2016

State of Utah, Appellee/ Plaintiff, v. Dennis Terry Wynn, Appellant/ Defendant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee/Plaintiff, v. DENNIS TERRY WYNN, Appellant/Defendant.	Court of Appeals Case No. 20150492

REPLY BRIEF OF APPELLANT

This is the reply brief of Mr. Wynn, who stands convicted of four counts of securities fraud, second and third degree felony violations of Utah Code Ann. § 61-1-1. The appeal is from an order denying Wynn's post-judgment motions for relief from the default restitution order and illegal imposition of the sentence, and denying his motion to compel discovery. The Honorable Robin W. Reese of the Third District Court in and for Salt Lake County, State of Utah, imposed the sentence. The order appealed from entered in the same court, the Honorable Paul B. Parker, Judge, presiding.

Elizabeth Hunt L.L.C.
Elizabeth Hunt (5292)
Attorney for Mr. Wynn
569 Browning Ave.
Salt Lake City, Utah 84105
Cell: (801)706-1114
E-fax: 1-801-443-1980
E-mail: elizabeth.hunt@comcast.net

Laura Dupaix, Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 8441-0854
Telephone: 801-366-0180

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Attorney for Mr. Wynn
569 Browning Ave.
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Cell: (801)706-1114
E-fax: 1-801-443-1980
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Laura Dupaix, Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 8441-0854
Telephone: 801-366-0180

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I. THIS COURT SHOULD REJECT THE STATE'S CURRENT POSITION ON THE PCRA.

The State's current overall contention is that Wynn's motions under 30(b), 22(e) and 60(b) seek to circumvent the long-expired time limits of the PCRA, and that the trial court was correct in so ruling. State's brief at 16, 18. Actually, the trial court did not rule that the time bar of the PCRA would bar Wynn's claims. Rather, the court ruled that the availability of relief under the PCRA precluded Wynn's resorting to rule 60(b) for relief (R. 507-08). The trial court was led to rule in this fashion by the State's position below, that rather than seeking relief under the court rules, Wynn should pursue withdrawal of his pleas under the PCRA. See R. 394, 398-400, 463, R. 544: 10, 16. Rather than arguing that Wynn's claims were time-barred under the PCRA, the State successfully led the trial court to believe and rule that the PCRA was "applicable to address Defendant's allegations" and an available remedy for Wynn that foreclosed his resorting to 60(b) (R. 506-508 and n.2). See State's brief at 15 (acknowledging that the attorney general's office argued that Wynn had to proceed and could seek discovery through the PCRA, and that the trial court ruled that Wynn could only seek relief through the PCRA).

Utah law recognizes that the State, like other parties on appeal, is not allowed to raise new issues it waived in the trial court. E.g., State v. Schlosser, 774 P.2d 1132, 1138-39 (Utah 1989) (declining to address Fourth Amendment standing issue that the State did not raise in trial court or on appeal). Our law recognizes that estoppel applies against the government when there are "very specific written representations

by authorized government entities," when the facts can be found with certainty and the injustice that would otherwise result is "of sufficient gravity" to allow for assertion of estoppel against the government. Anderson v. Public Service Commission, 839 P.2d 822, 827-28 (Utah 1992).

This Court should not adopt the State's current position, as it is inconsistent with the written position the Assistant Attorney General took below, is designed to prejudice Wynn's ability to obtain relief from the Courts, and was waived in the trial court.

The plea bargain agreement the Attorney General's Office entered into in the first place was that Wynn would serve only five years in federal prison and that he would serve no time in state prison, as "any" state prison time would run concurrently with Wynn's five-year federal sentence (R. 130,179-80, 182-183). Contrary to the State's position, particularly as it was articulated in the trial court, Wynn is not trying to withdraw his guilty pleas, and is not and should not be required to do so under the PCRA. He has already served more prison time than was contemplated in his agreement with the State. He should be allowed to enforce the terms of the original agreement by correcting his illegal sentence under rule 30(b), 22(e) and/or 60(b).

II. THE RESTITUTION ORDER SHOULD BE CORRECTED UNDER 30(B).

While it reiterates the court's error, the State makes no effort to defend Judge Parker's clearly erroneous ruling that the restitution involved no error as it reflected

what was intended by the parties and the court – that Judge Reese would enter an order for "'full and complete' restitution." (R. 508). Compare Wynn's opening brief at 15-17 with the State's brief *passim*. The State makes no effort to defend Judge Parker's clearly erroneous ruling that there is nothing in the record to counter that the restitution order carried out the court's and parties' intent. Compare Wynn's opening brief at 17-18 with State's brief *passim*.

The State claims that the legal error in the restitution order, which includes amounts for people who are not victims of the counts pled to, or victims of any count, is a judicial error reflecting legally erroneous judicial reasoning, not a clerical one correctible under 30(b). State's brief at 16, 20, 22. The State also argues that Wynn is not entitled to relief from clerical error under 30(b), because he has not shown a mathematical error in the calculation of restitution. State's brief at 16, 19, 21.

The State's interpretation of 30(b), as if mathematical errors qualify as clerical errors, whereas legal errors do not, is legally incorrect. Under the law interpreting 30(b), an error is clerical if an order does not reflect the intent or judicial reasoning of the court, or the intent of the court and the parties. E.g., State v. Rodrigues, 2009 UT 62, ¶ 15, 218 P.3d 610.

Here, the intent of the court was to impose an order of restitution that was agreed upon by the parties (R. 543: 3, 5). The final order here was not agreed upon, but was instead defaulted on by trial counsel for Wynn. See R. 135, State's brief at

10. And the default did not square with the intent of Wynn – to pay restitution for the counts pled to (R. 543; 3, 5, R. 130, 186).

Similarly to the order in Rodrigues, there was no judicial reasoning involved in the entry of the restitution order; the court simply signed the order defaulted on by Wynn's trial counsel, without having any underlying data with which to reason.

Assuming it were necessary to prove mathematical error, the final order of restitution in the amount of $782, 036.00 does not account for the $100,000 Wynn paid when he pled guilty, as the trial court and plea agreement intended (R. 543: 3, 5). This is a mathematical error that deviated from the intent of the court and the parties. It qualifies for relief even under the State's unduly limited view of relief available under 30(b). That Judge Parker now interprets that order as if it reflected the amount Wynn paid, and that the hearing officer for the board of pardons credited Wynn for paying $100,000, State's brief at 31 n.7, do not change the facts that the order on its face requires Wynn to pay the full amount without accounting for the $100,000 already paid (R. 141-147), as does the Board of Pardons' current order (R. 362).

After claiming the absence of mathematical error, he State notes discrepancies between the order and the charging information upon which Wynn relies in discussing amounts owed, and claims that the restitution order reflects the more accurate "updated" amounts. State's brief at 24. There is no record support for the proposition that the restitution order is updated or more accurate than the information and the sworn probable cause affidavit upon which Wynn relies (R. 11-38). The State has consistently denied Wynn discovery on how restitution was

calculated (R. 454-55) and the original prosecutor and defense counsel have not responded to the inquiries of present counsel for Wynn. (R. 544:7). The Court should reject the State's complaint that Wynn has shown no mathematical error in these circumstances.

The State argues as if Wynn agreed to pay "many times more" than $100,000 in restitution "to his securities fraud victims." State's brief at 1, 23. The record illuminates the State's representation as to the amount Wynn agreed to pay. This relevant portion of the colloquy was as follows:

> THE COURT: I'll also order that you pay full and complete restitution in an amount of at least $100,000, but probably as your attorney, I think in his words, were many times more than that, but the two of you will agree on a figure that will be presented at the time you surrender. Is that what you understand?
>
> MR. WYNN: Yes, Sir.

(R. 543: 3). Wynn agreed to pay what his attorney agreed upon, at least $100,000.

The State does not explain how Wynn's purported agreement to pay "his securities fraud victims" would allow for a restitution order including hundreds of thousands of dollars for people who are not even victims in the state criminal case, and for people who are victims of counts not pled to (R. 134-147). And as the State sometimes acknowledges, e.g. State's brief at 9, Wynn's actual agreement was for his lawyer to reach an agreement on the amount of restitution by October 6, 2008, the date Wynn was to report to federal prison, and that the amount would be at least $100,000 for the victims of the counts he pled to (R. 543; 3, 5, R. 130, 186). The default order requiring Wynn to pay hundreds of thousands of dollars to people who are not named victims of any of the charges, let alone the counts pled to, and

requiring Wynn to again pay the $100,000 he paid when he pled guilty, does not square with Wynn's agreement.

The State argues as if Wynn's statement before the hearing officer for the board of pardons that the restitution figure of $782,000 "sounds correct" affirms the accuracy of the court's restitution order. State's brief at 2, 24-25. But as the State at times acknowledges, State's brief at 11, Wynn made this statement when he was denied access to the information underlying that figure (R. 339-340).[1]

The State argues that because there is no contrary evidence, this Court must assume that counsel for Wynn reasonably opted to permit the entry of the restitution order because it was accurate. State's brief at 25. The State also argues that "everything in the record" supports the conclusion that trial counsel did not object to

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[1] The actual discussion was as follows:

> HEARING OFFICER: Okay. So at this point I have restitution is owed in the amount of $782,068.63. It says $100,000 of this has been paid, and there's a balance of $682,068; is that correct?
> MR. WYNN: I don't – I haven't seen those figures, it sounds correct.
> HEARING OFFICER: Well, they were in the blue packet.
> MR. WYNN: They're not in the blue packet that I have. They may have been in the original blue packet, but that original blue packet was sent –
> HEARING OFFICER: Have you paid more than $100,000?
> MR. WYNN: Not that I'm aware of.
> HEARING OFFICER: Okay. Did you pay the $100,000?
> MR. WYNN: Yes.
> HEARING OFFICER: Okay. So as I look over the victims, it looks like there were 20 separate victims with losses ranging from 7,000 to $107,000 each.
> MR. WYNN: And I don't have the – I don't have that in my blue packet, so –
> Hearing officer: Well, I can't give you the victim's addresses for mailing purposes. Okay. So any of that information that you want to add upon, or does that pretty well sum it up?
> MR. WYNN: I think that sums it up.

(R. 339-340).

the restitution order because it was correct. Id. at 25. There is evidence contrary to the State's desired assumption in the record: Wynn's declaration reflects that his agreement was to pay restitution only to the victims of the counts pled to (R. 186). The State had every opportunity to present a counter-declaration from Wynn's trial counsel or the trial prosecutor and never did so.

As in Rodrigues, the State submitted incorrect restitution amounts that were not contested by trial counsel for the defendant. The State's errors were not the product of judicial reasoning or intent, and the court's adoption of the State's errors was not the deliberate result of the court's judicial reasoning or intent and did not reflect the parties' intent, as the court intended. The errors are thus subject to correction as clerical errors under 30(b). Id. ¶¶ 25-27.

III. THE RESTITUTION ORDER AND ILLEGALLY IMPOSED SENTENCE SHOULD BE CORRECTED UNDER 22(E).

The State contends that there is no evidence that the parties and court intended that Wynn serve no time in the state prison, and that this Court should thus presume that trial counsel acted reasonably in not protecting Wynn from the possibility of serving time in the state prison. State's brief at 39 n.8. Wynn's declaration (181-187), the declaration of the federal prosecutor who negotiated the state and federal cases in a global agreement with the state prosecutor and counsel for Wynn (R. 179-180), and the plea form reflecting that "any" state prison time would run concurrently with Wynn's federal five year sentence (R. 130) all prove that the agreement was that Wynn would serve only the five year sentence in federal prison.

The absence of a declaration by trial counsel or the trial prosecutor is the result of their not responding to the inquiries of present counsel for Wynn (R. 544: 7). The State certainly had every opportunity to present whatever proof it had to counter Wynn's factual contentions in the declarations of Wynn and the federal prosecutor proving that the agreement was for Wynn to spend five years in federal prison and then be free working to earn restitution, and presented nothing. Instead, it refused to provide discovery on the details of the plea bargaining (R. 445; 454-455).

Consistent with its argument that there was no agreement for Wynn to serve time only in federal prison, the State argues as if Judge Reese delayed issuing the commitment in the State case to ensure that the state sentence ran concurrently with the federal. State's brief at 8. The record actually demonstrates that Judge Reese ordered all sentences to run concurrently and agreed to delay signing the commitment until after Wynn went to federal prison (R. 543: 2-5). The state sentence was imposed after the federal, and the concurrent effect of the sentence was established and guaranteed by his ruling regardless of when the commitment was signed. The only function of delaying the imposition of sentence was to ensure that Wynn went to federal prison, not state.

The State contends that Wynn is truly challenging the legality of his pleas, because he misunderstood the value of the plea agreement when he entered them, and argues as if the only way the trial court could give effect to his understanding would have been to change the pleas from second degree felonies to third degree felonies. State's brief at 38-39. While Wynn certainly has an argument that his

misunderstanding of the nature and value of the bargain induced his pleas, he should not be forced into withdrawal of the pleas in this case wherein he has already served more time than he should have under the terms of the agreement.

Wynn has independent claims that his trial lawyer was ineffective in the sentencing process, in failing to ensure that the federal five-year sentence was the only prison time Wynn would serve, by requesting a reduction of the convictions to third degree felonies pursuant to Utah Code Ann. § 76-3-402 or by requesting probation on the State case. Wynn also has an independent claim of ineffective assistance by virtue of counsel's defaulting his right to accuracy in the restitution portion of his sentence. These claims establish illegality in the manner the sentence was imposed and are correctible under the plain language of the second clause of rule 22(e).[2] Compare State v. Apadaca, 2015 UT App 212, ¶¶ 9-11, 358 P.3d 1124 (the Court considered whether the trial court violated Apadaca's right to allocution at sentencing before finding that his sentence was not imposed in an illegal manner under 22(e)).

The State claims that Wynn proffered nothing to show that counsel was objectively deficient in failing to object to the restitution award, and that absent contrary evidence, the Court should presume that counsel's performance was reasonable. State's brief at 40 n.9. There is evidence contrary to the State's desired presumption in the record: Wynn's declaration reflects that his agreement was to pay

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[2] We interpret our court rules according to standard principles of statutory construction and give effect to all parts of our rules. E.g., Cox v. Krammer, 2003 UT App 264, ¶ 10, 76 P.3d 184. We give heed to their plain language. See, e.g., Hartford Leasing Corp. v. State, 888 P.2d 694, 697 (Utah App. 1994).

restitution only to the victims of the counts pled to and did not encompass payments for other victims in the charges and other people outside of the case (R. 186). The State had every opportunity to present a counter-declaration from Wynn's trial counsel or the trial prosecutor and never did so. Accordingly the record disproves that counsel's default was objectively reasonable.

The State makes no effort to defend Judge Parker's clearly erroneous factual finding that the restitution payees were all among the victims underlying the counts in this case (R. 506). Compare Wynn's opening brief at 29-30 with State's brief *passim.*

Nor does the State seek to defend Judge Parker's contradictory rulings that the court had no jurisdiction to act under 22(e), yet the availability of 22(e) foreclosed Wynn's resorting to 60(b) (R. 506 n.2). Compare Wynn's opening brief at 28-29 with State's brief *passim.*

While it echoes the incorrect reasoning in its brief, e.g. State's brief at 9, the State does not defend Judge Parker's legal reasoning that the parties would have to affirmatively limit restitution to the victims underlying the counts pled to for such a limitation to be legally cognizable (R. 506). Compare Wynn's opening brief at 31-32 with State's brief *passim.*

While it echoes the erroneous reasoning, State's brief at 31 n.7, the State does not contest that Judge Parker was factually incorrect in reading the default restitution order as if it accounted for the $100,000 payment. Compare Wynn's opening brief at 31 with State's brief *passim.*

The State contends that Wynn is not entitled to relief under rule 22(e), because his sentence is legal, and to the extent it was imposed illegally through ineffective assistance of counsel, this is not subject to correction under 22(e) because claims of ineffective assistance of counsel are not "facial" challenges, as they would have to be to be corrected under 22(e). State's brief at 31-39. In making this argument, the State relies heavily on State v. Houston, 2015 UT 36, 353 P.3d 55, a decision that was issued after Wynn's 22(e) motion was filed, and which held that 22(e) illegal sentence claims are limited to true legal challenges to sentences, as opposed to fact intensive challenges to underlying convictions. See id. at ¶¶26-27.

Contrary to the State's argument on page 40 of its brief, the restitution order portion of Wynn's sentence certainly contains clear-cut facial legal error, as it requires Wynn to pay hundreds of thousands of dollars to people who are not even victims of the case charged, let alone victims of the counts he pled to in the absence of an agreement to justify restitution beyond that payable to the victims of the counts pled to. And the restitution order does not account for the $100,000 Wynn paid at the time he pled. This does not square with basic Utah law, which permits restitution to be ordered for extant debts attributable to criminal convictions unless there is an agreement to pay more. See, e.g., State v. Larsen, 2009 UT App 293, 221 P.3d 277; Utah Code Ann. 77-38a-302. Thus the illegal sentence is correctible under 22(e).

With regard to trial counsel's failure to seek a sentence that would embody the agreement that Wynn serve only five years in federal prison, the State contends that fact intensive challenges involved in claims of ineffective assistance of counsel are not

properly resolved under 22(e). State's brief at 37. The facts underlying this claim have been thoroughly documented by Wynn and have never been contested by the State. Thus, there is no fact-intensive analysis required in resolving Wynn's ineffective assistance claims. His legal claims regarding his counsel's ineffective assistance in the sentencing process, both with regard to the default restitution order, and with regard to counsel's failure to ensure that Wynn served no time in the state prison, are procedural errors in sentencing that are properly resolved under 22(e)'s remedy for sentences imposed "in an illegal manner." Cf. Apadaca, *supra.* See also State v. Samora, 2004 UT 79, ¶ 13, 99 P.3d 858 (sentence imposed in violation of Utah R. Crim. P. 22(a) was imposed in an illegal manner and thus subject to correction under 22(e)).

IV. THE RESTITUTION ORDER SHOULD BE CORRECTED UNDER 60(B).

A. THE PCRA DOES NOT FORECLOSE 60(B) RELIEF FROM THE DEFAULT JUDGMENT.

The State's current position is that the PCRA governs Wynn's claims, and that Wynn cannot proceed under 60(b) because his claims would be time-barred under the PCRA. State's brief at 42-43. The State never contended below that the PCRA would bar Wynn's claims for relief. Rather, the State repeatedly argued as if Wynn should be pursuing relief by challenging his pleas under the PCRA (e.g. R. 394, 463). As explained in Point I, this Court should not permit but should estop the State's

effort to take a position on appeal that is inconsistent with its position below, and would prejudice Wynn.

The State does not defend the trial court's ruling that the availability of the PCRA to address Wynn's claims foreclosed his resorting to 60(b)(6) (R. 507-08). This is likely because the State has changed positions on appeal, to now argue that the PCRA time bar would likely block Wynn from obtaining relief under the PCRA. State's brief at 43.

The State argues that the trial court properly ruled that Wynn could not resort to 60(b), as this would evade the time bar of the PCRA. State's brief at 17-18, 41-44. Actually, as detailed above, the State succeeded in leading the trial court to believe and rule that Wynn should proceed under the PCRA, and that the availability of that remedy disallowed him from proceeding under 60(b). Particularly as to default orders, 60(b) remains a viable remedy for claims of gross ineffective assistance of counsel, such as occurred here, and such as continues to prejudice Mr. Wynn.

Like the trial court, the State does not acknowledge the portion of Kell v. State, 2012 UT 25, ¶ 25, 285 P.3d 1133, wherein Kell reiterates that default judgments are generally properly set aside under 60(b)(6). Id. at ¶ 19. The restitution award is certainly a default judgment, as it requires Wynn to pay hundreds of thousands of dollars to people who were not victims of the counts pled to (141-147), when Wynn agreed only to pay restitution to the victims of the counts pled to (R. 186), and the record indisputably shows that Wynn's trial counsel did not respond when the State submitted the incorrect order to counsel or the court (R. 135). Thus,

60(b) relief is available to Wynn for counsel's gross ineffective assistance in his wholesale forfeiture of Wynn's right to an accurate determination of restitution. For when an attorney entirely forfeits a criminal defendant's procedural rights, this is ineffective assistance as a matter of law, as prejudice is presumed. See, e.g., Williams v. Taylor, 529 U.S. 362, 392-93 (2000); Hill v. Lockart, 474 U.S. 52, 56 (1985); Menzies v. Galetka, 2006 UT 81, ¶¶ 99-100, 150 P.3d 480.

B. WYNN'S 60(B) CHALLENGE TO THE DEFAULT JUDGMENT WAS TIMELY FILED.

The State argues that the trial court was correct in ruling that Wynn did not appear to have acted diligently in filing the 60(b) motion, because Wynn learned the total amount of restitution owed in 2013 during his second parole hearing, and did not begin challenging the restitution order until January of 2015. State's brief at 44-47. The court's ruling was that Wynn had not explained why his motion was not filed sooner (R. 507). Accord State's brief at 47 n.12 (recognizing the court's actual ruling that Wynn did not explain the delay). As the State does not contest, the court's ruling was clearly erroneous, for Wynn did explain that Wynn was relying on his trial counsel to have addressed the restitution issues, and did not learn until December of 2014 that counsel had defaulted on the restitution order in state court, and failed to object to the order, which requires Wynn to pay restitution to people who were not named in the criminal case, and who were not victims of the offenses to which he pled, and were thus beyond his expectation that he would be paying restitution only to the victims of the counts pled to (R. 181-187). The State faults Wynn for not

learning sooner of the details of the default judgment, id., failing to recognize that Wynn was constitutionally entitled to rely on the guiding hand of his counsel in the underlying criminal case. E.g., Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). Once Wynn learned that counsel had defaulted on the restitution issue, he did act, and file a comprehensive motion for relief under 22(e) within three months (R. 167-368). And after the Houston decision came down, he augmented his 22(e) claim under rules 30(b) and 60(b) (R. 440-444).

The State suggests that 60(b)'s reasonable diligence requirement should bar Wynn's efforts to correct the restitution award, as he has laid in wait with this claim to unfairly lull the State and victims into believing the order was final, resting assured that the corrected order would be lower due to document spoilage. State's brief at 48. There is no record support for this argument, as Wynn raised the claim as soon as he was aware of it, and the State has never previously complained or suggested that its documents have spoiled. Wynn sits in prison because he cannot pay the enormous restitution and has no incentive to wait to raise the claim. He was not aware of the default order or its contents until December of 2014.

The State claims that it has an interest in the finality of Wynn's sentence and would be prejudiced if the restitution order were set aside, as the State bargained for Wynn to pay full restitution in an amount many times more than the $100,000 he paid when he pled. State's brief at 47-48.[3] The State's position in this regard is founded on its misreading of the plea colloquy as if Wynn was thereby bound to pay

[3] It is noteworthy that the State is not claiming that specific amount listed in the current restitution order reflects what Wynn agreed to pay.

some amount multiple times greater than $100,000 to people who were not victims of the counts he pled to, and were not victims in his state case at all. As detailed above, the plea colloquy established no such thing (R. 543: 3). The undisputed record establishes that Wynn agreed to pay restitution only to the victims named in the counts pled to (R. 186).

The State argues that it is serving the State's interest by acting ethically and honestly in trying to hold Wynn to the letter and spirit of the plea agreement. State's brief at 49.[4] The agreement was that Wynn would serve five years in federal prison and then be free to earn the restitution he owed to the victims of the counts he pled to. This is proved by the plea form (R. 130), by Wynn's declaration (R. 181-188), by the declaration of the former federal prosecutor (R. 179-180), and by the fact that Judge Reese delayed signing Wynn's commitment until after he went to federal prison (R. 543 1-5). The State has never countered this with any evidence, despite having had the opportunity to do so (e.g. R. 450-51), and has refused to provide discovery concerning the details of the plea agreement and restitution issues (R. 445; 454-455).

Under the order of the Board of Pardons (R. 358-362), Wynn sits in state prison, where he never should have been under the terms of the State's agreement (R. 179-188), until he is able to pay hundreds of thousands of dollars he legally does not owe under the terms of the agreement (R. 186) and the governing law, e.g., State v.

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[4] In quoting Wynn's argument, the State apparently does not recognize the word integriously, and follows it with "[sic]." State's brief at 49. A person is integrious, and acts integriously, when that person's actions are marked with integrity. E.g. http://www.grammarphobia.com/blog/2009/09/an-adjective-with-integrity.html.

Larsen, 2009 UT App 293, 221 P.3d 277; Utah Code Ann. 77-38a-302, and is unable to pay (R. 181-188).

The State led the trial court to believe that Wynn's remedy for his predicament is withdrawal of his pleas through the PCRA (R. 394, 398-400, 463, R. 544: 10, 16; R. 506-508 and n.2), and on appeal now argues as if the trial court ruled correctly that he has no remedy under the PCRA (State's brief at 16-18). The State maintains that Wynn should stay in the prison unable to earn or pay restitution at all, as this serves the State's interest in finality, and that otherwise the State would be prejudiced (State's brief at 48-49).

The State's efforts to honestly and ethically uphold the letter and spirit of the plea agreement are required by our federal constitutional guarantee of due process of law. See, e.g., United States v. Cudjoe, 534 F.3d 1349, 1356 (10th Cir. 2008) (finding that government violated both the letter and spirit of the plea agreement, in violation of Santobello v. New York, 404 U.S. 257, 262 (1971)). The State's course of action in the trial court and on appeal, in obfuscating the nature of the plea agreement, in denying Wynn access to discovery on plea bargaining and restitution, and in trying to foreclose Wynn from pursuing any remedy from his illegal and/or illegally imposed sentence in the courts falls short of the constitutional mark and does not serve the State's interest. The State's efforts to maintain the status quo in the face of the illegal restitution order, and in derogation of the letter and the spirit of the plea agreement, do not serve any legitimate interest in finality or protect the State or the restitution victims from any legitimate prejudice. It is in the State's interest for the 60(b) motion

to go forward. Accordingly, the Court should hold that Wynn's 60(b) motion was filed with reasonable diligence.

V. THE TRIAL COURT HAD JURISDICTION TO ORDER DISCOVERY AND THE STATE SHOULD BE REQUIRED TO PRODUCE IT.

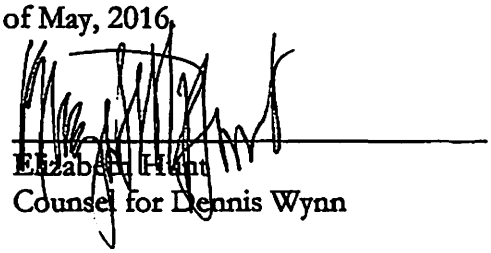
The State maintains that once the trial court determined it had no jurisdiction under 30(b), 22(e) and 60(b), it properly determined it had no jurisdiction to order discovery. State's brief at 49-50. This argument does not account for the fact that the trial court's ruling on 30(b) that there was no error in the judgment, ostensibly reached the merits during the court's exercise of jurisdiction (R. 508).

As the State does not contest, it has ongoing discovery obligations under 16(b), and ongoing constitutional obligations to produce exculpatory and mitigating evidence. Compare Wynn's opening brief at 44-45 with State's brief *passim*. These obligations were extant during the pendency of Wynn's motions in the trial court, and should be fulfilled on remand.

CONCLUSION

This Court should reverse all aspects of the lower court's ruling and remand for relief from the illegal restitution order and illegally imposed sentence.

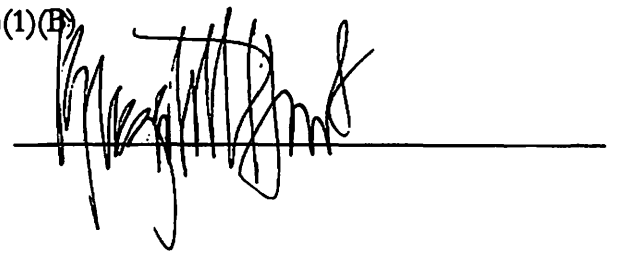
Respectfully submitted this 9th day of May, 2016.



Elizabeth Hunt
Counsel for Dennis Wynn

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because: this brief contains 5,135 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).



CERTIFICATE OF SERVICE

I hereby certify that on the 9th of May, 2016, I hired Salt Lake Legal to deliver two true and correct copies of this brief, and a CD rom containing PDFs of this brief to the Criminal Appeals Division of the Utah Attorney General's Office, 160 East 300 South, Sixth Floor, P.O. Box 140854, SLC, UT 84114-0854.