**Probation OSCs & Evidentiary Hearings (EH)**

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**I. Order to Show Cause**

1. **Notice and Procedure**
	1. **Procedure**

Utah Code 77-18-1(12)(b)(i)-(ii): An Order to Show Cause must be filed with the court “alleging with particularity facts asserted to constitution violation of the conditions of probation.” “[T]he court shall determine if the affidavit or unsworn declaration establishes probable cause to believe that revocation, modification, or extension of probation is justified.” If so, the court must order service of a warrant or copy of the affidavit/declaration along with an order to show cause.

* 1. **Notice**

Utah Code 77-18-1(12)(c)(i)-(iv): The order to show cause must specify the time and place for the hearing and must “be served upon the defendant at least five days prior to the hearing.” The defendant must show good cause for a continuance. The defendant must be informed of the right to be represented, and the right to present evidence.

“For a notice to meet the minimum requirements of due process to which a probationer is entitled in an extension proceeding, the defendant need not receive notice before the original probationary term expires. He need merely receive notice of the accusations against him and the notice must provide him an adequate opportunity to prepare a response to those accusations.” *State v. Orr*, 2005 UT 92, ¶ 26.

* 1. **Tolling of Probation**
		1. **Probation**

“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 77-18-1(11)(b).

* + 1. **Plea in Abeyances**

The entry of a PIA agreement is not a final order. If the PIA term has past but case remains open with an outstanding OSC, the Court maintains jurisdiction to find a violation of the PIA. *State v. Turnbow*, 2001 UT App 59.

* 1. **Waiver by the Defendant**

A defendant’s probation may be extended without a hearing if the defendant waives the hearing. Utah Code 77-18-1(12)(a)(ii); *State v. Martin*, 1999 UT App 062 (allowing for a waiver if it is made knowingly and voluntarily, including that the defendant is advised of the right to speak to an attorney before signing the waiver form).

* 1. **When Probation Begins**

Probation begins at the time of sentencing, not at the time in which the probationer reports to probation. *State v. Moya*, 815 P.2d 1312 (1991).

It is not reasonable for a person to believe that he is not on probation simply because AP&P failed to contact the person when the person was informed by the judge that is on probation with AP&P and signed a probation agreement with AP&P. *State v. Phillip*, 2016 UT App 245.

1. **When an Evidentiary Hearing is Not Required**
	1. **Admission by the Defendant**

If the Defendant admits to violating the terms of probation but argues that the violations are not willful, the State is relieved from having to put on any evidence of the violations. *State v. Robinson*, 2014 UT App 114, ¶ 19.

* 1. **Conviction?**

*Obiter dictum* suggests that a court may take judicial notice of a conviction without requiring evidence. *Layton City v. Stevenson*, 2014 UT 37, ¶ 3 (noting that to show that the defendant violated the law while in a PIA, the court may hold an evidentiary hearing, or rely on the existing record.).

If true, a probable exception to this offense would be where the conviction was for a strict liability offense that the defendant did not willfully commit because she was not personally aware of the law (i.e. failure to install an ignition interlock device as imposed by the DLD).

**II. OSC Evidentiary Hearing**

1. **Rules of Civil Procedure**

“Probation revocation proceedings are civil in nature and involve an evidentiary hearing.” *State v. Hudecek*, 965 P.2d 1069, 1071 (1998) (using the Rules of Civil Procedure to answer a question about probation revocation appeals from justice to district court).

1. **Rules of Evidence**

The Rules of Evidence do not apply to an OSC Evidentiary Hearing unless the trial court opts that they do, or implicitly applies the rules as evidenced by the record. If the court applies the Rules of Evidence, a misapplication of the rules is appealable under an abuse of discretion standard.

*Layton City v. Peronek*, 803 P. 2d 1294, 1296 (UT App 1990)

1. **Continuances**

“[W]hen a party to a criminal action moves for a continuance in order to procure the testimony of an absent witness, the party must demonstrate that: (1) the testimony sought is material and admissible, (2) the witness could actually be produced, (3) the witness could be produced within a reasonable time, and (4) due diligence had been exercised before the request for a continuance." *State v. Sisneros*, 2016 UT App 209, ¶ 23 (applying Supreme Court holding to probation revocation proceedings) (quotation marks and internal bracket omitted)

1. **Burden**
	1. **Burden of Production**

The burden of production rests on the State. *See* *State v. Hodges*, 798 P.2d 270, 279 (UT 1990) (“Violation of the requirement that [the defendant] participate in treatment or failure to make adequate treatment progress resulting in danger to others must be shown by a preponderance of the evidence.”).

* 1. **Burden of Persuasion**

The burden of proof to show that the defendant violated probation and that the violation was “willfully inadequate” rests on the State. *State v. Hodges*, 798 P.2d 270, 279 (UT 1990).

Likewise, the burden of proof for a plea in abeyance revocation rests on the State. *Layton City v. Stevenson*, 2014 UT 37, ¶ 2.

* 1. **Burden of Proof for Probation Violation**
1. **Preponderance**

“We . . . hold that the standard to be used in proving a violation of a condition of probation is a preponderance of the evidence.” *State v. Hodges*, 798 P.2d 270, 277 (UT 1990).

The preponderance standard applies to PIA hearings as well. *Layton City v. Stevenson*, 2014 UT 37, ¶ 35.

1. **Willfulness**

 “[I]n order to revoke probation for the violation of a condition of probation not involving the payment of money, the violation must be willful or, if not willful, must presently threaten the safety of society.” *State v. Hodges*, 798 P.2d 270, 277 (UT 1990)

* 1. Note: Utah Code 77-18-1 does not permit a “presently threaten the safety of society” standard, so this aspect of the holding might be challengeable.
	2. The standard for non-payment of money is discussed below.

Willfulness “merely requires a finding that the probationer did not make bona fide efforts to meet the conditions of his probation.” *State v. Archuleta,* 812 P.2d 80, 84 (Utah App.1991).

“[T]he word ‘willful’ should not be equated with the word ‘intentional.’” *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994).

1. **Sufficient Factual Basis for both *Actus Reus* and *Mens Rea* (when applicable)**

To find that a defendant willfully possessed cocaine, the court must make factual findings indicating that the defendant knew that the white substance in a pill bottle in the defendant’s possession (later NIK tested to be cocaine) was an illegal substance (i.e. cocaine). Meaning, there must be facts to support a required *mens rea* to find a willful violation occurred. *State v. Legg*, 2014 UT App 80, ¶ 19, *as referenced in* *State v. Legg* 2016 UT App 168, ¶ 4.

1. **Weighing Testimony Generally, and Mental Health of the Defendant**

In the context of weighing testimony at evidentiary hearings: “Testimony is inherently improbable if it is physically impossible or apparently false. Testimony is apparently false where it is incredibly dubious, or its falsity is apparent, without any resort to inferences or deductions.” *Salt Lake City v. Northern*, 2013 UT App 299, ¶ 6 (quotation marks and citations omitted).

Where defendant argues that a probation violation is not willful due to mental health conditions, the trial court’s findings and decision to revoke probation will be upheld if the court’s decision factored in the mental health conditions and did not otherwise abuse its discretion.

*State v. Meronk*, 2016 UT App 27.

1. **Extension Proceedings Treated Differently?**

For probation extension proceedings (as opposed to proceedings that may result in probation revocation), it is an undecided question as to whether the court must find that a probation violation is willful before deciding whether to extend probation. *State v. Orr*, 2005 UT 92, ¶ 35; *but see State v. Rawlings*, 893 P. 2d 1063, 1068-70 (UT App 1995) (noting that the same due process considerations for probation revocation proceedings apply to probation extension proceedings.).

* 1. **Standard for Plea in Abeyances**

A violation on a plea in abeyance agreement is not evaluated for willfulness. *State v. Wimberly*, 2013 UT App 160. Rather, substantial compliance is the mechanism for evaluating purported violations. Utah Code 77-2a-4.

To evaluate substantial compliance, the court should apply contract law:

An overriding principle in contract law is that the intentions of the parties are controlling. Where a contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law. Only where the contract is ambiguous will we look to extrinsic evidence to interpret a contract. The language of a contract is ambiguous only if it is reasonably susceptible to more than one interpretation." *Layton City v. Stevenson*, 2014 UT 37, ¶ 21 (applying contract law to plea in abeyance terms) (internal citations and quotation marks omitted).

A PIA term of “no violations of the law” does not require proof of conviction. *Layton City v. Stevenson*, 2014 UT 37, ¶ 17

* 1. **Standard for Reduced Sentence Pursuant to Cooperation Agreement**

Compliance with cooperative agreements—where a reduced sentence is given in exchange for cooperation by the defendant with the prosecutor—are analogous to plea bargains and are evaluated according to contract principles. Wilfulness is not the standard for non-compliance with a cooperative agreement. *State v. Terrazas*, 2014 UT App 229.

1. **Admissibility of Evidence Under Due Process**
	1. **Scope**

**“**Although not all of the procedural and evidentiary protections required in a criminal case are available in probation revocation proceedings, . . . such proceedings must nonetheless be fundamentally fair so as to satisfy the Due Process Clause of the Federal Constitution. *U.S. v. Holland,* 850 F.2d 1048, 1050 (5th Cir.1988) ("The revocation of probation implicates a probationer's fundamental liberty interest and hence entitles him to procedural due process.").” *Layton City v. Peronek*, 803 P. 2d 1294, 1298 (UT App 1990)

* 1. **General Requirements**

“At a minimum, due process requires that the probationer be given:

1. written notice of the claimed violation of probation;
2. disclosure of the evidence against him;
3. an opportunity to be heard in person and to present witnesses and documentary evidence;
4. the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation;
5. a neutral and detached hearing body; and
6. a written statement by the factfinder of the evidence relied on and reasons for revoking the probation.”

*Layton City v. Peronek*, 803 P. 2d 1294, 1299 (UT App 1990) (citing *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972)).

Utah Code 77-18-1(12)(c)-(d) codifies these requirements. Specifically: 77-18-1(12)(d):

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in the defendant’s own behalf, and present evidence.

* 1. **Reliability for OSC Evidentiary Hearings**

Even where the Rules of Evidence are not applied to OSC Evidentiary Hearings, the court must exclude evidence where foundation has not been adequately laid. *Layton City v. Peronek*, 803 P. 2d 1294, 1296 (UT App 1990)

In *Layton City v. Peronek*, the trial court should have excluded breathalyzer results because “[t]he record lacks any evidence that accepted testing procedures were employed in administering the breath test or that the test was administered by a trained and certified technician.” 803 P. 2d 1294, 1296 (UT App 1990)

* 1. **Confrontation for OSC Evidentiary Hearings**

While an objection to hearsay may not necessarily be made pursuant to the Rules of Evidence, hearsay objections may be made pursuant to the Confrontation Clause. *Layton City v. Peronek*, 803 P. 2d 1294, 1298-99 (UT App 1990).

*Layton City*, which predates the US Supreme Court’s clarification of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), made the following note on how to make a Confrontation analysis:

“Whether the use of documentary hearsay as a substitute for ‘live’ testimony by an accuser is violative of the Confrontation Clause turns on the indicia of reliability of the document or statement sought to be admitted.” *Id*.

Based on this analysis, the Court of Appeals held that an officer’s incident report should have been excluded for violation the Confrontation Clause when it was admitted through an officer who did not create the report (and good cause was not shown). *Id*. But a post-Crawford analysis may force an even more robust standard on hearsay testimony.

* + 1. **Good Cause Determination**

Confrontation may not necessarily apply if the court finds that good cause supersedes the right to Confrontation. *Layton City v. Peronek*, 803 P. 2d 1294, 1298-99 (UT App 1990).

“A finding of good cause requires the trial court to balance the defendant's interest in cross-examining a witness against the State's need to use a particular hearsay statement. The purpose of the good cause requirement is to limit the use of unreliable evidence at revocation hearings.” *State v. Tate*, 989 P.2d 73, ¶ 11 (UT App 1999) (citation omitted).

For good cause to be shown, the prosecutor must demonstrate that good cause applies and the court must “meaningfully address the issue, to make a specific finding that good cause existed for not allowing confrontation, or to evaluate the reliability of the hearsay statements used by the State.” This falls within a reversable error standard. *State v. Tate*, 989 P.2d 73, ¶ 12 (UT App 1999).

In *State v. Tate*, the court unlawfully revoked the defendant’s probation based on hearsay statements regarding a forgery charge offered by the investigating officers of that offense rather than the individuals with personal knowledge of the forgery. *State v. Tate*, 989 P.2d 73, ¶¶ 2-4, 17 (UT App 1999).

* 1. **Remedy for the Defendant**

If the court improperly reimposes the original sentence, the remedy on appeal is to vacate the order (i.e. the defendant’s probation must continue). *State v. Tate*, 989 P.2d 73, ¶ 15 (UT App 1999).

* 1. **Due Process for Plea in Abeyance Evidentiary Hearings**

The same due process requirements for a probation evidentiary hearing apply to a plea in abeyance evidentiary hearing. *Layton City v. Stevenson*, 2014 UT 37, ¶ 31.

* 1. **Other Constitutional Considerations**
		1. Left unbriefed is the role that Article 1 § 12 of the Utah Constitution plays in governing how these procedures work. *Layton City v. Peronek*, 803 P. 2d 1294, 1298 fn. 2 (UT App 1990). However, the Utah Supreme Court has suggested that Article 1 § 7 does not afford greater due process protections than the Federal Constitution for probation hearings. *State v. Orr*, 2005 UT 92, ¶ 25 fn. 7.
		2. On appeal, objections to the court’s factual findings (including the appropriate level of detail given) are waived unless an objection is made to the court at the hearing (and are then judged under a clearly erroneous standard). *State v. Ruesga*, 851 P.2d 1229, 1231 (Utah Ct. App. 1993).
1. **Fourth and Fifth Amendments**

The federal exclusionary rule does not apply to a defendant’s urinalysis test results for purposes of a probation revocation proceeding even when those tests resulted from a Fourth Amendment violation. *State v. Pizel*, 1999 UT App 270, ¶ 5.

A probation condition that can be used to compel self-incrimination for other criminal acts is unconstitutional. *Bennett v. Bigelow*, 2016 UT 54.

1. **Findings of Fact and Conclusions of Law**

The court’s finding for willfulness may be implicit. The court does not need to explicitly make a finding. *State v. Brady*, 2013 UT App 102, ¶ 7. But the findings must be sufficiently clear to ensure that the court did not erroneously revoke probation where there is a genuine question of whether the violation was willful. *State v. Hodges*, 798 P.2d 270 (UT 1990).

1. **Review on Appeal**

“[A] trial court's finding of a probation violation is a factual one and therefore must be given deference on appeal unless the finding is clearly erroneous.” *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994).

**III. Revocation and Other Probation Modifications**

1. **Statutory Authority**

“The trial court's power to grant, modify, or revoke probation is purely statutory, and although a trial court has discretion in these matters, the court's discretion must be exercised within the limits imposed by the legislature.” *Smith v. Cook*, 803 P. 2d 788, 791 (UT 1990).

1. **Purpose of Probation**

“Probation has two roles under Utah law. It is both a sentence and an alternative sanction to be imposed after the suspension of a harsher sentence.” *State v. Anderson*, 2009 UT 13, ¶ 15; *Id*. at ¶ 17 (noting that a sentence may be “served” through probation, and not just though jail).

“Our case law recognizes numerous legitimate purposes of probation, including rehabilitation, as well as protection of society, deterrence, punishment, and restitution, among others.” *State v. Candedo*, 2010 UT 32, ¶ 21 (citations omitted).

1. **Sanctions are not Re-Sentencing**

“[A] decision to revoke and restart probation does not constitute sentencing. . .”.

*State v. Schmidt*, 2015 UT App 96, ¶ 9 (holding that Utah R. Crim. P. 22(e) does not apply to probation revocation).

1. **Power and Limitations to Revocation**
	1. The court is bound by the original sentence when modifying conditions through revocation proceedings. *State v. Anderson*, 2009 UT 13.
		1. More specifically, the court may not change a concurrent sentence to a consecutive one at revocation. *State v. Anderson*, 2009 UT 13, ¶ 27; *State v. Jarmillo*, 2007 UT App 32, ¶ 14 (applying the same standard to misdemeanors).
	2. “It is well settled that a single violation of probation is sufficient to support a probation revocation.” *State v. Boysza*, 2020 UT App 8.
	3. The court’s choice of sanctions falls under an abuse of discretion standard:

“An appellate court will reverse a probation decision only when it is clear that the actions of the judge were so inherently unfair as to constitute an abuse of discretion. Because the granting or withholding of probation involves considering intangibles of character, personality, and attitude, a district court has complete discretion with respect to its decision. A court abuses its discretion only when no reasonable person would take the view adopted by the trial court.” *State v. Vazquez*, 2014 UT App 159, ¶ 7, (citations and internal quotation marks omitted).

1. **Revocation Based on Judge’s Unstated Intent**

The court may not violate a defendant’s probation if the probation requirements were clear but different than what the judge had intended and the defendant followed the clear requirements even when it violated the judge’s intent. *State v. Denney,* 776 P.2d 91, 93 (Utah Ct. App. 1989) (“It is necessary that sentences be rendered with clarity and accuracy in order to avoid the possibility of confusion and injustice.”)

1. **Alternative Sanctions**

The probation court has discretion on its choice of sanctions and need not “consider possible alternatives to imprisonment before revoking probation.” *State v. Hoffman*, 2017 UT App 173, ¶ 15; Utah Code 77-18-1(12)(e)(ii). Although, see below for fines and restitution.

1. **Fines and Restitution Non-Payment**
	1. **Fourteenth Amendment**

“The fundamental fairness requirement of the Fourteenth Amendment forbids the revocation of probation when a probationer has failed to pay restitution or a fine through no fault of his own.” *State v. Orr*, 2005 UT 92, ¶ 33

* + 1. **When Restitution Non-Payment Is Willful**

Failure to make even token payments towards restitution for someone who could do so may constitute a finding of willful refusal to pay restitution, *State v. Archuleta*, 812 P.2d 80 (1991); failure to borrow money from a brother to make restitution payments when that option is available may constitute willfulness, as can failure to not take on a second job when that is a possibility, *State v. Brady*, 2013 UT App 102, ¶ 7. A defendant “must make sufficient bona fide efforts to seek employment or borrow money” if he cannot make restitution payments. *State v. Orr*, 2005 UT 92, ¶ 34.

* 1. **Alternative Sanctions for Non-Payment**

“If . . . a court finds that a probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, the court must consider whether adequate alternative methods of punishing the defendant are available. Then, only if alternative measures are not adequate to meet the State's interests in punishment and deterrence, may the court imprison a probationer.” *State v. Orr*, 2005 UT 92, ¶ 34, *citing* *Beardon v. Georgia*, 461 U.S. 660, 666-67 (1983) (internal quotation marks omitted).

* + 1. **Bench Probation as Alternative Sanction**

“If, upon expiration or termination of the probation period under Subsection (10)(a), there remains an unpaid balance upon the accounts receivable as defined in Section 77-32a-101, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable. Utah Code 77-18-1(10)(b)(i).

* 1. **Unpaid Fines/Restitution and Close of Probation**

“When a defendant successfully terminates probation and has a nondelinquent criminal judgment account receivable with an outstanding balance, the court shall retain the account and allow the defendant to continue paying off the account.” Utah Code 77-32a-105(1).

* + 1. **Fines/Restitution/Costs in Default**

If, at any time, the criminal accounts receivable is more than 30 days past due, it is in default, and the court *may*, without motion or hearing, enter the unpaid balance as a civil judgment and transfer collection to the Office of State Debt Collection. Utah Code 77-32a-103(1).

* + 1. **Fines/Restitution/Costs Delinquent**

If, at any time, the criminal accounts receivable is more than 90 days past due, it is delinquent, and the district court *shall*, without motion or hearing, enter the unpaid balance as a civil judgment and transfer collection to the Office of State Debt Collection. Utah Code 77-32a-103(2).

Notably, section (1) on default accounts references only “court” whereas section (2) on delinquent accounts specifically references “district court.” This is either a typo, or only a district court is required to automatically send a delinquent account to the State Office of Debt Collection.

* 1. **Fines *in lieu* of Jail**

Utah Code 77-18-8 (failure to make a good faith effort to pay fines that are imposed *in lieu* of jail may trigger jail sanctions); *State v. Warner*, 2015 UT App 81 (willful non-payment of fines for someone with means to pay them may trigger probation revocation).

* 1. **Contempt**

The court has the power to find that a delinquent criminal accounts receivable is contempt of court. Utah Code 77-32a-104.

1. **Revocations on Illegal or Ambiguous Sentences**

If a judge imposes an illegal sentence, such as not specifying whether a sentence is consecutive or concurrent, the judge may correct and clarify the sentence at any later time. *State v. Yazzie*, 2009 UT 14,¶ 19.

“We only extend the meaning of ‘participate’ in treatment at Bonneville to mean ‘genuine participation’ and not token participation. To further extend the meaning of ‘participate’ to ‘participate at an acceptable rate, regardless of fault,’ would violate the requirement that a probationer be clearly and accurately apprised of the expectations for remaining on probation. *See State v. Denney,* 776 P.2d 91, 93 (Utah Ct.App. 1989) (probation sentences must be rendered with clarity and accuracy in order to avoid the possibility of confusion and injustice); *Rich v. State,* 640 P.2d 159, 162 (Alaska Ct. App. 1982) (probation conditions must be sufficiently precise and unambiguous to inform probationer of conduct essential to retain liberty).” *State v. Hodges*, 798 P.2d 270, 277 (UT 1990).

1. **Standard of Review**

“A determination to revoke probation is within the discretion of the trial court. We will reverse only if the evidence, when viewed in a light most favorable to the court's decision, is so deficient that it must be concluded the trial court abused its discretion. Furthermore, the court's underlying factual findings supporting its conclusion that defendant violated probation will not be disturbed unless they are clearly erroneous.” *State v. Ruesga*, 851 P.2d 1229, 1231 (Utah Ct. App. 1993) (citations omitted).

1. **Overcoming Mootness on Appeal**

*State v. Legg*, 2016 UT App 168 (describing the collateral consequences doctrine for overcoming mootness for revocation of probation); however, an appeal on the legality of a sentence is mooted when the sentence is complete, *State v. Peterson*, 2012 UT App 363.

1. **Justice Court Appeal**

A defendant is entitled to a hearing de novo in the district court of a probation revocation or imposition of a sentence, including the entry of a plea in abeyance as a conviction, a post-sentence order of restitution or a denial of expungement. Utah Code 78A-7-118(4).