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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH,<br><br>Appellee-Respondent<br><br>vs<br><br>DENNIS J GARCIA,<br><br>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,<br><br>Intervenors and real-parties-in-interest<br><br>Appellees-Respondents | ORAL ARGUMENT REQUESTED<br><br>Rule 27(d) certification: Appellant-Petitioner GARCIA is not presently incarcerated. This is not an *Anders* brief.<br><br>Appellate Case No. 20160932SC |

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**PETITIONER'S REPLY BRIEF**

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CERTIORARI REVIEW OF A DECISION OF THE UTAH COURT OF APPEALS
2016 UT App 96 [issued 12 May 2016]

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

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Petitioner DENNIS J GARCIA responds to the BRIEF OF RESPONDENT as follows.

PETITIONER'S REPLY ARGUMENTS

The BRIEF OF RESPONDENT---in which the substantive "argument" thereof is but a mere five pages of text---is, on all material issues, superficial and inadequate in its response to the issues raised in the case. The State's arguments fail to meaningfully analyze the issues; the State asserts conclusions which totally "miss" the more meaningful significance of cases. The Respondent fails to even mention, let alone address, the "stare decisis" issue arising from

the **Schultz** decision by a former panel of the Utah Court of Appeals.

I

THE STATE'S "IDENTIFICATION OF PARTIES"
IS FALSE AND INTENTIONALLY MISLEADING

On the page "i" of the BRIEF OF RESPONDENT---submitted above the signatures of THE Attorney General of the State of Utah, of the Solicitor General and the Assistant Solicitor General (and signed by the Assistant Solicitor, Mr Burnett), the State makes the following statement under its "List of All Parties":

> To the best of **Respondent State of Utah's knowledge, all interested parties** appear in the caption of this Brief.

Emphasis added. The second (and concluding) sentence of the Paragraph---although technically accurate in its substance---is confusing and intentionally misleading. That sentence states:

> The Utah Board of Pardons and Parole and the Utah Office of Debt Collection are entities of the State of Utah.

The first sentence (i.e. "To the best of Respondent State of Utah knowledge . . .") is all encompassing: it affirmatively identifies the entire State government, and not merely the individual knowledge of the three attorneys who have submitted the BRIEF in behalf of the State.

Likewise, the term "all interested parties" is used, albeit for an apparently misleading and disingenuous

purpose.

The statements---individually and in combination with each other---intentionally mislead and ignore the voluntary "intervention" effected in January 2014 when the Board of Pardons and the Utah Office of Debt Collection, through separate Assistant Attorneys General (Ms Reber and Ms Jex) moved the District Court to allow their voluntary "intervention", as the claimed "real-parties-in-interest" for the case at that time. Their motions for intervention were granted by the District Court. Thereafter, the two entities and their counsel filed hundreds and hundreds of pages of materials in their opposition to GARCIA's set aside motion. See RECORD at 155-275.

At no time thereafter has either State agency moved to "withdraw" from the case. That the case was initially "appealed" by GARCIA from the District Court and later petitioned for certiorari review by GARCIA required no action on the part of the State agencies (the Board of Pardons and the Office of Debt Collection) to stay in. Accordingly, the State's assertion that only the State of Utah is in the case is misleading, even fraudulent upon the Court.

While the State's motives in suppressing the agencies' continuing involvement in the case has not been explained (nor has any formalized withdrawal from the case been

identified by the State's appellate counsel), perhaps a reason the State presently desires to "hide" its agencies' former "intervention" into the case is that such intervention contradicts the State's position: that the District Court had "no jurisdiction" following sentencing. Thus, there was no case into which to "intervene". Application of the principle of "judicial estoppel" would preclude the State from now denying (or ignoring) the previous "intervention" of its agencies and the judicial "judgment" they obtained from the participation. [There may be other reasons for the State's motivation to "hide" the previous intervention (and the effect thereof) of its subordinate agencies into the "case".]

If the two State agencies are---as the attorneys now represent---no longer "interested" (State's term) in the case, then the Court should consider the State's "defenses" to the GARCIA "set aside" motion to be moot (and/or abandoned) and enter summary relief in GARCIA's favor.

The asserted "no interest" statement is disingenuous, given the fact that as recently as this last spring (i.e. in 2017) collection agencies representing the Office of Debt Collection have sent GARCIA "demand letters" demanding payment of the District Court's judgment.

## II

## THE STATE IGNORES THE PROVISIONS OF THE STATUTE THE STATE ITSELF CHARACTERIZES AS "CONTROLLING"

On page 2 of the RESPONDENT'S BRIEF the State identifies Subsection 77-27-6(4), Utah Code, as a "determinative statute", for which the "controlling provisions" are identified. The State then and there quotes the statutory text, including the first sentence thereof which expressly includes the "within 60 days" requirement. The "within 60 days" requirement---which is also identified within Subsection 77-27-6(2)---is (and has always been) the "core" basis for GARCIA's "set aside" motion. The Court should follow the statutory provisions which the State itself characterizes as "determinative" and "controlling".

## III

## THE STATE'S ARGUMENTS CONCERNING SECTION 77-27-5(3) ARE FLAWED, INCORRECT AND MISLEADING

On page 2 of RESPONDENT'S BRIEF the State identifies Subsection 77-27-5(3), Utah Code, to be "determinative" and "controlling". This conclusion and assertion is flawed, incorrect and misleading.

This "petition for certiorari" reviews the Utah Court of Appeals DECISION. In the DECISION the Court of Appeals did NOT base its "no jurisdiction" ruling upon the provisions of Subsection 77-27-5(3), Utah Code; the Court of Appeals was basically based upon the singe sentence from

**State vs Montoya**, 825 P.2d 676 (Utah Court of Appeals 1991). See ¶ 11 of the DECISION. Subsection 77-27-5(3), Utah Code, was, within the DECISION, identified but a single time---i.e. ¶ 8 of the DECISION---but only in the context of GARCIA's claim of "unconstitutionality" of the statute, which issue has been DENIED "certiorari review" by the Court.

Notwithstanding the relative clarity of the "no judicial review of Board decisions" (paraphrased) text of the statute, the State cites (page 6 within the "argument" section of its BRIEF) numerous appellate cases---i.e. **Foote vs Utah Board of Pardons**, 808 P.2d 734 (Utah Supreme Court 1991); **Padilla vs Utah Board of Pardons**, 947 P.2d 664 (Utah Supreme Court 1997); and **Preece vs House**, 886 P.2d 508 (Utah Supreme Court 1994)---which seemingly run counter to the clear thrust of the statute [77-27-5(3)]. So obviously, Subsection 77-27-5(3) does not mean what it appears to say.

The **Foote** decision affirmatively indicates that if the statute were to preclude all "judicial review", the statute would be unconstitutional as violating the "open courts" provisions of Article I, Section 11 of the Utah Constitution---an issue GARCIA has sought to raise in this case. Perhaps now that the State has raised Section 77-27-5(3) as an issue in the case, the Court should allow the parties to argue its "unconstitutionality".

The State's arguments, in various places within its BRIEF, that GARCIA's sole remedy against the Board is pursuant to Rule 65B, is flawed. GARCIA's fundamental claim, to "set aside" the resultant "civil judgment" arising from the "late" Board of Pardons "restitution order" is entirely appropriate, under the Rules---for example, Rule 60, which is directly on point---as well as case law decision, including **State vs Schultz**, 2002 UT App 297, 56 P.3d 974 (Utah Court of Appeals 2002). GARCIA's "set aside" argument, directed to the District Court and its "civil judgment", was timely filed and appropriate in light of the facially-obvious "lateness" of the Board's late-filed "restitution order". See Subsections 77-27-6(2) and 77-27-6(4), Utah Code.

## IV

## THE STATE'S CHARACTERIZATION OF PETITIONER'S CLAIMS IS MISLEADING AND SIMPLY WRONG

On page 4 of its BRIEF the State, in its "summary of argument" paragraphs, asserts that the "question in this case" is not whether GARCIA may challenge the Board's restitution order, but rather "how he may challenge it". The concept is further identified on page 5 under the "Argument" section of the State's BRIEF. [This newly-minted observation and characterization (of opposing party's long-standing position) certainly contradicts the State's (and/or the Board's and the Debt Collection Office's) consistently

asserted positions: that GARCIA simply could not challenge the Board's decision. Whether such disability arises from the "no judicial review" provisions of Subsection 77-27-5(3)---presently asserted by the State to be "determinative" and "controlling", although not relied upon by the Court of Appeals in its DECISION which this Court is presently reviewing---or some other basis, the State's argument is disingenuous. Indeed, the State expressly references [page 4, last two sentences of complete paragraph on page] the statutory prohibition, without actually referring to the specific statute.] The State agencies identified and argued the "no jurisdiction/lost jurisdiction" issue (from **Montoya**) before the District Court and renewed those claims before the Utah Court of Appeals, which incorporated the "no jurisdiction" basis into its DECISION.

The State's brazen attempt [page 4 of RESPONDENT'S BRIEF] to infuse the "Rule 60(b) motions" into the Court of Appeals "holding" (State's terminology) is an improper extension of the DECISION, which "speaks for itself".

The State's mischaracterization [page 5 of its BRIEF] as to GARCIA's lack of "challenge" to the Court of Appeals' "construction of the statutory text" is erroneous and misleading. GARCIA has always---and consistently---challenged the Court of Appeals DECISION: initially, in his "petition for rehearing" before the Court of Appeals, and

later before this Court in his "petition for writ of certiorari" and in his 30+ pages of "argument" in his opening BRIEF. Those arguments (i.e. disregard of stare decisis, disregard of statutory text, the "jurisdiction" issue and so forth) "speak for themselves".

GARCIA's position vis-a-vis the DECISION is not susceptible of simple analysis and easy dismissal. The DECISION does undertake an apparent statutory "construction", but that "construction" is fundamentally flawed by the Court of Appeals' failure to APPLY the operative statutory text: namely, the "within 60 days" restriction contained within Subsection 77-27-6(4), which the State herein characterizes as "determinative" and "controlling".

The State's attempt to characterize GARCIA's claims as an attempt to "review" the Board's decision is incorrect and misleading. GARCIA's position on this narrow point has always been to "set aside" the resulting "civil judgment" which improperly arose from the "late" filing of the Board's order. In this regard, the State's arguments and analysis concerning the "extraordinary relief" remedy under Rule 65B is just so much distraction: while such a litigation could have theoretically been filed, it couldn't have been undertaken within the context of the criminal case, as the Board of Pardons was not at the time a party thereto. Even

if the Rule 65B claim had been filed, the supposed "equitable remedy" against the Board to do something (i.e. hold the statutorily-required hearing it never held) would still have left the "civil judgment" untouched and in place. GARCIA's "set aside" motion was timely made, in the proper court which entered the "civil judgment" at issue in this case.

V

THE **Frito-Lay** CASE IS TOTALLY INAPPLICABLE TO THIS CASE

The State's continued assertion of the 2009 decision of this Court in the case of **Frito-Lay vs Utah Labor Commission**, 2009 UT 71, 222 P.3d 55 (Utah Supreme Court 2009) as being applicable hereto is misleading. This is nevertheless the situation, even though the Court of Appeals incorporated the argument into the DECISION.

**Frito-Lay** holds that the Utah Rules of Civil Procedure are not, per se, applicable to procedures followed in adjudicatory hearings by administrative agencies. Okay, we understand that. But that principle has absolutely nothing to do with the present case. Again, the State attempts to distract the focus away from the fundamental issue: that the Board was "late" in filing its order.

The State's blatant attempt to distract the focus is evidenced by the State's usage of almost two full pages devoted to the **Frito-Lay** argument [pp. 7 and 8 of its

BRIEF], while the State has devoted but two paragraphs---one on page 9 and one paragraph on page 10---to a discussion of this Court's decision in the **Laycock** case. [See discussion in depth in Point VI, immediately following.] The State likewise gives extraordinarily superficial treatment---a mere two paragraphs, consisting of but five sentences---to **Schultz**.

VI

THE STATE'S ANALYSIS OF **LAYCOCK** IS FLAWED AND SUPERFICIAL

The State's brief [one paragraph on Page 9 and one paragraph on page 10 of its BRIEF] is woefully inadequate to respond to the analysis raised by Petitioner GARCIA. On Page 10 the State asserts:

> . . . *Laycock* does not discuss a criminal court's post-sentencing jurisdiction. It [the Laycock decision] **acknowledges only** that a party may appropriately file a petition for an extraordinary writ to challenge a decision where the party does not have the right to appeal. *Laycock*, 2009 UT 53, ¶ 7.

Emphasis added. Bracketed text in the second sentence added for clarity.

That the State reads **Laycock** so superficially is incredible, if not troubling. In **The State of Utah, Petitioner vs Claudia Laycock, District Judge**, 2009 UT 53, 214 P.3d 104 (Utah Supreme Court 2009), the Supreme Court went to great lengths to explain "court-ordered restitution", even in a post-sentencing situational context.

Admittedly, **Laycock** did not, as the State correctly notes [page 10 of its BRIEF], "discuss a criminal court's post-sentencing jurisdiction". Page 10 of State's BRIEF.] But the reason for that lack of discussion was obvious: everybody knew that the District Court had jurisdiction. IF the District Court would have no post-sentencing jurisdiction, it would have been meaningless for the Supreme Court to order Judge Laycock to order "complete restitution" several years after the criminal sentence had been announced (in 2004), particularly in the face of the "within one year" after sentencing requirements of the statute. The Attorney General's "petition" for "extraordinary relief" against Judge Laycock impliedly admitted and acknowledged the "jurisdiction" the District Court had; otherwise, **Laycock** could have never been filed in the first place.

So the State's failure to properly analyze **Laycock** is deeply troubling. To refer to a principle identified in Paragraph 7 of a multi-page decision which extended across page-after-page as being the "acknowledges only that" (State's terminology, p. 10 of its BRIEF) evidences the superficiality of the State's analysis of the case---a case which the State itself filed.

## VII

## THE STATE'S FAILURE TO ANALYZE **Schultz** AND TO RESPOND TO THE "STARE DECISIS" ARGUMENTS IS LIKEWISE SUPERFICIAL AND INADEQUATE

Although the "stare decisis" arguments advanced by GARCIA across almost ten pages of text [see APPELLANT'S BRIEF, pp. 9-19], the State responded thereto with but two paragraphs, consisting of a mere 5 sentences. Such a tepid, superficial response to what will proved to be the dispositive issue is troubling, if not worse. The brief response is reminiscent of the State's similar response in February 2016 to the Court of Appeals "supplemental briefing order", wherein the Court of Appeals sought briefing on the "effect" (Court of Appeals terminology) of its **State vs Schultz**, 2002 UT App 297, 56 P.3d 974 (Utah Court of Appeals 2002), decision. The original STATE-submitted "supplemental brief" consisted of approximately four pages, which omitted any reference at all to **Schultz**. Later that day, a "corrected" supplemental brief was filed, in which a couple paragraphs---consisting of five or six sentences---addressed **Schultz**. Perhaps the State is taking its "cue" from the Court of Appeals and its DECISION: if we simply ignore **Schultz** we won't have to deal with it. So we will (ignore **Schultz**) and we'll pretend it doesn't exist.

The State's analysis is superficial and simply wrong. It apparent attempt [page 9, second paragraph] to

distinguish **Schultz** from the instant situation because **Schultz** arose in the context of a "challenge to the validity of a continuing garnishment based on a restitution order" [Id.] is meaningless. As previously noted extensively in GARCIA'S PETITIONER'S BRIEF, **Schultz** held---repeated numerous times---that the Board's restitution order was invalid, because it was "late" in its making, and that the Board had no jurisdiction to enter the order.

The State argues that **Schultz** did not discuss the "jurisdiction" of the sentencing court. That's probably the only truly-accurate statement made by the State in its BRIEF. But that situation does not change the analysis nor the result. The sentencing court was presumed to have jurisdiction. So **Schultz** is binding precedent and the principle of stare decisis was violated by the DECISION. Of course the State made no attempt to respond to the "stare decisis", because it could make no effective rebuttal thereto.

The singular distinction between the instant case and **Schultz** is NOT the "continuing garnishment" context. THE single distinction in the instant case is the Legislature's adoption---in 2005---the technical amendments to Subsection 77-27-6(4), and also in 77-27-6(2), adopting the "within 60 days" (of termination of sentence) requirement. While the amendment gave the Board of Pardons an additional sixty days

in which to act, the Board was nevertheless "late" in making and filing its "restitution order". So of course the State wants to "sweep under the rug", as does the DECISION, this unavoidable but nevertheless rather "inconvenient truth".

## CONCLUSION

The State's BRIEF and the superficial and inapplicable arguments and analysis contained therein are woefully inadequate, on their face. The Court should easily recognize the superficiality and dismiss the arguments.

The "bottom line" is unchanged. The Court of Appeals DECISION fails to follow **Schultz**, and thus violates the principle of "stare decisis", which is one of the bedrock foundations of our system of law.

The DECISION fails to even recognize, let alone apply, the dispositive nature of the "lateness" of the Board's making as well as filing its "restitution order". These failures invalidate---as per **Schultz** and certainly under the statute---that filing and the "civil judgment" which automatically arises therefrom.

**Laycock** implicitly overrules **Montoya** and its progeny; the Supreme Court should now say so.

The Decision of the Utah Court of Appeals must be overturned and 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 7th day of June, 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 REPLY 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 (including captions, certifications and so forth) is 3145 words, per the "word count" subroutine within the word-processing program upon which the document was created.

CERTIFICATE OF SERVICE UPON OPPOSING COUNSEL

I certify that I caused two copies of the foregoing PETITIONER'S REPLY BRIEF, with attachments, to be hand-delivered to the office of, and/or mailed, first class postage prepaid to, 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 7th day of June, 2017.

/s/Stephen G Homer