

2015

## **The State of Utah, Plaintiff-Appellee vs. Dennis J. Garcia, Defendant-Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, )  
 )  
Plaintiff-Appellee )  
 )  
vs )  
 )  
DENNIS J GARCIA, )  
 )  
Defendant-Appellant )  
 )  
----- )  
 )  
UTAH BOARD OF PARDONS AND )  
PAROLE, a governmental )  
agency of the State of Utah, )  
and UTAH OFFICE OF DEBT )  
COLLECTION, a governmental )  
agency of the State of Utah, )  
 )  
Intervenors and )  
real-parties-in-interest ) ORAL ARGUMENT REQUESTED  
 )  
Appellees ) Appellate Case No. 20141009CA  
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APPELLANT'S BRIEF

-----  
APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY  
The Honorable Randall N Skanchy, District Judge  
-----

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FILED  
UTAH APPELLATE COURTS

APR 01 2015

IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs	)	
	)	
DENNIS J GARCIA,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant	)	
	)	
-----	)	
	)	
UTAH BOARD OF PARDONS AND	)	
PAROLE, a governmental	)	
agency of the State of Utah,	)	
and UTAH OFFICE OF DEBT	)	
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agency of the State of Utah,	)	
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Intervenors and	)	
real-parties-in-interest	)	ORAL ARGUMENT REQUESTED
	)	
Appellees	)	Appellate Case No. 20141009CA

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TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	1
TABLE OF AUTHORITIES . . . . .	4
STATEMENT OF JURISDICTION OF APPELLATE COURT . . . . .	7
ISSUES PRESENTED FOR REVIEW . . . . .	7
CONSTITUTIONAL AND STATUTORY PROVISIONS . . . . .	12
STATEMENT OF THE CASE . . . . .	13
SUMMARY OF ARGUMENTS PRESENTED ON APPEAL . . . . .	19
ARGUMENT	

I

THE DISTRICT COURT ERRED IN ITS RULING  
 THAT THE COURT HAD "NO JURISDICTION" TO CONSIDER  
 AND RULE UPON DEFENDANT'S MOTION TO "SET ASIDE"  
 THE "CIVIL JUDGMENT" RESULTING FROM THE  
 FILING AND ENTRY OF THE "ORDER OF RESTITUTION"

II

THE BOARD'S ACKNOWLEDGED FAILURE TO CONDUCT A "FULL HEARING" CONCERNING THE "RESTITUTION" TO BE ORDERED AGAINST DEFENDANT INVALIDATES THE BOARD-MADE "ORDER OF RESTITUTION", ITSELF VOID AB INITIO, WHICH RENDERS DEFECTIVE, INEFFECTIVE AND ILLEGAL THE "CIVIL JUDGMENT" WHICH SHOULD BE SET ASIDE . . . . .	32
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

III

THE BOARD-ORDERED "RESTITUTION" FOR "FUNERAL EXPENSES" IS STATUTORILY DEFECTIVE AND INVALID DUE TO THE BOARD'S FAILURE TO PROPERLY ADHERE TO THE STATUTORY DEFINITION OF "PECUNIARY DAMAGES", WHICH IN THIS CASE FOR TIME-BARRED PURSUANT TO APPLICABLE STATUTES OF LIMITATION FOR "WRONGFUL DEATH" CLAIMS . . . . .	46
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

IV

THE BOARD-CREATED AND BOARD-FILED "ORDER OF RESTITUTION" IS DEFECTIVE AND INVALID, DUE TO ITS UNTIMELY "MAKING" WHICH DID NOT OCCUR WITHIN THE STATUTORILY-PRESCRIBED PERIOD OF TIME (77-27-6(4): "WITHIN 60 DAYS") OF THE PRISONER'S RELEASE FROM CUSTODY; THE RESULTANT "CIVIL JUDGMENT" MUST BE SET ASIDE . . . . .	50
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

V

THE PROVISIONS OF SECTION 77-27-5(3) ARE UNCONSTITUTIONAL AS VIOLATIVE OF THE "OPEN COURTS" PROVISIONS OF THE UTAH CONSTITUTION [ARTICLE I, SECTION 11] . . . . .	57
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

CONCLUSION . . . . .	67
REQUEST FOR ATTORNEY'S FEES ["BAD FAITH" LITIGATION] . .	70
REQUEST FOR "ORAL ARGUMENT" . . . . .	70
COUNSEL'S CERTIFICATION ["WORD COUNT" AND PRINT SIZE] .	71
CERTIFICATE OF SERVICE . . . . .	71
ADDENDA . . . . .	73

ATTACHMENT 1  
Board-prepared "ORDER OF RESTITUTION"  
[prepared 24 September 2013; filed 10 October 2013]  
RECORD at 119

ATTACHMENT 2  
District Court "MEMORANDUM DECISION AND ORDER"  
[11 April 2014]  
RECORD at 279-282

ATTACHMENT 3  
District Court "MEMORANDUM DECISION AND ORDER"  
[21 August 2014]  
RECORD at 593-596

ATTACHMENT 4  
"ORDER OF THE COURT" (Final Judgment)  
[29 September 2014]  
RECORD at 604-607

ATTACHMENT 5  
Excerpts from May 2008 PRESENTENCE REPORT [pp. 1, 5]  
RECORD at 172, 176

ATTACHMENT 6  
"Docket History" Gail Buckley vs Dennis Joseph Garcia  
Third Judicial District Court, Civil No. 080903244

ATTACHMENT 7  
June 2008 "General Release and Settlement Agreement"  
Gail Buckley vs Dennis Joseph Garcia  
Third Judicial District Court, Civil No. 080903244  
RECORD at 385-387

ATTACHMENT 8  
Board-prepared "ORIGINAL HEARING" document  
[7 October 2010]  
RECORD at 188

ATTACHMENT 9  
Board-prepared "HEARING OFFICER RESULTS" document  
[13 October 2010]  
RECORD at 190

ATTACHMENT 10  
Board's May 2011 "Letter" to Garcia relatives  
RECORD at 192

ATTACHMENT 11  
Corrections Department-prepared "NORMS Statements"  
[13 June 2008; 31 March 2013]  
RECORD at 383, 386

## TABLE OF AUTHORITIES

### cases

<b>Berry by and through Berry vs Beech Aircraft Corporation,</b>	
717 P.2d 670 (Utah Supreme Court 1985)	62, 63, 64, 66
<b>Celebrity Club Inc. vs Utah Liquor Control Commission,</b>	
657 P.2d 1293 (Utah Supreme Court 1982)	44
<b>Currier vs Holden,</b>	
862 P.2d 1357 (Utah Court of Appeals 1993)	
certiorari denied 870 P.2d 957	65, 66
<b>Dairy Produce Services, Inc. vs City of Wellsville,</b>	
2000 UT 81, 13 P.3d 581 (Utah Supreme Court 2000)	43
<b>Day vs State ex rel Utah Department of Public Safety,</b>	
1999 UT 46, 980 P.2d 1171 (Utah Supreme Court 1999)	
	65, 66
<b>Foote vs Utah Board of Pardons,</b>	
808 P.2d 734 (Utah 1991)	60, 61, 62, 66, 69, 70
<b>Hailing vs Industrial Commission of Utah,</b>	
71 Utah 112, 263 Pac. 78 (Utah Supreme Court 1927)	44
<b>Horton vs Goldminer's Daughter,</b>	
785 P.2d 1087 (Utah Supreme Court 1989)	63, 64, 65, 66
<b>Howell vs Howell,</b>	
806 P.2d 1209, 1211 (Utah Court of Appeals 1993)	8
<b>Jacobsen Investment Company vs State Tax Commission,</b>	
839 P.2d 789, 790 (Utah Supreme Court 1992)	8
<b>Jones vs Utah Board of Pardons &amp; Parole,</b>	
2004 UT 53, 94 P.3d 283 (Utah Supreme Court 2004)	11, 58
<b>Julian vs State,</b>	
966 P.2d 249 (Utah Supreme Court 1998)	65, 66
<b>Lee vs Gaufin,</b>	
867 P.2d 572 (Utah Supreme Court 1993)	66
<b>Maxfield vs Herbert,</b>	
2012 UT 44, 284 P.3d 647 (Utah Supreme Court 2012)	11, 58
<b>Miller vs USAA Casualty Insurance Co.,</b>	
2002 UT 6, 44 P.3d 663 (Utah Supreme Court 2002)	43

<b>Morris vs Public Service Commission,</b> 7 Utah 2d 167, 321 P.2d 644 (Utah Supreme Court 1958) . . . . .	44
<b>Nelson vs Jacobsen,</b> 669 P.2d 1207 (Utah Supreme Court 1983) . . . . .	44
<b>Peterson vs Coca-Cola USA,</b> 2002 UT 42, 48 P.3d 941 (Utah Supreme Court 2002) . . . . .	11, 58
<b>Salt Lake Child and Family Therapy Clinic, Inc. vs Frederick,</b> 890 P.2d 1017 (Utah Supreme Court 1995) . .	7
<b>State vs Pena,</b> [S/R] 869 P.2d 932, 936 (Utah Supreme Court 1994) . . . . .	8
<b>Sun Valley Water Beds of Utah, Incorporated vs Herm Hughes &amp; Son, Incorporated,</b> 782 P.d 188 (Utah Supreme Court 1989) . . . . .	65, 66
<b>The State of Utah, Petitioner vs Claudia Laycock, Judge,</b> 2009 UT 53, 214 P.3d 104 (Utah Supreme Court 2009) .	29
<b>United Park City Mines Co. vs Greater Park City Company,</b> 870 P.2d 880, 885 (Utah Supreme Court 1993) . . . . .	8
<b>Wells vs Children's Aid Society of Utah,</b> 681 P.2d 199 (Utah Supreme Court 1984) . . . . .	43, 44
<b>Young Electric Sign Company, Inc. vs State ex rel UDOT,</b> 2005 UT App 169, 110 P.3d 1118 (Utah Court of Appeals 2005) . . . . .	7, 8

#### Utah Constitution

Article I, Section 7 . . . . .	42, 61
Article I, Section 11 . . . . .	11, 13, 22, 57, 59, 61
Article VIII, Section 1 . . . . .	23
Article VIII, Section 5 . . . . .	23

## Utah statutes

77-18a-1(6)(b)	38
77-27-3, Utah Code	26
77-27-5, Utah Code [procedure]	9, 11, 12, 13, 21, 22 34, 35, 36, 37, 38, 45, 50, 67, 68
77-27-5(3), Utah Code	13, 57, 58, 59, 60, 61, 62, 64, 69
77-27-6, Utah Code	21, 22, 23, 25, 26, 42, 45, 46, 47
77-38a-101 et seq, Utah Code	26
77-38a-102(6)	10, 13, 21, 47, 48
77-38a-203(2)(d)	38
77-38a-401, Utah Code	26, 27
78-12-28, Utah Code [repealed 2008]	46, 49
78A-5-102, Utah Code	23
78B-2-304, Utah Code [enacted 2008]	9, 14, 21, 46, 49, 68
78B-5-825, Utah Code	70

## Administrative Regulations

Administrative Regulation R871-403.2 Restitution	42
--------------------------------------------------	----

## Rules

Rule 60, Utah Rules of Civil Procedure	20, 26, 30, 60, 67
Rule 65B, Utah Rules of Civil Procedure	30



## STATEMENT OF JURISDICTION OF APPELLATE COURT

This "appeal" of a decision of the Third District Court is to the Utah Court of Appeals, which has jurisdiction in accordance with Section 78A-4-103(e), Utah Code [appeals from non-capital "criminal" cases], even though this appeal effectively involves the "civil judgment" entered by reason of the "jurisdiction" statutorily-granted to the District Court to do so.

The Utah Court of Appeals has concurrent jurisdiction to rule upon the "unconstitutionality of statute" presented to the District Court and also raised in this appeal.

## ISSUES PRESENTED FOR REVIEW

This appeal (and the predicate factual situation surrounding it) presents the following issues for review:

1. The District Court erred in its ruling that the court had "no jurisdiction" to review Defendant's "set aside" motion involving the "civil judgment" arising from the filing of the Board's 24 September 2013 "order of restitution".

STANDARD OF REVIEW: Where the issue involves interpretation and application of a statute, the appellate court grants the trial court no deference but reviews the conclusion for correctness. **Salt Lake Child and Family Therapy Clinic, Inc. vs Frederick**, 890 P.2d 1017 (Utah Supreme Court 1995); **Young Electric Sign Company, Inc. vs State ex rel UDOT**, 2005 UT App 169, 110

P.3d 1118 (Utah Court of Appeals 2005). A trial court's conclusions of law in civil cases<sup>1</sup> are reviewed for correctness. **United Park City Mines Company vs Greater Park City Company**, 870 P.2d 880, 885 (Utah Supreme Court 1993). This standard of review has also been referred to as a "correction of error standard". **Jacobsen Investment Company vs State Tax Commission**, 839 P.2d 789, 790 (Utah Supreme Court 1992). "Correction of error" means that no particular deference is given to the trial court's ruling on questions of law. **State vs Pena**, 869 P.2d 932, 936 (Utah Supreme Court 1994). The "correction of error" standard means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. **Howell vs Howell**, 806 P.2d 1209, 1211 (Utah Court of Appeals 1993).

PRESERVATION OF ISSUE FOR APPEAL. The "jurisdiction" of the District Court to "set aside" the "civil judgment" arising from the filing of the Board-prepared "Order of

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<sup>1</sup>Although this "case" is actually a "criminal case", the Defendant's "motions to set aside" the resultant "civil judgment" against him by reason of the Board's defective "order of restitution" are properly before the District Court. The controlling statutes [77-27-6 and 77-38a-402, Utah Code] expressly direct the Board to file its "restitution order" with the sentencing court, which was the Third District Court and Judge Skanchy.

Restitution" was presented to the District Court in DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR NEW TRIAL, dated/filed 24 April 2014, pages 5-10, RECORD at 296-301.

2. The Board's September 2013 "restitution order" is invalid, due to the fact---admitted by the Board---that the Board failed to conduct the "full hearing" (or any hearing, for that matter) on the "restitution" issue, as said "full hearing" was expressly required by Section 77-27-5(3), Utah Code. STANDARD OF REVIEW: See #1, above.

PRESERVATION OF ISSUE FOR APPEAL. Defendant's arguments concerning the Board's failure to afford him the statutorily-prescribed "full hearing" were presented to the District Court in DEFENDANT'S MOTION TO SET ASIDE CIVIL JUDGMENT [LACK OF STATUTORILY-REQUIRED HEARING: 77-27-5], dated/filed 11 June 2014, RECORD at 545-546, and DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE CIVIL JUDGMENT [LACK OF STATUTORILY-REQUIRED RESTITUTION HEARING: 77-27-5], dated/filed 11 June 2014, RECORD at 547-557.

3. The Board's September 2013 "restitution order" is invalid, due to the fact that the State's claim for "restitution" would have time-barred by the 2-year statute of limitation of Section 78B-2-304(2), Utah Code [for "wrongful death"] and the

Board was statutorily-precluded from awarding "restitution" for "pecuniary damages" for such time-barred losses, in accordance with the provisions of Section 77-38a-102(6), Utah Code. Thus, the Board's September 2014 "restitution order" is, in essence, ultra vires of its statutorily-granted authorities and the civil judgment resulting from the filing thereof should be set aside.

STANDARD OF REVIEW: See #1, above.

PRESERVATION OF ISSUE FOR APPEAL. Defendant's arguments concerning the Board's "ultra vires" action in ordering "restitution" for "funeral expenses" already time-barred by the 2-year "wrongful death" statute of limitation were presented to the District Court within DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR NEW TRIAL, dated/filed 24 April 2014, pages 19-27, thereof. RECORD at 310-318.

4. The Board's September 2013 "restitution order" is invalid, due to the fact that the September 2014 "restitution order"---the "order" which was actually filed with the District Court and for which the filing thereof creates the "civil judgment" sought to be set aside---was not "made within sixty days" of the Defendant's release from prison, as expressly required by Section 77-27-

6(4), Utah Code.

STANDARD OF REVIEW: See #1, above.

PRESERVATION OF ISSUE FOR APPEAL. Defendant's arguments concerning the Board's failure to afford him the statutorily-prescribed "full hearing" were presented to the District Court in DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE RESTITUTION ORDER, dated/filed 12 November 2013. RECORD at 131-135.

5. The provisions of Section 77-27-5(3), Utah Code [administrative decisions (including restitution) and orders of the Board of Pardons decisions are not subject to any "judicial review"] is unconstitutional, as violative of Article I, Section 11 ["open courts" provisions] of the Utah Constitution.

STANDARD OF REVIEW: See #1, above. A validly-adopted statute is afforded a "strong presumption of constitutionality". See **Maxfield vs Herbert**, 2012 UT 44, ¶ 15, 284 P.3d 647 (Utah Supreme Court 2012); **Peterson vs Coca-Cola USA**, 2002 UT 42, ¶ 23, 48 P.3d 941 (Utah Supreme Court 2002). The challenging party has a "heavy burden" to show the statute is unconstitutional. See **Jones vs Utah Board of Pardons & Parole**, 2004 UT 53, ¶ 10, 94 P.3d 283 (Utah Supreme Court 2004).

PRESERVATION OF ISSUE FOR APPEAL. Defendant's

claims as to the "unconstitutionality" of Section 77-27-5(3), Utah Code, were presented to the District Court pursuant to and within DEFENDANT'S MOTION FOR JUDICIAL DETERMINATION OF UNCONSTITUTIONALITY OF STATE STATUTE [77-27-5(3)], dated/filed 21 April 2014. RECORD at 283-285. See also "Defendant's Notification to Utah Attorney General", dated 21 April 2014 [RECORD at 290-291] and "Defendant's Memorandum in Support", dated 24 April 2014. RECORD 292-318.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

##### **[Subsection 77-27-6(4), Utah Code]**

(4) If the defendant, upon termination or expiration of sentence owes outstanding fines, restitution, or other assessed costs, or if the board makes an order of restitution within 60 days after the termination or expiration of the defendant's sentence, the matter shall be referred to the district court for civil collection remedies. The Board of Pardons and Parole shall forward a restitution order to the sentencing court to be entered on the judgment docket. The entry shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.

[Points I, II]

##### **[Subsection 77-27-5(1)(c), Utah Code]**

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, except after a full hearing before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

[Point II]

##### **[Subsection 77-27-6(2)(b), Utah Code]**

(2)(b) In accordance with Section 77-38a-302(5)(d)(ii), the board may order that a defendant make restitution for pecuniary damages

that were not determined by the court, unless the board applying the criteria as set forth in Section 77-38a-302 determines that restitution is inappropriate.  
[Point III]

**[Subsection 77-38a-102(6), Utah Code]**

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities . . .

**[Subsection 77-27-6(2)(c), Utah Code]**

(c) Except as provided in Subsection (2)(d), the board shall make all orders of restitution within 60 days after the termination or expiration of the defendant's sentence.  
[Point IV]

**[Section 77-27-5(3), Utah Code]**

(3) Decisions of the board in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines and forfeitures are final and are not subject to judicial review. . . .  
[Point V]

**[Article I, Section 11 of the Utah Constitution]**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial and unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in the State, by himself or counsel, any civil cause to which he is a party.  
[Point V]

**STATEMENT OF THE CASE**

1. In March 2006 Defendant DENNIS J GARCIA was the driver of a motor vehicle involved in a single-vehicle accident in which his passenger Shane Buckley was killed. Defendant GARCIA was arrested at the scene and charged with Automobile Homicide, a third-degree felony. RECORD at 1-3.
2. On 25 February 2008 Gail Buckley, the court-appointed

Personal Representative of the Estate of Thomas Shane Buckley, Deceased filed a district court lawsuit [Civil No. 080903244] against GARCIA for "wrongful death" and/or related expenses incurred in the March 2006 automobile accident and related events which gave rise to the criminal charges against GARCIA.FOOTNOTE<sup>2</sup> The civil case was defended by private attorneys hired by the liability insurance carrier for the GARCIA-owned motor vehicle involved in the accident. Eventually, Gail Buckley in her individual and official Personal Representative capacity settled with the insurance carrier and received the sum of \$25,000---the "policy limits"---for the claim of loss, in behalf of the estate and the heirs. GARCIA was unaware whether the State of Utah or any of its agencies---except for UDOT, which was paid on a "property damage" claim---made claim upon the "estate" of the deceased. Gail Buckley in her individual and official Personal Representative capacities signed a two-page "General Release and Settlement Document" [RECORD at 365-367; ATTACHMENT 7 to this BRIEF], by which all claims against GARCIA (and his insurance company) would be released

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<sup>2</sup>The Buckley-filed, on 25 February 2008, "wrongful death" litigation was timely, as being before the expiration of the applicable 2-year statute of limitation therefor. [Section 78B-2-304(2), Utah Code.] The Buckley complaint pleaded only Mrs Buckley---albeit in her individual and "personal representative" capacities---as the Plaintiff therein. Neither the Utah Office for Crime Victims Reparations ["CVR"] nor any other Utah governmental agency was pleaded as a party therein, nor was the CVR's \$7,000 reimbursement to her expressly identified as such.



and forever discharged. GARCIA was generally unaware of the disposition of claims made or which should have been made within the "probate case" of the deceased, Thomas Shane Buckley. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 8, RECORD at 128-129.

3. On 17 April 2008, following a one-day jury trial, Defendant GARCIA was convicted of the charged felony offense. Following that conviction, GARCIA was immediately ordered into custody pending sentencing. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 2. RECORD at 127.

4. On 2 June 2008 GARCIA was sentenced by the trial judge (the Honorable Randall N Skanchy of the Third District Court) to serve an indeterminate sentence, not exceeding five years incarceration. Judge Skanchy announced that GARCIA would be "given credit for time served". Judge Skanchy announced that the "restitution" would be left "open"; no restitution was ordered at time of sentencing. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 3. RECORD at 127.

5. No "restitution" was ordered by the District Court within one year of sentencing. In fact, no "restitution"--- of any kind and in any amount---has, to my knowledge, ever been ordered by the District Court. GARCIA was never been notified of any District Court "restitution" hearing or

proceeding, was never been given opportunity to participate in any such proceeding, nor did GARCIA knowingly waive his rights to be notified of and/or participate in such proceedings. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 4, RECORD at 127.

6. GARCIA served a five-year period of continuous incarceration, without interruption: from 17 April 2008 (following the jury conviction) until his release on 15 April 2013 from the Utah State Prison, upon full and complete expiration of the Court-imposed sentence. At the time of GARCIA's release from prison on the herein-referenced felony conviction, he had no other "charges" or convictions against him for which the Utah Department of Corrections had jurisdiction over him or for which he was being held or serving "time". See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 5, RECORD at 127-128.

7. During his five-year period of incarceration at the Utah State Prison and up to just weeks before his release from prison, GARCIA routinely checked through the "NORMS" database---a service regularly provided to inmates---as to whether there were any unpaid fines, "restitution" or similar unresolved claims or holds against me: there were none. [See ATTACHMENT 11 to this BRIEF.] His bi-monthly written account statements always reflected a "\$0.00" balance for any "restitution" to be paid. See AFFIDAVIT OF

DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 6, RECORD at 128.

8. During his five-year incarceration at the Utah State Prison and up to and through his release from incarceration (in April 2013), GARCIA was never notified of any "restitution" hearing (to be held by the Third District Court or the Utah Board of Pardons and Parole), was never invited to participate in such a hearing (in either forum), did not participate in such a hearing, and never knowingly waived his right to participate in such a hearing. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 7, RECORD at 128.

9. Actions (and/or inaction) undertaken by GARCIA and by his liability insurance carrier were in reasonable and good faith reliance upon the efficacy of the "General Release and Settlement Document" signed by Gail Buckley in her official Personal Representative capacity. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 9, RECORD at 129; ATTACHMENT 7 to this APPELLANT'S BRIEF.

10. GARCIA was given no notice of any "restitution hearing" ostensibly held by the Utah Board of Pardons and Parole prior to or subsequent to or as a condition of his April 2013 release from incarceration. GARCIA did not participate in any such hearing and he did not knowingly waive his right to participate in any such hearing, at any time or place.

See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 10, RECORD at 129-130.

11. Until GARCIA received (in late-October 2013) written correspondence from the Utah Office of Debt Collection as to a claimed \$9,000+ "debt", claimed-to-be owed by him to the State, GARCIA was unaware of any such claimed "debt" or his liability for payment thereof. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 11, RECORD at 129-130.

12. On 15 April 2013 Defendant GARCIA was released from the Utah State Prison, his 5-year sentence for the felony conviction having expired. See AFFIDAVIT OF DENNIS J GARCIA IN SUPPORT OF MOTION TO SET ASIDE ORDER OF RESTITUTION, dated 7 November 2013, ¶ 3, RECORD at 127.

13. On or about 24 September 2013 the Honorable Clark A Harms, Chairman of the Utah Board of Pardons and Parole prepared and signed, in behalf of the Board, a one-page "ORDER OF RESTITUTION". The "ORDER" was forwarded to and received by the Clerk of the Third Judicial District Court in and for Salt Lake County and "entered" on the "judgment docket" about 11 October 2013. RECORD at 119. [ATTACHMENT 1 to this BRIEF]

14. On 8 November 2013 GARCIA filed his "set aside" motion. RECORD at 122-125.

15. On 13 January 2014 the UTAH BOARD OF PARDONS AND PAROLE, represented by Assistant Attorney General Sharel

Reber, and the UTAH OFFICE OF DEBT COLLECTION, represented by Assistant Attorney General Amanda Jex, orally petitioned the Third District Court for voluntary "intervention", as claimed "real-parties-in-interest, in the case. The two state agencies' petitions were granted by the District Court and the entities have continuously participated in the "civil judgment" proceedings thereafter. See RECORD at 155-218 [Board's "OPPOSITION" memorandum, dated 6 February 2014, with extensive attachments] and RECORD 221-275 [Utah Office of Debt Collection's "CONTRA MEMORANDUM", dated 13 February 2014, with extensive attachments].

16. In April 2014 the District Court---the Honorable Randall N Skanchy---ruled the District Court had "no jurisdiction" to set aside the "civil judgment" arising from the filing of the Board-filed "order of restitution". RECORD at 279-282. [ATTACHMENT 2 to this BRIEF] The Defendant made timely (within 10 days) "motion for new trial", in addition to other related motions, including a claim for the judicial determination of the unconstitutionality of the provisions of Section 77-27-5(3), Utah Code (purporting to prohibit any judicial review of Board of Pardons decisions). RECORD at 284-285.

17. On 28 August 2014 the District Court issued its "memorandum decision" [RECORD at 593-596; ATTACHMENT 3 to this BRIEF] denying the Defendant's motions (for new trial, and so forth), but did not sign the actual Court-directed but Board-prepared "ORDER OF THE COURT" until over a month

later (29 September 2014). RECORD at 604-607 [ATTACHMENT 4 to this BRIEF.]

18. On 25 October 2014 the Defendant DENNIS J GARCIA filed his "Notice of Appeal". RECORD at 611-612.

#### **SUMMARIES OF ARGUMENTS ON APPEAL**

1. The District Court erred in its ruling that the court had "no jurisdiction" to review Defendant's "set aside" motion involving the "restitution order" and/or, more specifically, the resultant "civil judgment" arising from the filing thereof. The two statutes expressly applicable to the "making" of a "restitution order" by the Parole Board additionally direct the filing thereof with the District Court, as the "sentencing court" of the underlying felony criminal case, from which the Board (upon incarceration in the state prison) has jurisdiction over the individual. That "filing" (of the "restitution order") has the effect---statutorily prescribed---of creating a "civil judgment" against the Defendant. However, those same statutes expressly provide that the "civil judgment" so created is "subject to the same rules as a judgment for money in a civil judgment". The "civil judgment" thus entered is not, per se, tied to the "sentencing" function of the District Court as part of the original criminal conviction; rather, the Board's filing of its "restitution order" has the effect of reinvesting the District Court with "civil jurisdiction", which includes the Rule 60(b) remedies to "set aside" the "civil judgment".

2. The Board's September 2013 "restitution order" is invalid, due to the fact---admitted by the Board---that the Board failed to conduct the "full hearing" (or any hearing, for that matter) on the "restitution" issue, as said "full hearing" was expressly required by Section 77-27-5(3), Utah Code. The excuses advanced by the Board to justify its failure to hold the "restitution hearing"---namely, an unsubstantiated, undocumented and unproved "waiver" of his right to the "full hearing"---are legally and factually unavailing to the Board.

3. The Board's September 2013 "restitution order" is invalid, due to the fact that the State's claim for "restitution" would have time-barred by the 2-year statute of limitation of Section 78B-2-304(2), Utah Code [for "wrongful death"] and the Board was statutorily-precluded from awarding "restitution" for "pecuniary damages" for such time-barred losses, in accordance with the provisions of Section 77-38a-102(6), Utah Code. Thus, the Board's September 2014 "restitution order" is, in essence, ultra vires of its statutorily-granted authorities; the civil judgment resulting from the filing thereof should be set aside.

4. The Board's September 2013 "restitution order" is invalid, due to the fact that the September 2014 "restitution order"---the "order" which was actually filed with the District Court and for which the filing thereof creates the "civil judgment" sought to be set aside---was

not "made within sixty days" of the Defendant's release from prison, as required by Section 77-27-6(4), Utah Code.

5. The provisions of Section 77-27-5(3), Utah Code [administrative decisions (including restitution) and orders of the Board of Pardons decisions are not subject to any judicial review] is unconstitutional, as violative of Article I, Section 11 ["open courts" provisions] of the Utah Constitution. The statutory terms---expressly prohibiting any and all "judicial review" of Board decisions---are clear on their face and are incapable of any reasonable interpretation which avoids the unconstitutional result. That the Utah Supreme Court in previous cases has avoided addressing the obvious "unconstitutionality" of Section 77-27-5(3)---because the Supreme Court in those cases was not requested to do so---is no reason for this appellate court to refuse the claims of this Defendant, who certainly has "standing" to raise this issue.

## **ARGUMENT**

### **I**

**THE DISTRICT COURT ERRED IN ITS RULING  
THAT THE COURT HAD "NO JURISDICTION" TO CONSIDER  
AND RULE UPON DEFENDANT'S MOTION TO "SET ASIDE"  
THE "CIVIL JUDGMENT" RESULTING FROM  
THE FILING AND ENTRY OF THE "ORDER OF RESTITUTION"**

Attempting to avoid having the District Court "set aside" its 24 September 2013 "Order of Restitution", Intervenor UTAH BOARD OF PARDONS [hereinafter "the BOARD" or simply "the Board"] argued [RECORD at 158] and the District Court agreed and ruled [RECORD at 279-282 (11 April 2014),



RECORD 593-595 (Memorandum Decision and Order": 21 August 2014) and RECORD at 604-608 (Court Order: 29 September 2014)] that the Court had "no jurisdiction" to consider and grant Defendant's "set aside" motion. [Photocopies of these District Court rulings are attached hereto as addenda to this APPELLANT'S BRIEF: ATTACHMENT No. 2, ATTACHMENT No. 3 and ATTACHMENT No. 4, respectively.] The District Court erred in its "no jurisdiction" rulings.

A

Article VIII, Section 1 of the Utah Constitution, provides in relevant part:

The judicial power of the state shall be vested in a supreme court, **in a trial court of general jurisdiction known as the district court,** and in such other courts as the Legislature by statute may establish.

Emphasis added.

Article VIII, Section 5 of the Utah Constitution, pertaining to the "jurisdiction of the District Court", provides in relevant part:

The district court **shall have original jurisdiction in all matters** except as limited by this constitution or by statute, and power to issue all extraordinary writs. . . .

Emphasis added.

The foregoing "constitutional" provisions have been incorporated into statute, codified at Section 78A-5-102, Utah Code, which provides in relevant part:

(1) **The district court has original jurisdiction in all matters civil and criminal,** not excepted in the Utah Constitution and not prohibited by law.

. . . .

Emphasis added.

The "jurisdiction" in the instant situation arises and is authoritatively controlled by Subsection 77-27-6(4), Utah Code, pertaining to the Board's authority to "order restitution" by a person under its control. Subsection 77-27-6(4) provides in its entirety:

(4) If the defendant, upon termination or expiration of sentence owes outstanding fines, restitution, or other assessed costs, or if the board makes an order of restitution within 60 days after the termination or expiration of the defendant's sentence, the matter shall be referred to the district court for civil collection remedies. The Board of Pardons and Parole shall forward a restitution order to the sentencing court to be entered on the judgment docket. The entry shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.

Emphasis added.

The first sentence will be analyzed in greater detail in Point IV of this APPELLANT'S BRIEF [pp. 46-51], but the closing phrase "the matter shall be referred to the district court for civil collection remedies" while initially appearing to be perhaps somewhat vague (ala "referred to the district court" and "for civil collection remedies"), deliberate thought proves otherwise: a legislative investiture of "jurisdiction"---namely "civil" jurisdiction---to the District Court. Correspondingly, there could be no "civil collection remedies" if there were not some kind of "jurisdiction" for the District Court to first enter some kind of "judgment" to be collected upon by the affected claimant.

That a "judgment"---for which "jurisdiction" of some kind is a fundamental conceptual prerequisite---will arise is made clear by the final two sentences of Subsection 77-27-6(4), thus:

. . . The Board of Pardons and Parole shall forward **a restitution order to the sentencing court** to be entered on the judgment docket. **The entry shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.**

Emphasis added. The phrase "forward a restitution order to the sentencing court to be entered on the judgment docket" is significant: the text confirms the Legislature's investiture of "jurisdiction" to "enter" the "restitution order" on the District Court's "judgment docket". The second sentence---namely

The entry [of the Board-prepared "order of restitution" upon the judgment docket] shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.  
[Bracketed text added for clarity]

---is even more clear as to the legislative intent: the thus "entered" order of restitution "is subject to the same rules as a **judgment** for money in a **civil judgment**". Emphasis added. [While the phrase "shall constitute a lien" is arguably confusing in the traditional "lien" sense of that word, the "judgment" term---utilized twice---is absolutely clear.] It is this "civil judgment" terminology which gives rise to the Defendant's usage of that terminology to describe the object of his "set aside" motion.

The closing phrase---pertaining to the "entry" of the

Board's "order of restitution" upon the District Court's "judgment docket"---"and is subject to the same rules" applies not only to the rules pertaining to the "collection" of the "civil judgment", but must also encompass and include those "rules"---for example, Rule 60(b)---providing for the "setting aside" of the former "judgment" in appropriate cases.FOOTNOTE<sup>3</sup>

The provisions of the Utah "Crime Victims Restitution Act", codified at Section 77-38a-101 et seq, Utah Code, are supportive of the foregoing analysis. Although most of the provisions of the Crime Victims Restitution Act are generally applicable only to the sentencing court, a few narrowly-drawn and specifically-referenced procedural provisions are expressly made applicable to Board-ordered "restitution" matters, as per Sections 77-27-3 and 77-27-5, applicable to the Board. Subsection 77-38a-401(4), Utah Code, also applicable to the situation, describes the "civil judgment" as follows:

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<sup>3</sup> The Defendant's simultaneously-filed Rule 60(b)(6) motion to "set aside" the "civil judgment" is authorized and meritorious under that Rule, which provides:

. . . On motion and upon such terms as are just, the court may in furtherance of justice **relieve a party** or his legal representative **from a final judgment, order, or proceeding** for the following reasons:

(6) any other reason **justifying relief from the operation of the judgment.**

Emphasis added.

A judgment ordering restitution, . . . is subject to the same rules as a judgment in a civil action.

Emphasis added.

B

Judge Skanchy's "no jurisdiction" ruling is seems confused and inconsistent. In his 11 April 2014 "MEMORANDUM DECISION" ruling upon Defendant's original "set aside" motion, Judge Skanchy wrote:

Utah Code Ann., Subsection (5)(d)(ii), provides that "[a]ny pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole." Utah courts have long recognized that "Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case." State v. Montoya, 825 P.2d 676, 679 (Utah App. 1991); State v. Vaughn, 2011 UT App 411, ¶ 11, 266 P.3d 202. This Court entered a valid sentence in this case, and **thereby lost subject matter jurisdiction**. Furthermore, once the one-year period after sentencing expired, **this Court also lost jurisdiction over Mr. Garcia's restitution obligation**. Jurisdiction moved to the Board to determine restitution owed.

**The Court hereby concludes that it lacks jurisdiction to set aside the Board's claim for restitution against Mr. Garcia. The Board's claim is not subject to judicial review by this Court.** The Court imposed a prison sentence on June 2, 2008, **thereby losing subject matter jurisdiction**. Once the one-year period after sentencing by this Court expired, the Court **further lost jurisdiction** over Mr. Garcia's restitution obligation. Jurisdiction moved to the Board at the expiration of the Court's jurisdiction over restitution.

Accordingly, Mr. Garcia's Motion to Set Aside Restitution is denied.

Emphasis added. Pages 3-4 of District Court "MEMORANDUM DECISION". RECORD at 281-282. Copy thereof at ATTACHMENT 2 in the Addenda to this APPELLANT'S BRIEF.

As can be seen from the foregoing quoted material, the District Court [Judge Skanchy] misapprehended and/or failed

to consider the applicable statutes (and/or Defendant GARCIA's arguments thereon): that under Section 77-27-6(4) the District Court is REINVESTED (or reinstated) "with jurisdiction", even "civil" jurisdiction. That REINSTATED "jurisdiction" arises pursuant to the Board's "refer[ring]" its "restitution order" for "entry on the [Court's] judgment docket", which essentially creates the "civil judgment" herein sought to be "set aside". [Quoted terms are from 77-27-6(4); bracketed term added for clarity.] It is that REINSTATED "jurisdiction" which the District Court could have and should have exercised.

The District Court's "jurisdiction" over the "civil judgment" arising from the "referring" and "forwarding" of the Board-prepared "restitution order" and its "entry" is not tied to or part of the court's "sentencing" function. The "civil judgment" issues described by and arising under the Section 77-27-6(4)-identified processes and events have nothing to do with "sentencing" and/or "restitution" which might have been initially associated therewith.

[Judge Skanchy's statement (i.e. "The Board's claim is not subject to judicial review by this Court.") contained within the second paragraph quoted above raises the "unconstitutionality of statute" issue described in Point V of this APPELLANT'S BRIEF.]

Notwithstanding whatever the Judge Skanchy-referenced "cases" [**Montoya** and **Vaughn**] may have held (or even stated in dicta) as to the criminal court generally "losing" its

"jurisdiction" upon sentencing, those cases did not decide the statutory reinvestiture of "jurisdiction" for these "restitution" matters at issue in this situation.

Judge Skanchy's "district court loses jurisdiction upon sentencing" analysis and conclusion is internally-inconsistent and flawed. Judge Skanchy expressly recognizes the statutory "one year" extension (or retention) of the Court's "jurisdiction" so as to order "restitution". See Subsection 77-38a-302(5)(d)(i) AND 77-38A-302(5)(d)(ii). Those provisions constitute a statutory exception to the "court loses jurisdiction upon sentencing" general rule. Likewise, the reinstatement of "civil jurisdiction" pursuant to Subsection 77-27-6(4) is a similar statutory exception.

For the proposition that a sentencing court has statutory "jurisdiction" to enter court-ordered restitution even beyond the "one year" following sentencing, see **The State of Utah, Petitioner, vs Claudia Laycock, Judge**, 2009 UT 53, 214 P.3d 103 (Utah Supreme Court 2009).

The Board's arguments---that the District Court has "no jurisdiction" to set aside the "entered" restitution order--are disingenuous and flawed, for a variety of reasons:

1. The Board filed ("forwarded") the "order of restitution" to the District Court, in procedural compliance with the statute: for the purpose of creating the "civil judgment" it seeks to take advantage of. The Board cannot now to be heard to claim that the District Court "has no

jurisdiction" to enter the "judgment" which the Board's "filing" (and/or "forward[ing]" and "refer[ing]" successfully brought into existence.

2. The Board's assertion that Defendant GARCIA is limited to a Rule 65B "extraordinary relief" remedy against the Parole Board [under subsection D(2) of the Rule] is disingenuous and flawed. If the District Court has "jurisdiction" to entertain a Rule 65B claim, the District Court has "jurisdiction" for a Rule 60 motion. Neither Rule 65B nor Rule 60 expressly purports to create or grant "jurisdiction" to the District Court; both rules recognize the "jurisdiction" the District Court already possesses.FOOTNOTE<sup>4</sup>

The "no jurisdiction" argument of the Board and of the Utah Office of Debt Collection---ostensibly made for the

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<sup>4</sup>Any "new" Rule 65B proceeding filed anew against the Parole Board would at best be suited to judicially mandate the Board to do something: i.e. actually hold the "restitution hearing" the Board neglected to hold in 2010 (or any other time). As the Defendant has long been released from Board custody, the Board has no statutory authority to hold such a hearing, even pursuant to judicial directive. The Court would not order the Board to do something the Board was statutorily unable to do.

Similarly, Rule 65B "extraordinary relief" (to hold a hearing??) would not necessarily "set aside" the previously-entered "civil judgment", entered in favor of the Utah Office for Victims of Crime. If such a result were contemplated and authorized pursuant to Rule 65B and the District Court had jurisdiction, the District Court would already have "jurisdiction" to "set aside" under Rule 60(b).



short-term purpose of avoiding judicial scrutiny of Defendant's "set aside" claims---and the District Court's acceptance of the argument is illogical and will prove to be misguided and self-defeating in the long-run: IF the District Court has "no jurisdiction", then the District Court cannot conduct "supplementary proceedings" to ascertain the defendant's assets to pay the "civil judgment". Likewise, the District Court would have "no jurisdiction" to issue a writ of garnishment (for wages and/or for bank accounts) or a writ of execution (other property) to seize and sell, to satisfy the "civil judgment". The "civil judgment"---except for the personal inconvenience and detriment experienced by the defendant for injury to his "credit rating" and the consequential damage to employment and housing opportunities---has become a meaningless, "judicial nullity", incapable of effective enforcement. This result---of "no jurisdiction" to pursue these identified post-judgment remedies---would be the situation not only for Defendant GARCIA in this case, but for ALL CRIMINAL DEFENDANTS statewide, in all Board-ordered "restitution" cases---a result the Legislature certainly has not intended.

Pursuant to the foregoing statutes, the District Court--as "the sentencing court" to which the "order of restitution" has been "referred" and has been "entered on the judgment docket"---is invested with "civil jurisdiction" over the "restitution order" (and, more particularly, the

resulting "civil judgment") which arises from the "entry" thereof. This conferring of "civil jurisdiction", arising from the foregoing statutes, exists and continues irrespective of and unrelated to the Court's long-expired authority to "order" that "restitution" be paid as part of the criminal sentence imposed against a convicted defendant.

The District Court DOES HAVE "jurisdiction" to consider the Defendant's "set aside" motion. The District Court's "no jurisdiction" rulings are clearly in error and must be reversed.FOOTNOTE<sup>5</sup>

## II

**THE BOARD'S ACKNOWLEDGED FAILURE  
TO CONDUCT A "FULL HEARING"  
CONCERNING THE "RESTITUTION"  
TO BE ORDERED AGAINST DEFENDANT  
INVALIDATES THE BOARD-MADE "ORDER OF RESTITUTION",  
ITSELF VOID AB INITIO, WHICH RENDERS  
DEFECTIVE, INEFFECTIVE AND ILLEGAL  
THE "CIVIL JUDGMENT" WHICH SHOULD BE SET ASIDE**

Early in the post-incarceration litigation process, the Board readily acknowledged [RECORD at pages 217-218] that NO "restitution hearing" was ever held by it prior to its "ordering" Defendant GARCIA to pay "restitution". See, for

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<sup>5</sup> The Court of Appeals should proceed to decide each of the following---Points II through IV, of this APPELLANT'S BRIEF---issues, previously presented to the District Court. The Court of Appeals decision should be "on-the-merits" thereof. Defendant GARCIA---constantly facing "execution" of or a "writ of garnishment" under the "civil judgment" (for \$7,000), and/or the adverse impact upon his "credit report" and potential employment and housing opportunities---ought not to have to wait for two more years on his "set aside" motion, while under those adverse burdens which should have never arisen.

example, Board-filed DECLARATION OF GREG JOHNSON, dated and filed February 2014 (as an "exhibit" to Board's OPPOSITION TO "DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE RESTITUTION ORDER" memorandum), dated 6 February 2014. [RECORD AT 155-167] Therein, the Board's "witness"--- Board Administrative Coordinator Greg Johnson---stated, in relevant part:

5. Even though it is the Board's practice to use the recommended restitution amount included in Presentence Investigation Reports as the amount for Board ordered restitution, if an offender notifies the Board that he wants to contest that restitution, the Board would hold a restitution hearing.

9. Nothing in Mr. Garcia's Board file indicates, in the five (5) years he was under the Board's jurisdiction, that he ever **asked for a restitution hearing**, or raised the issue of restitution in any communication with the Board, until his attorney's December 23, 2013, GRAMA requests concerning restitution.

DECLARATION OF GREG JOHNSON, dated 6 February 2014. RECORD at 217-218. Emphasis added.

The Johnson "declaration" is significant: the statements in Paragraph 5 imply that it is (was) the Board's regular practice to NOT hold the "restitution hearing", unless the prisoner "asked" for it.

The Board's failure (to conduct the "restitution hearing") was correspondingly acknowledged by the Board's counsel (Assistant AG Reber) when she---attempting to excuse and/or explain the Board's failure to hold the restitution hearing---wrote:

**As to a restitution hearing, there was no need for a hearing because Defendant had already waived**

**his right to contest the accuracy of the \$7000 amount.** The Board ordered the exact amount recommended in Defendant's Presentence Investigation Report, an amount Defendant failed to contest at sentencing, thereby waiving his right to subsequently do so.

Emphasis added. Page 7, Board's OPPOSITION TO "DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE RESTITUTION ORDER memorandum, dated 6 February 2014. [RECORD at 161]

Later in the litigation---but within this same "no hearing held" context---Assistant Attorney General Reber was to write:

**"His failure to object** there [in the District Court, at sentencing] waived any future challenge, which in turn **negated any requirement for the Board to hold a restitution hearing, . . .**" [p. 3 of Board motion]

**Defendant was provided all the due process he was entitled to** in his criminal case as to his **restitution obligation.** [page 4 of Board motion]

Emphasis added. Pages 3-4, Board's MOTION TO STRIKE DEFENDANT'S MOTION TO SET ASIDE "CIVIL JUDGMENT" [LACK OF STATUTORILY-REQUIRED HEARING: 77-27-5], dated 16 June 2014 [hereinafter "Board's STRIKE MOTION"], RECORD at 560-565; quoted paragraphs are at RECORD 562 and 563.

The "Order of Restitution"---"made" and thereafter filed by the Board in September 2013---is void ab initio and without legal effect for the reason that the Board-prepared "Order" was made without the statutorily-required "full hearing" (or any "hearing", for that matter), as required by Section 77-27-5(1)(c), Utah Code, as a pre-condition to the entry of the restitution "order". The resulting "civil judgment" arising automatically from the filing of the invalid (but nevertheless "filed") "Order of Restitution" is correspondingly itself invalid and must be set aside.

A

A "FULL HEARING" MUST BE HELD BEFORE THE BOARD  
MAY "ORDER" THE DEFENDANT TO PAY "RESTITUTION"

The Board's authority to "order" an incarcerated prisoner to pay "restitution" is controlled---and limited---by statute. Section 77-27-5(1)(c), Utah Code---in the Chapter applicable to the Board of Pardons---provides in its entirety:

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, **except after a full hearing** before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

Emphasis added.

The statutory requirement---

"No restitution may be ordered . . . except after a full hearing . . ." [Emphasis added]

---is clear and unambiguous. The statutory text is incapable of any other interpretation: a "full hearing" is REQUIRED to be held BEFORE "restitution" may be ordered. Indeed, this text is not merely a requirement, but is an actual LIMITATION, as evidenced by the language

"No restitution may be ordered . . . **except** . . ."

Emphasis added.

The statute [77-27-5(1)(c)] is clear and unambiguous. The statute does not provide for any exceptions to its requirements, nor for the limitation---i.e. "no restitution may be ordered . . . **except** . . . "---arising therefrom. The

statute doesn't place the burden of "asking for" a "restitution hearing" upon the incarcerated prisoner; the statutory burden to hold the "full hearing" is placed singularly upon the Board. If the Board wants to impose "restitution", the Board must first conduct the "full hearing" on the issue. Only "after a full hearing" has been conducted is the Board statutorily-authorized to "order" any "restitution".

The Board's self-admitted failure to conduct a hearing--let alone the statutorily-prescribed "full hearing"---invalidates its "order of restitution". The "civil judgment" arising automatically from the filing thereof is likewise invalid and must be set aside.

B

THE BOARD'S "EXCUSES" FOR ITS FAILURE  
TO HOLD ANY "RESTITUTION HEARING" ARE UNAVAILING

As documented above, the Board's disingenuous attempt to justify its acknowledged failure to hold the statutorily-required "restitution hearing" on grounds, none of which is identified or recognized in the controlling statute [77-27-5]:

1. The Board claims that Defendant GARCIA never requested a "restitution hearing" be held.
2. The Board claims that Defendant GARCIA had "waived" his right to a restitution hearing by failing to "object" to the pre-sentence report [June 2008] statement that the Utah Office of

Crime Victim Reparations ["CVR"] had paid \$7,000 for funeral expenses.

3. The Board claims that Defendant GARCIA had "waived" his rights to object to the \$7,000 amount, thus waiving his right to a hearing because the Board ordered that exact amount as "restitution".

The Board's arguments---advanced as excuses for its failure to hold the "full hearing"---are flawed, inaccurate and illusory, for numerous reasons, some of which are:

1. Other than its claimed, self-serving "Defendant waived" statements, the Board neither identified nor produced (or even suggested) any EMPIRICAL EVIDENCE---testimonial or documentary---that such a "waiver" actually occurred, let alone was implied or consciously intended. [Given that "waiver" of a "constitutional right" (in this case "procedural due process" right to the hearing) ought to be by clear and convincing evidence, of a knowing and intentional result (ala waiver), the Board's claimed "waiver" excuse is unavailing.]

2. The statutory scheme---particularly 77-27-5)(1)(c)---clearly imposed upon the Board the obligation to hold the "full hearing" as a prerequisite to Board-ordered "restitution". The Defendant is not required to "ask for" a hearing, and there is no statutory provision which even

suggests such a requirement.

3. Contrary to the Board's counsel's statement--- a material misstatement of fact intentionally made to mislead a tribunal---that "restitution had been recommended" (paraphrased), there simply was NO RECOMMENDATION within the June 2006 "pre-sentence report" as to any "restitution" to be "ordered".

4. The "pre-sentence report" did contain A TRUTHFUL STATEMENT: that the Utah Office for Crime Victims Reparation ["CVR"] asserted it had paid \$7,000 as funeral expenses. The statement was truthful on both counts: 1. The CVR Office made the statement, and 2. The CVR Office did, in fact, make the \$7,000 payment. There was no need for Defendant GARCIA to "object" to the truthful statement; his "failure to object" to an otherwise truthful statement cannot be the basis for failing to grant the statutorily-required "full hearing" to which he was entitled.

5. Defendant's "failure to object" to the otherwise-truthful statement that the CVR Office "paid \$7,000" in funeral expenses is not a waiver of his "right to object" that "restitution" would actually be sought and imposed ("ordered") against him. The \$7,000 amount did correspond to what the CVR Office paid two years earlier, but the failure to "object" thereto is not a "waiver" of his right



to contest the IMPOSITION of restitution, even though the stated amount was .

6. GARCIA did, in fact, explain---through counsel---the "restitution" issue: that the "funeral expenses" were the subject of currently-underway "civil litigation". See TRANSCRIPT OF 2 JUNE 2008 SENTENCING, pages 9 (line 14-25) and 10 (lines 1-22). Judge Skanchy accepted that "there is a civil case pending" explanation (of Defense Counsel Orifici) and ruled that the "restitution" issue would be "left open" (Court's terminology). No legitimate "waiver" can come (or reasonably be claimed to come) from Defendant's statements and the acceptance by the Court---for whom the "presentence report" was singularly prepared---thereof.

7. The Board-claimed "waiver" (as to his right to a "full hearing") allegedly arising from GARCIA's "failure to object" to the otherwise-truthful statement in the presentence report is a contortion and misreading and misapplication of the two statutes [Sections 77-18-1(6)(b) and 77-38a-203(2)(d)] describing the presentence report and the effect of a failure to object.

The Board-identified excuses for its failure to hold the "restitution hearing"---and more particularly, the "full hearing" required by 77-27-5---are just that: excuses. Those

excuses do NOT justify the Board's failure to conduct the statutorily-required "full hearing", as a pre-condition to the imposition of "restitution"

Defendant GARCIA acknowledges that Page 5 of the "presentence report", under the general heading of "VICTIM IMPACT STATEMENT AND RESTITUTION", contained the following statement:

. . . She [Mrs Buckley] states that regarding restitution **she did file a civil suit** in order for Shane's automobile insurance to pay for the accident. She states the matter is still pending collection from the company and that they have asked for an additional \*\*\*\* [Board-redacted amount; probably circa \$5,000+] which was over the amount covered for the funeral expenses by Crime Victim Reparations.

According to the Utah Office of Crime Victims Reparations **they paid \$7,000 for funeral expenses** in this offense. Reference CVR # 151627 for restitution payments.

Emphasis added. Bracketed material added for clarity. Presentence Report, p. 5. [RECORD at 176, ATTACHMENT 5 to this BRIEF] The AP&P Investigator who prepared the Presentence Report (and/or Mrs Buckley herself) was seemingly confused as to the precise nature of the civil suit" she filed: her lawsuit was filed against GARCIA, whose car was involved. His victim's (i.e. "Shane's") liability insurance would not have---and did not---defend GARCIA in that "civil suit".

What is significant, however, about the foregoing statements (in the Presentence Report) is the simple fact that IF the Board had truly read the Presentence Report and/or the prepared (for GARCIA's 2008 "appeal") and

presumptively-available TRANSCRIPT OF SENTENCING, the Board would have been aware of the "civil suit" issue.

It is significant that this two-paragraph section of the pre-sentence report---the location where a "recommendation" as to some kind of "restitution" might be found---is itself facially devoid of any "recommendation" (as to "restitution" or anything else).

The "RECOMMENDATION" portion of the Presentence Report is located on Page 1 thereof and provides, in its entirety:

It is recommended by the staff of Adult Probation and Parole that the defendant is sentenced to serve the term at the Utah State Prison as prescribed by law.

Emphasis added. Page 1, Presentence Report. RECORD at 172; ATTACHMENT 5 to this APPELLANT'S BRIEF. The foregoing, single sentence "recommendation" is the ONLY "recommendation" made therein; contrary to the Board's patently false and misleading statements (that "restitution was recommended" [see, for example, RECORD at 338: "Defendant's failure to challenge the accuracy of this **recommended restitution** amount at the time of sentencing waived any future challenge." Emphasis added.], NO restitution was ever recommended---not on page 1 within the "RECOMMENDATION" section and not on page 5 of the "RESTITUTION" section of the Presentence Report. There being no specific "recommendation" as to "restitution", Defendant's claimed (by the Board) "failure to object" is illusory and misleading. Defendant clearly did not thus

"waive" his right to the "full hearing" or his right to "object" to Board-ordered "restitution".

C

VIOLATION OF BOARD'S OWN  
ADMINISTRATIVE REGULATIONS

In addition to the statutorily-imposed obligations (which arguably ought to be "enough"), the Board has violated its own publicly-promulgated (pursuant to the Utah Administrative Rule-Making Act) "administrative regulations". Regulation R671-403 [entitled "Restitution"], in effect in 2010 when the Board, in seeming "Star Chamber" fashion and without notice to GARCIA, allegedly (i.e. claimed by the Board) "ordered" the restitution against him, provides in relevant part:

. . . The offender and the victim(s) **shall have the right to be present at the hearing and present evidence in their behalf.**

Emphasis added. Administrative Regulation R671-403.2 Procedure [2009].

The Board appears to be "violating its own rules", which rules grant to the prisoner "the right to be present at the hearing" and "[the right] to present evidence in [his] behalf". That the Board itself characterizes these conceptual principles as "rights" further undermines the Board's claimed "waiver" excuse.

D

CONSTITUTIONAL "DUE PROCESS" VIOLATION

In addition to the statutory violations, the Board's acknowledged failure to afford Defendant GARCIA the "full

hearing"---or any hearing, in that regard---concerning the "restitution" issue offends and violates his "due process of law" rights guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution, the latter of which provides:

**No person shall be deprived of life, liberty or property, without due process of law.**

Article I, Section 7, Utah Constitution. Emphasis added. The Board's action---first in considering and then in "ordering" Defendant GARCIA to pay the \$7,000 in "funeral expenses", all without any "notice" to him and/or any "opportunity to be heard"----clearly "deprives" GARCIA of his "property"; accordingly, "due process of law" is constitutionally required as a pre-condition to that governmental action. There can be no "due process" in any situation undertaken in violation of the statutorily-prescribed conditions and prerequisites, legislatively-mandated to assure that very "due process".

The minimum requirement for "due process of law" in these situations are (1) adequate notice (that potentially-adverse action against the person is contemplated by the government agency) and (2) an opportunity to be heard in a meaningful manner (to challenge the intended agency action). **Dairy Produce Services, Inc. vs City of Wellsville**, 2000 UT 81, 13 P.3d 581; **Miller vs USAA Cas. Ins. Co.**, 2002 UT 6, 44 P.3d 663 (Utah Supreme Court 2002); **Wells vs Children's Aid**

**Society of Utah**, 681 P.2d 199 (Utah Supreme Court 1984); **Nelson vs Jacobsen**, 669 P.2d 1207 (Utah Supreme Court 1983); **Celebrity Club Inc. vs Utah Liquor Control Commission**, 657 P.2d 1293 (Utah Supreme Court 1982). The order of an administrative body issued without notice to affected individuals violates due process. **Morris vs Public Service Commission**, 7 Utah 2d 167, 321 P.2d 644 (Utah Supreme Court 1958). Neither court nor other judicial tribunal may deny constitutional right or deprive a person of vested property interest without opportunity to be heard. **Hailing vs Industrial Commission of Utah**, 71 Utah 112, 263 Pac. 78 (Utah Supreme Court 1927).

#### E

#### THE "G.R.A.M.A. EVIDENCE" AND INFERENCES

The District Court's "no jurisdiction" ruling effectively precluded "pre-trial discovery" to ascertain the operative "facts" as to the Board-ordered "restitution". [Actual "discovery" in the "criminal" case was arguably minimal at best, given the already-completed status of the underlying case.] Defendant GARCIA attempted to utilize the G.R.A.M.A. statute to force the Board to disclose these relevant "records". GARCIA's G.R.A.M.A. request (initially in December 2013, and follow-up in June 2014) focused upon the precise "restitution vote" issue, thus:

1. Board disclosure of the operative "staff recommendation" (or whatever existed) as to the specific "restitution" question, upon which the

five Boardmembers were expected to individually deliberate, decide and actually "vote". [Without actually seeing the precise "issue" (or "recommendation" or whatever) was physically presented to each voting Boardmember, it would be impossible to ascertain if the Boardmember actually "voted" to "order restitution".]

2. Board disclosure of the actual "vote" document: the actual piece(s) of paper by which the voting Boardmembers---actually, it was disclosed there were only three members voting---actually "voted", that is, communicated their affirmative "vote" (to "order" restitution), without qualification or condition, to the other Boardmembers and/or to the staff, for implementation of that decision. [Any qualification or condition (as to "ordering" restitution] by any of the three "voting" Boardmembers would violate the "majority vote" requirement of Section 77-27-5(1)(c).]

The Board actively and vigorously resisted disclosure of the two categories of "restitution vote" records. This "stone-walling" approach (undersigned's terminology) was inexplicable: one would have thought the Board would want to disclose the "hard evidence" of its statutory compliance. But the opposite proved to be true: no disclosure, leading to the conclusion that there was "something to hide".

One would think that the Board---then presently involved (as a claimed "real-party-in-interest") in active litigation presumably headed "up on appeal" would want to disclose its documents which (1) "restitution" was clearly and actually "recommended" for the Board's "vote" and (2) that the three Boardmembers---but only three---who actually voted, did so in an affirmative manner and without qualification. That the Board continuously resisted the G.R.A.M.A. disclosure leads to the unavoidable inference that the undisclosed documents are antagonistic to the Board's orally-claimed position.

The Board's failure to conduct the "full hearing" before actually "ordering" the Defendant to make "restitution" invalidates the Board's "order". The "civil judgment" resulting from the "filing" of that statutorily-defective, constitutionally-defective and administratively-defective "order of restitution" must be set aside.

### III

**THE BOARD-ORDERED "RESTITUTION" FOR "FUNERAL EXPENSES" IS STATUTORILY DEFECTIVE AND INVALID DUE TO THE BOARD'S FAILURE TO PROPERLY ADHERE TO THE STATUTORY DEFINITION OF "PECUNIARY DAMAGES", WHICH IN THIS CASE FOR TIME-BARRED PURSUANT TO APPLICABLE STATUTES OF LIMITATION FOR "WRONGFUL DEATH" CLAIMS**

The single-vehicle accident which resulted in the death of Defendant's passenger occurred in March 2006. Defendant was convicted of the felony offense in April 2008, but was not sentenced until June 2008. [By that time the applicable statute of limitation---under 78-12-28 (repealed 2008)



and/or 78B-2-304(2) (adopted 2008)---had already "run", to bar any "wrongful death" claim. Because the State "Crime Victims Reparation" office had not then (by March 2008) filed "wrongful death" litigation against GARCIA on its "subrogation" claim, any corresponding "restitution" ordered by the Board would have been technically impossible. Even if the Board "ordered" the restitution in October 2010---disputed by Defendant---the claim would still have been barred.]

The Board's "authority" to order a prisoner within its custody to pay "restitution" is entirely statutory.

The statute [77-27-6(2)(b)] provides, in relevant part:

(2)(b) In accordance with Section 77-38a-302(5)(d)(ii), **the board may order that a defendant make restitution for pecuniary damages** that were not determined by the court, unless the board applying the criteria as set forth in Section 77-38a-302 determines that restitution is inappropriate.

Emphasis added.

Subsection 77-38a-102(6), within the "definitions" section of the Crime Victims Restitution Act, "defines" "pecuniary damages" thus:

(6) **"Pecuniary damages"** means all demonstrable economic injury, whether or not incurred, **which a person could recover in a civil action** arising out of the facts or events constituting the defendant's criminal activities . . .

Emphasis added.

The statutory "definition" of "pecuniary damages"---that "definition" being further restricted by statutory provisions not applicable here---seemingly expansive in

scope ("all demonstrable economic injury") but nevertheless includes the restrictive phrase

**"which a person could recover in a civil action".**

Emphasis added. In the GARCIA setting---factually and legally---as the "restitution" issue was before---as claimed by the Board, but disputed by GARCIA---the Board of Pardons in October 2010, the following facts are "operative" (and even admitted by GARCIA):

1. Defendant's "victim" died in March 2006.
2. The Utah Crime Victims Reparation ["CVR"] payment of \$7,000 to Mrs Gail Buckley, mother and court-designated "personal representative" of the deceased's "probate estate", occurred in September 2006.
3. Defendant was "sentenced" to prison in June 2008.
4. At the earliest, the Board "ordered" restitution in October 2010. [Defendant DISPUTES the Board's assertion that "restitution" was actually "ordered" at that time.]

Under "subrogation law" principles, the Crime Victims Reparations office payment of \$7,000 to the Personal Representative for "funeral expenses" effectively "substituted" the state agency "to stand in the shoes of" (undersigned's terminology) that Personal Representative. With that September 2006 payment, the State agency acquired---at least to the limit of its \$7,000 payment---the "right"

to bring its own litigation against Defendant GARCIA for the "funeral expenses" thus reimbursed to Personal Representative Gail Buckley. However, those same legal restrictions (for example lack of negligence on Defendant's part, comparative negligence by deceased passenger, time-barred defense under applicable statute of limitation, and so forth) which could have been asserted against the Personal Representative would nevertheless be available (for assertion by Defendant GARCIA) against the State CVR claim.

Former Section 78-12-28(2)---repealed, renumbered [to Section 78B-2-304(2), and reenacted pursuant to the Legislature's 2008 recodification of the "Title 78--Judicial Code" of the Utah Code, effective 7 February 2008---provided in relevant part:

An action may be brought **within two years:**

(2) for recovery of damages for a death **caused by the wrong act or neglect of another;**  
.

Emphasis added.

These foregoing "overlapping"---actually "bookending" is perhaps a more accurate terminology---"statutes of limitation" combine to require that the State Office for Crime Victim Reparations [CVR] litigation, under its own name and pursuant to its "subrogation" entitlement to do so, had to be filed BEFORE the March 2008 2-year deadline; the State's litigation simply wasn't filed then, nor at any time.

Had the Board given---the Board didn't---Defendant GARCIA (1) "notice" of its intention to "order restitution" and/or (2) the statutorily-required "full hearing" [77-27-5(1)(c)] on the "restitution" issue, the Board would have learned from GARCIA of this "defense" thereto. Having failed to give GARCIA the "full hearing" [see Point II, above], the Board cannot complain or object to what might have been told to it.

In any event, the fact that the Board was, as a minimum, at least four years (or more) "late" in "ordering" the "restitution", prohibits, as a matter of law, the underlying validity of its "restitution order": the Board's "order" of "restitution", exceeding and outside of the statutory "definition" of the "pecuniary damages", is an ultra vires act.

The resultant "civil judgment" flowing from the filing of the thus-defective "order of restitution" must be set aside.

#### IV

**THE BOARD-CREATED AND BOARD-FILED "ORDER OF RESTITUTION"  
IS DEFECTIVE AND INVALID, DUE TO ITS UNTIMELY "MAKING"  
WHICH DID NOT OCCUR WITHIN THE STATUTORILY-PRESCRIBED  
PERIOD OF TIME (77-27-6(4): "WITHIN 60 DAYS")  
OF THE PRISONER'S RELEASE FROM CUSTODY;  
THE RESULTANT "CIVIL JUDGMENT" MUST BE SET ASIDE**

The Board-prepared "order of restitution", ostensibly "made" as of 24 September 2013 as of its thus stated "date", was "forwarded" [statutory term] to the Third District Court (as "the sentencing court") on or about 10 October 2013 and

thereafter "entered on the judgment docket". The "making" of that "restitution order" runs afoul of the "within 60 days" (of the prisoner's release) requirement of Section 77-27-6(4); the resultant "civil judgment" arising from the subsequent "forwarding", "referring" and/or "entry" of the facially-defective "order" is defective, improper and must be set aside.

Section 77-27-6(4), Utah Code, applicable to the Board and expressly in the context of "restitution" ordered against prisoners, provides in relevant part:

(4) If the defendant, upon termination or expiration of the sentence owes outstanding fines, restitution, or other assessed costs, or **if the board makes an order of restitution within 60 days after the termination or expiration of the defendant's sentence**, the matter shall be referred to the district court for civil collection remedies. The Board of Pardons and Parole shall forward a restitution order to be entered on the judgment docket. The entry shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.

Emphasis added.

Section 77-27-6(2)(c), Utah Code, reaffirms the legislative intent by providing:

(c) Except as provided in Subsection (2)(d), the board **shall make all orders of restitution within 60 days** after the termination or expiration of the defendant's sentence.

Emphasis added. The introductory phrasing ("except as provided by Subsection (2)(d)": pertaining to prisoners incarcerated for other charges and sentences extending past the current sentence) is inapplicable to the GARCIA situation. The Subsection (c) says "all orders": no

exceptions and no excuses.

Defendant GARCIA was released from prison on 15 April 2013. The "within 60 days" time-period expired on or about 14 June 2013; the Board's "order", "made" as of 24 September 2013 is months and months "late". The BOARD offered no rebuttal "evidence" to show the 24 September 2013 document was not created ("made") on that date.

The statutory word "made" is not confusing or ambiguous; the word, in "plain, common everyday English" means to create or to bring into existence, perhaps composing from pre-existing materials into a composite item. In this sense, the word "made"---although not frequently the subject of "legal" or legislative usage as to describe the process (or product) of governmental agency action---is straight-forward and precise. In this context, the Board (and/or its Chairperson) "made" the "restitution order" ostensibly by combining an otherwise blank sheet of paper and affixing, in a computer printer, the black "toner cartridge toner" thereto. Thereafter, an "ink" signature was affixed. The "order" was thus "made" or created or brought into existence, as such.

In the trial court the Board's counsel (Ms Reber) attempted to excuse the facially-obvious violation of the "within 60 days" (of release) rule by arguing that the Board---in October 2010---had "ordered" the restitution and thus the situation fell within the first introductory phrasing of the first sentence of Subsection 77-27-6(4),

pertaining to "If the defendant owes restitution . . .", so as to avoid the "within 60 days" requirement occurring within the second dependent phrase. The Board's argument was flawed, for numerous reasons:

1. The Defendant GARCIA did not "owe"---then, in 2010---any "restitution"; none had been "ordered" by the District Court.

2. The Board-ordered "restitution", ostensibly arising from its action in October 2010, was without the statutorily-required "full hearing" as well being also in violation of constitutional "due process" standards. See Point II of this APPELLANT'S BRIEF.

3. The subrogation claim (for \$7,000, for "funeral expenses" reimbursed to the victim's mother and Personal Representative) was obviously time-barred by the applicable statute of limitation; the Board's "order" was and/or would be *ultra vires*. See Point III of this APPELLANT'S BRIEF.

The "second" phrase is applicable and controlling for the following reasons:

1. First, the statutory requirement is clear; the requirement speaks in terms of "making" an order, which will be thereafter "forwarded" and "entered" and so forth, to achieve the statutorily-described result: the so-called "civil judgment" so entered

against Defendant GARCIA. The statute does NOT talk about "deciding" to "order" the restitution. Thus, the "date" of the actual "making" is critical and dispositive; the date of any decision-making process (or even the resultant decision), even from years earlier, is irrelevant.

2. Secondly, the Board-created 2010 documents---the October 7th "INITIAL HEARING" and the "correcting" October 13th "HEARING OFFICER RESULTS" documents---do not themselves claim to be an "order of restitution". [The "restitution" language contained therein is ambiguous and arguably confusing: it is arguable whether the Board actually decided anything specific as to "ordered" restitution, or was merely leaving it up to a later "referral" to the District Court. For example, the ORIGINAL HEARING document states, albeit under the "Hearing Notes" section of the document:

1. Other: The restitution owed of \$7000.00 on Case # 06-1607 will be **forwarded to the sentencing Court for a Civil Judgement**(sic).

Emphasis added. RECORD at 188; ATTACHMENT 8 to this APPELLANT'S BRIEF. There is nothing to indicate---particularly to Defendant GARCIA, incarcerated and without ready access to legal counsel---the Board had thus "ordered"



restitution. The phrase "shall be forwarded to the sentencing Court for a Civil Judgement(sic)" could be readily understood (by GARCIA) that there was going to be a new civil case filed against him. [See also his bi-weekly "NORMS Statements", which continuously and affirmatively indicated, for the entirety of his 5-year incarceration, that "zero" restitution was owing. RECORD at 383-384; ATTACHMENT 11 to this APPELLANT'S BRIEF.]

The HEARING OFFICER RESULTS document [RECORD at 190, ATTACHMENT 9 to this APPELLANT'S BRIEF], dated six days later, facially purporting to be a "correcting" document for "clerical error", is even more vague and ambiguous, by providing in relevant part:

Hearing notes:

2. . . Other. The restitution owed will be forwarded to the sentencing Court for a Civil Judgement(sic).

Emphasis added. RECORD at 190; ATTACHMENT 9 to this APPELLANT'S BRIEF. Again, the written text is devoid of any affirmative "indication" that the Board has actually "ordered" GARCIA to pay "restitution", for which---in this "correcting" document---NO "amount" is stated, thus leading to additional confusion on GARCIA's part. The TWO October 2010 documents must be compared to and

contrasted with the September 2013 "ORDER OF RESTITUTION" which "looks" like an operative "ORDER OF RESTITUTION", "forwarded" and so forth.

3. Similarly, those October 2010 documents were NOT "filed" with the District Court; the 24 September 2013 "order WAS so "forwarded" and "entered". IF the 2010 documents were intended and then (by the Board) considered to be "restitution orders", why were they not actually "filed" as such? [Rhetorical question.] As the October 2013 was so "made" and thereafter "filed" ("forwarded") and entered?

4. That the Board actually "filed" its 24 September 2013 "restitution order" establishes its intentions, then (in 2010) and now: the October 2010 documents are not "restitution orders" and were never intended to be such.

5. Lastly, and most importantly, it is THE 24 September 2013 "order" which brings about the result complained of in this proceeding.

Due to the untimely "making" of the Board-filed "order of restitution", the resultant "civil judgment" must be set aside.

V

**THE PROVISIONS OF SECTION 77-27-5(3)  
ARE UNCONSTITUTIONAL AS VIOLATIVE OF THE  
"OPEN COURTS" PROVISIONS OF THE UTAH CONSTITUTION  
[ARTICLE I, SECTION 11]**

The State has argued that the provisions of Section 77-27-5(3), Utah Code, preclude the Court from reviewing the decision of the Board of Pardons in this case. Indeed, the provisions of Section 77-27-5(3) are quite clear and unambiguous and state in relevant part:

**(3) Decisions of the board in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines and forfeitures are final and are not subject to judicial review. . . .**

Emphasis added.

Article I, Section 11 of the Utah Constitution states:

**All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial and unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in the State, by himself or counsel, any civil cause to which he is a party.**

Emphasis added.

The "open courts" violation is as obvious as the nose on one's face: a Board decision (specifically, involving "restitution" as in the GARCIA situation) is insulated from any and all "judicial review". No if's, and's or but's. The "restitution order" wrongfully issued [see Points II, III and IV, herein] against GARCIA is certainly an "injury done to him in his . . . property", but Section 77-27-5(3) immunizes the Board (and it's "order") from any and all

"judicial review".FOOTNOTE<sup>6</sup>

**A**

**preservation of issue and standard of review**

The District Court was presented with the "unconstitutionality of statute" issue pursuant to "DEFENDANT'S MOTION FOR JUDICIAL DETERMINATION OF UNCONSTITUTIONALITY OF STATUTE [77-27-5(3)]", dated/filed 24 April 2014. RECORD at 288-289. The Utah Attorney General was notified of this "unconstitutionality" challenge to a Utah statute pursuant to mailed "Defendant's Notification", dated 24 April 2014, RECORD at 290-291.

Notwithstanding the "strong presumption of constitutionality" afforded a validly-adopted statute [see **Maxfield vs Herbert**, 2012 UT 44, ¶ 15, 284 P.3d 647 (Utah Supreme Court 2012) and **Peterson vs Coca-Cola USA**, 2002 UT 42, ¶ 23, 48 P.3d 941 (Utah Supreme Court 2002), and the challenging party's "heavy burden" [**Jones vs Utah Board of Pardons & Parole**, 2004 UT 53, ¶ 10, 94 P.3d 283 (Utah Supreme Court 2004)], Defendant GARCIA accepts that challenge.

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<sup>6</sup>Although not involving the "unconstitutionality" of Section 77-27-5(3) per se, the Board's action in imposing "restitution"---ostensibly following the 5 October 2010 "initial hearing", but without notice to or participation by GARCIA, for a civil claim ("pecuniary damages") which were clearly time-barred and for which the Board was "late" in "making" (statutory term) its "order of restitution"---violates the "no person shall be barred from . . . defending before any tribunal" requirement contained in the latter half of Article I, Section 11.

**B**

**Defendant's "standing" and parties**

Defendant-Appellant GARCIA is the subject of a "civil judgment" (for \$7,000) for "restitution", arising from the administrative decision of the Utah Board of Pardons and Parole. In that capacity, he certainly has "standing" to raise the "unconstitutionality" challenge to the statute relied upon by the Board is "defending" its decision and/or seeking to deny GARCIA's claims, certainly in the "restitution" context in which he is involved.

The UTAH BOARD OF PARDONS AND PAROLE, a Utah state government agency, in January 2014 petitioned the District Court for "voluntary intervention" in this case: to "defend" the "restitution order" the Board made and caused to be "entered" against GARCIA. The Board---represented by legal counsel from the Office of Utah Attorney General---is a proper party to "defend" the statute. [Although "notified" of Defendant's "unconstitutionality motion" in the District Court, the Utah Attorney General did not personally appear in the case, but rather allowed the staff attorneys (ala Ms Reber) assigned to the Board to defend.

**C**

**unconstitutionality under Foote (1991)**

The facial "unconstitutionality" of Section 77-27-5(3) ---which, without exception or limitation, effectively denies and prohibits all "judicial review" of Board decisions across the whole "range" (of Board decisions)---is obvious:

the statute clearly violates the "open courts" provisions of the Utah Constitution, as contained in Article I, Section 11 thereof.

In **Foote vs Utah Board of Pardons**, 808 P.2d 734 (Utah Supreme Court 1991), an "habeas corpus" case filed to challenge Parole Board decisions (for parole, not granted) after an unsuccessful "Anders brief appeal" the defendant's original criminal conviction, the Utah Supreme Court was called upon to discuss---and did so---the so-called "collateral attack". Concerning the petitioner's claims (for habeas corpus relief) and the provisions of Section 77-27-5(3), the Utah Supreme Court wrote:

Utah Code Ann. § 77-27-5(3) provides that determinations and **decisions of the board of pardons** in cases involving the approval or denial of paroles **are final and not subject to judicial review**. Thus there is no right of appeal from a decision of the board of pardons. Since an appeal is barred by this provision, and since an appeal is the only legal remedy that could exist in this case, it follows that no remedy at law exists. **However, if section 77-27-5(3) was intended to preclude all judicial review, both by way of law and by way of extraordinary writs, then that section runs afoul of article I, section 11 of the Utah Constitution.** [Footnote to Dunn v. Cook, 791 P.2d 873 (Utah 1990)]

808 P.2d at 735.

Although in **Foote** the Utah Supreme Court did not invalidate (as unconstitutional) Section 77-27-5(3)---probably because the "habeas corpus" proceeding had not expressly sought such relief---the Supreme Court nevertheless could not have been more clear in its opinion. Indeed, it would seem obvious to all that any statute which

precluded "judicial review" of the administrative agency would "run afoul" of the "open courts" provisions of the Utah Constitution [Article I, Section 11]. In any event, the Utah Supreme Court ignored the obviously-unconstitutional statutory provision and proceeded to consider (and implicitly grant) the sought-for habeas corpus relief, at least to remand to a district court for evidentiary hearing on the petitioner's claims.

The provisions of Section 77-27-5(3) are clear and unambiguous: no alternative interpretation can be adopted or developed, to avoid the "unconstitutional" result that the Legislature has intended. [While the "intent" of the Legislature may be understandable, even laudable, the blanket prohibition against any and all "judicial review" is the statute's fatal "Achilles' heel" from which there is no survival.] The statute clearly offends the "open courts" provisions of the Utah Constitution, contained in Article I, Section 11. Clearly, the Defendant's "constitutional right" to keep and maintain "property" and/or to not be deprived thereof "without due process of law" [Article I, Section 7] are valuable rights; violations---or alleged violations---of such rights must be subject to judicial review. On this point, the **Foote** opinion noted:

In addition, the mandate of the due process clause of article I, section 7 of the Declaration of Rights in the Utah Constitution is comprehensive in its application to all activities of state government. **It is the province of the judiciary to assure that a claim of the denial of due process by an arm of government be heard and,**

**if justified, that it be vindicated. What may constitute due process in any given circumstance may vary, but assuredly, the parole board is not outside the constitutional mandate that the actions of government must afford due process of law.**

808 P.2d at 735. Emphasis added.

Indeed, the obvious thrust of the Statute is to preclude, without exception, any and all recourse to "judicial review" of Board actions and decisions.

In the instant setting, the Court has no convenient alternative by which to side-step this important issue: the Defendant---clearly having "standing" to make the claim---has asserted the "unconstitutionality" of the Statute.

Indeed, given the "habeas corpus relief is allowed" (in spite of the Statute's provisions to the contrary) result in **Foote**, the Utah Supreme Court might be deemed to have implicitly determined the Statute to be unconstitutional, without explicitly saying so. In the instant situation, the Court of Appeals would be following the implicit "precedent" established by the Utah Supreme Court in **Foote**.

#### **D**

#### **Unconstitutionality of Section 77-27-5(3) under Berry vs Beech Aircraft analysis**

In **Berry vs Beech Aircraft Corporation**, 717 P.2d 670 (Utah Supreme Court 1985), the Utah Supreme Court determined that the Utah Products Liability statute of repose---requiring tort litigation to be brought six years after the product's first use or ten years after manufacture---to be unconstitutional, as violative of "open courts" provision.



In **Horton vs Goldminer's Daughter**, 785 P.2d 1087 (Utah Supreme Court 1989), the Utah Supreme Court held the Utah "architects and builders statute of repose" violated the "open courts" provision of Utah Constitution in that it does not provide injured persons with effective and reasonable alternative remedy for vindication of his or her constitutional interest. The Court found the elimination of cause of action was an arbitrary and unreasonable means of achieving statutory objective of limiting stale claims and protecting construction industry. The **Goldminer's Daughter** majority, described the two-part test adopted in **Berry vs Beech Aircraft** and wrote:

**Berry** established the following two-part test to determine whether a statute that limits one's right to remedy by due course of law for injury to one's "person, property, or reputation" violates Article I, section 11:

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

717 P.2d at 680.

In the instant situation, Defendant GARCIA has been Board-ordered to pay \$7,000 in restitution which---as described in Points II, III, IV and V, above---he should not

have been so ordered. Section 77-27-5(3) clearly is "a statute that limits one's right to remedy by due course of law for injury to one's . . . property" (**Goldminer's Daughter**, supra): the Statute [77-27-5(3)] bars ALL "judicial review" of a Board "decision" for "restitution" (in GARCIA's case) and a lot of other cases (for other similarly-situated persons). Applying the **Berry vs Beech Aircraft** standards to Section 77-27-5(3):

The "first" standard---does the statute provide an "effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest?---cannot be satisfied. Section 77-27-5(3) is absolute in its terms: judicial review of Board decisions is prohibited in all cases. No alternative remedy is allowed.

The statute's failure under the first standard invokes the "second" standard: namely, "abrogation of the remedy (i.e. judicial review of Board decisions) may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving that objective." The Legislature, in enacting 77-27-5(3), has identified no "clear social or economic evil to be eliminated" if there were to be the proscribed "judicial review" of Board

decisions. Nor has the Legislature attempted to "narrow" the scope of the prohibition.

Having "judicial review" of Board decisions is not "a clear social or economic evil"; the Board is subject to the law just like every other agency of State government. See quotation from **Foote**, in Point V-C, above [page 55].

In **Goldminer's Daughter** the Supreme Court noted that the Legislature in enacting the applicable statute of limitation (barring the claim) had identified no "clear social or economic evil".

The following decisions of the Utah Supreme Court and the principles of law contained therein describing the "open courts" provisions are applicable to the situation-at-hand. **Day vs State ex rel Utah Department of Public Safety**, 1999 UT 46, 980 P.2d 1171 (Utah Supreme Court 1999) [governmental immunity statute barring claim for injuries arising from police vehicle chases violates open courts provision]; **Julian vs State**, 966 P.2d 249 (Utah Supreme Court 1998) [attempted application of catch-all 4-year statute of limitation to habeas corpus proceedings violates "open courts" provisions of constitution]; **Currier vs Holden**, 862 P.2d 1357 (Utah Court of Appeals 1993), certiorari denied 870 P.2d 957 [three-month statute of limitation for habeas corpus relief was unconstitutional as violating "open courts" provisions]; **Sun Valley Water Beds of Utah, Incorporated vs Herm Hughes & Son, Incorporated**, 782 P.d 188 (Utah Supreme Court 1989) [architects and builders statute

of repose violates "open courts" provisions]; **Lee vs Gaufin**, 867 P.2d 572 (Utah 1993) [holding unconstitutional legislative abrogation of remedies based on economic and social problems that had occurred in other states but not in Utah].

The above-referenced "statute of limitation" cases (e.g. **Berry, Goldminer's Daughter, Sun Valley Water Beds, Julian, Day** and others) are, in principle, applicable to the "no judicial review" (of Board decisions) statutes: if the "statute of limitations" statutes, restricting the impacted person by limiting that person's access to judicial remedy, are violative of the "open courts" guarantee, then Section 77-27-5(3)---which in all cases and for all time, prohibits any and all "judicial review"---must certainly violate the "open courts" provision. The Utah Supreme Court in **Foote** readily observed as much, but had not been asked for the "unconstitutionality" determination. GARCIA is asking for it now.

That there are other cases---numerous cases, even (e.g. **Julian, Currier** and others)---which have ignored the clear prohibitions (i.e. "no judicial review") of 77-27-5(3) is not an indication of an alternative interpretation of the statutory text; there can be no other meaning than that so clearly stated. That other cases may have avoided confronting the "unconstitutionality" issue---because those appellate courts were not expressly requested to do so---is not evidence of the statutes validity. On the contrary, that

the appellate courts have "skirted the issue" is an implicit recognition of the statute's invalidity.

### CONCLUSION

The District Court does have "jurisdiction"---even "civil" jurisdiction---over the Board-ordered "restitution", as such "jurisdiction" arises, pursuant to statute, by reason of the Board's "forwarding" and "referring" its "restitution order" to the District Court, which "order" was thereafter "entered on the judgment docket". The District Court's "jurisdiction" includes Rule 60(b) remedies to "set aside" the resultant "civil judgment" entered against Defendant GARCIA.

The Board admits that it failed---prior to "ordering" the Defendant's "restitution"---to conduct any "restitution hearing". This failure falls far short of the statutory [77-27-5(3)] requirement and limitation: namely, that "no restitution may be ordered . . . except after a full hearing . . .". No hearing---let alone the "full hearing"---having been first conducted, the "order of restitution" was improperly "made" and the "civil judgment" resulting from the filing of that "order" must be set aside.

The Board's claimed justifications---the Defendant didn't "request" a hearing and/or the Defendant thus "waived" his hearing by failing to object to the truthful statement of fact [namely, that "CVR claimed to have paid \$7000" (paraphrased)] within the presentence report---are inadequate reasons for the Board's failure to follow the

statutory requirements directly applicable hereto.

The Board's decision to "order" restitution---even if made as early as October 2010 (albeit without the statutorily-required "full hearing"---is nevertheless invalid and ultra vires. The Board is allowed to "order restitution" only for "pecuniary damages", which are further defined as what a person "might recover in a civil action". The \$7,000 "funeral expenses"---ostensibly incurred and/or paid in March 2006 (at time of death)---were time-barred by the two-year statute of limitation (for "wrongful death") of Section 78B-2-304(2), Utah Code. Thus, no "restitution" could have been ordered therefor. The "civil judgment" must be set aside.

The Board-filed "order of restitution" was untimely "made", as not occurring "within 60 days" of the expiration of GARCIA's sentence of incarceration. The resulting "civil judgment" arising from the "entry" of that "order" must be set aside.

The Statute (Section 77-27-5(3), Utah Code) is clear and unequivocal in its direction, intent and scope: ALL "judicial review" of Board decisions is prohibited. There are NO exceptions. That some case law decisions have overlooked the otherwise all-encompassing provisions of the statute does not validate the statute; those cases did not involve a direct attack upon the statute's "unconstitutionality", upon which the decisions made no direct ruling. In fact, that the former courts ignored the

statutory prohibitions is evidence of that same unconstitutionality, even if the courts didn't say so. But **Foote** did expressly say so, even if in a "dicta" manner. The all-encompassing prohibition against "judicial review" embodied with 77-27-5(3) flies in the face of the "open courts" provisions of Article I, Section 11. The Court should make that judicial determination, as so "moved" by Defendant GARCIA.

The Court of Appeals must decide the "jurisdiction" issue: if only to advise District Courts and the Board of the requirements of the law on that narrow question.

The Court of Appeals should decide the "on-the-merits" substantive issues raised---lack of "full hearing", time-barred "funeral expenses", and untimely "made" restitution order---to avoid GARCIA from the continuing and lingering effects of the undeserved "civil judgment" entered against him: future execution and/or garnishment, as well as adverse "credit report" which seriously affects job potential and housing opportunities. The identified issues should be decided to authoritatively avoid future situations (and appeals) which may result from similar actions by the Board, taken against similarly-undeserving persons (e.g. on parole or awaiting parole) who may not be in a position to meaningfully challenge such illegal actions. The Court of Appeals should remand the case back to the District Court for entry of judgment in accordance with its decision.

The Court of Appeals must decide the

"unconstitutionality" question: Defendant GARCIA has "standing", is economically threatened by invocation of the statute, and has made a more-than-adequate demonstration of the statute's "unconstitutionality", which has already (Foote) been already been judicially recognized.

**APPELLANT'S CLAIM FOR ATTORNEY'S FEES**  
**["BAD FAITH" LITIGATION: Section 78B-5-825, Utah Code]**

The Board's admitted failure to hold the statutorily-required "full hearing" as a prerequisite and in contradiction to its own publicly-promulgated "administrative regulations" and notions of constitutional "procedural due process" standards, its "restitution order" for pecuniary damages which were facially time-barred and thus ultra vires, and its "filing" of an "order" was statutorily "late" in its making but nevertheless thus creating an immediately-enforceable "civil judgment" upon an undeserving person, have each worked to cause Defendant GARCIA significant attorney's fees to set aside the "restitution order". Coupled with the Board's "no jurisdiction" assertions to the District Court and the resulting necessary appeal thereof, those actions constitute "bad faith litigation" for which Defendant seeks and should be awarded reasonable attorney's fees pursuant to Section 78B-5-825, Utah Code.

**APPELLANT'S REQUEST FOR ORAL ARGUMENT**

Defendant-Appellant GARCIA requests that the Utah Court



of Appeals grant "oral argument" prior to considering and adjudging this appeal.

**COUNSEL'S CERTIFICATION ["WORD COUNT" AND TYPE SIZE]**

The undersigned counsel certifies that the text and footnotes within the foregoing APPELLANT'S BRIEF were printed in 13-point Courier type (font) and that the "word count" for the BRIEF---exclusive of Table of Contents, Table of Authorities and Rule-required quotations within "Constitutional and Statutory Provisions"---was 13,483 words, as indicated by the "word count" subroutine of the WordPerfect 5.1 word-processing system upon which the typed material was created.

Respectfully submitted this 30th day of March, 2015.

/s/ Stephen G Homer  
STEPHEN G HOMER  
Attorney for Defendant-Appellant  
DENNIS J GARCIA

**CERTIFICATE**

I certify that I caused a two copies of the foregoing APPELLANT'S BRIEF, with attachments (addenda), to be hand-delivered to the office of Mr Sean Reyes, Utah Attorney General, Ms Nancy Kemp, Assistant Attorney General, Utah Attorney General's Office, Heber Wells Building, Fifth Floor, 160 East 300 South, Salt Lake City, Utah, this 30th day of March, 2015.

/s/Stephen G Homer

# ADDENDA

## ATTACHMENT 1

Board-prepared "ORDER OF RESTITUTION"  
[prepared 24 September 2013; filed 10 October 2013]  
RECORD at 119

## ATTACHMENT 2

District Court "MEMORANDUM DECISION AND ORDER"  
[11 April 2014]  
RECORD at 279-282

## ATTACHMENT 3

District Court "MEMORANDUM DECISION AND ORDER"  
[21 August 2014]  
RECORD at 593-596

## ATTACHMENT 4

"ORDER OF THE COURT" [Final Judgment]  
[29 September 2014]  
RECORD at 604-607

## ATTACHMENT 5

Excerpts from May 2008 PRESENTENCE REPORT [pp. 1, 5]  
RECORD at 172, 176

## ATTACHMENT 6

"Docket History" Gail Buckley vs Dennis Joseph Garcia  
Third Judicial District Court, Civil No. 080903244

## ATTACHMENT 7

June 2008 "General Release and Settlement Agreement"  
Gail Buckley vs Dennis Joseph Garcia  
Third Judicial District Court, Civil No. 080903244  
RECORD at 385-387

## ATTACHMENT 8

Board-prepared "ORIGINAL HEARING" document  
[7 October 2010]  
RECORD at 188

## ATTACHMENT 9

Board-prepared "HEARING OFFICER RESULTS" document  
[13 October 2010]  
RECORD at 190

## ATTACHMENT 10

Board's May 2011 "Letter" to Garcia relatives  
RECORD at 192

## ATTACHMENT 11

Corrections Department-prepared "NORMS Statements"  
[13 June 2008; 31 March 2013]  
RECORD at 383, 386



FILED DISTRICT COURT  
Third Judicial District

OCT 10 2013

By SALT LAKE COUNTY  
Deputy Clerk

**BEFORE THE UTAH BOARD OF PARDONS AND PAROLE**

**UTAH STATE BOARD OF PARDONS AND PAROLE**

THE STATE OF UTAH

ORDER OF RESTITUTION

Plaintiff,  
Third District-Salt Lake  
VS  
Dennis Garcia (OFF# 184816)  
Defendant

Salt Lake County

Case Number: 061901607

Pursuant to Utah Code Annotated, Section 77-27-6(4), the Board of Pardons and Parole has determined that the above-entitled Defendant owes restitution. The Defendant should make payments as follows:

Pay restitution in the amount of \$7,000.00 to UOVC

When entered on the Courts Docket, this Order shall constitute a lien against the Defendant and is subject to the Rules that apply in any Civil Judgment.

IT IS SO ORDERED, this 24<sup>th</sup> day of September 2013

BY THE BOARD:

Clark A. Harms,  
Chairman

**ATTACHMENT 1**

Page 1 of 1 pages

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER ON
Plaintiff,	:	MOTION TO SET ASIDE RESTITUTION
	:	ORDER
vs.	:	CASE NO. 061901607
DENNIS GARCIA,	:	
Defendant.	:	Judge Randall N. Skanchy

-----

On March 24, 2014, the Court had before it defendant Dennis Garcia's ("Mr. Garcia") Motion to Set Aside the Restitution Order from the Utah Board of Pardons and Parole ("Board"). Mr. Garcia was represented by Stephen Homer, and the Board was represented by Sharel Reber and Amanda Jex. The matter was fully briefed by the parties, argument was made, and the matter is now ready for decision.

Factual Background

Mr. Garcia was convicted of Automobile Homicide, a third degree felony, by a jury on April 17, 2008, and was sentenced on June 2, 2008 to an indeterminate term not to exceed five years at the Utah State Prison. On the date of Mr. Garcia's sentence the issue of restitution was left open. Ultimately, the Court never determined the amount of restitution owed by Mr. Garcia, within one year of Mr. Garcia's sentencing date.

Mr. Garcia's Presentence Report, dated May 28, 2008, under section "Victim Impact Statement and Restitution" reads "[a]ccording to the Utah Office of Crime Victim Reparations they paid \$7,000 for funeral expenses in this offense," which information was available to Mr. Garcia and his counsel at the time of sentencing. (Presentence Report, p. 5.) At Mr. Garcia's original Board hearing, on October 5, 2010, a Board hearing officer informed Mr. Garcia as to restitution "...I know there's seven thousand dollars was paid by a state agency for funeral costs...." (Hearing Transcript, p. 6.) The Board's "Original Hearing," dated October 7, 2010 thereby ordered "[t]he restitution owed of \$7,000.00 on Case # 06-107 will be forwarded to the sentencing Court for a Civil Judgment." (Original Hearing.) Mr. Garcia's sentence expired on April 13, 2013. (Hearing Officer Results.) Pursuant to Utah Code Ann. § 77-27-6(4), on September 24, 2013 the Board entered an "Order of Restitution" indicating Mr. Garcia still owed \$7,000 in restitution payable to UOVC.

#### Discussion

Pursuant to Utah Code Ann. § 77-38a-302(5)(d)(i), "[e]xcept as provided in Subsection (5)(d)(ii)...the Court shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing." At the time Mr. Garcia was sentenced on June 2, 2008 this Court left the issue of restitution open. Ultimately, the Court

never determined the amount of restitution and Mr. Garcia entered the Utah Prison under the direction of the Board.

Utah Code Ann., Subsection (5)(d)(ii), provides that "[a]ny pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole." Utah courts have long recognized that "Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case." State v. Montoya, 825 P.2d 676, 679 (Utah App. 1991); State v. Vaughn, 2011 UT App 411, ¶ 11, 266 P.3d 202. This Court entered a valid sentence in this case, and thereby lost subject matter jurisdiction. Furthermore, once the one-year period after sentencing expired, this Court also lost jurisdiction over Mr. Garcia's restitution obligation. Jurisdiction moved to the Board to determine restitution owed.

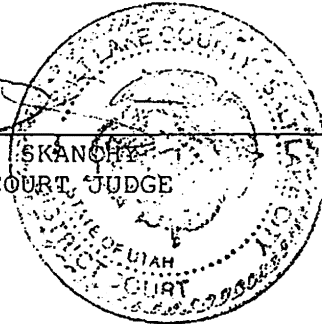
The Court hereby concludes that it lacks jurisdiction to set aside the Board's claim for restitution against Mr. Garcia. The Board's claim for restitution is not subject to judicial review by this Court. The Court imposed a prison sentence on June 2, 2008, thereby losing subject matter jurisdiction. Once the one-year period after sentencing by this Court expired, this Court further lost jurisdiction over Mr. Garcia's restitution obligation. Jurisdiction moved to the Board at the expiration of the Court's jurisdiction over restitution.

## ATTACHMENT 2

Accordingly, Mr. Garcia's Motion to Set Aside Restitution is denied.

Dated this 11 day of April, 2014.

RANDALL N. SKANOFF  
DISTRICT COURT JUDGE



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

-----

STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. 061901607
vs.	:	
DENNIS J. GARCIA,	:	Judge Randall N. Skanchy
Defendant.	:	

-----

This matter came before the Court on Mr. Dennis Garcia's ("Mr. Garcia") Motion for New Trial; Motion to Set Aside Civil Judgment; and Motion for Judicial Determination of Unconstitutionality. Oral argument was held August 11, 2014. The motions are ready for decision.

Discussion

Mr. Garcia was sentenced to 0-5 years in prison on June 2, 2008. The Court left open the issue of restitution. Mr. Garcia's sentence expired April 15, 2013. On September 24, 2013, the Board of Pardons entered an Order of Restitution for \$7,000 to the Utah Office of Victims of Crime to cover the costs of the funeral expenses for Garcia's victim. The Court entered the Order on October 10.

Mr. Garcia sought to set aside the Order of Restitution. The Court's Memorandum Decision of April 11, 2014 concluded that the trial court does not have jurisdiction over this matter; rather, jurisdiction was properly with the Board of Pardons. See State v. Montoya, 825 P.2d



676, 679 (Utah App. 1991) ("Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case").

Mr. Garcia now re-raises his arguments in a series of similar motions: Motion for New Trial, Motion to Set Aside Civil Judgment, and Motion for Judicial Determination of Unconstitutionality.<sup>1</sup> He asks the Court to reconsider its April 11 decision; set aside the Order of Restitution; order a new trial for error of law under Rule 59, U.R.C.P; and relieve him from the Judgment under Rule 60, for mistake, fraud, and a void Judgment.

Mr. Garcia reiterates his previous argument that the trial court maintains jurisdiction (concurrent with the Board of Pardons) over this matter because (i) an Order of Restitution is a legal Judgment, Utah Code Ann. § 77-38a-401(4), and the trial court's entry of the Order restores its jurisdiction over the matter, and (b) the Utah Supreme Court has implicitly held that the trial court has unending jurisdiction after sentencing. State v. Laycock, 2009 UT 53, 214 P.3d 104.

The Court reiterates its prior determination that it has been divested of jurisdiction. Mr. Garcia's rehash of his prior arguments adds no persuasive authority to change the Court's decision. As for the Laycock case, at first blush, Mr. Garcia is correct: Laycock allowed the

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<sup>1</sup>The State filed a Motion to Strike, noting that Mr. Garcia's motions are duplicative and redundant. The State is correct, but the Court opts to treat the Motions together as they significantly overlap. The Motion to Strike is denied.

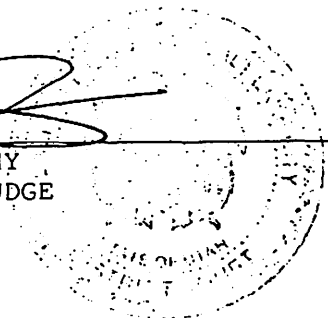
trial court to issue an order of restitution beyond the one-year date from sentencing, contrary to § 77-38a-302(5)(d)'s provision that after the one-year mark, any issue of restitution goes to the Board of Pardons; Mr. Garcia suggests Laycock stands for the premise that the provision does not divest the Court of authority over restitution. Mr. Garcia is incorrect; the statute did not include the one-year rule when Laycock was rendered, thus negating Garcia's reliance on that case.

Because the Court does not have subject matter jurisdiction, the Court may not entertain Mr. Garcia's additional arguments that (a) the Order of Restitution is void for being served beyond the 60-day rule, Utah Code Ann. § 77-27-6(4), (b) the Order of Restitution is barred by the statute of limitations, and (c) the Order of Restitution is void as based on an unconstitutional statute.

Because this Court lost jurisdiction over this criminal matter, Mr. Garcia is not entitled to the relief he is seeking in this case. His motions are denied. The Court directs counsel for the State to prepare an Order consistent with this decision.

Dated this 21 day of August, 2014.

  
RANDALL N. SKANCHY  
DISTRICT COURT JUDGE

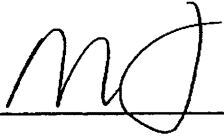


CERTIFICATE OF SERVICE

I hereby certify that I emailed/mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 21<sup>st</sup> day of August, 2014:

Sharel S. Reber  
Assistant Attorney General  
Attorney for Utah Board of Pardons  
P.O. Box 140812  
160 East 300 South, Fifth Floor  
Salt Lake City, Utah 84114-0812

Stephen G. Homer  
Attorney for Defendant  
2877 West 9150 South  
West Jordan, Utah 84088  
shomerlaw@netzero.com

  
\_\_\_\_\_

The Order of Court is stated below:

Dated: September 29, 2014  
07:15:25 AM

/s/ Randall N. Skanchy  
District Court Judge



SHAREL S. REBER (#7966)  
Assistant Attorney General  
SEAN D. REYES (#7969)  
Utah Attorney General  
Attorneys for Utah Board of Pardons  
PO Box 140812  
160 East 300 South 5<sup>th</sup> Floor  
Salt Lake City, Utah 84114-0812  
Telephone: (801) 366-0216

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

<b>STATE OF UTAH,</b>  <b>Plaintiff,</b>  <b>vs.</b>  <b>DENNIS J. GARCIA,</b>  <b>Defendant.</b>	<b>ORDER OF THE COURT</b>    <b>Case No. 061901607</b>  <b>Judge: Randall N. Skanchy</b>
---------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------

A hearing on Mr. Garcia's Motion for a New Trial, Motion to Set Aside Civil Judgment, and Motion for Judicial Determination of Unconstitutionality was held August 11, 2014, before the Honorable Randall N. Skanchy. Mr. Garcia was represented by his legal counsel, Stephen G. Homer, and the Utah Board of Pardons and Parole (Board) was represented by its counsel, Assistant Attorney General, Sharel S. Reber.

Having carefully reviewed all the pleadings submitted by both parties, having heard oral

**ATTACHMENT 4**

argument from both parties, having taken the matter under advisement to further consider the legal authorities cited by both parties and the oral argument presented by the parties, being fully advised in the premises, and good cause appearing, the Court hereby enters the following:

### **BACKGROUND**

Mr. Garcia was sentenced to 0-5 years in prison on June 2, 2008, with the Court leaving open the issue of restitution. Mr. Garcia's sentence expired April 15, 2013, and on September 24, 2013, the Board entered an Order of Restitution for \$7,000 to the Utah Office of Victims of Crime for the costs of the funeral expenses for Garcia's victim. The Court entered that Order on October 10, 2013.

Mr. Garcia sought to set aside the Order of Restitution, but in the Court's Memorandum Decision of April 11, 2014, the Court concluded that the trial court does not have jurisdiction over this matter; rather, jurisdiction was properly with the Board. See State v. Montoya, 825 P.2d 676, 679 (Utah App. 1991) ("Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case").

Mr. Garcia re-raised his arguments in a series of similar motions: Motion for New Trial; Motion to Set Aside Civil Judgment; and Motion for Judicial Determination of Unconstitutionality. He asked the Court to reconsider its April 11 decision, set aside the Order of Restitution, order a new trial for error of law under Rule 59, U.R.C.P, and relieve him from the Judgment under Rule 60, U.R.C.P, for mistake, fraud, and a void Judgment.

### **ORDER OF THE COURT**

Mr. Garcia reiterated his previous argument that the trial court maintains jurisdiction

## **ATTACHMENT 4**

(concurrent with the Board) over this matter because (a) an Order of Restitution is a legal Judgment, Utah Code Ann. § 77-38a-401(4), and the trial court's entry of the Order restores its jurisdiction over the matter, and (b) the Utah Supreme Court has implicitly held that the trial court has unending jurisdiction after sentencing. State v. Laycock, 2009 UT 53, 214 P.3d 104.

The Court reiterates its prior determination that it has been divested of jurisdiction. Mr. Garcia's rehash of his prior arguments adds no persuasive authority to change the Court's decision. Addressing the Laycock case, at first blush, Mr. Garcia is correct: Laycock allowed the trial court to issue an order of restitution beyond the one-year date from sentencing, contrary to § 77-38a-302(5)(d)'s provision that after the one-year mark, any issue of restitution goes to the Board. Mr. Garcia suggests Laycock stands for the premise that the provision does not divest the Court of authority over restitution. Mr. Garcia is incorrect; the statute did not include the one-year rule when Laycock was rendered, thus negating Garcia's reliance on that case.

Because the Court does not have subject matter jurisdiction, the Court may not entertain Mr. Garcia's additional arguments that (a) the Order of Restitution is void for being served beyond the 60-day rule, Utah Code Ann. § 77-27-6(4), (b) the Order of Restitution is barred by the statute of limitations, and (c) the Order of Restitution is void as based on an unconstitutional statute.

Because this Court lost jurisdiction over this criminal matter, Mr. Garcia is not entitled to the relief he is seeking in this case. His motions are denied. This is the final order of the Court; no further order is required. This is the end of the Order of the Court in this matter, and the Court's signature and seal appear at the top of this Order.

## ATTACHMENT 4

Page 3 of 4 pages

**CERTIFICATE OF MAILING**

I certify that I mailed a true and correct copy of the foregoing "**ORDER OF THE COURT**" postage prepaid, on this 28<sup>th</sup> day of August, 2014, to the following:

Stephen G. Homer  
Attorney for Defendant  
2877 West 9150 South  
West Jordan, UT 84088

Jacob Franklin  
Attorney for Utah Office of State Debt Collection  
State Office Building  
Box 1001  
Salt Lake City 94114-1001

**ATTACHMENT 4**

**Page 4 of 4 pages**

# PRIVATE

STATE OF UTAH  
ADULT PROBATION AND PAROLE  
SALT LAKE A. P. & P.  
36 W FREMONT AVE  
SALT LAKE CITY, UT 84101  
Telephone: (801) 239-2244

## PRESENTENCE REPORT

Date Due: 05/28/2008  
Sentencing Date: 06/02/2008

JUDGE RANDALL SKANCHY, 3RD DISTRICT - SALT LAKE CITY COURT

SALT LAKE CITY  
(CITY)

SALT LAKE  
(COUNTY)

UTAH

AIDA WOODWARD, INVESTIGATOR

NAME:	GARCIA, DENNIS JOSEPH	OFFENDER #:	184816
AKA'S:		PROS. ATTY:	MICHAEL COLBY
ADDRESS:	[REDACTED]	DEF. ATTY:	JOE ORIFICI
		INTERPRETER:	NONE
BIRTH DATE	[REDACTED]	LANGUAGE:	ENGLISH
MARITAL STATUS:	[REDACTED]	CODEFENDANTS:	NONE

COURT CASE	OFFENSE	PLEA	CONVICTION DATE
061901607	AUTOMOBILE HOMICIDE, THIRD DEGREE FELONY	NOT GUILTY	04/17/08

### RECOMMENDATION:

It is respectfully recommended by the staff of Adult Probation and Parole that the defendant is sentenced to serve the term at the Utah State Prison as prescribed by law.

ATTACHMENT 5

Page 1 of 2 pages

172



VICTIM IMPACT STATEMENT AND RESTITUTION:

Telephone contact was made with the deceased mother, [REDACTED]. Mrs. [REDACTED] plans to be present for sentencing, but is unsure at this time if she will wish to speak to the Court. Mrs. [REDACTED] states that she feels it was evident during testimony that the defendant had no other concern other than for himself and made no attempt after the accident to obtain medical assistance for [REDACTED]. She states that regarding restitution she did file a civil suit in order for Shane's automobile insurance to pay for the accident. She states the matter is still pending collection from the company and that they have asked for an additional \$[REDACTED] which was over the amount covered for the funeral expenses by Crime Victim Reparations.

According to the Utah Office of Crime Victim Reparations they paid \$7,000 for funeral expenses in this offense. Reference CVR # 151627 for restitution payments.

DEFENDANT'S LIFE HISTORY AND CURRENT LIVING SITUATION:

The defendant was born in Utah and is the youngest of four children born to [REDACTED] and [REDACTED] a. He reports having a normal/close family having excellent relationships with his parents and no particular problems other than both parents are deaf. He states it was a problem when he was younger as he felt other people made fun and took advantage of his deaf parents. He feels he had a good childhood and his parents did a good job raising their family he had everything he could wish for as a child. In June 1998 the defendant married his longtime girlfriend, [REDACTED]. They have three children together who born before they were legally married. Since their divorce in 2002 he feels they have maintained a "rocky" relationship. The defendant is not romantically involved with anyone at present and has recently felt he should try to work things out with his ex-wife. He reports that around 2004 he started hanging out with the "wrong crowd." Since this accident though, he has quit drinking and using illegal drugs. He reports that God has become a major part of his life and he's realized how precious life is and how much, God, his children, his family and a couple good friends really mean to him. The defendant was living with his parents in their [REDACTED] home before his incarceration..

EDUCATION, EMPLOYMENT AND FINANCIAL INFORMATION:

The defendant attended [REDACTED] through the tenth grade, but finished with his diploma from [REDACTED] an alternative school in 1992. He has received some advance sign language training since graduation and is interested in going to school to become a sign language interpreter. He reports he knows sign language now as it was the primary language in his home while growing up. The defendant has worked in various jobs including customer service and construction work. Prior to this offense he was working construction but suffered injuries in this accident and could no longer do the work. Prior to coming to jail in April 2008 he was working as a Customer Service Representative part time for an internet coaching business out of [REDACTED]. The defendant has some past due bills for child support, rent and personal loans from family members. Since this offense he feels he has gotten himself "buried in debt."

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

GAIL BUCKLEY vs. DENNIS JOSEPH GARCIA

CASE NUMBER 080903244 Wrongful Death

---

CURRENT ASSIGNED JUDGE

ROYAL I HANSEN

PARTIES

Plaintiff - GAIL BUCKLEY

Represented by: MARGARET H OLSON

Defendant - DENNIS JOSEPH GARCIA

Represented by: SYLVIA G ACOSTA

ACCOUNT SUMMARY

TOTAL REVENUE Amount Due: 233.50

Amount Paid: 233.50

Credit: 0.00

Balance: 0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

Amount Due: 155.00

Amount Paid: 155.00

Amount Credit: 0.00

Balance: 0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL

Amount Due: 75.00

Amount Paid: 75.00

Amount Credit: 0.00

Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due: 3.50

Amount Paid: 3.50

Amount Credit: 0.00

Balance: 0.00

CASE NOTE

PROCEEDINGS

02-25-08 Case filed

**ATTACHMENT 6**  
Page 1 of 2 pages

02-25-08 Judge VERNICE TREASE assigned.

02-25-08 Filed: Complaint No Amount

02-25-08 Filed: Demand Civil Jury

02-25-08 Fee Account created Total Due: 155.00

02-25-08 Fee Account created Total Due: 75.00

02-25-08 COMPLAINT - NO AMT S Payment Received: 155.00

Note: Code Description: COMPLAINT - NO AMT S, Code

Description: JURY DEMAND - CIVIL, Mail Payment;

02-25-08 JURY DEMAND - CIVIL Payment Received: 75.00

04-24-08 Filed: Answer

DENNIS JOSEPH GARCIA

04-30-08 Filed return: Summons with Affidavit of Service

Party Served: GARCIA, DENNIS JOSEPH

Service Type: Personal

Service Date: April 14, 2008

08-08-08 Filed: Joint Motion and Stipulation for Dismissal with  
Prejudice

Filed by: ACOSTA, SYLVIA G

08-12-08 Filed order: Order for Dismissal with Prejudice

Judge VERNICE TREASE

Signed August 12, 2008

08-12-08 Case Disposition is Dismissed

Disposition Judge is VERNICE TREASE

08-17-12 Judge ANDREW H STONE assigned.

11-02-12 Judge DENO HIMONAS assigned.

03-24-14 Fee Account created Total Due: 3.50

03-24-14 COPY FEE Payment Received: 3.50

Note: 5.00 cash tendered. 1.50 change given.

03-16-15 Judge ROYAL I HANSEN assigned.

**GAIL BUCKLEY, individually and as personal representative of the ESTATE OF  
THOMAS SHANE BUCKELY V. DENNIS JOSEPH GARCIA**  
Third Judicial District Court, in and for Salt Lake, State of Utah, Case No  
080903244

**General Release and Settlement Agreement**

For and in consideration of the payment to the undersigned, GAIL BUCKLEY, individually and on behalf of the estate and heirs of THOMAS SHANE BUCKELY, for and in the sum of TWENTY FIVE THOUSAND AND 00/100 CBNTS (\$25,000.00), the receipt and sufficiency of which are hereby acknowledged, the undersigned on her own behalf and for all heirs, executors, administrators and assigns, does hereby RELEASE and FOREVER DISCHARGE UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "UNITED"), its officers, directors, employees, insurers and/or successors (collectively "the parties") and its insured(s), DENNIS JOSEPH GARCIA (hereinafter the "Insured"), if any, from any claims, demands, obligations, actions, causes of action, losses of services, property damage, repairs, costs, and expenses or compensations, of any nature whatsoever, resulting from or relating to the aforementioned claims arising from the car accident occurring on or about March 8, 2006. The details are more fully set forth in the litigation entitled GAIL BUCKLEY, individually and as personal representative of the ESTATE OF THOMAS SHANE BUCKELY V. DENNIS JOSEPH GARCIA Civil No. 080903244, Third Judicial District Court, Salt Lake County, State of Utah. It is intended that this Agreement shall relieve United, its officers, directors, employees, insurers and/or successors and its insured, if any, from any further duties, responsibilities, or obligations relating to or arising from the accident, or any other action or inaction by United or the insured relating thereto.

Nothing contained herein, nor the consummation of this Agreement, shall be construed or deemed as an admission of liability, culpability, negligence, or wrongdoing on the part of United or the insured. The Parties hereto have entered into this Agreement with the intention to avoid further litigation with its attendant inconveniences and expenses. Irrespective of whether this Agreement is fully consummated, nothing contained herein, or any prior draft hereof, or in any form of communication pertaining to the consummation of this Agreement, shall be construed or deemed at any time or place, or in any proceedings, to be an admission or concession, expressed or implied, of any allegation, inference, implication, or charge of wrongdoing, liability, negligence, culpability, or lack thereof by the Parties. This Agreement may be pled or asserted by or on behalf of the Parties as a defense and complete bar to any action, claim, counter-claim, cross-claim, cause of action, demand or proceeding that may be brought, instituted, or taken, against or on behalf of the Parties with respect to any of the matters set forth herein, excepting only any obligations duly arising out of the terms of this Agreement.

It is understood and agreed that subject to the terms and conditions of this Agreement the payment of the sums referenced herein by or on behalf of United or its insured are made and accepted in compromise and settlement of disputed claims, and that this Agreement shall terminate all issues which have been, might have been, or could be raised in any suit, or action in any court of law or equity, or any judicial, quasi-judicial,

or administrative forum, arising from or relating to the aforementioned claims and accident, and any other action or inaction by United or the insured relating thereto.

The Parties represent at the time of execution of this Agreement that they are authorized and competent to execute this Agreement, and furthermore, each of them acknowledge that they either have sought and obtained the advice of counsel concerning the rights and obligations confirmed by this Agreement or they have expressly and knowingly waived the opportunity to seek and obtain the advice of counsel concerning the rights and obligations confirmed by this Agreement.

The Parties each acknowledge that: (i) they are executing this Agreement in reliance solely on their own judgment, belief, and knowledge, and upon the advice of their legal counsel if sought; (ii) no promise, inducement or agreement not herein expressed has been made to any Party by any other Party, or person acting on his behalf; (iii) the terms and conditions contained herein are contractual and not mere recitals; and (iv) this Agreement contains the entire Agreement between the Parties hereto.

This Agreement sets forth the entire understanding of the Parties replacing any and all prior agreements relating to the subject matter hereof. This Agreement may be changed, amended, or terminated, only by a similar written instrument executed by all Parties to be bound thereby.

If any provision of this Agreement is held to be unlawful, invalid, or unenforceable under any present or future laws, such provision shall be fully severable; and this Agreement shall then be construed and enforced as if such unlawful, invalid, or unenforceable provision had not been a part hereof. The remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such unlawful, invalid, or unenforceable provision or by its severance therefrom. Furthermore, in lieu of such unlawful, invalid or unenforceable provision, there shall be added automatically as a part of this Agreement, a provision as similar in terms to such unlawful, invalid or unenforceable provision as may be possible and legal, valid and enforceable.

The individuals executing this General Release and Settlement Agreement represent that each has full authority to enter into and sign this Release and Agreement on behalf of the entities so released.

Dated this 5 day of June 2008.  
Day Month

Gail Buckley  
GAIL BUCKLEY, on behalf of the heirs of  
Thomas Shane Buckley

STATE OF UTAH )  
COUNTY OF Utah ) ss.

On this 5 day of JUNE, 2008 personally appeared before me, Gail Buckley known personally to me (or satisfactorily proven) to be the person(s) whose names are subscribed to on this General Release and Settlement Agreement, and being first duly sworn, acknowledged that they voluntarily and knowingly executed the same.

Tara L Merryweather  
Notary Public

Dated this 5 day of June 2008.  
Day Month



Gary R. Herbert  
Governor  
Clark A. Harms  
Chairman



Members  
Curtis L. Garner  
Jesse Gallegos  
Robert S. Yeates  
Angela F. Micklos

## BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH

Offender # 184816Consideration of the Status of Dennis Joseph GarciaUSP # 42994

The above-entitled matter came on for consideration before the Utah State Board of Pardons on the 5th day of October, 2010 for:

### ORIGINAL HEARING

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

Results	Effective Date
1. EXPIRATION OF INMATE SENTENCE	4/15/2013

#### Hearing Notes

- Other: The restitution owed of \$ 7000.00 on Case# 06-1607 will be forwarded to the sentencing Court for a Civil Judgement.
- Final decision of the hearing held on 10/05/2010.

No	Crime	Sent	Case No.	Judge	Expiration
1.	AUTOMOBILE HOMICIDE	0-5	061901607	SKANCHY	4/15/2013

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

By order of the Board of Pardons of the State of Utah, I have this date 7th day of October, 2010, affixed my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.

  
Clark A. Harms, Chairman

## ATTACHMENT 8

Page 1 of 1 page

188

Gary R. Herbert  
Governor  
Clark A. Harms  
Chairman



Members  
Curtis L. Garner  
Jesse Gallegos  
Robert S. Yeates  
Angela F. Micklos

**BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH**Consideration of the Status of Dennis Joseph GarciaOffender # 184816USP # 42994**HEARING OFFICER RESULTS**

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

Results	Effective Date
1. NO CHANGE	10/13/2010

**Hearing Notes**

1. No change in the expiration of inmate sentence on 04/15/2013.
2. Other: The restitution owed will be forwarded to the sentencing Court for a Civil Judgement.
3. The Board of Pardons is aware this is not a regular release date. CLERICAL ERROR CORRECTED.

No	Crime	Sent	Case No.	Judge	Expiration
1.	AUTOMOBILE HOMICIDE	0-5	061901607	SKANCHY	4/15/2013

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

By order of the Board of Pardons of the State of Utah, I have this date 13th day of October, 2010, affixed my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.

Clark A. Harms, Chairman





## BOARD OF PARDONS & PAROLE

448 East 6400 South, Suite 300  
Murray, Utah 84107  
Tel (801) 261-6464  
Fax (801) 261-6481  
[www.bop.utah.gov](http://www.bop.utah.gov)

Gary R. Herbert  
Governor  
Clark A. Harms  
Chairman  
Angela F. Micklos  
Vice Chair  
Jesse Gallegos  
Curtis L. Garner  
Robert S. Yeates  
Members

May 17, 2011

Family and Friends of Dennis Garcia  
3952 W. 8620 So.  
West Jordan, Utah 84088

RE: Dennis Garcia  
Offender # 184816

To Whom It May Concern,

The Board of Pardons has received your letter and I have been asked to respond. You ask that re-consider the decision to keep Dennis in prison for the full five year term given by the Judge.

As you may be aware, Dennis Garcia is in prison for Automobile Homicide, having killed his friend and passenger. The Board of Pardons has the administrative ability to give him the full five years, so it would appear very fortunate that Aaron only received the Third Degree Felony he did.

Although we acknowledge the support at his Original Hearing, it was not a popularity contest, so no weight is given just because his friends were there, and the victim's family wasn't. I will send the inmate a copy of the Aggravating and Mitigating factors if he did not receive one. When released from prison, it is hoped that Dennis will never do another horrendous crime such as this. If he is working inside, it is hoped he has already started to pay the \$7,000 burial expenses. As you have now brought that to our attention, I will send a copy of this to Crime Victims Reparations who will be seeking that restitution amount (CVR # 151627) as we will pursue a Civil Judgment against him.

Respectfully,

Kent Wm. Jones  
Senior Hearing Officer

CC: Board file  
Dennis Garcia  
Caseworker Phillip Green  
Lori Maroney-CVR

ATTACHMENT 10

Page 1 of 1 page

**Offender No:** 184816

**DENNIS GARCIA**

**Location: PROMONTORY**

**DD 11**

Utah Department of Corrections  
NORM Offender Accounting System  
**INMATE ACCOUNT STATEMENT**  
From: 3/18/2013 To: 3/31/2013

<b>Offender No:</b>	<b>First Name:</b>	<b>Last Name:</b>	<b>3/18/2013 Begin Bal:</b>	<b>3/31/2013 End Bal:</b>
184816	DENNIS	GARCIA	78.76	45.37

**Transaction Detail**

<b>Document No</b>	<b>Posting Date</b>	<b>Description</b>	<b>Amount</b>	<b>Balance</b>
1286469-001	3/18/2013	Commissary 03/18/13	-12.85	65.91
1291862-001	3/25/2013	Commissary 03/25/13	-20.54	45.37
Available Balance as of 3/31/2013				45.37

**Victim Restitution**

<b>Restitution Balance:</b>	<b>Restitution Interest:</b>	<b>Balance:</b>
0.00	0.00	0.00

DISCLAIMER: The victim restitution information listed above is based upon data that is currently documented in NORM. There may be other outstanding victim obligations not yet entered.

Utah Department of Corrections  
SOUTH POINT  
**STATEMENT OF ACCOUNT**  
Offender Account Activity

Statement Date: 05/31/2008 To: 06/13/2008

Page 1 of 1

**ACCOUNT TRANSACTION DETAIL:**

Account: GARCIA, DENNIS JOSEPH

Account Balance: 64.68

Trans. ID	Trans. Date	Transaction Description	Debit	Credit	Account Balance
		Beginning Balance			0.00
1055149	06/05/2008	Cash Receipt - INTAKE		82.08	82.08
1055848	06/09/2008	Commissary Purchase; Invoice 840536	17.40		64.68
		Ending Balance			64.68

**Victim Restitution (NORM):**

Principle: \$0.00

Interest: \$0.00

Balance: \$0.00

**DISCLAIMER:** The victim restitution information listed above is based upon data that is currently documented in NORM. There may be other outstanding victim restitution obligations not yet entered.

**MESSAGES:**

Please write to Inmate Accounting if you have any questions about your account. Thank you.