2007

State of Utah v. Ronald Richard Rodrigues : Brief of Appellee

Utah Court of Appeals

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Case No. 20070741-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Ronald Richard Rodrigues,
Defendant/Appellant.

Brief of Appellee

Appeal from an amended restitution order following a guilty plea to criminal nonsupport in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Robin W. Reese presiding.

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Oral Argument Requested

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STATEMENT OF JURISDICTION

Defendant appeals an amended restitution order imposed following a guilty plea to criminal nonsupport. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2008).

STATEMENT OF THE ISSUES

Defendant pleaded guilty to one count of criminal nonsupport; as part of his guilty plea, he agreed to pay all of his delinquent child support through sentencing as restitution. At sentencing, however, the trial court miscalculated the amount that defendant owed and imposed a lesser amount. After learning of its error a few weeks later, the court corrected the restitution order to reflect defendant's agreement.

1. Did the trial court have the authority to correct its restitution order, where the original order contained a clerical error regarding defendant's restitution amount?

Standard of Review. The trial court had the authority to correct a clerical error under rule 30(b), Utah Rules of Criminal Procedure. "[T]he interpretation of a rule of procedure is a question of law that we review for correctness." *State ex rel. A.M.D.*, 2006 UT App 457, ¶ 7, 153 P.3d 724 (quotations and citation omitted).

2. Did the trial court violate the Double Jeopardy Clause when it corrected defendant's restitution order?

Standard of Review. This issue is unpreserved, so no standard of review applies. If reviewed, this is a question of law that is reviewed for correctness. *State v. One 1980 Cadillac*, 2001 UT 26, ¶ 8, 21 P.3d 212.

3. Did the trial court violate defendant's right to allocution when it heard arguments regarding its clerical error without defendant being present?

Standard of Review. Constitutional questions are reviewed for correctness. *State v. Norcutt*, 2006 UT App 269, ¶ 7, 139 P.3d 1066.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 30, Utah Rules of Criminal Procedure:

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

United States Constitution, Amendment V:

"... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ..."

STATEMENT OF THE CASE

On April 23, 2003, defendant was charged with two counts of criminal nonsupport. R. 1-4. In the first count, the State alleged that defendant had failed to support the child that he had with Jennifer Falsone; in the second count, the State alleged that defendant had failed to support the two children that he had with Michele Rodrigues. R. 1-4.[1] Defendant left the state prior to trial, was jailed in another state, and was not returned to Utah until April 2005. R. 20.

On May 19, 2005, defendant entered into a plea agreement with the State. R. 46. In the agreement, defendant agreed to plead guilty to one of the two counts and

[1]The trial court's restitution order was ultimately correct with respect to Jennifer Falsone, and that order is not at issue in this appeal. But the two claims were tried together below, so the State provides detail regarding that claim for context.

then pay restitution "in the amount of the total amount of child support arrears owed for the support of my children on both counts from May 1999 through the date of sentencing." R. 53. Defendant acknowledged that he owed $289 per month in support to Jennifer Falsone and $328 per month to Michele Rodrigues, and he also agreed that the final restitution amount would include interest. R. 53-54.[2]

Defendant failed to appear for sentencing, however, so the proceedings were continued. R. 66-67. An arrest warrant was issued, and defendant was not apprehended until January 17, 2007. R. 68, 72.

A PSI was prepared prior to sentencing. R. 79. The PSI first confirmed that defendant owed $289 per month to Jennifer Falsone and $328 per month to Michele Rodrigues. R. 79: 3. The PSI then determined that defendant had not paid any child support to Jennifer Falsone since May 1, 1999, and that defendant had only paid $80 in child support to Michele Rodrigues. R. 79: 3. The PSI concluded that defendant owed $63,507.71 as of February 2, 2007: $34,317.82 to Michele Rodrigues, $19,433.72 to Jennifer Falsone, and $9,756.17 to the State of Utah for reimbursement of public assistance. R. 79: 10.

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[2] Defendant's delinquency in both cases actually pre-dated May 1999, but the parties agreed to begin the restitution obligation from May 1999 during the plea negotiations. R. 127: 24-25.

Defendant did not contest the PSI's accuracy at the sentencing hearing, but instead stated that he "concur[red] with the recommendations in the pre-sentence report." R. 127: 1-2. Defendant also did not object or disagree when the State noted that he had not paid any child support to Jennifer Falsone, and only $80 in support to Michele Rodrigues. R. 127: 3-4, 14-16. Michele Rodrigues also testified and confirmed that defendant had owed her $328 per month in support during the relevant period. R. 127: 10. Defendant did not object to this assertion.

The court asked the parties what the "total" amount owed was. R. 127: 4. The State responded that the "total" amount owed as of "today's date" was $24,078.76 for Michele Rodrigues and $30,680.96 for Jennifer Falsone. R. 127: 4.[3] The court accepted this assertion, added the figures together, and concluded that defendant's "total arrearage" was "$54,760." R. 127: 4-5. At the close of the hearing, the court ordered defendant to pay $54,600 in restitution. R. 127: 16. The court did not provide any explanation for dropping $160 from the overall amount. In its written sentencing order, filed on March 29, 2007, the court stated that this amount "represent[ed] child support arrears for the Defendant's children with Jennifer

[3] At the time of sentencing, defendant owed $19,778.44 to Jennifer Falsone and $10,902.52 to the State. R. 111. The $30,680.96 amount was a combination of these two obligations. R. 111.

Falsone and Michele Rodrigues through March 19, 2007" and ordered defendant to pay $54,600 in restitution. R. 85.

One month later, the prosecutor filed a motion to amend the restitution order, claiming that it did not accurately reflect the restitution that defendant owed and had agreed to pay. R. 89-92. The prosecutor acknowledged that she had originally informed the judge that defendant owed Michele Rodrigues $24,078.76, but explained that she had inadvertently taken that figure from a document that had been prepared prior to defendant's flight from Utah in May 2005. R. 127: 18-19. The prosecutor then provided the court with spreadsheets showing that based on defendant's accepted obligation of $328 per month (plus interest), the original award only covered defendant's obligations through December 2004. R. 94-104; Addenda A & B. Given that defendant had agreed to pay the "total amount of child support" "through the date of sentencing," R. 53, the prosecutor asked the court to amend the order to reflect defendant's actual obligation to Michele Rodrigues at the time of sentencing, which would have been $34,722.70. R. 89-104; Addendum B.

Defendant did not file a written response to this motion, nor did he contest any of the underlying facts when the matter was argued on August 15, 2007. R. 127: 18-31. Instead, defendant asserted that the court lacked jurisdiction to amend its restitution order, and then claimed that amending the order would violate his "due

process" rights. R. 127: 19-20. Though defendant was not present, his attorney did not argue that defendant had a right to be present for this hearing. R. 127: 18-31.

Following argument, the court noted that defendant's plea bargain required defendant to pay restitution "from May '99 to whenever he was sentenced," R. 127: 25, and then concluded that there had been a "misstatement of what the actual total amount of restitution was" in the original order. R. 127: 30. Relying on rule 30, Utah Rules of Criminal Procedure, the court amended the restitution order and required defendant to pay $34,722.70 to Michele Rodrigues. R. 110; 127: 19, 27, 30. The court stated that this amendment would "correct the error" and make the award "conform to the parties' intent." R. 127: 30. Defendant now appeals.

SUMMARY OF ARGUMENT

Point I: The trial court retained jurisdiction to amend its restitution order. Under rule 30, Utah Rules of Criminal Procedure, trial courts can correct clerical errors at any time. In this case, defendant agreed to pay his "total amount of child support" as restitution, but the original restitution order only covered defendant's obligations through December 2004. This mistake was not deliberate, nor was it the product of any conscious judicial determination. It was therefore correctible under rule 30.

Point II: Defendant claims that the trial court violated his double jeopardy rights when it amended the restitution order, but that claim is unpreserved. Defendant never raised a double jeopardy claim below, but instead only argued that his "due process" rights had been violated. This did not preserve a double jeopardy claim.

In any event, the trial court did not violate the Double Jeopardy Clause when it amended the original restitution order. There are two reasons for this. First, restitution orders are compensatory, not punitive, and therefore do not implicate the Double Jeopardy Clause. Second, while the Double Jeopardy Clause prevents a court from punishing a defendant a second time, it does not prevent a court from correcting a clerical error in the original sentence.

Point III: The trial court did not violate defendant's right to allocution when it heard arguments on the State's motion in defendant's absence. The right to allocution guarantees a defendant the right to speak at trial and sentencing, but it does not provide the same right when a court considers an alleged clerical error. The error in this case was clerical, so defendant's right to allocution was not violated.

ARGUMENT

I.

THE TRIAL COURT RETAINED JURISDICTION TO CORRECT THE CLERICAL ERROR IN ITS ORIGINAL SENTENCE

Defendant claims that the trial court did not have jurisdiction to amend the original restitution order. Aplt. Br. 10-22. Defendant is incorrect.

A trial court may correct "[c]lerical mistakes in judgments . . . at any time" under rule 30(b), Utah Rules of Criminal Procedure. A clerical error "is an error in the entry or recording of a judgment; it is a mistake or omission that prevents the judgment as entered from accurately reflecting the judgment that was rendered." 46 Am.Jur.2d *Judgments* § 139 (2008). Such errors are akin to "blunders in execution." 46 Am.Jur.2d *Judgments* § 142 (2008). When correcting a clerical error, courts "correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded." *Diehl Lumber Transp. Inc. v. Mickelson*, 802 P.2d 739, 742 (Utah App. 1990).

Courts thus distinguish clerical errors from "judicial errors." While a clerical error is the result of "a minor mistake or inadvertence," Black's Law Dictionary, *Error* (8th ed. 2004), a judicial error involves "the deliberate result of the exercise of judicial reasoning and determination." *State v. Lorrah*, 761 P.2d 1388, 1389 (Utah 1988) (quotations and citation omitted). "[T]he distinction between clerical error

and judicial error does not turn on whether the correction of the error results in a substantive change in the judgment. Rather, the distinction turns on whether the error was the deliberate result of judicial reasoning and determination." *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000) (quotations and citation omitted). In this manner, the distinction "depends on whether [the error] was made in rendering the judgment or in recording the judgment as rendered." *Richards v. Siddoway*, 471 P.2d 143, 145 (Utah 1970).

No Utah court has considered the question of whether a judge's mistaken restitution calculation constitutes a clerical error or a judicial error. In *Bishop v. Gentec Inc.*, 2002 UT 36, 48 P.3d 218, however, the Utah Supreme Court considered a similar question in the context of a civil suit and held that calculation errors are clerical in nature. The jury in that case had apportioned fault between the plaintiff and two separate defendants. *Id.* at ¶¶ 2-7. Following trial, several jurors signed affidavits stating that the damage award had been based on mistaken calculations. *Id.* at ¶ 6. The jurors testified that after deciding on the fault apportionment, they had subtracted the plaintiff's apportioned fault from the damage award, "not realizing that the subtraction for [the plaintiff]'s fault was the duty of the trial court, not the jury." *Id.*

On appeal, the supreme court held that even though the verdict had already been issued, the judgment could still be revised to correct the jury's mistaken calculation. *Id.* at ¶¶ 27-32. The court noted that when considering a clerical error, "it matters little whether an error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having [the] judgment . . . reflect what was done or intended." *Id.* at ¶ 30 (quotations and citation omitted).

The *Bishop* court specifically rejected the suggestion that a judgment cannot be amended once reduced to an enumerated damage amount. The court held that while a judgment's underlying logic is not clerical in nature, the underlying math behind the judgment is. Thus, a mistake in "accurately recording the intent of the jury in its calculation of the damage award constitutes correction of a clerical error, not a judicial error." *Bishop*, 2002 UT 36, ¶ 32; *accord Haase v. Ashley Valley Med. Ctr.*, 2003 UT App 260U at * 2 (Addendum C) (holding that a jury's mistaken calculation was a clerical error, rather than a judicial error).[4]

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[4] The correction in *Bishop* was authorized under rule 60(a), Utah Rules of Civil Procedure. *Bishop v. Gentec Inc.*, 2002 UT 36, ¶¶ 27-32, 48 P.3d 218. In *State v. Moya*, 815 P.2d 1312 (Utah App. 1991), this Court held that because rule 60(a), Utah Rules of Civil Procedure, and rule 30(b), Utah Rules of Criminal Procedure, are "nearly textually identical," the result in that case would have been the same under either rule. *Moya*, 815 P.2d at 1314 n.3.

This Court recently reached a similar result in *Frito-Lay & Transcontinental Insurance Co. v. Labor Commission*, 2008 UT App 314, -- P.3d --. In *Frito-Lay*, an ALJ issued a workers compensation order that "failed to explicitly exclude those stipulated weeks" that the claimant had actually been able to work. *Id.* at ¶ 5. The Utah Labor Commission subsequently affirmed the ALJ's order. *Id.* at ¶7. This Court reversed, holding that the ALJ's "miscalculation" was a clerical error that was correctible under rule 60(a). *Id.* at ¶ 16. This Court reaffirmed that when a calculation "mistake" is "clear from the record," a trial court can "correct the incorrect total amount of judgment" to reflect the correct amount. *Id.* (quotations, citation, and alterations omitted).

The decisions in *Bishop* and *Frito-Lay* are not unique. Other courts have similarly concluded that calculation errors are clerical, rather than judicial. The decision in *Milazzo v. Schwartz*, 871 A.2d 1040 (Conn. App. Ct. 2005), is illustrative. In *Milazzo*, the trial court entered a deficiency judgment against a debtor, but then modified that judgment after discovering that it had performed the wrong calculations. *Id.* at 1041-42. Like defendant in this case, the debtor in *Milazzo* argued that the original ruling was not reviewable for clerical error. *Id.* The Connecticut Appellate Court disagreed, concluding that the error was clerical because "the amount of the deficiency judgment owed by the defendant to the plaintiff did not

reflect the actual amount owed." *Id.* at 1043. Given this, the court refused to allow the debtor to "escape the full amount for which he is liable to the plaintiff because of a simple mistake made in the mathematical calculation of the deficiency judgment." *Id.* Other courts have reached similar results. *See Foley v. Ziegler*, 931 A.2d 498, 501 n.2 (Me. 2007) (concluding that "a small clerical error was committed" in "calculating [one party's] annual income"); *Westmark Commercial Mortg. Fund IV v. Teenform Assocs., L.P.*, 827 A.2d 1154, 1162 (N.J. Super. Ct. App. Div. 2003) (holding that the miscalculation of interest constituted a "clerical error"); *Lischio v. Gill*, 704 A.2d 216, 217 (R.I. 1997) (concluding that an miscalculation of interest was a "clerical error").

Like the errors discussed above, the mistake in this case was nothing more than a calculation error. In his May 2005 plea agreement, defendant agreed to pay restitution in the "total amount of child support arrears owed for the support of my children on both counts from May 1, 1999 through the date of sentencing," plus interest. R. 53-54. Defendant was not sentenced until March 2007, a period of 94 months. While the original restitution order required defendant to pay $24,078.76 to Michele Rodrigues, at $328 per month (plus interest), that order would only have covered defendant's "total amount of child support" had defendant been sentenced in December 2004. Addendum A. But defendant left Utah prior to sentencing, R.

66-67, so defendant was not sentenced until March 19, 2007. At that point, defendant's actual obligation was $34,722.70. R. 89-104; Addendum B.

Thus, as a matter of simple math, the original restitution order did not reach as far as defendant, the State, and the court had agreed that it would reach. Upon discovering this mistake, the court was allowed to recalculate its original order in order to correct its mistaken calculation.

In response, defendant first suggests that the error could not have been clerical because the mistake was not apparent from the record as it existed "prior to judgment." Aplt. Br. 14-15. While it is true that clerical errors are sometimes apparent on the record (such as when an oral judgment is incorrectly reduced to writing), *Bishop* demonstrates that this is not always the case. The error in that case was a calculation error that was not apparent until jurors submitted affidavits, which only occurred *after* the verdict had been delivered. *Bishop*, 2002 UT 36, ¶ 6.

But even if clerical errors are limited in the manner suggested by defendant, the error in this case was apparent from the record as it existed prior to sentencing. As part of his plea, defendant agreed to pay the "total amount of child support arrears owed . . . from May 1, 1999 through the date of sentencing." R. 53. It is undisputed that defendant owed $328 per month (plus interest) in child support to Michele Rodrigues. R. 53-54. This monthly obligation has never changed during

the pendency of this action. The court's correction therefore did not rely on any new evidence, but instead simply reflected updated calculations that were performed using figures that were available in the record prior to sentencing.

Defendant also suggests that the trial court may have exercised discretion as to "whether to require Rodrigues to pay restitution" for the period between his original plea and his actual sentence. Aplt. Br. 17. While the court could have chosen to deviate from the original plea, the record demonstrates that it did not. When the court asked the prosecutor for a restitution recommendation at the original sentencing hearing, the court asked what the "total" amount owed was. R. 127: 4. It then adopted that amount without ever stating that it intended to reduce the amount by a matter of months or years. R. 127: 4-5, 16. In its written order, the court expressed its belief that the amount "represent[ed] child support arrears for the Defendant's children with Jennifer Falsone and Michele Rodrigues **through March 19, 2007.**" R. 85 (emphasis added). The court never indicated that it had decided to cap defendant's restitution obligation at some fixed date that preceded defendant's actual sentencing. When the court revisited the issue while considering the State's motion to amend, it therefore noted that the agreement had required defendant to pay his obligations "from May '99 to whenever he was sentenced." R. 127: 25. Thus, while the trial court's original order deviated from both the State's

original recommendation and from defendant's actual obligation, the record shows that the court had always intended to order full restitution, but simply failed to do so by mistake.

In sum, the error in this case was not an error of judicial reasoning or studied determination; rather, the error was an error of multiplication, unintentionally initiated by the prosecutor and inadvertently memorialized by the court. In correcting its mistake, the court did not reconsider its reasoning, but instead simply redid its math, using defendant's uncontested monthly obligations as the sole predicate. The court therefore "corrected" its earlier mistake to make the restitution award "reflect what was done or intended." *Bishop*, 2002 UT 36, ¶ 30. This calculation correction was inherently clerical in nature.

II.

DEFENDANT'S DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED

Defendant claims that the court violated his double jeopardy rights when it corrected the restitution award. Aplt. Br. 22-29. This claim should be rejected for three reasons. First, it is unpreserved. Second, restitution orders are compensatory, not punitive, and therefore do not implicate the Double Jeopardy Clause. Third, defendant did not have a legitimate expectation in the finality of the court's clerical error.

A. Defendant's double jeopardy claim is unpreserved.

At the hearing below, defendant claimed that his "due process" rights would be violated if the court amended the original restitution order. R. 127: 19-20. Defendant did not specifically invoke the Double Jeopardy Clause, but now argues that his reference to his due process rights preserved this argument. Aplt. Br. 28-29. This is incorrect.

"A general rule of appellate review . . . is that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial record before an appellate court will review such claim on appeal." *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987). "The objection must be specific enough to give the trial court notice of the very error of which counsel complains." *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (quotations and citation omitted). The purpose of this requirement is to afford the lower courts an "opportunity to correct the errors if appropriate." *State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993) (quotations and citation omitted). "To serve these policies, . . . the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (citation omitted). The preservation rule applies to double jeopardy claims. *See State v. Anderson*, 2007 UT App 68, ¶ 4, n.1, 157 P.3d 809

(refusing to reach a double jeopardy claim that was raised for the first time on appeal).

Defendant did not even mention the Double Jeopardy Clause below, let alone explain how it applies to a motion to correct a miscalculation in a restitution award. R. 127: 19-20. He did not cite to any cases interpreting the Double Jeopardy Clause, nor did he explain how a corrected sentence would violate the specific rights protected by that clause. While defendant correctly notes that double jeopardy is an incorporated constitutional right, Aplt. Br. 28, defendant does not cite to any authority holding that reference to the Due Process Clause specifically raises all other constitutional rights in any given case. The trial court therefore did not have the opportunity to consider his double jeopardy claim, let alone correct any such error, and the claim is therefore unpreserved.

In response, defendant argues that although the issue may not have been preserved below, review is still appropriate under rule 22(e), Utah Rules of Criminal Procedure. Defendant is incorrect.

"While rule 22(e) allows a court to review an illegal sentence at any time, it must be 'narrowly circumscribed' to prevent abuse." *State v. Thorkelson*, 2004 UT App 9, ¶ 15, 84 P.3d 854 (citation omitted). Though parties can obtain relief under the rule when a sentence is "patently" or "manifestly" illegal, this

"generally occurs in one of two situations: (1) where the sentencing court has no jurisdiction, or (2) where the sentence is beyond the authorized statutory range." *Id.*

Neither category applies in this case. As set forth above, the trial court had jurisdiction to amend this restitution order because the original order contained a clerical error. In addition, defendant has not contended that the amended restitution order exceeds any statutory limit on restitution orders in criminal nonsupport cases. Thus, rule 22(e) is inapplicable.

This claim is therefore unpreserved and should not be addressed by this Court.[5]

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[5] Even if defendant's double jeopardy claim is properly before this Court, this Court should still decline defendant's invitation to conduct a separate state constitutional analysis. Defendant did not raise a state constitutional claim below, but instead simply invoked his general "due process" rights. R. 127: 20. In *State v. Worwood*, 2007 UT 47, 164 P.3d 397, the Utah Supreme Court stated that while it understood "counsel's hesitance to robustly address state constitutional issues in the lower courts," the preservation rules still require "a state constitutional law argument" to be raised "in the trial court." *Id.* at ¶¶ 17, 18. Utah's appellate courts are accordingly "resolute" in "refus[ing] to take up constitutional issues which have not been properly preserved, framed, and briefed." *Brigham City v. Stuart*, 2005 UT 13, ¶ 14, 122 P.3d 605, *reversed on other grounds by* 547 U.S. 398 (2006).

Defendant did not preserve a state constitutional claim below. Thus, if this Court reaches the double jeopardy claim, it should limit its analysis to the federal constitution.

B. If reached, defendant's double jeopardy claim should be rejected on its merits.

If reached, this Court reject defendant's double jeopardy claim for two reasons. First, the Double Jeopardy Clause is inapplicable to restitution orders. Second, the Double Jeopardy Clause does not prevent a court from correcting a clerical error.

1. The Double Jeopardy Clause does not apply to restitution orders.

Under Utah law, a trial court can order a defendant to pay restitution in order to cover the "pecuniary damages" suffered by a victim as the result of the defendant's crime. Utah Code Ann. § 77-38a-102(11) (West 2004). Pecuniary damages include "all special damages, but not general damages . . . arising out of the facts or events constituting the defendant's criminal activities." *Id.* § 77-38a-102(6). "An award of pecuniary damages as restitution for crime is justified because proof of a defendant's guilt beyond a reasonable doubt necessarily meets the preponderance of evidence standard establishing civil liability." *State v. Houston*, 2000 UT App 342, ¶ 12, 9 P.3d 188.

In *Monson v. Carver*, 928 P.2d 1017 (Utah 1996), the supreme court held that because restitution orders are compensatory in nature, such orders do not implicate

double jeopardy. *Id.* at 1027-28.[6] According to the court, "it is clear from the legislative scheme that restitution is not a 'punishment' but a civil penalty whose purpose is entirely remedial, i.e., to compensate victims for the harm caused by a defendant and whose likely intent is to spare victims the time, expense, and emotional difficulties of separate civil litigation" *Id.* at 1027. As a result, the court held that restitution orders do not qualify as "'punishment' for double jeopardy purposes." *Id.* at 1028; *accord Houston*, 2000 UT App 342, ¶ 12. *But see State v. Dominguez*, 1999 UT App 343, ¶ 12 n.6, 992 P.2d 995 (holding that "[w]hile an order of restitution is intended to provide a remedy to the victim, it is also part of the punishment imposed upon the offender").

As in *Monson*, the amended restitution order in this case did nothing more than compensate the victim for the harm she suffered from defendant's crime. Specifically, it required defendant to pay the child support that he was required to have paid during the relevant period. As such, defendant was not "punished" for purposes of double jeopardy, but was instead simply required to make his victim whole. Under *Monson*, double jeopardy was inapplicable to this order.

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[6] Though the restitution order in *Monson* was imposed by the Board of Pardons and Parole, rather than the trial court at sentencing, the restitution order in that case was similarly limited to the victim's pecuniary damages. *Monson v. Carver*, 928 P.2d 1017, 1027 (Utah 1996).

2. The Double Jeopardy Clause does not prevent a trial court from correcting a clerical error.

The Double Jeopardy Clause states that no person can "be subject for the same offence to be twice put in jeopardy of life or limb." United States Const. amend. V. The Double Jeopardy Clause "embodies three separate protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense." *Bernat v. Allphin*, 2005 UT 1, ¶ 11, 106 P.3d 707 (quotations and citation omitted); *accord United States v. Halper*, 490 U.S. 435, 440 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997). While the prohibition against multiple punishments "has deep roots in our history and jurisprudence," *Halper*, 490 U.S. at 440, sentencing procedures themselves "'traditionally receive less double jeopardy protection than do prosecutions.'" *State v. Maguire*, 1999 UT App 45, ¶ 11, 975 P.2d 476 (quoting *Montoya v. New Mexico*, 55 F.3d 1496, 1498 (10th Cir. 1995)). The Supreme Court's decisions therefore "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980).

Thus, "[r]esentencing per se does not implicate the double jeopardy protection from multiple punishments." *Maguire*, 1999 UT App 45, ¶ 11. Instead, the Double Jeopardy Clause is only violated when a resentencing upsets a defendant's "legitimate expectation of finality in his original proceedings." *Id.* at ¶ 8; *see also DiFrancesco*, 449 U.S. at 137-39; *Warnick v. Booher*, 425 F.3d 842, 847 (10th Cir. 2005). But while the "analytical touchstone for double jeopardy is the defendant's legitimate expectation of finality in the sentence," legitimacy "may be influenced by many factors." *State v. Jones*, 650 N.W.2d 844, 847 (Wis. App. 2002). "If a circumstance exists to undermine the legitimacy of that expectation, then a court may permissibly increase the sentence" without violating double jeopardy. *Id.*

No Utah court has yet considered the question of whether the Double Jeopardy Clause prevents correction of a clerical error. A number of courts from other jurisdictions have considered the question, however, and have held that the Double Jeopardy Clause does not bar such corrections.

The decision in *Gallinat v. State*, 941 So.2d 1237 (Fla. Dist. Ct. App. 2006), is illustrative. In *Gallinat*, the trial court miscalculated the defendant's incarceration history prior to sentencing and inadvertently gave him credit for time that he had not actually served. *Id.* at 1238. After the trial court was alerted to its

miscalculation, it issued a "corrected order" that accurately reflected defendant's incarceration history. *Id.*

On appeal, the court held that this correction did not violate the Double Jeopardy Clause. The court held that because clerical errors are "not [the] result of judicial decision-making," *id.* at 1241, a defendant cannot obtain a legitimate expectation that the errors will be permanently enforced. Instead, "the defendant's only *legitimate* expectation is that he or she will serve the full sentence," rather than the inadvertently reduced sentence stemming from the mathematical error. *Id.* at 1242 (emphasis added). "Because correcting a time-served reporting error does not defeat a defendant's legitimate expectations, it should not be held to violate double jeopardy." *Id.*

The New York Court of Appeals reached a similar result in *People v. Minaya*, 54 N.Y.2d 360 (N.Y. 1981). Minaya pleaded guilty to one count of attempted robbery, and the plea agreement called for him to receive an eight-year sentence. *Id.* at 362. At sentencing, the court stated that it was going to follow the plea agreement, but then inadvertently sentenced the defendant to a three-year sentence. *Id.* at 363. The court learned of its mistake three months later and issued a corrected sentence giving Minaya eight years in prison. *Id.*

On appeal, Minaya claimed that the corrected sentence violated double jeopardy. The New York Court of Appeals disagreed, holding that Minaya could not have acquired a legitimate expectation of finality in the court's clerical error.

> [W]e know of no case binding on this court which has held that a defendant who is mistakenly sentenced to a lesser term than he agreed to, should immediately upon commencing the sentence acquire a vested interest in the error so that it would be unfair, under the double jeopardy clause, to correct the error and make the defendant serve out the term of his own sentencing agreement.

Id. at 366. Thus, "there is no basis for concluding that the double jeopardy clause posed any impediment to the court's power to correct the error in the sentence." *Id.*

This rule has been followed in numerous cases, many involving clerical errors resulting from misstatements at sentencing. In *Nelson v. Commonwealth*, 407 S.E.2d 326 (Va. Ct. App. 1991), for example, the trial court sentenced the defendant to fifteen years in prison, "to be suspended after Nelson had served two years." *Id.* at 327. Approximately fifteen minutes after the court pronounced sentence, the court brought the defendant and the attorneys back into the courtroom and informed them that it had misspoken. "The trial judge then stated that it was her intention to sentence Nelson to fifteen years in the penitentiary, to be suspended after Nelson served ten years, not two years; the court modified Nelson's sentence accordingly." *Id.*

The Virginia Court of Appeals rejected the defendant's double jeopardy challenge to the corrected sentence, holding that the error was clerical in nature. "The record clearly supports a finding that the trial court did not intend to impose a lenient sentence and that, at the time of imposing sentence, she actually believed she had ordered Nelson to serve ten years." *Id.* at 328. The appellate court concluded that the original sentence "was an oversight much the same as [a] drafting error," and that it did not violate double jeopardy. *Id.* at 328-29.

A wide number of other courts have agreed, and have accordingly refused to bar resentencing when necessary to correct a clerical error. *See Hicks v. Duckworth*, 708 F.Supp. 214, 218 (N.D. Ind. 1989) ("[I]t is not inconsistent with the Double Jeopardy Clause for a defendant to be resentenced upon remand according to the original intentions of the trial judge even if this entails enhancement of one or more of the original sentences."); *DeMario v. State*, 933 P.2d 558, 561 (Alaska Ct. App. 1997) (allowing a court to correct an "objectively ascertainable mistake" without violating double jeopardy); *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000); *Newberry v. State*, 812 S.W.2d 210, 212 (Mo. Ct. App. 1991); *State v. Lane*, 957 P.2d 9, 19 (Mont. 1998) ("When a district court corrects a written judgment and commitment to conform to the one it originally intended, double jeopardy does not apply to bar the correction."); *Warnick v. Booher*, 144 P.3d 897, 902-03 (Okla. Crim.

App. 2006) (allowing court to correct a clerical error in the sentence that was created by the department of corrections' record-keeping error); *Commonwealth v. Kunish*, 602 A.2d 849, 853 (Pa. 1992); *Grant v. State*, 247 S.W.3d 360, 374 (Tex. App. 2008) (allowing court to make a "correction in sentence to reflect a misstatement"); *State v. Burt*, 614 N.W.2d 42, 46 (Wis. Ct. App. 2000) (no double jeopardy violation to correct "an error of speech in pronouncing" the original sentence).

Thus, defendant is incorrect when he claims that "when a court enters a final restitution order as part of a legal sentence . . . it cannot later amend its order to increase restitution." Aplt. Br. 25. While this may be true with judicial errors, it is not true when the court corrects a clerical error.

Given this distinction, the authority cited by defendant is readily distinguishable. For example, defendant cites *Strickland v. State*, 681 So.2d 929 (Fla. Dist. Ct. App. 1996). Aplt. Br. 25. In *Strickland*, the trial court originally ordered the defendant to pay a specific amount in restitution to cover the injuries the victim had testified about at sentencing. *Strickland*, 681 So.2d at 929. The court later reopened sentencing, however, and heard additional testimony from the victim regarding additional injuries that had not been discussed at the original hearing; at the close of this second sentencing hearing, the court ordered the defendant to pay "additional

restitution." *Id.* at 929-30. On appeal, the Florida District Court of Appeals held that this second sentence violated double jeopardy. *Id.*

In contrast to *Strickland*, the amended sentence below did not require additional evidence, nor did it address injuries not covered in the original order. As explained above, the court in this case corrected a calculation error regarding the injuries that were at issue in the original order, and it did so using figures that were available at the original hearing.

Defendant also cites to *Wilson v. State*, 688 N.E.2d 1293 (Ind. Ct. App. 1997). Aplt. Br. 25. Wilson was convicted of burglary and theft, and the court ordered him to pay restitution for the burglary conviction. *Wilson*, 688 N.E.2d at 1294. After the burglary conviction was overturned on appeal, the trial court reopened the case and ordered Wilson to pay restitution on the theft charge. *Id.* at 1294-95. On appeal, the court held that the additional order of restitution was improper because it was not part of the original sentence. *Id.* at 1295-96.

In this case, however, the trial court ordered defendant to pay restitution at the original hearing, and the underlying guilty plea is not at issue in this appeal. Thus, unlike *Wilson*, the trial court in this case did not add anything new to the defendant's sentence, but instead simply corrected an already existing order. *Wilson* is therefore inapposite.

Defendant also claims that double jeopardy precludes a court from amending a restitution order "[o]nce a legal sentence has been imposed and a defendant has begun to serve that sentence." Aplt. Br. 25. This is incorrect. As noted by the Second Circuit, "it was once thought that a sentence could never be increased" without violating the Double Jeopardy Clause. *United States v. Rosario*, 386 F.3d 166, 170 (2d Cir. 2004). That view was "altered," however, by the Supreme Court's decision in *DiFrancesco*. *Rosario*, 386 F.3d at 170. Under *DiFrancesco*, "the application of the double jeopardy clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence." *Rosario*, 386 F.3d at 171 (quotations and citation omitted). While *DiFrancesco* dealt with a case in which the government had a statutory right to appeal, "the reasoning of Justice Blackmun's opinion for the majority went beyond the specific facts of the case, undercutting the basis for any general rule that the Double Jeopardy Clause precludes a sentence increase once the defendant has commenced serving the sentence." *United States v. Bello*, 767 F.2d 1065, 1069 (4th Cir. 1985).

Thus, "after *DiFrancesco*, a court may, in some situations, modify a sentence after the defendant has begun serving it. The proper inquiry is the defendant's legitimate expectations in the finality of his sentence." *Hicks v. Duckworth*, 922 F.2d 409, 412 (7th Cir. 1991); *accord Rosario*, 386 F.3d at 170-71; *United States v. Contreras-*

Subias, 13 F.3d 1341, 1345 (9th Cir. 1994); *United States v. McMillen*, 917 F.2d 773, 776-77 (3d Cir. 1990); *Romero v. People*, 179 P.3d 984, 985, 989-90 (Colo. 2007); *Francis v. United States*, 715 A.2d 894, 895-98 (D.C. App. 1998); *State v. Burt*, 614 N.W.2d 42, 46-47 (Wis. Ct. App. 2000).

As discussed above, defendant did not have a legitimate expectation that the court's calculation error at sentencing would be protected by the Constitution. The fact that defendant had already begun serving his sentence is therefore immaterial.

In sum, the Constitution "'does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.'" *United States v. DiFrancesco*, 449 U.S. 117, 135 (1980) (quoting *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)). Granting constitutional imprimatur to clerical mistakes would result in defendants receiving a "fortuitous and undeserved windfall," a result not required by the Double Jeopardy Clause. *Cardwell*, 12 S.W.3d at 675.

III.

DEFENDANT'S RIGHT TO ALLOCUTION WAS NOT VIOLATED

Finally, defendant claims that his right to allocution was violated because he was not present when the court heard arguments on the State's motion to amend his sentence. Aplt. Br. 29-33.

While the Utah Constitution guarantees a defendant the "right to appear and defend in person," Utah Const., art. I, § 12, the right to allocution does not apply when a trial court considers a motion to correct a clerical error. "The trial court may correct clerical mistakes in judgments at any time, *with or without notice* as the court may order." *State v. Lorrah*, 761 P.2d 1388, 1389 (Utah 1988) (emphasis added). In such cases, the defendant's right to allocution is satisfied "in the first sentencing hearing," so long as the hearing was "held in [defendant's] presence" and the defendant had the opportunity to speak. *Id.* at 1390.

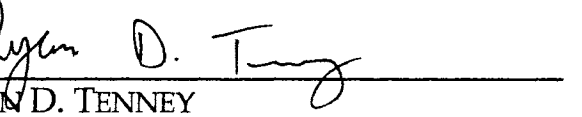
In this case, defendant was present and had the opportunity to speak at the original sentencing hearing. R. 127: 3, 14-15. Defendant's right to allocution therefore was not violated.

CONCLUSION

For the foregoing reasons, the Court should affirm the final restitution order.

Respectfully submitted September 8, 2008.

MARK L. SHURTLEFF
Utah Attorney General



RYAN D. TENNEY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on September 8, 2008, two copies of the foregoing brief were

☐ mailed ☒ hand-delivered to:

Joan C. Watt
Salt Lake Legal Defender Association
424 East 500 South, Suite 200
Salt Lake City UT 84111

A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Trujeo

Addenda

Addendum A

DHS ORS CSS CCIC
05/30/01 Rev. 03/21/02

E # C000124964 **OLD SYSTEM #**

IGOR: RONALD R RODRIGUES
I: 0080149087
5/99-12/04
IGEE: MICHELE RODRIGUEZ
I: 0090137918

Date Prepared: March 19, 2007
Prepared by: J.Baxter

TOTAL DUE	$24,078.76
Principal	Interest
$22,224.00	$1,854.76

DEBT COMPUTATION

ITH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
/-99	$328.00		$328.00	3.000%	$0.00	$328.00	
-99	$328.00	$80.00	$576.00	3.000%	$0.82	$576.82	
99	$328.00		$904.00	3.000%	$1.44	$906.26	
-99	$328.00		$1,232.00	3.000%	$2.26	$1,236.52	
-99	$328.00		$1,560.00	3.000%	$3.08	$1,567.60	
-99	$328.00		$1,888.00	3.000%	$3.90	$1,899.50	
-99	$328.00		$2,216.00	3.000%	$4.72	$2,232.22	
-99	$328.00		$2,544.00	3.000%	$5.54	$2,565.76	
-00	$328.00		$2,872.00	3.000%	$6.36	$2,900.12	
-00	$328.00		$3,200.00	3.000%	$7.18	$3,235.30	
-00	$328.00		$3,528.00	3.000%	$8.00	$3,571.30	
-00	$328.00		$3,856.00	3.000%	$8.82	$3,908.12	
/-00	$328.00		$4,184.00	3.000%	$9.64	$4,245.76	
-00	$328.00		$4,512.00	3.000%	$10.46	$4,584.22	
00	$328.00		$4,840.00	3.000%	$11.28	$4,923.50	
-00	$328.00		$5,168.00	3.000%	$12.10	$5,263.60	
[redacted]	$328.00		$5,496.00	3.000%	$12.92	$5,604.52	
[redacted]	$328.00		$5,824.00	3.000%	$13.74	$5,946.26	
[redacted]	$328.00		$6,152.00	3.000%	$14.56	$6,288.82	
[redacted]	$328.00		$6,480.00	3.000%	$15.38	$6,632.20	
[redacted]	$328.00		$6,808.00	3.000%	$16.20	$6,976.40	
[redacted]	$328.00		$7,136.00	3.000%	$17.02	$7,321.42	
[redacted]	$328.00		$7,464.00	3.000%	$17.84	$7,667.26	
[redacted]	$328.00		$7,792.00	3.000%	$18.66	$8,013.92	
[redacted]	$328.00		$8,120.00	3.000%	$19.48	$8,361.40	

DHS ORS CSS CCIC
05/30/01 Rev 03/21/02

E # C000124964 OLD SYSTEM #

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Prepared by: J.Baxter

IGOR: RONALD R RODRIGUES
I: 0080149087
5/99-12/04
IGEE: MICHELE RODRIGUEZ
I: 0090137918

TOTAL DUE	$24,078.76
Principal	Interest
$22,224.00	$1,854.76

DEBT COMPUTATION

TH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
01	$328.00		$8,448.00	3.000%	$20.30	$8,709.70	
)1	$328.00		$8,776.00	3.000%	$21.12	$9,058.82	
-01	$328.00		$9,104.00	3.000%	$21.94	$9,408.76	
-01	$328.00		$9,432.00	3.000%	$22.76	$9,759.52	
01	$328.00		$9,760.00	3.000%	$23.58	$10,111.10	
-01	$328.00		$10,088.00	3.000%	$24.40	$10,463.50	
-01	$328.00		$10,416.00	3.000%	$25.22	$10,816.72	
02	$328.00		$10,744.00	3.000%	$26.04	$11,170.76	
-02	$328.00		$11,072.00	3.000%	$26.86	$11,525.62	
-02	$328.00		$11,400.00	3.000%	$27.68	$11,881.30	
02	$328.00		$11,728.00	3.000%	$28.50	$12,237.80	
-02	$328.00		$12,056.00	3.000%	$29.32	$12,595.12	
02	$328.00		$12,384.00	3.000%	$30.14	$12,953.26	
)2	$328.00		$12,712.00	3.000%	$30.96	$13,312.22	
-02	$328.00		$13,040.00	3.000%	$31.78	$13,672.00	
-02	$328.00		$13,368.00	3.000%	$32.60	$14,032.60	
02	$328.00		$13,696.00	3.000%	$33.42	$14,394.02	
-02	$328.00		$14,024.00	3.000%	$34.24	$14,756.26	
-02	$328.00		$14,352.00	3.000%	$35.06	$15,119.32	
03	$328.00		$14,680.00	3.000%	$35.88	$15,483.20	
03	$328.00		$15,008.00	3.000%	$36.70	$15,847.90	
03	$328.00		$15,336.00	3.000%	$37.52	$16,213.42	
03	$328.00		$15,664 00	3.000%	$38.34	$16,579.76	
-03	$328.00		$15,992.00	3.000%	$39.16	$16,946.92	
03	$328.00		$16,320.00	3.000%	$39.98	$17,314.90	

DHS ORS CSS CCIC
05/30/01 Rev. 03/21/02

E # C000124964 OLD SYSTEM #

Date Prepared: March 19, 2007
Prepared by: J.Baxter

IGOR: RONALD R RODRIGUES
I: 0080149087
5/99-12/04
IGEE: MICHELE RODRIGUEZ
I: 0090137918

TOTAL DUE	$24,078.76
Principal	Interest
$22,224.00	$1,854.76

DEBT COMPUTATION

TH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
03	$328.00		$16,648.00	3.000%	$40.80	$17,683.70	
-03	$328.00		$16,976.00	3.000%	$41.62	$18,053.32	
-03	$328.00		$17,304.00	3.000%	$42.44	$18,423.76	
03	$328.00		$17,632.00	3.000%	$43.26	$18,795.02	
-03	$328.00		$17,960.00	3.000%	$44.08	$19,167.10	
-03	$328.00		$18,288.00	3.000%	$44.90	$19,540.00	
-04	$328.00		$18,616.00	3.000%	$45.72	$19,913.72	
-04	$328.00		$18,944.00	3.000%	$46.54	$20,288.26	
-04	$328.00		$19,272.00	3.000%	$47.36	$20,663.62	
04	$328.00		$19,600.00	3.000%	$48.18	$21,039.80	
-04	$328.00		$19,928.00	3.000%	$49.00	$21,416.80	
-04	$328.00		$20,256.00	3.000%	$49.82	$21,794.62	
04	$328.00		$20,584.00	3.000%	$50.64	$22,173.26	
-04	$328.00		$20,912.00	3.000%	$51.46	$22,552.72	
-04	$328.00		$21,240.00	3.000%	$52.28	$22,933.00	
04	$328.00		$21,568.00	3.000%	$53.10	$23,314.10	
-04	$328.00		$21,896.00	3.000%	$53.92	$23,696.02	
-04	$328.00		$22,224.00	3.000%	$54.74	$24,078.76	

DHS ORS CSS CCIC
New 05/03/01

GEE:	MICHELE RODRIGUEZ 0090137918	OBLIGOR: HLCI:	RONALD R RODRIGUES 0080149087
			Adjusted 427 (Benefit History screen):
			Researched By:

URA & ASSIGNMENT CALCULATIONS

CASH ASSISTANCE R	CASH ASSISTANCE AMOUNT	CASE # NET PMNT.	CASE # NET PMNT.	CASE # NET PMNT.	CASE # NET PMNT.	CASE # NET PMNT.	TOTAL NET PAYMENTS	TOTAL UNREIMBURSED ASSISTANCE	CHILD SUPPORT ASSIGNED ANNUALLY	SUPPORT ASSIGNED TO STATE ACCRUING
		G000124964								
LS	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00

DHS ORS CSS CCIC
New 05/03/01

OBLIGOR: CASE# OLD SYSTEM #	RONALD R RODRIGUES C000124964		OBLIGEE:	MICHELE RODRIGUEZ	
CHILD SUPPORT ASSIGNED TO THE STATE	PREPARED BY:	J.Baxter		DATE PREPARED:	March 19, 2007
	PRINCIPAL BALANCE	TOTAL INTEREST	INTEREST WAIVED BY THE STATE	INTEREST OWED TO THE FAMILY	BALANCE WITH STATE INTEREST WAIVED
$0.00	$22,224.00	$1,854.76	$0.00	$1,854.76	$24,078.76

Addendum B

DHS ORS CSS CCIC
05/30/01 Rev. 03/21/02

E # C000124964 **OLD SYSTEM #**

Date Prepared: March 19, 2007
Prepared by: J.Baxter

IGOR: RONALD R RODRIGUES
I: 0080149087
5/99-03/07
IGEE: MICHELE RODRIGUEZ
I: 0090137918

TOTAL DUE	$34,722.70
Principal	Interest
$31,080.00	$3,642.70

DEBT COMPUTATION

NTH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
y-99	$328.00		$328.00	3.000%	$0.00	$328.00	
-99	$328.00	$80.00	$576.00	3.000%	$0.82	$576.82	
99	$328.00		$904.00	3.000%	$1.44	$906.26	
-99	$328.00		$1,232.00	3.000%	$2.26	$1,236.52	
-99	$328.00		$1,560.00	3.000%	$3.08	$1,567.60	
-99	$328.00		$1,888.00	3.000%	$3.90	$1,899.50	
-99	$328.00		$2,216.00	3.000%	$4.72	$2,232.22	
-99	$328.00		$2,544.00	3.000%	$5.54	$2,565.76	
-00	$328.00		$2,872.00	3.000%	$6.36	$2,900.12	
-00	$328.00		$3,200.00	3.000%	$7.18	$3,235.30	
-00	$328.00		$3,528.00	3.000%	$8.00	$3,571.30	
-00	$328.00		$3,856.00	3.000%	$8.82	$3,908.12	
y-00	$328.00		$4,184.00	3.000%	$9.64	$4,245.76	
-00	$328.00		$4,512.00	3.000%	$10.46	$4,584.22	
00	$328.00		$4,840.00	3.000%	$11.28	$4,923.50	
-00	$328.00		$5,168.00	3.000%	$12.10	$5,263.60	
-00	$328.00		$5,496.00	3.000%	$12.92	$5,604.52	
[redacted]	$328.00		$5,824.00	3.000%	$13.74	$5,946.26	
[redacted]	$328.00		$6,152.00	3.000%	$14.56	$6,288.82	
[redacted]	$328.00		$6,480.00	3.000%	$15.38	$6,632.20	
[redacted]	$328.00		$6,808.00	3.000%	$16.20	$6,976.40	
[redacted]	$328.00		$7,136.00	3.000%	$17.02	$7,321.42	
[redacted]	$328.00		$7,464.00	3.000%	$17.84	$7,667.26	
[redacted]	$328.00		$7,792.00	3.000%	$18.66	$8,013.92	
[redacted]	$328.00		$8,120.00	3.000%	$19.48	$8,361.40	

DHS ORS CSS CCIC
05/30/01 Rev. 03/21/02

E # C000124964 OLD SYSTEM #

IGOR: RONALD R RODRIGUES
I: 0080149087
5/99-03/07
IGEE: MICHELE RODRIGUEZ
I: 0090137918

Date Prepared: March 19, 2007
Prepared by: J.Baxter

TOTAL DUE	$34,722.70
Principal	Interest
$31,080.00	$3,642.70

DEBT COMPUTATION

NTH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
-01	$328.00		$8,448.00	3.000%	$20.30	$8,709.70	
01	$328.00		$8,776.00	3.000%	$21.12	$9,058.82	
g-01	$328.00		$9,104.00	3.000%	$21.94	$9,408.76	
p-01	$328.00		$9,432.00	3.000%	$22.76	$9,759.52	
-01	$328.00		$9,760.00	3.000%	$23.58	$10,111.10	
v-01	$328.00		$10,088.00	3.000%	$24.40	$10,463.50	
c-01	$328.00		$10,416.00	3.000%	$25.22	$10,816.72	
-02	$328.00		$10,744.00	3.000%	$26.04	$11,170.76	
p-02	$328.00		$11,072.00	3.000%	$26.86	$11,525.62	
r-02	$328.00		$11,400.00	3.000%	$27.68	$11,881.30	
-02	$328.00		$11,728.00	3.000%	$28.50	$12,237.80	
y-02	$328.00		$12,056.00	3.000%	$29.32	$12,595.12	
-02	$328.00		$12,384.00	3.000%	$30.14	$12,953.26	
02	$328.00		$12,712.00	3.000%	$30.96	$13,312.22	
g-02	$328.00		$13,040.00	3.000%	$31.78	$13,672.00	
p-02	$328.00		$13,368.00	3.000%	$32.60	$14,032.60	
-02	$328.00		$13,696.00	3.000%	$33.42	$14,394.02	
v-02	$328.00		$14,024.00	3.000%	$34.24	$14,756.26	
c-02	$328.00		$14,352.00	3.000%	$35.06	$15,119.32	
-03	$328.00		$14,680.00	3.000%	$35.88	$15,483.20	
p-03	$328.00		$15,008.00	3.000%	$36.70	$15,847.90	
r-03	$328.00		$15,336.00	3.000%	$37.52	$16,213.42	
-03	$328.00		$15,664.00	3.000%	$38.34	$16,579.76	
y-03	$328.00		$15,992.00	3.000%	$39.16	$16,946.92	
-03	$328.00		$16,320.00	3.000%	$39.98	$17,314.90	

DHS ORS CSS CCIC
05/30/01 Rev 03/21/02

E # C000124964 OLD SYSTEM #

Date Prepared: March 19, 2007
Prepared by: J.Baxter

IGOR: RONALD R RODRIGUES
I: 0080149087
5/99-03/07
IGEE: MICHELE RODRIGUEZ
I: 0090137918

TOTAL DUE	$34,722.70
Principal	Interest
$31,080.00	$3,642.70

DEBT COMPUTATION

TH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
)3	$328.00		$16,648.00	3.000%	$40.80	$17,683.70	
-03	$328.00		$16,976.00	3.000%	$41.62	$18,053.32	
-03	$328.00		$17,304.00	3.000%	$42.44	$18,423.76	
03	$328.00		$17,632.00	3.000%	$43.26	$18,795.02	
-03	$328.00		$17,960.00	3.000%	$44.08	$19,167.10	
-03	$328.00		$18,288.00	3.000%	$44.90	$19,540.00	
04	$328.00		$18,616.00	3.000%	$45.72	$19,913.72	
-04	$328.00		$18,944.00	3.000%	$46.54	$20,288.26	
-04	$328.00		$19,272.00	3.000%	$47.36	$20,663.62	
04	$328.00		$19,600.00	3.000%	$48.18	$21,039.80	
-04	$328.00		$19,928.00	3.000%	$49.00	$21,416.80	
04	$328.00		$20,256.00	3.000%	$49.82	$21,794.62	
)4	$328.00		$20,584.00	3.000%	$50.64	$22,173.26	
-04	$328.00		$20,912.00	3.000%	$51.46	$22,552.72	
-04	$328.00		$21,240.00	3.000%	$52.28	$22,933.00	
04	$328.00		$21,568.00	3.000%	$53.10	$23,314.10	
-04	$328.00		$21,896.00	3.000%	$53.92	$23,696.02	
-04	$328.00		$22,224.00	3.000%	$54.74	$24,078.76	
05	$328.00		$22,552.00	3.000%	$55.56	$24,462.32	
-05	$328.00		$22,880.00	3.000%	$56.38	$24,846.70	
-05	$328.00		$23,208.00	3.000%	$57.20	$25,231.90	
05	$328.00		$23,536.00	3.000%	$58.02	$25,617.92	
-05	$328.00		$23,864.00	3.000%	$58.84	$26,004.76	
05	$328.00		$24,192.00	3 000%	$59.66	$26,392.42	
)5	$328 00		$24,520.00	3 000%	$60.48	$26,780.90	

DHS ORS CSS CCIC
05/30/01 Rev. 03/21/02

: # C000124964 OLD SYSTEM #

Date Prepared: March 19, 2007
Prepared by: J.Baxter

GOR: RONALD R RODRIGUES
: 0080149087
5/99-03/07
GEE: MICHELE RODRIGUEZ
: 0090137918

TOTAL DUE	$34,722.70
Principal	Interest
$31,080.00	$3,642.70

DEBT COMPUTATION

TH/YEAR	CURRENT DUE	PAYMENTS	PRINCIPAL BALANCE	INT RATE	INTEREST	TOTAL BALANCE	COMMENTS
-05	$328.00		$24,848.00	3.000%	$61.30	$27,170.20	
-05	$328.00		$25,176.00	3.000%	$62.12	$27,560.32	
05	$328.00		$25,504.00	3.000%	$62.94	$27,951.26	
-05	$328.00		$25,832.00	3.000%	$63.76	$28,343.02	
-05	$328.00		$26,160.00	3.000%	$64.58	$28,735.60	
06	$328.00		$26,488.00	3.000%	$65.40	$29,129.00	
-06	$328.00		$26,816.00	3.000%	$66.22	$29,523.22	
-06	$328.00		$27,144.00	3.000%	$67.04	$29,918.26	
06	$328.00		$27,472.00	3.000%	$67.86	$30,314.12	
-06	$328.00		$27,800.00	3.000%	$68.68	$30,710.80	
06	$328.00		$28,128.00	3.000%	$69.50	$31,108.30	
)6	$328.00		$28,456.00	3.000%	$70.32	$31,506.62	
-06	$328.00		$28,784.00	3.000%	$71.14	$31,905.76	
-06	$328.00		$29,112.00	3.000%	$71.96	$32,305.72	
06	$328.00		$29,440.00	3.000%	$72.78	$32,706.50	
-06	$328.00		$29,768.00	3.000%	$73.60	$33,108.10	
-06	$328.00		$30,096.00	3.000%	$74.42	$33,510.52	
-07	$328.00		$30,424.00	3.000%	$75.24	$33,913.76	
-07	$328.00		$30,752.00	3.000%	$76.06	$34,317.82	
-07	$328.00		$31,080.00	3.000%	$76.88	$34,722.70	

DHS ORS CSS CCIC
New 05/03/01

OBLIGOR:	RONALD R RODRIGUES	OBLIGEE:	MICHELE RODRIGUEZ
CASE#	C000124964		
OLD SYSTEM #			

CHILD SUPPORT	PREPARED BY:	J.Baxter		DATE PREPARED:	March 19, 2007
ASSIGNED TO THE STATE	PRINCIPAL BALANCE	TOTAL INTEREST	INTEREST WAIVED BY THE STATE	INTEREST OWED TO THE FAMILY	BALANCE WITH STATE INTEREST WAIVED
$0.00	$31,080.00	$3,642.70	$0.00	$3,642.70	$34,722.70

Addendum C

Haase v. Ashley Valley Medical Center
Utah App.,2003.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Lori HAASE, Plaintiff, Appellant, and Cross-appellee,
v.
ASHLEY VALLEY MEDICAL CENTER, Columbia Ashley Valley Medical Center, and John Does 1 through 10, Defendants, Appellees, and Cross-appellants.
No. 20020524-CA.

July 17, 2003.

Eighth District, Vernal Department; The Honorable Douglas L. Cornaby.

Douglas G. Mortensen, Salt Lake City, for Appellant.
Robert R. Harrison and David W. Slagle, Salt Lake City, for Appellees.

Before Judges JACKSON, BILLINGS, and DAVIS.

MEMORANDUM DECISION (Not For Official Publication)

JACKSON, Presiding Judge:
***1** Appellant Lori Haase appeals the trial court's judgment pursuant to its interpretation of a special verdict form. We reverse the trial court's judgment and remand for the trial court to enter judgment of $820,000, plus statutory interest, in accordance with the jury's true intention.

The hospital asserts that the trial court erred in responding to a mid-deliberation question from the jury without notifying counsel. It argues that it is entitled to a new trial under rule 47(o) of the Utah Rules of Civil Procedure.[FN1] Rule 47(o) provides:

> FN1. The hospital actually cites rule 47(n) of the Utah Rules of Civil Procedure. However, in 2003, rule 47 was amended and rule 47(n) was renumbered as 47(o).*See* Utah R. Civ. P. 47.

After the jury have retired for deliberation, ... if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

" 'The language of rule 47(o) seems to require notification of the attorneys only when the jury is conducted into the courtroom in the presence of the judge.' " *Bearden v. Wardley Corp.*, 2003 UT App 171,¶ 11, 474 Utah Adv. Rep. 40 (quoting *Utah State Bar v. Petersen,* 937 P.2d 1263, 1271 (Utah 1997)). In the present case, the jury sent its question to the judge and received his reply without being conducted into the courtroom. Thus, the judge was not obligated to notify counsel prior to his reply.[FN2]

> FN2. Although not required, it is good practice to notify counsel prior to responding to a jury inquiry.

Additionally, neither the record nor the briefs indicate that the hospital objected to the judge's mid-deliberation communication with the jury. It is well established that "issues not raised at trial cannot be argued for the first time on appeal ... unless the petitioner demonstrates that plain error occurred or exceptional circumstances exist."*State v. Arguelles,* 2003 UT 1, ¶ 41, 63 P.3d 731 (quotations and citations omitted) (omission in original). The hospital does not argue plain error or exceptional circum-

stances and therefore fails to demonstrate that it is entitled to a new trial under Rule 47(o) of the Utah Rules of Civil Procedure.

Central to Haase's appeal is the trial court's entry of judgment against the weight of affidavits and testimony of the jurors regarding their intent. Haase correctly asserts that *Bishop v. GenTec, Inc.*, 2002 UT 36, 48 P.3d 218, is controlling in this case. In *Bishop,* the jury was asked to apportion fault among three parties, including the plaintiff (Bishop), and determine general and special damages. *See id.* at ¶ 5. The trial court then subtracted Bishop's fault and entered judgment accordingly. *See id.*At least three of the jurors later signed affidavits explaining that they had already subtracted the plaintiff's fault in calculating the general and special damages. *See id.* at ¶ 6. Based on these affidavits, Bishop moved to amend the jury verdict pursuant to Utah Rule of Civil Procedure 60(a), arguing that the error was clerical rather than judicial, thus appropriate for post-verdict correction rather than a new trial. *See id.*The trial court denied Bishop's motion, and on appeal the Utah Supreme Court reversed and remanded for the trial court to enter judgment according to the true intent of the jury. *See id.*

***2** We conclude the facts of the present case are indistinguishable from the facts in *Bishop,* and thus apply the supreme court's analysis to the facts of this case. Like the jury in *Bishop,* the Haase jurors were asked to perform calculations of both damages and apportionment. Both juries filled out special verdict forms that were interpreted by the trial courts to indicate other than their true intent because each trial court misunderstood the meaning of each jury's apportionment of fault. Jurors from both juries later signed affidavits indicating that in completing their respective special verdict forms they did not intend the court to use the juries' apportionment of fault to reduce the damages they had specified. Thus, the error involved here was clerical, and the trial court erred in disregarding the true intent of the jury.

Accordingly, we reverse the trial court's judgment and remand for the trial court to enter judgment of $820,000, plus statutory interest, in accordance with the jury's true intent.[FN3]

FN3. Haase and the hospital each challenge several evidentiary rulings of the trial court. Because of our ruling on appeal, we do not address Haase's evidentiary challenges. Regarding the hospital's evidentiary challenges, it fails to demonstrate prejudice. "[E]ven where error is found, reversal is appropriate only in those cases where, after review of all of the evidence presented at trial, it appears that absent the error, there is a reasonable likelihood that a different result would have been reached."*Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80,¶ 8, 977 P .2d 508 (quotations and citations omitted); *see also*Utah R. Evid. 103(a).

WE CONCUR: JUDITH M. BILLINGS, Associate Presiding Judge and JAMES Z. DAVIS, Judge.

Utah App.,2003.

Haase v. Ashley Valley Medical Center

Not Reported in P.3d, 2003 WL 21664781 (Utah App.), 2003 UT App 260

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