

2016

## **The State of Utah, Appellee-Respondent, vs. Dennis J Garcia, Appellant-Petitioner**

Utah Supreme Court

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THE STATE OF UTAH,  
Appellee-Respondent  
vs  
DENNIS J GARCIA,  
Appellant-Petitioner

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  
  
Appellees-Respondents

Appellate Case No. 20160932SC

Appeal from a decision of the Third Judicial District Court  
in and for Salt Lake County  
The Honorable Randall Skanchy, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

-----

THE STATE OF UTAH,	)	
	)	
Appellee-Respondent	)	
	)	
vs	)	PETITIONER'S BRIEF
	)	
DENNIS J GARCIA,	)	
	)	
Appellant-Petitioner	)	
	)	
-----	)	
UTAH BOARD OF PARDONS AND	)	[Certiorari review of a Utah
PAROLE, a governmental	)	Court of Appeals decision]
agency of the State of Utah,	)	2016 UT App 96]
and UTAH OFFICE OF DEBT	)	
COLLECTION, a governmental	)	
agency of the State of Utah,	)	
	)	
Intervenors and	)	
real-parties-in-interest	)	ORAL ARGUMENT REQUESTED
	)	
Appellees-Respondents	)	Appellate Case No. 20160932SC

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STATUTORY PROVISIONS PERTINENT HERETO

Section 77-27-6, Utah Code [excerpts]:

. . . .

(2)(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 defendant's sentence.** [Emphasis added]

. . . .

(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]

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

THE STATE OF UTAH,	)	
	)	
Appellee-Respondent	)	
	)	
vs	)	PETITIONER'S BRIEF
	)	
DENNIS J GARCIA,	)	
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	)	
-----	)	[Certiorari review of a
	)	decision of the Utah
UTAH BOARD OF PARDONS AND	)	Court of Appeals]
PAROLE, a governmental	)	2016 UT App 96
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-Respondents	)	Appellate Case No. 20160932SC

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**IDENTIFICATION OF PARTIES**

The parties hereto are as identified above. In January 2014 the UTAH BOARD OF PARDONS AND PAROLE and the UTAH OFFICE OF DEBT COLLECTION, each separately represented by authorized counsel from the Utah Attorney General Office, voluntarily applied for---and were granted---"intervention" into the "case". Those State agencies participated extensively in the District Court proceedings. See, for example, RECORD at 155-275. The State, through its Assistant Attorney General counsel, in proceedings before the Utah

Court of Appeals, seemingly sought to overlook and ignore that "intervention" and participation by those state agencies.<sup>FOOTNOTE<sup>1</sup></sup>

#### STATEMENT OF JURISDICTION OF THE UTAH SUPREME COURT

The Utah Supreme Court has, pursuant to the provisions of Section 78A-3-102(3)(a), Utah Code, appellate jurisdiction over a judgment of the Utah Court of Appeals.

The Utah Supreme Court has jurisdiction for "certiorari" review of the Utah Court of Appeals DECISION pursuant to Section 78A-3-102(5), Utah Code. See also Rules

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<sup>1</sup>This identification of parties is not merely "routine" (i.e. Rule-expected) formality; the issue may prove substantial.

On "appeal" before the Court of Appeals, the State---acting through the Office of the Utah Attorney General---seemingly attempted to downplay the significance---if not the actual existence---of the voluntary "intervention" applied for and granted to the two state agencies within the District Court proceedings. None of the "State's" appeal materials facially indicated concurrent "representation" of either of the two state agencies---the Board of Pardons or the Debt Collection agency---or even claimed the two agencies were even "parties" to the "appeal" to the Utah Court of Appeals.

The "State of Utah" acting through the Salt Lake County District Attorney, did not appear before Judge Skanchy and made no argument within GARCIA's "set aside" motion. Thus, if the BOARD and/or the DEBT COLLECTION OFFICE were NOT formally before the Court of Appeals (on the prior "appeal"), then they cannot be before this Court. Thus, before this court, none of the Arguments raised (or to be raised) were raised by these specific "respondents" and ought not be properly considered within this certiorari review, as being raised for the first time "on (this) appeal".



45 through 51, Utah Rules of Appellate Procedure.

On 30 January 2017 the Utah Supreme Court issued an Order granting a writ of certiorari to review the Court of Appeals decision. See ATTACHMENT 4, herein.

#### ISSUE PRESENTED FOR REVIEW

Certiorari review of the Utah Court of Appeals Decision [2016 UT App 96, issued 12 May 2016], hereinafter "the DECISION", and the predicate factual situation surrounding it, has been determined and is framed by the Supreme Court's 30 January 2017 order granting certiorari review:

Whether the Court of Appeals erred in affirming the district court's determination that it lacked jurisdiction to adjudicate Petitioner's motion to set aside the Board of Pardons and Parole's restitution order.

ORDER of the Utah Supreme Court, 30 January 2017. See ATTACHMENT 4, hereto.

STANDARD OF REVIEW: On certiorari, "we review the decision of the court of appeals and not that of the district court." **State vs Hansen**, 2002 UT 125, ¶ 25, 63 P.3d 650 (internal quotation marks omitted). See also **Salt Lake City vs Miles**, 2014 UT 47, 342 P.3d 212 (Utah Supreme Court 2014). The Supreme Court's review of statutory interpretations by the Utah Court of Appeals is for correctness, giving no deference to the Court of Appeals conclusions. **Stephens vs Bonneville Travel, Inc.**, 935 P.2d 518, 519 (Utah Supreme Court 1997); **Salt Lake City vs Miles**, 2014 UT 47, 342 P.3d

212 (Utah Supreme Court 2014).

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 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.

#### **CITATION TO UTAH COURT OF APPEALS DECISION**

The decision of the Utah Court of Appeals---hereinafter referred to as "the DECISION"---is officially reported at 2016 UT App 96, issued 12 May 2016. Petitioner's counsel is unaware that the West Publishing Company has identified the DECISION for inclusion in the Pacific Reporter, Third Series.

On 26 September 2016 the Court of Appeals denied Petitioner's petition for rehearing.

#### **STATEMENT OF THE CASE**

This "case"---in the context of this "certiorari" review of a formal decision of the Utah Court of Appeals---involves the Petitioner's challenge to the "civil judgment" which arose from the filing with the District Court of an "order of restitution" which had been "made" (statutory term) by the Utah Board of Pardons and Parole ["the Board"] against a former prisoner who had completely served his court-ordered sentence of incarceration and thereafter

forwarded to the District Court for "entry" (statutory term) on the judgment docket. See Subsection 77-27-6(4), Utah Code.

In March 2006 Appellant-Petitioner GARCIA was the driver of a motor vehicle involved in a single-car accident in Salt Lake County, in which his passenger was killed. Mr GARCIA was arrested at the scene and subsequently charged with the offense of automobile homicide, a third-degree felony. RECORD at 1 et seq. In mid-April 2008 he was convicted of the felony and ordered to confinement, pending sentencing; in June 2008 GARCIA was sentenced to the indeterminate term of incarceration not to exceed "five years", with "credit given for time served" (while in pre-sentence confinements: circa 47 days). GARCIA was released from prison confinement on or about 15 April 2013. RECORD at 127-128.

In September 2006 the Utah Office for Crime Victim Reparations paid to Mrs Gail Buckley, the mother of GARCIA's deceased passenger, the sum of \$7,000 as "reimbursement" for "funeral expenses" she had paid. It is this \$7,000 which is the basis of the Board-ordered "restitution". Mrs Buckley ultimately filed a timely civil lawsuit against GARCIA for "wrongful death", including claims for "funeral expenses". In her separately-filed lawsuit Mrs Buckley did not disclose that the State had paid her the \$7,000. Shortly thereafter

Mrs Buckley "settled" with GARCIA and his liability insurance carrier and was paid the "policy limits" of \$25,000 for the funeral expenses, medical expenses and the deceased's pain and suffering. The State agency (Office of Crime Victims Restitution) NEVER filed civil suit---pursuit to its "subrogation" rights arising under the agency's "reimbursement" payment to Mrs Buckley---against GARCIA; the State agency's claims would have been time-barred by the then-applicable statute of limitation [78B-2-304(2), Utah Code] in March 2008---months BEFORE the Board of Pardons acquired any jurisdiction (for "restitution") over GARCIA as a result of his incarceration.

At no time during his 5-year confinement did the Board of Pardons hold the statutorily-required [77-27-5(1), UC] "full hearing" on any "restitution" owed by GARCIA. The State has ADMITTED, in writing, numerous times, that no "restitution hearing" was held. RECORD at 161, at 217-218, and at 562-563.

On or about 24 September 2013---more than five months after GARCIA had been released from prison at the expiration of his sentence---the Utah Board of Pardons and Parole prepared and entered an "order of restitution" [ATTACHMENT #2] against GARCIA for the amount of \$7,000 payable to the Utah Office for Victims of Crime, as reimbursement for "funeral expenses" paid to Mrs Gail Buckley, mother of

GARCIA's accident victim. On or about 11 October 2013 the Board-prepared "order of restitution" was filed with the Third District Court (as "sentencing court", Section 77-27-6, Utah Code). RECORD at 119. On 8 November 2013 GARCIA filed a "motion to set aside" the "restitution order" and/or the civil judgment arising from the filing thereof. RECORD at 122-125. The "set aside" motion was based upon the Board's failure to comply with the statutory restrictions of Subsection 77-27-6(2) and 77-27-6(4), Utah Code, which expressly require Board-prepared orders of restitution to be "made" not later than "within 60 days of expiration of sentence".

In January 2014 Intervenors UTAH BOARD OF PARDONS AND PAROLE and the UTAH OFFICE OF DEBT COLLECTION petitioned for voluntarily "intervention" into the criminal case. The District Court granted the "intervention" motion and the two Intervenors took an extensive and active role in the case. See RECORD at 155-275.

In April 2014 the District Court ruled it had "no jurisdiction" to consider GARCIA's "set aside" motion. RECORD at 279-284. Defendant GARCIA timely filed a "motion for new trial", which identified additional grounds as to the invalidity of the Board action against GARCIA. In August 2014 the District Court denied the "motion for new trial". RECORD at 593-596. In September 2014 the Court entered its

"final judgment" document. RECORD at 604-607. A "notice of appeal" was timely filed 25 October 2014. RECORD at 611-612.

Briefing was undertaken before the Utah Court of Appeals in 2015. In February 2016 the Utah Court of Appeals issued a "supplemental briefing order"---of which a photocopy is included at ATTACHMENT 3 hereto---directing that the parties "supplementally brief" the "effect of" Court's decision in the **State vs Schultz**, 2002 UT App 297, 56 P.3d 974 (Utah Court of Appeals 2002) case [hereinafter "**Schultz**"]. [A photocopy of **Schultz** is included herewith as ATTACHMENT 6 to this BRIEF.] Both parties complied and filed supplemental briefs. On 12 May 2016 the Court of Appeals issued its DECISION, 2016 UT App 96, affirming the District Court on the basis of "no post-sentence jurisdiction" (paraphrased) for the sentencing court to set aside the "restitution order". See DECISION, ¶ 10.

Defendant GARCIA filed for "rehearing" of the Court of Appeals Decision. The "rehearing" issue---namely, that the Court overlooked **Schultz**---was thoroughly briefed by Appellant, again, for the second time. The State filed an abbreviated brief in response thereto. On 26 September 2016 the Court of Appeals denied the "petition for rehearing": in the totality of the situation, the Court of Appeals had intentionally ignored the "effect of" its previous decision (albeit of a different "panel") of **Schultz**, but dared not

expressly say so.

Appellant GARCIA timely petitioned the Utah Supreme Court for "certiorari" review. On 30 January 2017 this Court entered an Order granting certiorari review on a limited issue: the correctness of the DECISION.

#### ARGUMENT

On certiorari, "we review the decision of the court of appeals and not that of the district court." **State vs Hansen**, 2002 UT 125, ¶ 25, 63 P.3d 650 (Utah Supreme Court 2002) (internal quotation marks omitted). See also **Salt Lake City vs Miles**, 2014 UT 47, 342 P.3d 212 (Utah Supreme Court 2014).

The Supreme Court's review of statutory interpretations by the Utah Court of Appeals is for correctness, giving no deference to the Court of Appeals conclusions. **Stephens vs Bonneville Travel, Inc.**, 935 P.2d 518, 519 (Utah Supreme Court 1997); **Salt Lake City vs Miles**, supra.

#### I

THE DECISION VIOLATES THE "STARE DECISIS" DOCTRINE  
BY IGNORING PREVIOUSLY-ESTABLISHED PRECEDENT  
CLEARLY APPLICABLE TO THE CASE AT HAND

#### A

The centuries-old doctrine of "stare decisis"---the concept that an appellate decision upon a principle of law becomes binding upon inferior tribunals and even that decision-making appellate court itself---is a revered

bulwark of Anglo-American jurisprudence. When honored and followed, the doctrine achieves stability, predictability and uniformity in the understanding and application of "the law". When "stare decisis" is not followed, misunderstanding arises and expensive (to parties and courts), unnecessary litigation---burdensome at all levels to an overloaded judicial system---results. This "case" absolutely proves this latter result. If "stare decisis" isn't followed, there is simply no "rule of law".

In 1993 the Utah Supreme Court issued its decision in the case of **State vs Thurman**, 846 P.2d 1256 (Utah Supreme Court 1993). **Thurman** involved a "search and seizure" law question, generally inapplicable to the instant case directly. However, in describing the doctrine of "stare decisis" and its application to the Utah Court of Appeals, the Utah Supreme Court wrote:

. . . This [stare decisis] doctrine, under which the first decision by a court on a particular question of law governs later decisions by the same court, is a cornerstone of Anglo-American jurisprudence that is crucial to the predictability of the law and fairness of adjudication. The very viability of the common law depends in large part on the doctrine. "[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it."

Although the doctrine is typically thought of when a single-panel appellate court is faced with a prior decision from the same court, **stare decisis has equal application when one panel of a multi-panel appellate court is faced with a prior decision from a different panel.** . . . [The] general federal rule [is] that "a decision of a



panel constitutes a decision of the court and carries the weight of stare decisis in a subsequent case before the same or a different panel." Any other rule would produce unacceptable indeterminacy in the law and would undermine confidence in its institutions. **If stare decisis has no application to a multi-panel court such as the court of appeals**, it would sanction a judicial system under which an appeal would be dependent more upon the composition of the panel hearing the case than on whether the issue has been previously addressed and decided by that court.

846 P.2d at 1269. Emphasis added. Bracketed text added for clarity. Citations to authorities cited therein omitted.

B

In February 2016 the Court of Appeals issued a SUPPLEMENTAL BRIEFING ORDER [included herewith as ATTACHMENT 2 hereto]. The SUPPLEMENTAL BRIEFING ORDER directed the parties to "supplementally brief" the question of whether the Appellant must file an "independent action" in which to raise his "set aside" claims, and additionally stated:

In addressing this issue, the parties should **specifically address the effect of this court's analysis in *State v. Schultz*, 2002 UT App 297, 56 P.3d 974.**

Emphasis added. By this statement the Court of Appeals explicitly recognized the **State vs Schultz**, 2002 UT App 297, 56 P.3d 974 (Utah Court of Appeals 2002) decision---which had not been previously identified within either parties' briefings---to be of possible significance in the resolution

of the case.<sup>FOOTNOTE<sup>2</sup></sup>

As directed by the Utah Court of Appeals, Appellant-Petitioner GARCIA submitted an exhaustive---within the Court-imposed page limitation for the "supplemental brief"---analysis of "the effect of **Schultz**", to the conclusion that **Schultz** was binding precedent and dispositive of the case, in Appellant GARCIA's favor. [The State filed a short (less than five pages total brief length), half-hearted "supplemental" argument against the applicability of **Schultz**.]

Notwithstanding the Court of Appeals' specific identification of **Schultz** as being implicated in the appeal, the Court of Appeals' DECISION is absolutely silent concerning **Schultz**, and more precisely whether **Schultz** is to be followed or has been overruled. There is not even a

---

<sup>2</sup>Defendant and his counsel were unaware of Schultz until thus notified thereof. On the other hand, the Board's counsel was aware of **Schultz** beforehand---she had actually participated as "lead counsel" on appeal in the **Schultz** case---but failed to disclose **Schultz** to either tribunal, as ethical standards prescribed. See Rules of Professional Conduct, Rule 3.3(a), which provides in relevant part:

A lawyer shall not knowingly . . . (a) (2) **fail to disclose** to the tribunal legal authority in the controlling jurisdiction **known to the lawyer** to be **directly adverse to the position of the client** and not disclosed by opposing counsel; . . .

Emphasis added.

One can only imagine how much-unneeded litigation and resultant expense might have been avoided had the Board's counsel made proper disclosure of **Schultz** to the District Court, as the professional ethics Rule required.

single reference to **Schultz** made within the Decision. The Decision makes no attempt to distinguish **Schultz**, to reconcile the decision with the current situation and/or to overrule **Schultz'** clear holding [that the late-made, Board-ordered "restitution" was itself invalid and must be set aside].

In **Schultz** the criminal defendant---facing a "writ of garnishment" issued (against him, years after his original sentencing and even after his parole had been terminated) to collect upon a "civil judgment" entered by the district court acting upon Board-ordered restitution---filed a "motion" [not expressly under Rule 60(b)] seeking to "set aside" a "restitution" judgment entered against him for Board-ordered restitution.

**Schultz** represents a correctly-decided, long-standing controlling precedent---which certainly should not be abandoned or disregarded---dispositive of the case-at-hand. **Schultz** involved a factual and legal situation strikingly similar to the case at bar: Board-ordered restitution, but nevertheless "late" made, together with Board-made arguments advanced to justify that lateness. The **Schultz** holding [of "no jurisdiction" for the Board to file the late-made restitution order (see ¶¶ 14, 19-20 of **Schultz**)] should be followed and applied in the instant case. In the instant situation, the Board's failure to make and file with the

sentencing court its written "restitution order" in a timely manner violates the statutory deadline: namely "within 60 days" [77-27-6(4)] of GARCIA's release, has---in the wording of **Schultz**---deprived the Board of "jurisdiction" to issue the order, which is thus invalid. The statutorily-prescribed "deadline"---namely, Subsection 77-27-6(2), which provides:

"the board shall make **all** orders of restitution **within 60 days . . .**" (of prisoner's expiration of sentence) [Emphasis added]

---is "jurisdictional" for the Board to make the order in the first place. The Court must recognize and apply the legislatively-imposed "deadline" before which the Board must act. The Board's failure to do so in this case is fatal to the validity of its "restitution order". [In the closing sentences of ¶ 8 of **Schultz** the Court wrote: "Although the statute does not expressly provide a deadline for submitting a restitution order to the sentencing court, . . .". Such may have been the situation in 2002 was decided. Obviously, the Legislature---ostensibly acting (in 2005) at the behest of its staff attorneys charged to monitor appellate court decisions which detect deficiencies in the statutory scheme---later adopted the "within 60 days" requirement for Board action. Laws of Utah 2005, ch 96, §2. See Subsection 77-27-6(2), Utah Code.]

Petitioner's "petition for rehearing" to challenge the

DECISION vigorously and exhaustively presented **Schultz** and its application to the case-at-hand. The Court of Appeals ignored the arguments and denied the "rehearing" to correct its obvious error.

The Court of Appeal's decision in **Schultz**---in 2002---is illuminating, even controlling and dispositive as binding, "stare decisis" precedent which should be followed. **Schultz** represents a correctly-decided, long-standing controlling precedent---which certainly should not be abandoned or disregarded---dispositive of the case-at-hand. **Schultz** involved a factual and legal situation strikingly similar to the case at bar: Board-ordered restitution, but nevertheless "late" ordered, together with Board-made arguments therein. The **Schultz** holding [of "no jurisdiction" for the Board to file the "late" made restitution order (see ¶¶ 14, 19-20)] should be followed here. That the "Board has no jurisdiction" result is precisely the situation in the instant case. [It must be noted that the underlying statute [Section 77-27-6, Utah Code] in **Schultz** was not precisely the same as in the instant case: namely, the "within 60 days" requirement of Subsection 77-27-6(2)---adopted by the 2005 Legislature---was not in effect at the time **Schultz** was decided in 2002. [The "within 60 days" standard is also recognized and required in Subsection 77-27-6(4).] After the statutory "within sixty days" period expired, the Board

itself "lost jurisdiction"---an ironic twist to the Board's argument advanced herein---to issue the "restitution order". The Board's failure to issue and file its written "restitution order" in a timely manner, "within 60 days" of GARCIA's release, has---in the wording of **Schultz**---deprived the Board of "jurisdiction" to issue the order, which is thus invalid. In **Schultz** the Board-prepared "order of restitution" actually "filed" with the District Court was but a few days "late"; nevertheless, "late" is "late" and the **Schultz** appellate "panel" approved the trial court's setting aside. In GARCIA's situation, the BOARD was more than three months "late" of the statutorily-identified "deadline". The BOARD simply no longer had any "jurisdiction" itself to "make" its "restitution order".

**Schultz** is dispositive not only for the "set aside" result, but also implicitly disregards the "no jurisdiction/lost jurisdiction" issue singularly claimed by the STATE---but erroneously so---in this appeal. **Schultz** implicitly recognizes the District Court's "jurisdiction" in the "restitution" context, including the ability to "set aside" the "judgment" arising from the filing of the Board's late-made "restitution order". The Court of Appeals in **Schultz** had no trouble in "setting aside" the late-filed "order of restitution".

The **Schultz** Court's reasoning process is consistent and

clear from its numerous statements therein, thus:

" . . . **Thus, the Board did not have jurisdiction over Schultz at the time . . .**" [Schultz, ¶ 12, 56 P.3d at 977]

" . . . the restitution order was issued when the Board no longer had jurisdiction over Schultz. Therefore, the order had no effect. Because the Board had no jurisdiction to issue the restitution order, the sentencing court also did not have jurisdiction to enter the order as an enforceable civil judgment." [Schultz, ¶14, 56 P.3d at 977-978.]

" . . . once an offender's parole and sentence have been terminated, **the Board loses jurisdiction . . .**" (to issue a restitution order to be collected via the sentencing court). [Schultz, ¶18, 56 P.2d at 978] [parenthetical text added]

Emphasis added in all quotations.

The so-called "holding" of **Schultz** is made absolutely clear in its "conclusion", so stated, thus:

" . . . In this case, the Board issued the restitution order after the termination of Schultz's sentence and parole. At that time, the Board no longer had jurisdiction over Schultz. Therefore, the sentencing court's entry of the order on the judgment docket is equally invalid.

200 UT App 297, ¶ 19, 56 P.2d at 979. Emphasis added.

The above-quoted statement from **Schultz** is not merely dicta; rather, the statement is a controlling principle of law, necessary for the appellate court's decision (ala late-filed order is "set aside") and are thus binding upon the Court of Appeals in the later case, as per "stare decisis" principles which are core to our system of jurisprudence. Stare decisis is, of necessity, even more applicable to the

Utah Court of Appeals, which never sits en banc but regularly decides and speaks through 3-judge "panels". A later "panel" (for example, in this case: "Garcia" 2016) should not be contradicting the ruling of the former "panel" (in **Schultz**, 2002), especially when the latter case is decided on technical "legal" grounds factually indistinguishable from the former decision.

**Schultz** makes clear and actually holds that because the Board made its restitution order AFTER the prisoner's sentence had been terminated, the civil judgment arising therefrom was invalid, even void, and the "entry" of the Board's order (as a "civil judgment") should be set aside.

**Schultz** is the presently-controlling "law" on this issue. The Court of Appeals could have---but for "stare decisis" reasons should NOT have---overruled its former "panel", but simply didn't. The jurisprudential discretion of the Utah Supreme Court is arguably greater: it too could "overrule" **Schultz** as being simply "wrong" in the first instance. But the Supreme Court certainly should NOT do so, and for reasons not tied merely to "stare decisis" principles. **Schultz** was correctly decided: administrative agencies MUST follow the statutory conditions and restrictions upon them and their decision-making. When those agencies are "outside" of the statutory requirements, their decisions are invalid.



Obviously, the DECISION (in 2016) ignores and disregards the long-standing decision in **Schultz** and thus violates the centuries-old doctrine of "stare decisis". Indeed, the Supreme Court should follow its own stated (in **Thurman**) "stare decisis" principle by overturning the DECISION and adhering to the **Schultz** decision, which is---until modified or overturned by the Supreme Court---"the law of the state".

## II

THE DECISION CONTRADICTS THE DECISION  
OF THE UTAH SUPREME COURT IN THE LAYCOCK CASE [2009]  
RECOGNIZING POST-SENTENCE "JURISDICTION"  
OF THE "SENTENCING COURT" FOR "RESTITUTION" MATTERS

The "no jurisdiction" aspects of the DECISION directly contradicts the holding of the Utah Supreme Court in the case of **The State of Utah, Petitioner vs Claudia Laycock, Judge**, 2009 UT 53, 214 P.3d 103 (Utah Supreme Court 2009). In **Laycock** the time-frame behind the "extraordinary relief" Petition filed against the District Court Judge is significant. The offense occurred in February 2004; the defendant pleaded guilty to a lesser charge and was sentenced in October 2004. Partial restitution was not ordered by the trial court until 2007: almost three years later. Thereafter the State filed a "petition for extraordinary relief" against the trial judge: seeking to order her to determine "complete restitution".

The "extraordinary relief" petition was ultimately heard by the Utah Supreme Court, which ruled (in August 2009: more than four years after sentencing) the district court judge must determine the "complete restitution" amount. In **Laycock**, no mention was made of any "lack of jurisdiction", "lost jurisdiction" or "no jurisdiction" status of the case.

Seemingly **Laycock** implicitly overrules---at least in the "restitution" context---the 1995 decision of the Utah Court of Appeals in **State vs Montoya**, 825 P.2d 676 (Utah Court of Appeals 1991). Accordingly, reliance upon the "no post-sentencing jurisdiction" (paraphrased) statements made in **Montoya** is misguided and erroneous.

While the Utah Court of Appeals could have---but should not have, for stare decisis reasons---even overruled its earlier decision in **Schultz** (which it didn't), the Court of Appeals had absolutely no authority to disregard the **Laycock** decision of the Utah Supreme Court, as vigorously argued to the Court of Appeals, which also ignored those arguments.

It is ironic that to achieve **Laycock** (in 2009) the Utah Attorney General not only argued but actively filed a free-standing lawsuit, for "extraordinary relief", against a sitting district court judge: to thus have that judge ordered (by the Supreme Court) to determine "complete restitution". Implicit in all of this is the fact that the

**Laycock** result requires "post-sentence jurisdiction". Having prevailed in **Laycock** (and the implicit result, as to post-sentence "jurisdiction"), attorneys from the Office of the Utah Attorney General presently argue and continue to argue against post-sentencing "jurisdiction". Such flip-flopping of positions should not be countenanced. The Supreme Court must clearly act to overcome the resulting confusion created by the DECISION.

### III

#### THE DECISION'S RELIANCE UPON THE MONTOYA (1991) CASE AS A BASIS FOR ITS "NO JURISDICTION" RULING IS FLAWED AND ERRONEOUS

The jurisprudential foundation of the Court of Appeals' analysis is found in Paragraph 11 of the DECISION---affirming the District Court's decision based on the same principle---quoting but a single sentence from the Court of Appeals decision in the case of **State vs Montoya**, 825 P.2d 676 (Utah Court of Appeals 1991), thus:

"Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case." *State v. Montoya*, 825 P.2d 676, 679 (Utah Ct. App. 1991).

DECISION, ¶ 11. However, the immediately-following sentence of the DECISION contains a limitation upon the otherwise-absolute statement from **Montoya**, thus:

However, it [the court] retains **the ability** to determine the amount of restitution for a year after sentencing: . . .

Id. Emphasis added. Bracketed terms added for clarity. As support for the statement, the DECISION quoted from the statute, thus recognizing the principle that the Legislature has modified "the law" applicable in this regard. It is unfortunate---and perhaps even confusing---that in spite of the essence of the appeal before it involving "jurisdiction" of the trial court, the DECISION utilizes the term "ability". Nevertheless, the herein quoted sentence evidences the legislative determination that in "restitution" situations, the sentencing court's jurisdiction extends beyond sentencing.

Immediately thereafter the DECISION recognized a statutory modification (and exception) to the **Montoya**-announced general rule (of "lost jurisdiction"), but having opted for the "wrong path", thereafter [¶¶ 13-16] meanders through thus-misguided analysis of statutory principles, while ignoring obvious statutory provisions: for example, the "within 60 days" requirements of Section 77-27-6, Utah Code.

**Montoya** involved a blatant attempt---with identified judicial collusion on the part of the trial court---to improperly extend the time-period for filing an appeal. As decided within the narrow scope of facts presented, **Montoya** was correctly decided.

The jurisprudential essence of the Court of Appeals'

Decision concerning the "no post-sentence jurisdiction" ruling is contained in Paragraph 11 of the DECISION. Although there is subsequent discussion (Paragraphs 12 and following) as to principles of statutory interpretation and other topics, that line of reasoning is faulty, flawed and fails to correct or adequately explain the basic "no jurisdiction" premise.

The Court of Appeals' reliance upon **Montoya** as authority for the principle is flawed. A careful analysis of **Montoya** evidences the inapplicability of the decision as binding precedent. **Montoya** involved a collusive situation, wherein the defense (having neglected to timely file an appeal) and the prosecutor procured, with the trial court's knowledge, a "resentencing" of the defendant, for the jointly understood of permitting the timely filing of a notice of appeal. When this inappropriate scheme as analyzed by the Court of Appeals, the appellate court did the correct thing: it applied the time-honored principle, so as to avoid manipulation of the appellate process, and ruled against the Defendant.

The Court of Appeals' quoted statement (as to "no jurisdiction" or "lost jurisdiction") within the DECISION [for example, ¶ 11], albeit accurately quoted from **Montoya**, is clearly inappropriate in this "restitution" setting, at least applied in a sweeping, universal and absolute fashion

as the State seemingly argues. There are numerous "exceptions", some based upon statute, and some based upon other sources, wherein the absolute, unconditional "no jurisdiction" or "lost jurisdiction" result is simply not true. For example:

1. It is without question that a sentencing court, having imposed a valid sentence upon a criminal defendant---which sentence includes a "suspended" penalty---has post-sentence "jurisdiction" over that defendant, pending satisfactory completion of any "probation" requirements identified as a pre-condition to that "suspended" sentence. The sentencing court has "jurisdiction" to issue an "order to show cause" requiring the defendant to appear and may "revoke" the "probation".

2. In the "restitution" context, Utah statute [for example, Subsection 77-38a-305(5)(d), Utah Code] expressly grants to a sentencing court a one-year period following sentencing in which to consider, determine and order restitution to be paid by the convicted defendant. Obviously, this statutorily-recognized "exception" to the "no jurisdiction" or "lost jurisdiction" arguments advanced by the State---and accepted by the Court

of Appeals---shows the fallacy thereof. The "logic" of the DECISION on this point is confusing. The sentencing court loses "jurisdiction" upon sentencing, but then the "ability" (ala "jurisdiction"?) to determine restitution is retained, for a year following, when it is then lost forever. [See, however, **Laycock**, which implicitly recognizes post-sentencing "jurisdiction" for longer than five years after sentencing.] The district court's "jurisdiction" cannot be reasonably expected to have a whimsical, now you see it now you don't "it's here, now lost, oops it's back again but only for a year, but thereafter lost" existence and life-span.

3. The SPECIFIC STATUTE [i.e. Subsection 77-27-6(4), Utah Code] "core" to this case expressly provides for post-sentencing "jurisdiction" (for the "sentencing court") in situations of Board-ordered restitution, by providing:

. . . The entry [by the District Court, of the Board's "order of restitution"] shall constitute a lien and **is subject to the same rules as a judgment for money in a civil judgment.**

Emphasis added. Bracketed words added for clarity.

Obviously, the Legislature clearly intended---

notwithstanding the Court of Appeals text (Paragraph 13 of the DECISION) discussing "statutory interpretation" principles, which principles were ignored by the DECISION---that the "sentencing court", in a "criminal" case, would have "civil" jurisdiction. In this context, the sentence clearly indicates a legislative intention to "re-invest" (undersigned's characterization and terminology) the District Court with "jurisdiction". The "same rules" text---which the DECISION (Paragraph 12) quotes but similarly disregards---seemingly, as a minimum, refers to those "rules" pertaining to the methods by which a "judgment for money" might be collected (for example: garnishment, attachment, execution, "supp order" proceedings) in a "civil" case, as conceptually distinguished and contrasted with those "remedies" (e.g. a court order to "go to jail" for wilful failure) available in a "criminal" case setting. [See also Paragraph 14 of the DECISION.] While seeming to recognize the applicability of those "rules" to enforce the sentencing court's "restitution" powers---i.e. see the State's arguments and position in **Laycock**, supra, wherein the State's attorneys vigorously



argued FOR post-sentencing "restitution" and, thus implicitly, "jurisdiction"---the statute implicitly recognizes the court's "jurisdiction" to "set aside" an improperly-procured judgment. If the District Court has post-sentence "jurisdiction", per the statute, for "garnishment" and similar proceedings and remedies, there is nothing in the statute [77-27-6(4), Utah Code] which limits the exercise of those "jurisdictional" powers. The "set aside" powers must be presumed to be present in the absence of any legislatively-adopted text expressly prohibiting such "set aside" powers and "jurisdiction".

4. In this case, on appeal [see STATE'S SUPPLEMENTAL BRIEF to the Court of Appeals, February 2016], the State's appellate counsel acknowledged that the District Court would have "jurisdiction" to make a correction to the resultant "civil judgment" if the amount thereof were incorrectly stated or an improper person were named therein.

5. IF the Court of Appeals' decision in **Montoya** ("court loses jurisdiction upon sentencing") were correct, then the Court of Appeals decision in

**State vs Schultz**, supra, discussed at length in Point I, above, would be fundamentally incorrect. Conversely, the Court of Appeals "panel" in **Schultz** decided oppositely, and thus---at least on the narrow "no jurisdiction" question---implicitly overruled **Montoya**, at least in "restitution" settings.

6. As noted in Point I herein, the Court of Appeals "panel" effecting the DECISION had, for "stare decisis" reasons, no authority to disregard the Court's former "panel" deciding **Schultz**. Arguably, the "panel" in this case could have, for valid and meritorious reasons so explained, "overruled" the decision (in **Schultz**) of the former panel; the later panel didn't to anything of the kind. The DECISION ignores **Schultz** (from the former "panel"), but "stare decisis" and **Thurman** do not permit that.

7. The Supreme Court's decision in **Laycock** can be neither "overruled" nor disregarded by the Court of Appeals. **Laycock**, as shown in Point II, above, clearly establishes that the sentencing court has, as much as more than five years after sentencing, "jurisdiction" in which to determine the court-ordered "restitution", per statute. Obviously, any

contrary conclusion (of "no jurisdiction") based upon **Montoya** is flawed. On that narrow point, **Laycock** implicitly overrules **Montoya**.

There are probably numerous other examples and reasons which the "lost jurisdiction" argument based on **Montoya** is faulty and must fail.

It is ironic that the BOARD, and correspondingly the Court of Appeals, are so precisely pre-occupied with the "jurisdiction" of the district court, but both seem to intentionally ignore the "lack of jurisdiction" on the part of the BOARD, so identified by **Schultz**.

The Court of Appeals DECISION, ignoring **Schultz** but without expressly saying so, sets up a jurisprudentially-unacceptable situation: of confusion and uncertainty. Judges, attorneys and citizens reading **Schultz** will come to one conclusion, while those reading **Garcia** (Utah Court of Appeals 2016) will come to the opposite. The Supreme Court must act to correct the problem.

#### IV

THE DECISION OVERLOOKS AND IGNORES THE PRINCIPLES OF JURISPRUDENCE AND STATUTORY INTERPRETATION AND APPLICATION IT CLAIMS TO PROMOTE

The Supreme Court will readily recognize that the district court's "jurisdiction" is the core issue in this case. Indeed, the DECISION itself characterizes [¶ 10] it as "the threshold issue".

The last third of the DECISION---¶¶ 12 through 19 thereof---purports to address the remaining issues. Having announced [¶ 10] its "no jurisdiction" conclusion, the DECISION---purporting to interpret and reconcile the statutory issues inherent in the appeal before the Court of Appeal---then undertakes to interpret the various statutory terms utilized in Subsection 77-27-6(4), which is THE statute upon which this entire "case" is predicated.

The Decision quotes [¶ 12] the statute. In the immediately-following paragraph the DECISION purports to identify the various terms (nouns and verbs) legislatively selected within the statute, but makes no meaningful attempt to reconcile them or to apply them. Such activity is merely "window dressing" without consequence. The DECISION claims to recognize [¶ 13] the principle of statutory construction (that "the legislature used each term advisedly" and that "we . . . give effect to each term . . ."), but the DECISION then IGNORES and disregards the "within 60 days" (of the prisoner's termination of sentence) requirement embodied with the statute [77-27-6(4)] the DECISION just quoted. The failure by the BOARD to act within the statutorily-prescribed time-frame (i.e. "within 60 days" of GARCIA's mid-April 2013 termination of sentence and resultant release from custody) was and continues to be the "core" claim of this case.

In **Schultz** the Board of Pardons was "late", even to preclude the BOARD having "jurisdiction" to enter its "order" in the first place; such was the situation, even though there was no legislatively-identified "deadline" for Board action. Nevertheless the former "panel" of the Court of Appeals affirmed the District Court's order "setting aside" the "judgment" of restitution. In the instant case, the BOARD has "missed" the "within 60 days" deadline---twice expressed in the statute---and its order is defective, facially, for that reason alone.

**Schultz**-identified principles---that the BOARD itself has no "jurisdiction" to enter a restitution order against a former prisoner following termination or expiration of sentence---is controlling "law" and binding precedent upon the Court of Appeals for "stare decisis" purposes. The Court of Appeals has no authority to ignore or disregard **Schultz**.

The DECISION ignores and/or fails to consider and apply other statutory prerequisites going first to the ability of the Board to enter the order in the first place, including but not limited to:

1. The BOARD's acknowledged failure to conduct, before making its "restitution" order, a "full hearing" on the restitution, as required by Section 77-27-5(c), Utah Code; and
2. Precisely applying the definition of

"pecuniary damages" [Subsection 77-38a-102(6)], wherein the state agency [Crime Victims Reparation: CVR] claim would have been otherwise barred by the 2-year statute of limitation, even BEFORE the BOARD had acquired "jurisdiction" over criminal defendant GARCIA.

The DECISION [¶¶ 15-17] purports to make the facile distinction that under the statutory scheme, the "civil judgment" (statutory term) arising from the "entry" of the Board-made "order" does not require any judicial decision-making function. This is perhaps empirically accurate; in previous writings the undersigned has even characterized the "civil judgment" (although the actual concept says "lien", a term not explained in the DECISION) arising from the "entry" of the Board-made order as being "automatic". All of that is, in spite of the unresolved confusion, fine and good. But the DECISION [see, for example, ¶ 14] purports to claim that the District Court would have---ostensibly pursuant to the "same rules" terminology within the statute---jurisdiction to entertain "garnishment" and "execution" proceedings, but implies that somehow the District Court would not have the "jurisdiction" to "set aside" an improperly-procured "judgment". Such a precise operational definition of "jurisdiction"---with an "exception" here and a "loophole" there---cannot have been intended by the

Legislature when it enacted Subsection 77-27-6(4), Utah Code. In essence, the DECISION says, expressly or impliedly, the District Court would have "jurisdiction" to issue a writ of garnishment or execution (under, for example, Rule 65C, 65D or 65E), but that the District Court has "no jurisdiction" to "set aside" a clearly-erroneous "judgment" under Rule 60, which uses that "judgment" terminology without regard to how the "judgment" was procedurally obtained.

It seems to be a very dangerous "slippery slope" to start down were the Court to allow the BOARD---or any other state agency subject to statutory controls and limitation---to engage in behavior and decision-making which is seemingly beyond the reach and overview of the "judicial branch" in a time-filed, proper parties proceeding. This (i.e. judicial review) should especially be the situation when the agency's violation (e.g. "late" in "making" the filed-order) is so patently obvious and in openly-obvious disregard of the statutory prerequisites.

Footnote #4, attached to Paragraph 18 [page 8] of the Court's Decision, incorrectly asserts that Appellant failed to cite to the Record his "Rule 60(b)" motion; possibly true, but a careful reading of **Schultz** would indicate that there simply was no valid "judgment" to be set aside.

The Defendant's original motion [Record at 120-122],

promptly (and timely) filed did not expressly reference Rule 60(b) ---was concerned only with the facially-obvious defect that the Board-filed "order" was months late. [In this regard, the original "set aside" motion "tracks" **Schultz**.] As the case developed, even more shortcomings of the Board became known: namely, that the State's claim was barred by 2-year statute of limitation and the Board's admitted failure to conduct the statutorily-required [77-27-5(1)(c), UC] hearing "before" ordering restitution.

In June 2014 Defendant filed his "Motion to Set Aside Civil Judgment", wherein the Motion expressly stated:

. . . pursuant to the provisions of Rule 60(b)(6), Utah Rules of Civil Procedure, respectfully moves the Court to set aside and vacate that certain "civil judgment" . . .

RECORD at 545. Emphasis added. Defendant's "Rule 60(b)" motion was expressly recognized by District Judge Skanchy in the first full paragraph of his Memorandum Decision and Order, dated 21 August 2014, RECORD at 595. Mr Schultz' "set aside" motion, filed literally years after the "civil judgment" was entered by the district court in **Schultz**, was approved by the Court of Appeals.

The DECISION's "shell game" [¶ 18] concerning the distinctions---not identified within the DECISION---between the words "judgment" and "lien" only confuses the issue. The DECISION's non-existent analysis nevertheless again ignores



the clear import of the statute:

" . . . the entry [of the Board's "order"] shall constitute a lien and is subject to the same rules as a judgment . . ."

Subsection 77-27-6(4). Emphasis added. Bracketed text added for clarity.] The syntax of the foregoing sentence---ignored by the DECISION---is such that the verb "shall constitute" refers back to the filing of the order. However, the verb phrase "is subject to the same rules . . ." likewise refers back to the "filing of the order", NOT the ambiguous "lien": it is the filing of the order which is "subject to the same rules as a judgment".

V

THE SUPREME COURT SHOULD ACT DECISIVELY TO EXPLICITLY  
ORDER THE "SETTING ASIDE" OF THE UNDISPUTED "LATE-MADE"  
RESTITUTION ORDER AND THE RESULTANT "CIVIL JUDGMENT"  
ARISING FROM THE FILING THEREOF

The "intervening" State-related real-parties-in-interest [namely, the UTAH BOARD OF PARDONS and the UTAH OFFICE OF STATE DEBT COLLECTION] raised before the District Court the "no jurisdiction" and/or "lost jurisdiction" issue so as to avoid a trial court ruling on the substance of Petitioner's time-filed and meritorious "set aside" motion. The Utah Supreme Court's "certiorari" review will undoubtedly recognize and hopefully correct this egregious judicial error.

By the time the Utah Supreme Court issues its

formalized opinion in this "certiorari" case, it will be more than FOUR YEARS in which Appellant-Petitioner GARCIA has been subject to the "civil judgment" arising from the uncontroverted "late-filed", Board-made "restitution order". In those intervening three years of litigation, the Board has made no attempt to explain, contradict or challenge the obvious "lateness" of the Board's making (of its "order") and/or subsequent filing thereof with the District Court, in open disregard to the statutory "within 60 days" (of the prisoner's release) under Subsections 77-27-6(2) [". . . the board shall make all orders of restitution within 60 days after termination or expiration of the defendant's sentence"] and 77-27-6(4) (essentially same), Utah Code.

Concurrent with the Supreme Court's ruling on the "jurisdictional" issue, the Court should decide and rule the late-filed "order of restitution" to be facially-defective, and the "civil judgment" based thereon to be invalid. See **Schultz**.

#### CONCLUSION

The DECISION directly conflicts with **Schultz** and is, for that reason, a violation of "stare decisis" principles. No attempt has been seemingly made by the Court of Appeals to reconcile the two cases ("Garcia" and **Schultz**). The DECISION clearly violates *the doctrine of "stare decisis"*, in that the later "panel" has ignored the applicable

precedent of the earlier "panel". See **Thurman**.

The DECISION directly conflicts with the Utah Supreme Court's decision in **Laycock**, decided in 2009, which itself implicitly overruled **Montoya** (decided in 1991, by the inferior appellate tribunal), at least for "restitution" situations. Obviously, the Court of Appeal's reliance upon **Montoya** for its simplistic "no jurisdiction" (or "lost jurisdiction") result is flawed.

The Decision is fundamentally flawed in its reliance upon **Montoya's** single-sentence statement (that the "sentencing court loses jurisdiction upon sentencing") which is subject to numerous well-recognized "exceptions". Those aspects of **Montoya** have been implicitly overruled by the Utah Court of Appeals decision in **Schultz** (in 2002) and by the Utah Supreme Court in **Laycock** (in 2009), as well as numerous legislative enactments, including but not limited to Subsection 77-27-6, Utah Code. The Supreme Court must act to decisively correct the jurisprudential confusion the Decision will unavoidably create.

The Supreme Court should also decide and remand back to the Court of Appeals that Petitioner's "set aside" motion (for the late-made "restitution order") should be granted by the District Court.

The Decision of the Utah Court of Appeals must be overturned, the case remanded back to the Utah Court of

Appeals, with directions to remand the case back to the District Court with instructions to set aside the resultant "civil judgment".

Petitioner should be awarded all his costs incurred herein (at both appellate courts).

#### REQUEST FOR ORAL ARGUMENT

Oral argument before the Court is requested.

Respectfully submitted this 27th day of March, 2017.

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

#### COUNSEL'S CERTIFICATION ["WORD COUNT" AND PRINT SIZE]

Counsel certifies that substantive portions of this PETITIONER'S BRIEF (excluding captions, indexes, separately-quoted statutes, and so forth) were printed in Courier type in a size 13 font.

The "word count" of the substantive portions of the BRIEF (excluding captions, indexes, separately-quoted statutes, certifications and so forth) is 7404 words, per the "word count" subroutine within the word-processing program upon which the document was created.

#### CERTIFICATE OF MAILING

I certify that I caused two copies of the foregoing APPELLANT'S BRIEF, with attachments, to be hand-delivered to the office of Mr Brent A Burnett, Assistant Attorney General, Office of the Utah Attorney General, Heber Wells Building, Fifth Floor, 160 East 300 South, Salt Lake City, Utah, this 27th day of March, 2017.

/s/Stephen G Homer

# ATTACHMENTS

ATTACHMENT 1  
SECTION 77-27-6, UTAH CODE  
EXCERPTS

ATTACHMENT 2  
Board-prepared "ORDER OF RESTITUTION"  
[prepared 24 September 2013; filed 10 October 2013]  
RECORD at 119

ATTACHMENT 3  
Court of Appeals SUPPLEMENTAL BRIEFING ORDER  
11 February 2016

ATTACHMENT 4  
Utah Supreme Court ORDER: certiorari issue  
30 January 2017

ATTACHMENT 5  
Utah Court of Appeals DECISION  
12 May 2016  
2016 UT App 96

ATTACHMENT 6  
Utah Court of Appeals Decision  
The State of Utah vs Schultz  
2002 UT App 297, 56 P.3d 974  
[2002]

**77-27-6. Payment of restitution.**

(1) When the Board of Pardons and Parole orders the release on parole of an inmate who has been sentenced to make restitution pursuant to Title 77, Chapter 38a, Crime Victims Restitution Act, or whom the board has ordered to make restitution, and all or a portion of restitution is still owing, the board may establish a schedule, including both complete and court-ordered restitution, by which payment of the restitution shall be made, or order compensatory or other service in lieu of or in combination with restitution. In fixing the schedule and supervising the paroled offender's performance, the board may consider the factors specified in Section 77-38a-302.

(2) (a) The board may impose any court order for restitution.

(b) In accordance with Subsection 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.

(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.

(d) If, upon termination or expiration of a defendant's sentence, the board has continuing jurisdiction over the defendant for a separate criminal offense, the board may defer making an order of restitution until termination or expiration of all sentences for that defendant.

(3) The board may also make orders of restitution for recovery of any or all costs incurred by the Department of Corrections or the state or any other agency arising out of the defendant's needs or conduct.

(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 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.

2005



FILED DISTRICT COURT  
Third Judicial District

OCT 10 2013

SALT LAKE COUNTY

By [Signature] 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

Salt Lake County

VS

Dennis Garcia (OFF# 184816)

Case Number: 061901607

Defendant

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:

[Signature]

Clark A. Harms,  
Chairman

**ATTACHMENT 2**

Page 1 of 1 page

FEB 11 2016

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee,  v.  DENNIS J. GARCIA, Appellant.	SUPPLEMENTAL BRIEFING ORDER  Case No. 20141009-CA
------------------------------------------------------------------------------	---------------------------------------------------------

Before Judges Christiansen, Toomey, and Greenwood.

We have determined that our disposition of this appeal would benefit from supplemental briefing. Accordingly, we direct the parties to address the following issue:

Does Utah Code section 77-27-6(4)'s reference to "the same rules" in its provision that a restitution lien "is subject to the same rules as a judgment for money in a civil judgment" include Utah Rule of Civil Procedure 60(b)? If so, does a rule 60(b) motion challenging a restitution order by the Utah Board of Pardons and Parole and entered on the judgment docket need to be filed in the "sentencing court" or as a separate civil action filed in the "district court" system?

In addressing this issue, the parties should specifically address the effect of this court's analysis in *State v. Schultz*, 2002 UT App 297, 56 P.3d 974.

IT IS HEREBY ORDERED that the Appellant and the Appellee shall submit supplemental briefing simultaneously on the issue identified above in memoranda not to exceed ten (10) pages within fourteen (14) days of this order. The Court will grant extensions only for good cause, and no other memoranda shall be filed without further order of this Court. The memoranda must be filed and served as provided in Utah Rule of Appellate Procedure 26 subsections (b) and (d). The memoranda must comply with the typeface and paper size requirements of Utah Rule of Appellate Procedure 27



subsections (a) and (b), but need not comply with the content and form requirements of Utah Rules of Appellate Procedure 24(a), 24(b), and 27.

Dated this 11<sup>th</sup> day of February, 2016.

FOR THE COURT:



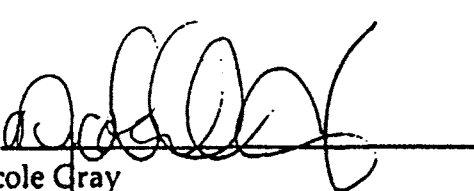
Michele M. Christiansen, Judge

### CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2016, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

STEPHEN G HOMER  
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W JORDAN UT 84088  
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NANCY L KEMP  
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nkemp@utah.gov

By   
Nicole Gray  
Judicial Assistant

Case No. 20141009  
District Court No. 061901607

COMPILER'S NOTE: Please note that this page is a compilation of Page 2 and Page 3 of the original ORDER.

**ATTACHMENT 3**

Page 2 of 2 pages

The Order of the Court is stated below:

Dated: January 30, 2017  
01:23:42 PM

/s/ Thomas R. Lee  
Associate Chief Justice



IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,  
Respondent,

v.

Dennis J. Garcia,  
Petitioner.

ORDER

Appellate Case No. 20160932-SC

This matter is before the court upon a Petition for Writ of Certiorari, filed on October 29, 2016.

The Petition for Writ of Certiorari is granted as to the following issue:

Whether the Court of Appeals erred in affirming the district court's determination that it lacked jurisdiction to adjudicate Petitioner's motion to set aside the Board of Pardons and Parole's restitution order.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

End of Order - Signature at the Top of the First Page

THE UTAH COURT OF APPEALS

STATE OF UTAH,  
Appellee,

v.

DENNIS J. GARCIA,  
Appellant.

Memorandum Decision  
No. 20141009-CA  
Filed May 12, 2016

Third District Court, Salt Lake Department  
The Honorable Randall N. Skanchy  
No. 061901607

Stephen G. Homer, Attorney for Appellant  
Sean D. Reyes, Nancy L. Kemp, and Brent A. Burnett,  
Attorneys for Appellee

JUDGE MICHELE M. CHRISTIANSEN authored this Memorandum  
Decision, in which JUDGE KATE A. TOOMEY and SENIOR JUDGE  
PAMELA T. GREENWOOD concurred.<sup>1</sup>

CHRISTIANSEN, Judge:

¶1 Defendant Dennis J. Garcia crashed a car, killing his friend. After being convicted of automobile homicide and serving the resulting prison sentence, Garcia was ordered to pay \$7,000 toward the victim's funeral expenses. Defendant moved to set aside that order, but the trial court determined that it no longer had jurisdiction over Garcia's case. Defendant appeals and we affirm.

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1. Senior Judge Pamela T. Greenwood sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

¶2 After the single-vehicle crash in March of 2006 killed Defendant's passenger, Defendant was arrested and charged with automobile homicide, a third-degree felony. Defendant's blood test indicated that "he had marijuana and cocaine in his system as well as 0.15 grams blood alcohol." Defendant was convicted after a one-day trial on April 17, 2008, and was sentenced to serve zero to five years in the Utah State Prison.

¶3 Although Defendant's presentence investigation report stated that "[a]ccording to the Utah Office of Crime Victim Reparations they paid \$7,000 for funeral expenses in this offense," the minutes of his sentencing noted, "The issue of restitution is open." Similarly, at Defendant's first parole hearing, on October 5, 2010, the hearing officer opined that if the Board of Pardons and Parole were to parole Defendant, the officer was "sure they would order you to . . . pay restitution,"<sup>2</sup> noting "there's seven thousand dollars [that] was paid by a state agency for the funeral costs."

¶4 Defendant appealed his conviction, arguing that the evidence was insufficient to prove that he had been the driver or that he had been negligent in driving while intoxicated. *See State v. Garcia*, 2009 UT App 384U. This court rejected those arguments and affirmed his conviction. *Id.* Defendant served his entire five-year sentence and was released on April 15, 2013.

¶5 Months later, the Board of Pardons and Parole issued an order of restitution, requiring Defendant to pay \$7,000 to the Utah Office for Victims of Crime. The Board also sent a copy of the order to the trial court. The order stated that, pursuant to

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2. In its brief on appeal and its filings before the trial court, the State omitted this first portion of the hearing officer's statement, and therefore did not address the apparently conditional nature of the statement.

Utah Code section 77-27-6(4), “[w]hen 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 then concluded “IT IS SO ORDERED, this 24th day of September 2013 . . . BY THE BOARD: [signed] Clark A. Harms, Chairman.” The order was duly entered into the docket by the trial court.

¶6 Defendant then filed a motion in the trial court to set aside the restitution order. Specifically, he requested that the court enter an order “[s]etting aside and vacating that certain ‘Order of Restitution’ entered by the Utah Board of Pardons and Parole” and removing or refraining from entering that order on the “Judgment Roll.” He argued that the Board’s restitution order had not been entered within the statutory timeframe and that he had not been given notice and an opportunity to be heard by the Board before it issued the order.

¶7 The trial court did not rule on the merits of Defendant’s motion. Rather, the court rejected the motion on the ground that the court’s jurisdiction over the case had ended. The court explained that it had “entered a valid sentence in this case, and thereby lost subject matter jurisdiction.” The court also explained that, “once the one-year period after sentencing expired, this Court also lost jurisdiction over [Defendant’s] restitution obligation. Jurisdiction moved to [the Board of Pardons and Parole] to determine restitution owed.”

¶8 Defendant then filed a motion for a new trial, asserting

The District Court does have “jurisdiction” —even “civil jurisdiction”—to set aside the “civil judgment” so “entered” in furtherance of [the] Board-filed “order of restitution”, itself facially “made” in violation of law (later than the “within sixty days” period specifically required by statute).

Defendant argued that,

upon the Board[ filing] (with the District Court) [an] “order of restitution”, the Board-filed “order of restitution” becomes, automatically, as a matter of law, the equivalent of a “civil judgment” of the District Court. . . . This “civil judgment” equivalency authorizes the District Court, even in a “post-sentencing” (which is a “criminal” concept) context, to exercise “jurisdiction” . . . .

The trial court held a hearing on this motion and related motions to set aside the order of restitution and for a judicial determination of unconstitutionality as to Utah Code section 77-27-5(3), which forecloses judicial review of Board decisions.<sup>3</sup> The court ultimately denied Defendant’s motions, concluding again that it lacked jurisdiction over the case.

¶9 On appeal, Defendant contends that the trial court had jurisdiction to review his challenge to the Board’s restitution order. He also contends that the order of restitution was invalid for three reasons: the Board’s failure to hold a “full hearing,” the expiration of the wrongful-death statute of limitations, and the untimeliness of the order of restitution. Finally, Defendant contends that a statute barring judicial review of restitution decisions made by the Board of Pardons and Parole is unconstitutional.

¶10 The threshold issue in this case is whether the trial court had jurisdiction to review the Board’s restitution order simply because the order had been entered upon the sentencing court’s docket in Defendant’s criminal case. At the core of Defendant’s contention is his assertion that entry of the restitution order, pursuant to section 77-27-6(4) of the Utah Code, “reinvested” the

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3. The transcript of the hearing is not in the record on appeal.

trial court with civil jurisdiction over his case. We conclude that it did not.

¶11 “Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case.” *State v. Montoya*, 825 P.2d 676, 679 (Utah Ct. App. 1991). However, it retains the ability to determine the amount of restitution for a year after sentencing: “the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.” Utah Code Ann. § 77-38a-302(d)(i) (LexisNexis 2012). If a defendant has been committed to prison, “[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.” *Id.* § 77-38a-302(d)(ii).

¶12 A separate statute governs the administration of Board-ordered restitution:

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 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.

Utah Code Ann. § 77-27-6(4) (LexisNexis 2012).

¶13 “We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.” *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d

726 (citation and internal quotation marks omitted). Here, Defendant's argument fails to do so and instead conflates several distinct terms employed by the legislature.

¶14 The statute provides that, after restitution has been ordered by the Board, "the *matter* shall be *referred* to the *district court* for civil collection remedies" and that the Board "shall *forward* a restitution order to the *sentencing court* to be entered on the judgment docket." Utah Code Ann. § 77-27-6(4) (emphases added). We presume that the distinctions (matter versus order, referred versus forwarded, and district court versus sentencing court) were deliberate choices by the legislature and were intended to mean different things. See *Pearson v. South Jordan City*, 2012 UT App 88, ¶¶ 19–20, 275 P.3d 1035 (noting that a trial court correctly understood a statute's use of both "deputy" and "assistant" to indicate "a legislative intent to distinguish the terms"). And we note that the term "the district court" often refers to the whole district court system rather than to a specific court. See Utah Const. art. VIII, § 1 ("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)). We therefore understand the statute to do three things: first, it empowers the Board to make orders of restitution; second, it invests the district court system with jurisdiction to administer any collection processes stemming from such orders; and third, it requires the specific sentencing courts to enter the orders upon their dockets.

¶15 Defendant asserts that the phrase "shall be referred to the district court for civil collection remedies" evinces a legislative intent to reinvest jurisdiction in the trial court. He argues that "[t]he 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." He further argues that "there could be no 'civil



collection remedies' if there were not some kind of 'jurisdiction' for the [trial court] to first enter some kind of 'judgment' to be collected upon by the affected claimant."

¶16 Contrary to Defendant's implicit assertion, however, the statutory scheme does not permit the trial court to enter a judgment at all. Rather, the Board "makes an order of restitution" and forwards the order to the sentencing court. The trial court which sentenced the defendant is then required to enter the order into its docket, presumably for the sake of completing its record of the case. This type of entry does not require any decisions or determinations to be made by the trial court. Thus, we conclude that the trial court does not gain jurisdiction to enter a *judgment* but rather is required to add the Board's *order* to the case docket, whereupon the order automatically "constitute[s] a lien and is subject to the same rules as a judgment for money in a civil judgment." *See* Utah Code Ann. § 77-27-6(4).

¶17 Defendant also argues that, by referring the matter to the district court for civil collection remedies, the statute contemplates district court jurisdiction over the judgment. However, civil collection remedies such as wage garnishment or a writ of execution generally presume the presence of an existing judgment. *See Remedy*, Black's Law Dictionary (10th ed. 2014) (defining "civil remedy" as "[t]he means of enforcing a right"). Although the district court has jurisdiction under this statute to order such civil remedies to assist the claimant in collecting on the judgment, nothing in the statute confers jurisdiction on the district court to rule upon challenges to the fact, amount, or validity of the judgment itself. And, in any event, the legislature's use of the term "district court" as opposed to "sentencing court" as used elsewhere in the same statute indicates that any jurisdiction is vested in the district court system rather than the specific trial court that tried and sentenced a defendant.

¶18 Defendant also highlights the last sentence of the statute (“The entry shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.”) and asserts that the import of this sentence is that a Board order constitutes a judgment of the trial court. However, such a reading overlooks the legislature’s use of the phrase “shall constitute a lien” rather than “shall constitute a judgment.” While the legislature provided for “the same rules” to apply to the lien as to a money judgment, that provision does not convert the nature of the lien into a judgment.<sup>4</sup>

¶19 We conclude that Utah Code section 77-27-6(4) did not reinvest jurisdiction in the specific trial court that sentenced Garcia. Instead, the statute required the trial court to enter the Board’s order of restitution into the judgment docket—a procedural act that did not involve any judgment on the part of the trial court. Additionally, while the statute empowers the district court system to administer civil remedies should

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4. In a footnote, Defendant asserts that the fact that the same rules apply to the lien as to a money judgment authorizes his “simultaneously-filed Rule 60(b)(6) motion.” He provides no citation to the record for such a motion nor did he file a rule 60(b) motion in the Utah Court of Appeals. It therefore appears that he did not file one. Moreover, the Utah Rules of Civil Procedure are generally inapplicable to administrative proceedings unless expressly adopted. *See Frito-Lay v. Utah Labor Comm’n*, 2009 UT 71, ¶ 17, 222 P.3d 55 (“The scope of our rules is limited by the scope of the authority granted to this court by the Utah Constitution. Thus, we can apply [the Utah Rules of Civil Procedure] only to ‘the courts of the state.’”). Rule 60(b) provides an avenue for a party to ask the court to review and reconsider its own decisions; it does not allow the court to review and modify decisions made by an administrative body such as the Board.

Defendant refuse to pay restitution, that role does not encompass challenges to the validity of the order of restitution.

¶20 We affirm the trial court's ruling that it lacked jurisdiction over Defendant's case. Because Defendant's remaining claims—relating to the Board's failure to hold a full hearing, the expiration of the wrongful-death statute of limitations, and the untimeliness of the Board's restitution order—are not properly part of an appeal from his criminal case, we do not address them further.

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2002 UT App 297

STATE of Utah, Plaintiff and Appellee,

v.

Joseph B. SCHULTZ, Defendant  
and Appellant.

No. 20010908-CA.

Court of Appeals of Utah.

Sept. 19, 2002.

Former parolee moved to set aside civil judgment obtained by victim pursuant to restitution ordered by the Board of Pardons and Parole. The Second District Court, Ogden Department, Stanton M. Taylor, J., denied motion. Former parolee appealed. The Court of Appeals, Davis, J., held that Board lacked jurisdiction to issue restitution order after parole and sentence were terminated.

Affirmed.

Russell W. Bench, J., concurred in the result only.

1. Criminal Law  $\S$ 1134(3)

Whether Board of Pardons and Parole had jurisdiction to issue restitution order af-

ter parolee's sentence and parole were terminated was a question of law that Court of Appeals would review for correctness, as the paramount issue was a matter of statutory construction. U.C.A.1953, 77-27-5(1).

## 2. Pardon and Parole ⇨55.1

An action to terminate a prison sentence and parole supervision is within the exclusive authority of the Board of Pardons and Parole. U.C.A.1953, 77-27-5(1).

## 3. Pardon and Parole ⇨64.1

Board of Pardons and Parole has independent authority to impose restitution. U.C.A.1953, 77-27-5(1).

## 4. Pardon and Parole ⇨93

Board of Pardons and Parole cannot enforce parole conditions after the termination of a defendant's sentence and parole supervision. U.C.A.1953, 77-27-5(1)(a), 77-27-9(1)(a).

## 5. Pardon and Parole ⇨93

After parolee's sentence and parole were terminated, Board of Pardons and Parole lacked jurisdiction to issue restitution order that it then forwarded to sentencing court to be entered as a civil judgment. U.C.A.1953, 77-27-5(1), 77-27-6(2, 4).

## 6. Pardon and Parole ⇨93

Board of Pardons and Parole's restitution order issued after parolee's sentence and parole were terminated was not a nunc pro tunc order that related back to Board's special attention hearing that was held when Board still had jurisdiction over parolee, and thus civil judgment against parolee that sentencing court imposed pursuant to the order was invalid. U.C.A.1953, 77-27-5(1), 77-27-6(2, 4).

## 7. Motions ⇨56(2)

Nunc pro tunc orders may be used to correct an omission or error.

## 8. Pardon and Parole ⇨55.1

Jurisdiction of the Board of Pardons and Parole extends to actions taken against an offender that has committed a class A misdemeanor or felony who is serving a sentence in a penal or correctional facility or is on

parole, with certain statutory exceptions. U.C.A.1953, 77-27-5(1)(a), 77-27-9(1)(a).

J. Thomas Bowen, Midvale, for Appellant.

Mark L. Shurtleff, Atty. Gen., and Sharel S. Reber, Asst. Atty. Gen., Salt Lake City, for Appellee.

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

## OPINION

DAVIS, Judge:

¶ 1 Defendant Joseph B. Schultz (Schultz) challenges the trial court's denial of his motion to set aside a civil judgment to enforce restitution and to quash a writ of garnishment filed by the victim. We reverse.

## BACKGROUND

¶ 2 On October 17, 1983, Schultz was sentenced to the Utah State Prison. Approximately five-and-one-half years later, the Utah Board of Pardons and Parole (Board) ordered that Schultz be released on parole effective October 26, 1993. In September 1993, the Board concluded at a Special Attention Review that as a condition of Schultz's parole he was to pay restitution in an amount "TBD" (to be determined). Prior to his release, the Board ordered that Schultz's parole agreement be amended to include the restitution. Schultz assented to the special condition in the parole agreement that he would "[p]ay restitution of \$TBD CASE # " by specifically initialing the restitution provision in his parole agreement.

¶ 3 Schultz paid nothing, and on October 23, 1996, two days before his sentence and parole were to terminate, a restitution hearing was held. The hearing officer determined that a full parole revocation hearing before the Board would be required because of Schultz's failure to pay restitution. At that time, Schultz's parole termination date was suspended. The Board then issued an arrest warrant on the ground that the failure to pay restitution was a parole violation and released Schultz on his own recognizance pending a parole violation hearing. Howev-

er, the Board never held a formal hearing concerning whether Schultz violated his parole by failing to pay restitution.

¶4 The Board did, however, conduct a Special Attention Hearing on April 22, 1997, where it established that Schultz's sentence and parole would be terminated effective August 4, 1997. The Board's hearing decision, issued August 5, 1997, included a "[r]equest for restitution . . . to be forwarded to the Sentencing Court." Two days later, an amount of restitution—\$3,798.43—was calculated and approved by the Board. A copy of the hearing results was mailed to Schultz on August 15, 1997.

¶5 On September 8, 1997, the Board issued and signed an order of restitution for Schultz to pay \$3,798.43 to the victim. The trial court signed and approved the restitution order on September 17, 1997. In March 2001, after an application was submitted by the victim, the Second District Court issued a writ of continuing garnishment to be imposed against the wages of Schultz. Schultz filed an objection to the garnishment and a motion to set aside the civil monetary judgment, which the court ultimately denied.

#### ISSUE AND STANDARD OF REVIEW<sup>1</sup>

[1] ¶6 Schultz challenges the trial court's denial of his motion to set aside judgment by contending that the Board's original restitution order, dated September 8, 1997, and signed by the court on September 17, 1997, was invalid because the Board did not have jurisdiction to issue the order since the Board had terminated his sentence and parole effective August 4, 1997. "[B]ecause the paramount issue in this case is a question of statutory construction," whether the Board had jurisdiction to issue the restitution order is a question of law reviewed for correctness. *Taghipour v. Jerez*, 2002 UT 74, ¶8, 52 P.3d 1252.

1. Because we hold that the Board did not have jurisdiction over Schultz at the time the restitution order was issued, we need not address the issues of whether the Board failed to follow the statutory requirements for imposing restitution or whether the victim may enforce a restitution order issued by the Board and by the trial court.

#### ANALYSIS

¶7 Schultz argues that the Board's restitution order was ineffective because the Board's jurisdiction ended when his sentence and parole were terminated on August 4, 1997. The jurisdiction of the Board extends to all "persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law." Utah Code Ann. § 77-27-5(1)(a) (Supp. 2002).<sup>2</sup> Further, the Board's jurisdiction over offenders subject to pardon or parole and offenders having their sentences commuted or terminated includes "any offender committed to a penal or correctional facility under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor." *Id.* § 77-27-9(1)(a) (1999). Thus, the Board has jurisdiction over any offender committed to serve a sentence at a state penal or correctional facility for a class A misdemeanor or felony, with exceptions, and any offender on parole.

[2, 3] ¶8 An action to terminate a prison sentence and parole supervision is within the exclusive authority of the Board. *See id.* § 77-27-5(1); *see also State v. Schreuder*, 712 P.2d 264, 277 (Utah 1985). In addition, there is no question that the Board has independent authority to impose restitution. *See* Utah Code Ann. § 77-27-5(1); *see also Monson v. Carver*, 928 P.2d 1017, 1025 (Utah 1996); *Stilling v. Utah Bd. of Pardons & Parole*, 933 P.2d 391, 392 (Utah Ct.App. 1997). The Board also has the authority to "impose any court order for restitution." Utah Code Ann. § 77-27-6(2) (Supp. 2002). However, once a defendant is terminated from parole and outstanding restitution remains, the matter is "referred to the district court for civil collection remedies." *Id.* § 77-27-6(4). Thus, at the time a defendant's sentence and parole are terminated,

2. For convenience, we cite to the most recent version of the Utah Code. There has been no significant change to the statute that would affect our analysis.

the Board must "forward a restitution order to the sentencing court to be entered on the judgment docket." *Id.* Although the statute does not expressly provide a deadline for submitting a restitution order to the sentencing court, we conclude that the restitution order must be executed prior to the termination of a sentence and parole. Otherwise, the Board could indefinitely extend its authority to those no longer under its jurisdiction.

[4] ¶ 9 Simply put, the Board cannot enforce parole conditions after the termination of a defendant's sentence and parole supervision. "If the Board could assert jurisdiction over a former parolee at any time after formal termination from parole, . . . a person whose sentence had been formally terminated could be subject to the Board's jurisdiction for an indefinite time." *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1153 (Utah 1995). In *Petersen*, the Utah Supreme Court recognized that statutory provisions governing the Board's authority to incarcerate an offender for a parole violation are not "unlimited." *Id.* In addition, the purpose behind limiting the time for revocation to the statutory parole period was to "set a certain time after which a parolee is freed from the jurisdiction of the Board and allowed to resume a normal life." *Id.* Also, the court acknowledged that the legislature "did not intend that a person whose sentence ended by termination of his parole should be indefinitely subject to the Board's jurisdiction, possibly for the remainder of his life." *Id.*

¶ 10 Furthermore, in the analogous situation of a court's jurisdiction over a probationer, Utah courts have recognized that a trial court loses authority to take action (i.e. revoke probation) after the expiration of the probation period set by statute. See *Smith v. Cook*, 803 P.2d 788, 795 (Utah 1990) (holding jurisdiction is maintained if notice of revocation proceeding is given to probationer within probation period); *State v. Green*, 757 P.2d 462, 464 (Utah 1988) (noting that defendants "would be left in a perpetual state of limbo" by having probation appear to be terminated but being subject to a continued term of fictional supervision); *State v. Rawlings*, 893 P.2d 1063, 1069 (Utah Ct.App.1995)

(stating that court lacks authority to extend probation period if no notice or hearing is provided within probation period).

[5] ¶ 11 In this case, the Board decided that a restitution order should be issued after holding a Special Attention Hearing on April 22, 1997. The Board executed the restitution order for the outstanding restitution amount of \$3,798.43 on September 8, 1997, over a month after Schultz's sentence and parole were terminated. The trial judge signed the order on September 17, 1997, in accordance with Utah Code Ann. § 77-27-6(4).

¶ 12 It is undisputed that the Board had jurisdiction over Schultz until his sentence and parole were terminated on August 4, 1997. However, by the time the Board issued the restitution order, Schultz was no longer an "offender committed to a penal or correctional facility" or an offender on parole. Utah Code Ann. § 77-27-9(1)(a). Thus, the Board did not have jurisdiction over Schultz at the time it forwarded the restitution order to the sentencing court to be entered as a civil judgment.

¶ 13 Also, Schultz was not immediately notified, nor was a hearing held to determine that restitution grounded on a past termination order would be enforced after the termination of his sentence and parole. The restitution hearing in October 1996 would not constitute sufficient notice or hearing because that hearing resulted in a determination to have the Board hold a full parole revocation hearing. The Board never held such a hearing, and, six months later, the Board decided to terminate Schultz's sentence and parole. Furthermore, there is nothing in the record that indicates Schultz was actually notified prior to the termination of his sentence and parole that, as a result of the Special Attention Hearing in April 1997, the restitution order was to be issued.

¶ 14 The Board could have easily issued and forwarded the restitution order to be entered into the judgment docket of the sentencing court prior to the termination of Schultz's sentence and parole. However, under the circumstances, the restitution order was issued when the Board no longer had jurisdiction over Schultz. Therefore, the or-

der has no effect. Because the Board had no jurisdiction to issue the restitution order, the sentencing court also did not have jurisdiction to enter the restitution order as an enforceable civil judgment.

¶ 15 The State contends that the Board had issued the order of restitution while Schultz was under its jurisdiction when it concluded at the April 22, 1997 Special Attention Hearing that restitution was to be imposed. We disagree.<sup>3</sup> As a result of the hearing, the Board concluded that Schultz's sentence and parole would be terminated effective August 4, 1997. The Board also recommended that a civil judgment be entered against Schultz for payment of restitution owed. The decision from the hearing was not an order of restitution, as evidenced by the actual restitution order issued by the Board on September 8, 1997. If the hearing results could be deemed an official order, as argued by the State, then the Board would have simply forwarded the hearing results to the trial court for entry as a judgment. In addition, the Special Attention Hearing decision merely stated that a request for restitution would be forwarded to the sentencing court, not that the results constituted a formal order of restitution.

¶ 16 The language of the decision clearly shows that Schultz's sentence and parole termination were the result of the hearing held in April. The hearing decision reads as follows:

Terminate sentence and parole effective 08/04/97. OTHER: Request for restitution of \$3798.43 is to be forwarded to the Sentencing Court for a Civil Judgement.

The decision indicates that the result of the hearing was to terminate Schultz's sentence and parole and, separately, a "request" that a restitution order be submitted to the sentencing court. Although the decision of the April 1997 Special Attention Hearing was not formally issued until August 5, 1997, this had

no impact on the fact that the termination of Schultz's parole and sentence became effective on August 4, 1997, or the fact that the restitution order was not issued and forwarded to the trial court until September 8, 1997, after the Board had lost jurisdiction.

[6, 7] ¶ 17 The State also argues that the restitution order "relates back" to the Special Attention Hearing on April 22, 1997. We do not consider this an appropriate case to, in effect, deem the September 8, 1997 restitution order nunc pro tunc. Nunc pro tunc orders may be used to correct an omission or error. See *Southwick v. Leone*, 860 P.2d 973, 978 (Utah Ct.App.1993). In this case, there was no omission or error that was being corrected by the Board when it issued a restitution order for the sentencing court to impose a civil judgment against Schultz. In addition, the Board "cannot circumvent [the termination of Schultz's sentence and parole] and bootstrap its authority to act simply by issuing a nunc pro tunc order relating back" to when he was under the Board's jurisdiction. *Id.*; see also *In re Daoud*, 16 Cal.3d 879, 129 Cal.Rptr. 673, 549 P.2d 145, 147 (1976) (stating that a court cannot revive lapsed jurisdiction after expiration of probation by issuing nunc pro tunc order). Thus, the Board cannot revive its jurisdiction over Schultz merely by claiming that the order relates back to the Special Attention Hearing where the Board concluded that a request for restitution was to be forwarded to the sentencing court.

¶ 18 In sum, the Board has statutory authority to submit to the sentencing court a restitution order to be entered on the judgment docket so that restitution can continue to be collected after the Board no longer has jurisdiction. See Utah Code Ann. § 77-27-6. However, once an offender's parole and sentence have been terminated, the Board loses jurisdiction to take that action.

Also, the parole agreement was not an order of restitution, as evidenced by the Board's formal order submitted to the trial court on September 8, 1997. If the agreement was considered to be an order, the Board would have simply forwarded the agreement to be entered as a civil judgment.

3. We also reject the State's argument that the parole agreement itself was an order. The parole agreement imposed conditions for parole supervision, one of which was restitution. However, once Schultz's parole and sentence were terminated on August 4, 1997, the agreement was no longer summarily enforceable under Utah Code Ann. § 77-27-6(4) (Supp.2002).



CONCLUSION

[8] ¶ 19 We conclude that the jurisdiction of the Board extends to actions taken against an offender that has committed a class A misdemeanor or felony who is serving a sentence in a penal or correctional facility or is on parole, with certain statutory exceptions. In addition, the Board has the authority to issue restitution orders. However, such orders must be issued while an offender is under its jurisdiction. In this case, the Board issued the restitution order after the termination of Schultz's sentence and parole. At that time, the Board no longer had jurisdiction over Schultz. Therefore, the sentencing court's entry of the order on its judgment docket is equally invalid.

¶ 20 Accordingly, we reverse the trial court's denial of Schultz's motion to set aside the civil judgment to enforce restitution.

¶ 21 I CONCUR: JUDITH M.  
BILLINGS, Associate Presiding Judge.

¶ 22 I CONCUR IN THE RESULT  
ONLY: RUSSELL W. BENCH, Judge.

