12-16-2014

State v. Stevenson Appellant's Brief 2 Dckt. 41173

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ROBERT LOUIS STEVENSON, Defendant-Appellant.	NO. 41173 ADA COUNTY NO. CR 2008-19663 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

Robert Stevenson asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 96 (Ct. App. Nov. 12, 2014) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed the order denying his motion for credit for time served by holding that credit is only appropriate for periods when the defendant is imprisoned, misreads the relevant statutes. The Court of Appeals' conclusion fails to give effect to the common use definition of all the terms in the

statutes, is inconsistent with the plain language of the whole statutes, creates discord with other related statutes, and, therefore, is inconsistent with precedent.

As such, this Court should grant review in this case. On review, this Court should reverse the order denying Mr. Stevenson's motion for credit for time served and remand this case for a proper calculation of credit.

Statement of the Facts & Course of Proceedings

In 2008, Mr. Stevenson was charged with three counts of aggravated assault, as well as a sentencing enhancement for use of a deadly weapon. (R., pp.27-28.) Mr. Stevenson stated that he had used a knife in an attempt to defend himself from three people – his ex girlfriend (L.B.), her teenage son (T.B.), and her son's friend (C.M.) – as they approached him in an aggressive manner and took his backpack. (Presentence Investigation Report (*hereinafter*, PSI), pp.68-69.)[1] The victims admitted they were trying to take Mr. Stevenson's backpack, but asserted they did so in an effort to recover some of L.B.'s property, which they said Mr. Stevenson had taken. (PSI, p.81.)

Pursuant to a plea agreement, Mr. Stevenson pled guilty to one of the charges of aggravated assault and the weapon enhancement. (R., pp.56-57.) The State agreed to dismiss the remaining charges and recommend a unified sentence of eight years, with two years fixed, to be suspended for a period of probation, which would include local jail time as a condition of probation. (R., pp.56-60.) The district court followed that

[1] PSI page numbers correspond with the page numbers of the electronic PDF file "STEVENSON psi." Included in this file are the PSI report and all the documents attached thereto (police reports, addendum from rider staff, etc.).

recommendation, suspending the sentence for an eight-year period of probation. (R., pp.75-76.)

As part of that period of probation, the district court imposed some nineteen special conditions by which Mr. Stevenson would be required to abide. (R., pp.76-78.) Those conditions included service of 210 days in the local jail, waiver of Fourth, Fifth, and Sixth Amendment rights, restrictions on Mr. Stevenson's use of his time and money, and restrictions on his ability to move about. (R., pp.76-78.) Mr. Stevenson was also advised that credit would not be awarded for the time spent on probation. (R., p.78) While his performance during that period of probation was not perfect, Mr. Stevenson was able to comply with most of the terms of his probation for three years. (*See generally* R.)

However, in 2012, the State filed a motion for probation violation, alleging various violations occurring between 2010 and 2012. (R., pp.106-08.) Mr. Stevenson ultimately admitted to being charged with three new misdemeanor offenses and drinking alcohol on three different occasions. (*See* R., pp.107-08, 141.) A mental health evaluation was performed following those admissions and Mr. Stevenson was diagnosed as suffering from major depressive disorder and anxiety disorder (not otherwise specified). (PSI, p.27.) Considering this information, both his probation officer and the presentence investigator recommended that the district court retain jurisdiction. (PSI, p.6; R., p.112.) The district court followed that recommendation. (R., pp.141-46.)

Unfortunately, Mr. Stevenson did not perform well during that period of retained jurisdiction, as there were several incidents which the staff indicated could have constituted formal disciplinary reports. (PSI, p.31.) However, no formal disciplinary

reports were filed against Mr. Stevenson. (PSI, p.31.) There were also reports that Mr. Stevenson refused to participate in the programs as directed. (PSI, pp.31-32.) As such, the rider staff recommended that the district court relinquish jurisdiction. (PSI, p.34.) The district court followed that recommendation. (R., pp.150-52.)

Thereafter, Mr. Stevenson filed two *pro se* motions pursuant to I.C.R. 35 (*hereinafter*, Rule 35). The first, filed pursuant to Rule 35(b), requested that the district court reconsider his sentence and grant leniency. (R., pp.163-66.) The district court denied that motion, pointing to Mr. Stevenson's failures during his periods of probation and retained jurisdiction, which it decided demonstrated that the sentence imposed was still appropriate. (R., pp.186-87.)

The second motion was filed pursuant to Rule 35(c) and requested credit against his sentence for the time Mr. Stevenson had been on probation and complying with the terms thereof. (R., pp.177-78.) He contended that credit was appropriate because he was subject to numerous restrictive conditions, and thus, his probation was more akin to incarceration. (R., pp.177-78.) The district court denied that motion based on precedent which held that probationers are not entitled to credit for the time served on probation. (R., p.190.)

Mr. Stevenson filed separate, timely notices of appeal from each of the district court's decisions on his Rule 35 motions. (R., pp.195-201.) On appeal, he requested that transcripts of five hearings be prepared and augmented into the appellate record.[2]

[2] Specifically, he requested the transcripts from the change of plea hearing held on March 2, 2009, the sentencing hearing held on April 10, 2009, the admit/deny hearing held on March 30, 2012, the dispositional hearing held on May 18, 2012, and the rider review hearing held on September 12, 2012. However, he did not pursue his requests for the transcripts of the change of plea or admit/deny hearings on appeal.

(Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof, filed October 2, 2013.) This Court denied that motion. (Order Denying Motion to Augment and to Suspend the Briefing Schedule, dated October 16, 2013.)

Mr. Stevenson argued three issues on appeal: (1) whether the district court erred in denying his motion for credit for time served in regard to the period of time he had been on probation and adhering to the terms thereof; (2) whether this Court had erred in denying his motion to augment the record[3]; and (3) whether the district court abused its discretion when it denied his motion for a reduction of his sentence. On the credit issue, he argued that the plain language of I.C. § 18-309 revealed that the district court erred by denying credit for the time he was on probation adhering to the terms thereof. He contended that I.C. § 18-309 provides, as a general rule, that credit is accrued against the sentence once the sentence is pronounced and continues accruing unless and until one of the statutory exceptions to that rule apply. However, he contended that, by the plain language of the statutes, those exceptions only apply when the person is "temporarily" released from prison and is "at large" during that release. As a person on probation adhering to the terms thereof is not temporarily released or at large, he contended those exceptions did not apply in his case.

In regard to the credit issue, the Court of Appeals held that, under its reading of the plain language of the credit statutes, only the periods of time the defendant was imprisoned were properly awarded as credit. (Opinion, pp.3-4.) Since Mr. Stevenson was not incarcerated during the time for which he was claiming credit, the Court of

[3] While the appeal was proceeding, this Court issued its opinion in *State v. Easley*, 156 Idaho 214, 218-20 (2014), which addressed several of the issues Mr. Stevenson raised in regard to his challenge on the motion to augment the record.

Appeals affirmed the district court's denial of Mr. Stevenson's motion for credit. (Opinion, p.4.) The Court of Appeals did not review the decision on the motion to augment the record based on its decision in *State v. Morgan*, 153 Idaho 618, 620 (Ct. App. 2012). (Opinion, p.5.) It also found no abuse of discretion in denying the motion for reduction of sentence. (Opinion, p.6.) Mr. Stevenson filed a timely petition for review.

ISSUE

Whether this Court should grant review of the Idaho Court of Appeals' Opinion affirming the district court's order denying Mr. Stevenson's motion for credit for time served because it fails to give effect to the plain language of the relevant statutes.

ARGUMENT

This Court Should Grant Review Of The Idaho Court Of Appeals' Opinion Affirming The District Court's Order Denying Mr. Stevenson's Motion For Credit For Time Served Because It Fails To Give Effect To The Plain Language Of The Relevant Statutes

A. Standard For Evaluating Petitions For Review

The Idaho Appellate Rules provide that petitions for review may be granted only "when there are special and important reasons" for doing so but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered. Rule 118(b) provides some factors which must be considered in evaluating any petition for review, including:

> 2) Whether the Court of Appeals' decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;
>
> 3) Whether the Court of Appeals' decision is inconsistent with its own prior decisions;
>
> 4) Whether the Court of Appeals' actions are so unusual as to call for the Supreme Court's exercise of its supervisory authority;

I.A.R. 118(b). In this case, Mr. Stevenson contends that there are special and important reasons for review to be granted. For example, the Court of Appeals' analysis is in contravention of Idaho Supreme Court and Court of Appeals precedent in regard to the proper interpretation of statutes, as it fails to give effect to the plain language in the credit statutes. I.A.R. 118(b)(2)-(3). It also creates discord between the credit statutes

and other, related statutes. *See* I.A.R. 118(b)(4). Therefore, this Court should exercise its review authority in this case.[4]

B. Applying The Whole Of The Relevant Statutes And Giving All The Terms Their Plain, Ordinary Meanings, Mr. Stevenson Should Have Received Credit For The Time He Was On Probation And Adhering To The Terms Thereof

Mr. Stevenson contends that the Court of Appeals' Opinion is erroneous because it does not give effect to the plain language of the terms in the relevant statutes. The two statutes at issue in this case are I.C. § 18-309 and I.C. § 19-2603.[5] Idaho Code § 18-309 guides the courts in the computation of the "term of imprisonment" the defendant will be required to serve. As such, it provides:

> In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

I.C. §18-309. This statute addresses credit awards in both pre-judgment and post-judgment contexts. Mr. Stevenson's claim is for credit for time served post-judgment.

---

[4] If this Court grants the petition for review, it should grant review as to all issues raised in the original briefing. In that case, Mr. Stevenson contends he should be granted relief on those issues for the reasons stated in his Appellant's and Reply Briefs, which are incorporated herein by reference thereto.

[5] The district court only considered I.C. § 18-309. (R., pp.189-90.) However, as the Court of Appeals pointed out, I.C. § 19-2603 is "the more applicable statute in this instance" because Mr. Stevenson is claiming credit in regard to a period of probation. (*See* Opinion, p.3 n.1.) Nevertheless, as both statues use similar language in their provisions regarding credit awards, that distinction is not relevant to the analysis of this issue on appeal. *See, e.g., Taylor v. State*, 145 Idaho 866, 870 (Ct. App. 2008) (reversing the district court's grant of credit for time served for a period of probation based on the language in I.C. § 18-309). Neither statute prevents awards of credit for the time the probationer is adhering to the terms of his probation.

In the post-judgment context, I.C. § 18-309 provides that "the remainder" of the term of imprisonment "commences upon the pronouncement of sentence." I.C. § 18-309. That means the time accrued against the sentence (*i.e.*, the time to be credited against the sentence) will be counted from the date the sentence was pronounced, and it will continue counting unless and until some other situation stops it from doing so. *See* I.C. § 18-309. Therefore, the remainder of Mr. Stevenson's "term of imprisonment" commenced on April 10, 2009, which was the date his sentence was pronounced by the district court.[6] (R., pp.68-69.) Thus, under the general rule set forth in I.C. § 18-309, all the time after the pronouncement of that sentence, which includes the period of probation, should have been calculated as part of his term of imprisonment.

There are a few exceptions to this general rule which will stop a person from accruing credit against his sentence after his sentence has been pronounced. The first exception is in I.C. § 18-309 itself: if, after the remainder of the term of imprisonment commences, "the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term." I.C. § 18-309. However, as release on probation is not a "temporary" release, nor is the probationer who is adhering to the terms of his probation "at large" during that time he is adhering to the terms of his

[6] In fact, while the execution of Mr. Stevenson's pronounced sentence was ordered suspended for a period of probation, Mr. Stevenson was not immediately released from custody. He was held until he obtained "written proof of living accommodations for clean/sober housing . . . [he] can be released upon submission [of that documentation]." (R., p.69.) Under the general rule from I.C. §18-309, Mr. Stevenson would be entitled to credit for the time he was in custody before being released to probation because he began serving his term of imprisonment before he was actually released to probation.

probation, the time during which the probationer is adhering to the terms of his probation does not trigger the exception in I.C. §18-309.

A second exception to the general rule from I.C. § 18-309 appears in I.C. § 19-2603, which provides:

> When the defendant is brought before the court in such case [alleging a probation violation], it may, if judgment has been withheld, pronounce any judgment which it could originally have pronounced, or, if judgment was originally pronounced but suspended, the original judgment shall be in full force and effect and may be executed according to law, and the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence, but the time of the defendant's sentence shall count from the date of service of such bench warrant.

I.C. § 19-2603. As such, it also creates an exception for "the time such person shall have been at large under such suspended sentence [which] shall not be counted as a part of the term of his sentence." I.C. § 19-2603. However, that exception, like the exception in I.C. § 18-309, does not apply to the probationer who is adhering to the terms of probation because that probationer is not "at large."

However, the Court of Appeals determined that the critical language in the credit statutes, particularly I.C. § 18-309, is the use of the terms "imprisonment" and "incarceration," and so, held that a defendant is only entitled to credit for time he was imprisoned or incarcerated. (Opinion, pp.3-4.) That interpretation does not give effect to the plain language of the other terms in the statutes (such as "at large"), and creates discord with other, related statutes, and, as such, is inconsistent with precedent. Therefore, this Court should grant review. [7]

[7] For these same reasons, Mr. Stevenson also contends that previous decisions which have held that credit for time served on probation is not appropriate, *see, e.g., State v. Banks*, 121 Idaho 608, 610 (1992); *State v. Buys*, 129 Idaho 122, 126 (Ct. App.

1. As Probation Is Not A "Temporary" Release, It Does Not Fall Within I.C. § 18-309's Exception To The Rule That A Defendant Get Credit For Time Following The Pronouncement Of The Sentence

Mr. Stevenson contends that, because a release is not temporary, release on probation does not trigger the exception in I.C. § 18-309. The word "temporary" is ordinarily defined as "lasting for a time only." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, 821 (2007). Therefore, the phrase "by any legal means is temporarily released from incarceration" is ordinarily understood to mean "by legal means is released for a time only from such incarceration."

The determination of whether the release was temporary should be made based on the time the relevant act – the release from incarceration – took place. *Cf. Guzman v. Piercy*, 155 Idaho 928, 937 (2014) (holding that, in general, statutes are meant to act prospectively; retrospective or retroactive statutes are disfavored); *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 315 (2010) (holding that, when a term in a contract is unclear, the courts consider "the meaning intended by the parties at the time of contracting, not at some future time"). Thus, the appropriate question is: at the moment of release, was the release temporary? The answer in regard to a release on probation is "no," because there is no associated requirement that the defendant ever return to prison. Therefore, the *release* was not temporary; it was designed to release the probationer from incarceration permanently. *See, e.g.,* I.C. § 19-2604(1).

1996); *Taylor v. State,* 145 Idaho 866, 869-70 (Ct. App. 2008), are manifestly wrong and should be overruled to vindicate plain, obvious principles of law, since those previous decisions also do not give effect to the plain language of the credit statutes. *State v. Humphreys*, 134 Idaho 657, 660 (2000). At any rate, "[t]he interpretation of a statute is a question of law over which this Court exercises free review." *State v. Doe*, 140 Idaho 271, 274 (2004).

For example, if a probationer successfully completes his period of probation, he is not required to go back to prison. *See id.* Rather, when the sentencing court determines that the defendant has satisfactorily completed the period of probation, it may: terminate the sentence; set aside the guilty plea or conviction, dismiss the case, and discharge the defendant; or, amend the sentence to be equivalent to the period of time the defendant served in a penal facility prior to the suspension of his sentence, which may then be treated as a misdemeanor. *Id.* Regardless of which option the sentencing court opts to use, the defendant is free to leave custody and is not required to be incarcerated again before doing so. *See id.* Therefore, a term of probation cannot be classified as a "temporary" release from incarceration or a release from incarceration "for a limited time only."

That conclusion becomes clear when the period of probation is compared to the grant of a furlough to an inmate. Furloughs are a legal means which permit an incarcerated person to be released from that incarceration so he might maintain regular employment, schooling, and the like while he serves his sentence. I.C. § 20-242(1). However, unlike the probationer, the furloughed inmate must return and continue to be incarcerated during the time he is not participating in the activity underlying his furlough. I.C. §§ 20-242(3), 20-614(3). As a result of the requirement that the furloughed inmate return to the place of his incarceration, the furlough release is "for a limited time only" (*i.e.*, the hours allotted for the employment or schooling), and thus, that release is

"temporary."[8] Since the probationer is not subject to similar requirement to return to incarceration, the probationer's release is not temporary.

Furthermore, probationers have a constitutionally-protected liberty interest in remaining on probation. *State v. Rose*, 144 Idaho 762, 766 (2007) (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). As such, before the State may terminate that period of probation, it must provide the defendant with certain due process protections. *Id.* This makes probation distinctly different from temporary releases, like furloughs, since the privilege of temporary release may be revoked at any time by the Department of Correction without providing due process protections. *See* I.C. § 20-242(7). Therefore, because release on probation imbues a probationer with liberty interests and due process rights, such a release is designed to be permanent, not temporary.

As probationary release is not temporary, the period during which the defendant is on probation does not fall within the conditional scenario under which I.C. §18-309 would stop counting credit post-judgment. Therefore, under a proper reading of the statute, I.C. § 18-309 does not allow the denial of credit for the period when Mr. Stevenson was on probation adhering to the terms thereof.

[8] While furlough may constitute a temporary release, that release does not trigger the exception in I.C. § 18-309, such that a furloughed inmate could not receive credit for the time he is on furlough. As will be discussed in depth in Section 2, *infra*, a furloughed inmate who is adhering the to the conditions of his furlough is not "at large," and so, the second condition needed to deny that inmate credit under I.C. §18-309 would not be present.

2. Pursuant To Its Common Definition, The Period During Which The Probationer Is "At Large" Only Applies To Periods When He Has Escaped Or Absconded From Supervision, Not The Entire Period Of Probation

Mr. Stevenson also contends that a probationer who is adhering to the terms of his probation is not "at large" based on the ordinary definition of the term "at large." Since I.C. §§ 18-309 and 19-2603 only apply when the person is "at large,"[9] if the probationer is not "at large" during a particular period of time, neither statute allows the district court to deny credit for that period of time.

The Court of Appeals held that any person who is released from incarceration is "at large" for purposes of the credit statutes. (Opinion, p.4 (citing *State v. Climer*, 127 Idaho 20, 22 (Ct. App. 1995).) That conclusion ignores the plain definition of the term "at large," creates discord with other related statues, and, as such, is inconsistent with precedent. Therefore, this Court should grant review.

The courts are required to recognize and give effect to the Legislature's choice of terms. *See Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895-96 (2011). "[T]his Court assumes that the [L]egislature meant what is clearly stated in the statute." *State v. Rhode*, 133 Idaho 459, 462 (1999). Additionally, where unique terms and phrases, such as "at large," have developed specific definitions, the Legislature is presumed to have full knowledge of that specific definition. *See Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 212 (2003) (discussing a situation where jurisprudence expanded the definition of the term in question beyond a common-usage definition for

[9] Idaho Code § 18-309 provides that only "the time during which he was *at large* must not be computed as part of such term [of imprisonment]." I.C. § 18-309 (emphasis added). Similarly, I.C. § 19-2603 provides: "[T]he time such person shall have been *at large* under such suspended sentence shall not be counted as a part of the term of his sentence." I.C. § 19-2603 (emphasis added).

purposes of a specific statute). The definition of the unique term of art that the Legislature chose to use in this case – "at large" – is: "Free; unrestrained; not under control <the suspect is still at large>." BLACK'S LAW DICTIONARY, 52 (3d pocket ed. 2006).

By choosing to use the term "at large," the Legislature chose not to use other terms, such as "released on probation" or "released from incarceration." For example, had the Legislature intended to deprive a person of credit for the entire period during which he was released on probation, it could have written I.C. §19-2603 as follows: "the time such person shall have been ~~at large~~ released on probation shall not be counted as a part of the term of his sentence." In fact, the Legislature did just that in I.C. § 20-228, which governs, in part, credit in the parole context. In I.C. § 20-228, the Legislature provided that a person who violates the terms of his parole "must serve out the sentence, and the time during which such prisoner *was out on parole* shall not be deemed part thereof, unless the commission, in its discretion, shall determine otherwise." I.C. § 20-228 (emphasis added). By not drafting I.C. §§ 18-309 and 19-2603 in the same way as I.C. § 20-228, the Legislature demonstrated that the term "at large" does not equate to the whole term of probation or release from incarceration. Therefore, the Opinion, which effectively substitutes new terms for the terms actually used by the Legislature, is erroneous.

The meaning of this different, narrower phrase – "at large" – is best understood by referring to the illustrative definition of the term, which reads: "<the suspect is still at large>." BLACK'S LAW DICTIONARY, 52. This example refers to a situation where the person is not in custody, but rather, is evading capture and at a location unknown to

authorities. *See id.* In fact, when considering the application of I.C. § 18-309, the Court of Appeals indicated that this is the proper way to read the term "at large": "a prisoner who *escapes* from incarceration should [not] be permitted accrual of the time toward his sentence *while he is at large*." *In re Chapa*, 115 Idaho 439, 443 (Ct. App. 1989) (emphasis added). In a similar situation, the Court of Appeals modified a district court's award of credit to deny the award for three days, "tak[ing] into account the three days that [the defendant] was *at large following his escape*." *Fullmer v. Collard*, 143 Idaho 171, 172 n.2 (Ct. App. 2006) (emphasis added). As such, the term "at large" does not broadly apply to all situations where the defendant not incarcerated, but rather, only to those situations where he is not in custody and his whereabouts are unknown.

In the context of probation, those conditions are only met when the probationer absconds from supervision. The United States Supreme Court has long recognized that, "by virtue of their status alone, probationers do not enjoy the absolute liberty to which every citizen is entitled, justifying the impos[ition] [of] reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Samson v. California*, 547 U.S. 843, 848-49 (2006) (internal citations and quotation marks omitted). It has also recognized that probation is like incarceration, in that it is a punishment imposed by the justice system, and like other forms of punishment, restricts the person's freedoms. *United States v. Knights*, 534 U.S. 112, 119 (2001). As a result, probationers who have not absconded supervision, by definition, are not free, unrestrained, or not under control, and thus, do not fall under the plain, ordinary definition of the term "at large."

The rationales supporting the narrow understanding of the term "at large" are twofold. First, interpreting "at large" as equivalent to "released from incarceration," as the Court of Appeals has done, places I.C. §§ 18-309 and 19-2603 in inherent conflict with other sections of the statutory scheme controlling credit for time served. That is inappropriate, since the courts are duty-bound, when construing statutes, to harmonize and reconcile the statutory scheme whenever possible. *Dept. of Health and Welfare v. Housel*, 140 Idaho 96, 104 (2004); *State v. Gamino*, 148 Idaho 827, 829 (Ct. App. 2010).

For example, an inmate who is granted a furlough is temporarily released from incarceration by legal means. *See* I.C. § 20-242. However, if "at large" is to be read as equivalent to "released from incarceration," the furloughed inmate would not be entitled to credit during the time he is on furlough since he would be not be incarcerated during that time. *See* I.C. § 18-309 ("if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large [read: released] must not be computed as part of such term"). Such a result is directly contrary to the purpose of the furlough statute, which was enacted to provide an incarcerated person the opportunity to serve his sentence (*i.e.*, get credit against his sentence) while simultaneously being released from incarceration in order to continue his employment or education. *See* I.C. § 20-242(1)-(2). The Court of Appeals' reading of I.C. § 18-309 – that credit is only properly awarded for time spent while incarcerated – prevents that from being a possibility. However, if "at large" is given its proper, narrow definition, then I.C. §§ 18 309 and 20-242 may be read harmoniously, because if the furloughed inmate

does not return at the end of his temporary release, he would have absconded supervision, and thus, he would be "at large." In that case, he would not be entitled to credit under I.C. § 18-309 for the time during which he absconded and was "at large."

Similarly, the Court of Appeals' interpretation puts I.C. §§ 18-309 and 20-228 in conflict. Under the Court of Appeals' interpretation, I.C. §18-309 says that credit "*must* not" be given for any period of post-judgment time that the defendant is not incarcerated.[10] That makes I.C. § 18-309 diametrically opposed to I.C. § 20-228, which allows the parole board, in its discretion, to grant credit for post-judgment time that the defendant is not incarcerated, but is released on parole. However, the narrower reading of "at large" would allow these two statutes to be read harmoniously – periods of post-judgment release may be credited in either scenario, depending on different factors (whether the probationer absconds supervision, as opposed to whether the parole board chooses to exercise its discretion). Therefore, since reading "at large" in the broad manner the Court of Appeals did creates discord within the statutory scheme and a harmonizing interpretation is possible, the discordant interpretation should be rejected. *See Housel*, 140 Idaho at 104; *Gamino*, 148 Idaho at 829.

The second rationale for the narrower interpretation of the term "at large" is related to the first, since it also arises from the fact that the Legislature has, for the last sixteen years, provided that parolees are able to receive credit for the time during which they are released from incarceration pursuant to the terms of their parole. I.C. § 20-228; 1998 Idaho Session Laws, ch. 327, § 2, p.1057 (amending the statute to allow for

[10] The use of the term "must" means the statutory provision is mandatory; the courts have no discretion to ignore its directive. *See, e.g., Rife v. Long*, 127 Idaho 841, 848 (1995) (explaining the difference between mandatory and permissive language in statutory provisions).

discretionary awards of credit for time spent on parole); *compare with* I.C. §§ 18-309, 19-2603.[11] Release on parole and release on probation are so similar that some aspects of both situations, such as the supervisory authority of the Department of Correction in both instances, are addressed in a single statute. *See, e.g.,* I.C. § 20-219(1). However, the Court of Appeals' interpretation of I.C. §§ 18-309 and 19-2603 draws a significant distinction and treats these similarly-placed individuals in vastly different regards.

The incongruity of maintaining such a distinction was criticized by Judge Schwartzman soon after the Legislature made the change in the parole statute: "If a parolee may now be able to receive some discretionary credit for time actually spent on parole in an unincarcerated status, how much sense does it make to *not* give a probationee [sic] credit for time served *while actually incarcerated* as a condition of probation?" *State v. Jakoski*, 132 Idaho 67, 69 (Ct. App. 1998) (Schwartzman, Judge, specially concurring) (emphasis in original). While Judge Schwartzman was particularly focused on the denial of credit for the time the probationer served in a county jail as a condition of probation, his criticism is applicable beyond that particular scenario: it is nonsensical and improper to allow credit for parolees who adhere to the terms of their parole, but not credit probationers who adhere to the terms of their probation (which

[11] Of particular note in this comparison is the fact that I.C. § 20-228 provides "[f]rom and after the issuance of the warrant and suspension of the parole of any convicted person and until arrest, the parolee shall be considered a fugitive from justice." I.C. § 20-228. This corresponds with the prohibition against the award of credit for time that the defendant is "at large" (*i.e.*, a fugitive). *See* I.C. §§ 18-309, 19-2603; BLACK'S LAW DICTIONARY, 52. Despite the "fugitive from justice" provision, I.C. § 20-228 immediately goes on to provide that the parole commission may grant credit for the time which the parolee served on parole. I.C. § 20-228. Therefore, a similar interpretation of I.C. §§ 18-309 and 19-2603 is also reasonable.

may, in fact, include serving jail time). *See id.* Therefore, the Court of Appeals' broad interpretation of "at large" is unreasonable because it makes I.C. §§ 18-309 and 19-2603 incoherent within the context of the criminal justice system as a whole. As such, that interpretation of those statutes should be rejected.

It is clear that Mr. Stevenson was not "at large" during his period of probation and adhering to the terms and conditions thereof since he was not free or unrestrained. He was subject to at least nineteen different "special conditions" while he was on probation. (R., pp.76-78.) One of those terms was that he serve 210 days in the Ada County Jail.[12] (R., pp.76-77.) He was controlled, in that he was required to maintain full-time employment. (R., p.77.) He was required to attend a domestic violence evaluation as well as any other treatment program recommended by his probation officer. (R., pp.77-78.) His right to privacy was restrained, as he was required to waive his Fourth Amendment constitutional rights regarding searches of his person and property. (R., p.77.) He was also required to waive his Fifth Amendment right against self incrimination, as he was required to truthfully answer all questions of his probation officer related to the terms of his probation. (R., p.77.) He was even required to waive his Sixth Amendment right to confrontation at any subsequent hearing in regard to his probation. (R., p.77.)

[12] The district court awarded Mr. Stevenson credit against the period of discretionary time for 160 days previously served, leaving him with fifty days that he could be required to serve. (R., p.76.) Mr. Stevenson was also not immediately released to probation, though his motion for early release in that regard was granted. (R., pp.69, 89.) Therefore, the fact that Mr. Stevenson was still actually physically confined in a penal facility for part of the term of his probation invokes Judge Schwartzman's specific criticism and demonstrates why the Opinion is wrong. *See Jakoski*, 132 Idaho at 67-69.

Mr. Stevenson was also not free in his use of his money, as he was prohibited from purchasing certain items, such as firearms or alcohol, and as he was required to pay all court-imposed costs, including restitution and the costs for supervision. (R., pp.76-77.) He was restricted in regard to his whereabouts, as he was required to waive extradition and not contest efforts to return him to Idaho, regardless of whether his absence from the state was approved by his probation officer. (R., p.78.) Thus, given these numerous restraints on Mr. Stevenson, it cannot be said that he was "free, unrestrained, or not under control," and therefore, it cannot be said that he was "at large" during his period of probation.

Furthermore, Mr. Stevenson worked to comply with those restraints and controls on his freedom pursuant to his probation for three years. (*See generally* R. (containing no reports of violation filed between the order granting Mr. Stevenson early release on April 24, 2009, and the probable cause form filed on March 3, 2012, based on an agent's warrant).) During that time, Mr. Stevenson lived under those restrictions to his rights and restraints to his freedom. *See Knights*, 534 U.S. at 119. As such, he was not free, unrestrained, or not under control due to the terms of his probation. This is true even though the report of violation that was filed in 2012 indicates he was not fully successful at all times during that three-year period. (*See* R., pp.106-08.) None of those alleged violations are based on his absconding from supervision.[13] (*See*

[13] Mr. Stevenson does recognize that one of the allegations that he admitted was that he had committed the crime of Failure to Appear. (R., p.107.) However, that allegation does not indicate that he had absconded supervision or that his probation officer did not know where he was; rather, it only indicates that he missed a court appearance. (*See* R., pp.107, 110.) And even if that is sufficient to determine he was "at large," the record demonstrates that he would have been at large for a total of twenty-one days, as he

generally R., pp.106-08.) He also remained in the custody of the Department of Correction throughout that time. *See* §§ 19-2604(1), 20-219(1). Therefore, during that time, Mr. Stevenson was not "at large," as the term is ordinarily defined.

Thus, by examining the specific term of art the Legislature chose to use, the applicability of the credit statutes becomes clear: the only scenario in which a probationer may be denied credit under these statutes is if he absconds from supervision. Therefore, giving all the terms their common meanings, the statutes are properly interpreted to read, "the time such person shall have been at large [read: absconded] under such suspended sentence shall not be counted as part of the term of his sentence." I.C. § 19-2603; *accord* I.C. § 18-309. As such, denying Mr. Stevenson credit for the time during which he was not at large, but rather in the custody of the Department of Correction and adhering to the numerous restraints and controls on his freedom was improper.

C. The Statute Is, At Least, Ambiguous, And The Rule Of Lenity Requires That Ambiguity Be Resolved In Mr. Stevenson's Favor

To the extent that there are multiple, rational interpretations of the terms in the credit statutes, specifically in regard to the terms "at large" and "temporarily released," the statutes are, at least, ambiguous as to whether credit should be given for time spent in the custody of the Department of Correction adhering to all the restrictive terms of probation. *See Verska*, 151 Idaho at 895-96. In such an instance, the rule of lenity requires the ambiguity to be resolved in Mr. Stevenson's favor. *See, e.g., State v. Anderson*, 145 Idaho 99, 103 (2007). In this case, that would mean that

---

turned himself into authorities on September 20, 2011. (R., p.110.) Thus, even in that case, the credit statutes would only disallow credit for those twenty-one days.

Mr. Stevenson should be credited for the time he spent on probation adhering to the restrictions thereof.

CONCLUSION

Mr. Stevenson respectfully requests that this Court grant review in this case. On review, Mr. Stevenson respectfully requests that this Court reverse the order denying his motion for credit for time served and that it remand this case for a proper calculation of credit.

He also respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Stevenson respectfully requests that this Court reverse the decision to deny his motion for leniency and reduce his sentence as it deems appropriate, or alternatively, remand the case for a reduction of sentence pursuant to I.C.R. 35.

DATED this 16th day of December, 2014.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ROBERT LOUIS STEVENSON
INMATE #92674
ISCC
PO BOX 70010
BOISE ID 83707

PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

MICHAEL W LOJEK
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court

EVAN A. SMITH
Administrative Assistant

BRD/eas