

Printed: 04/14/04 10:00:11 Page 9

CASE NUMBER 001902772 State Felony

This matter is before the Court for evidentiary hearing regarding
probation violation. Counsel appearing as shown above. APP is

present, (Danny Platis ?)

Counsel advise the Court that they have reached a resolution in the matter. Based on the agreement, the Court will dismiss the OSC, subject to:

1. Counsel/APP, providing the Court with information regarding the status of the trust fund.
2. Amounts still owed to victims, how much has been paid, and to whom.

The State has until 6/1/01 to provide the Court with the information. Probation will not terminate pending restitution being satisfied.

The Court clarifies the probation condition regarding defendant's handling other persons funds.

Defendant is not be be involved in activities that involves other persons money, investments, or involving financial accounts.

02-16-01 Note: ORDER TO SHOW CAUSE minutes modified.

03-09-01 Filed order: Supplemental Order of the Court and Dismissal of revised Order to Show CAUSE DATED 1/2/01

Judge thanson

Signed March 09, 2001

03-14-01 Filed: Letter to Court form Thomas J. Million, D.M.D. (cc: APPD)

05-31-01 Filed: Motion to Enter Partial Restitution Order and Motion to Extend Time to Compelte Restitution Order

06-05-01 Filed order: Partial restitution order and additional order of the Court

Judge thanson

Signed June 05, 2001

06-08-01 Filed: Copy of letter from DOC (APP) to Larry Keller

07-31-01 Filed: Motion to Enter Final Restitution Order

08-01-01 Filed order: Final Restitution Order of the Court

Judge thanson

Signed August 01, 2001

08-02-01 Judgment #1 Entered

Debtor: DAVID J ORR

Creditor: KURT OSTLER

30,000.00 restitution

Debtor: DAVID J ORR

Creditor: JEFF OSTLER

30,000.00 restitution

Creditor: CRAIG GRENIER

Debtor: DAVID J ORR

50,000.00 restitution

110,000.00 Judgment Grand Total

08-02-01 Filed: Final Restitution Order of the Court @J

09-18-01 Filed: Letter to court from Thomas J. Million D.M.D., dated

8/13/01

09-18-01 Filed: Ct's M.E: setting scheduling conferene to determine restitution amount against defendant

09-18-01 Notice - NOTICE for Case 001902772 ID 921966

CONFERENCE RE: RESTITUTION is scheduled.

Date: 10/12/2001

Time: 02:00 p.m.

Location: Fourth Floor - N45
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84111-1860

Before Judge: TIMOTHY R. HANSON

Scheduling conference, see Court's minute entry

09-18-01 CONFERENCE RE: RESTITUTION scheduled on October 12, 2001 at
02:00 PM in Fourth Floor - N45 with Judge HANSON.

10-12-01 Filed: Accounting records, etc.,

10-12-01 Minute Entry - Minutes for MINUTE ENTRY

Judge: TIMOTHY R. HANSON

PRESENT

Clerk: evelynt

Prosecutor: LEMCKE, HOWARD R

Defendant

Defendant's Attorney(s): KELLER, LARRY R.

Video

Tape Number: 10/12/01 Tape Count: 2:20/2:33

HEARING

This case is before the Court for scheduling conference.
Defendant and Counsel are present. Robert Egelund (APP) is
present, and Dr. Thomas J. Million, D.M.D.

Discussion is had, and the restitution hearing is set as indicated
herein.

The only issue to be considered, is Dr. Million's claim.
RESTITUTION HEARING is scheduled.

Date: 01/31/2002

Time: 10:00 a.m.

Location: Fourth Floor - N45
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84111-1860

Before Judge: TIMOTHY R. HANSON

The foregoing dates should be considered firm settings and will not
be modified without court order, and then only upon a showing of
manifest injustice. Counsel are instructed to stay in contact with
the Clerk as the trial date approaches regarding dates.

Printed: 04/14/04 10:00:15

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CASE NUMBER 001902772 State Felony

10-12-01 RESTITUTION HEARING scheduled on January 31, 2002 at 10:00 AM
in Fourth Floor - N45 with Judge HANSON.

01-31-02 Minute Entry - Minutes for MINUTE ENTRY

Judge: TIMOTHY R. HANSON

PRESENT

Clerk: evelynt
Prosecutor: LEMCKE, HOWARD R
Defendant
Defendant's Attorney(s): KELLER, LARRY R.

Video

Tape Number: 1/31/02 Tape Count: 10:21/1:25

HEARING

This case is before the Court for restitution hearing. Defendant is present, and counsel appearing as shown above.

Counsel present no opening statements.

COUNT: 10:22

Dr. Thomas Jackson Million is sworn and examined on behalf of the State.

COUNT: 11:14

Defendant, David J. Orr is sworn and examined, called by the State.

COUNT: 11:30

The State rest.

COUNT: 11:31

Quinn Howe is sworn and examined on behalf of defendant.

COUNT: 12:03

Defendant rest.

Counsel present closing arguments.

COUNT: 12:15

Lunch Recess to 1:00 p.m.

COUNT: 1:11

The Court determines that the restitution owed to victim, Dr. Thomas Million, is \$255,504.39. This amount may be off-set by any amount received from case before Judge Nehring #010901021.

The Clerk of Court will hold Stocks in question, subject to further order of distribution by the Court.

Anyone wanting to buy the Stock is to petition the Court in writing, with detailed amount buyer is willing to pay.

Mr. Lemcke is to prepare appropriate documentation regarding the hearing today.

01-31-02 Notice - Final Exhibit List

01-31-02 Note: MINUTE ENTRY minutes modified.

03-07-02 Fee Account created Total Due: 6.75

03-07-02 COPY FEE Payment Received: 6.75

04-30-02 Fine Payment Received: 110.87

Note: Mail Payment;

Printed: 04/14/04 10:00:16

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CASE NUMBER 001902772 State Felony

04-30-02 INTEREST Payment Received: 279.13

05-14-02 Filed: Letter from Dr. Million, to Court w/attached documents dated 5/6/02

05-21-02 Fine Payment Received: 42.33

Note: Mail Payment;

05-21-02 INTEREST Payment Received: 7.67

06-04-02 Filed: Letter to Dr. Million from the Court, cc: counsel
07-01-02 Filed order: Progress/violation report: Approved & Ordered:
Defendant remains on probation as ordered
Judge thanson
Signed July 01, 2002
07-02-02 Fine Payment Received: 50.00
Note: Mail Payment;
07-30-02 Fine Payment Received: 85.33
Note: Mail Payment;
07-30-02 INTEREST Payment Received: 24.67
11-23-02 Note: Accounts Receivable accounted for by Adult Probation and
Parole. Any outstanding payments should be made to AP&P.
05-05-03 Filed: Letter to the Court from Thomas J. Million
05-13-03 Filed order: Progress/violation report; OSC to be set
Judge thanson
Signed May 13, 2003
05-13-03 Filed: Affidavit in support of OSC
05-13-03 ORDER TO SHOW CAUSE scheduled on May 30, 2003 at 09:00 AM in
Fourth Floor - N45 with Judge HANSON.
05-13-03 Filed: Faxed documents from APP
05-23-03 Filed: Motion to Dismiss Order to Show Cause for Lack of
Jurisdiction
05-23-03 Filed: Memorandum in Support of Motion to Dismiss Order to Show
Cause for Lack of Jurisdiction
05-27-03 Filed: Letter to Thomas J. Million from the Court
05-30-03 Minute Entry - Minutes for Law and Motion
Judge: TIMOTHY R. HANSON
PRESENT
Clerk: evelynt
Prosecutor: BERNARDS-GOODMAN, KATHERINE
Defendant
Defendant's Attorney(s): KELLER, LARRY R.

Video

Tape Number: 5/30/03 Tape Count: 9:25

HEARING

Defendant's motion to dismiss is argued, and the court allows the
State to respond to the motion. State is to file their response by
6/13/03.

Any final reply is due by 6/20/03.

Hearing on the motion is set as indicated herein.

Printed: 04/14/04 10:00:18

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CASE NUMBER 001902772 State Felony

cc: counsel/app
MOTION TO DISMISS is scheduled.
Date: 06/23/2003
Time: 11:00 a.m.
Location: Fourth Floor - N45
THIRD DISTRICT COURT
450 SOUTH STATE

SLC, UT 84114-1860

Before Judge: TIMOTHY R. HANSON

06-02-03 MOTION TO DISMISS scheduled on June 23, 2003 at 11:00 AM in
Fourth Floor - N45 with Judge HANSON.

06-20-03 Filed: Memo to the Court from APP

06-23-03 Minute Entry - Minutes for Law and Motion

Judge: TIMOTHY R. HANSON

PRESENT

Clerk: evelynt

Prosecutor: LEMCKE, HOWARD R

Defendant

Defendant's Attorney(s): KELLER, LARRY R.

Video

Tape Number: 6/23/03 Tape Count: 11:25/12:10

HEARING

This matter is before the Court for oral argument regarding
defendant's motion to dismiss, on basis of lost jurisdiction.
Appearances as shown above. Robert Egelund appearing on behalf of
APP.

Counsel present arguments to the Court.

robert Egelund is sworn and examined.

Counsel present closing arguments. The matter is submitted.

Based upon the foregoing, the Court denies the defendant's motion
to dismiss.

The defendant is ordered to satisfy the May & June restitution
payments within 30 days.

The Court will issue a formal Order regarding the hearing today,
and in so doing, will determine the appropriate time to extend the
probation period.

06-23-03 Notice - Final Exhibit List

07-02-03 Filed order: Memorandum Decision and Order (def's motion to
dismiss denied; probation extended to the remaining term of his
sentence - 10 years)

Judge thanson

Signed July 02, 2003

07-09-03 Filed: Notice of Appeal

07-14-03 Note: Forwarded Cert/Copy of Notice of Appeal to Court of
Appeals

07-15-03 Filed order: Progress/violation report: Approved & Ordered:

Printed: 04/14/04 10:00:20

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CASE NUMBER 001902772 State Felony

Probation reduced to an amt approved by APPD, either side may
request hearing if dispute

Judge thanson

Signed July 15, 2003

07-16-03 Filed: Transcript of OSC hearing dated June 23, 2003, Beverly
Lowe, CCT

07-17-03 Filed: Letter from Court of Appeals - Noa received, Court of
Appeals No. 20030574-ca

07-31-03 Filed order: Progress/violation report; Court Update
Judge thanson
Signed July 31, 2003
09-08-03 Filed: Letter to Court from Thomas Million, D.M.D.
09-24-03 Filed: Motion for Issuance of Certificate of Probable Cause and
Request for Oral Argument
09-24-03 Filed: Ex Parte Motion for Leave to File Over-Length Memroandum
09-24-03 Filed: Memorandum in Support of Defendant's Motion for
Certificate of Probable Cause and Motion for Stay of Execution
10-01-03 Minute Entry - Minutes for MINUTE ENTRY
Judge: TIMOTHY R. HANSON
Clerk: evelynt

HEARING

The Court has received and reviewed the defendant's motion for
Certificate of Probable Cause.

The Court sets the matter for oral argument for October 14, 2003,
at 9:00 A.M.

Counsel for the State is to file any reply memorandum no later
than 5 working days prior to hearing.

The Court has set this matter for a 30 minute setting.

10-01-03 MOTION HEARING scheduled on October 14, 2003 at 09:00 AM in
Fourth Floor - N45 with Judge HANSON.

10-09-03 Filed: Joint and Stipulated Motion to Continue

10-14-03 MOTION HEARING Cancelled.

Reason: ATD requested continuance.

10-14-03 ORAL ARGUMENT scheduled on November 20, 2003 at 09:00 AM in
Fourth Floor - N45 with Judge HANSON.

10-14-03 Filed order: Order on Joint Motion to continue hearin gon
defendant's motion for certifiect of probable cause

Judge thanson

Signed October 14, 2003

10-23-03 Note: Indexed - record forwarded to Court of Appeals (2 files,
1 transcript, 2 envelopes exhibits)

11-17-03 Filed: Letter dated 11/10/03 to the Court from Dr. Saeed
Ghaderi

11-20-03 Minute Entry - Minutes for INCOURT NOTE

Judge: TIMOTHY R. HANSON

PRESENT

Clerk: kathrygw

Printed: 04/14/04 10:00:22

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CASE NUMBER 001902772 State Felony

Prosecutor: LEMCKE, HOWARD R

Defendant

Defendant's Attorney(s): KELLER, LARRY R.

Video

Tape Number: 11/20/03 Tape Count: 9:04/9:14

This matter is before the Court on Defendant's Motion for
Certificate of Probable Cause. The Court heard argument and based

thereon, the motion is denied. This Minute Entry will stand as the Court's Order.

11-26-03 Filed: **UNSIGNED** order denying defendant's request for certification of probable cause filed unsigned; order (11/20/03 M.E.) already entered