2016

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

Utah Court of Appeals

Case No. 20150492-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DENNIS TERRY WYNN,
Defendant/Appellant.

Brief of Appellee

Appeal from the denial of motions under Utah R. Crim. P. 30(b), Utah R. Crim. P. 22(e), and Utah R. Civ. P. 60(b), for relief from a 2008 sentence and restitution order, in the Third Judicial District, Salt Lake County, the Honorable Paul B. Parker presiding

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STATEMENT OF JURISDICTION

Wynn pled guilty in 2008 to four counts of securities fraud: two second-degree felonies and two third-degree felonies. He appeals from the denial of his 2015 motions to correct a clerical error under Utah R. Crim. P. 30(b), to correct an illegal sentence under Utah R. Crim. P. 22(e), and to grant relief from a final judgment under Utah R. Civ. P. 60(b). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009 & Supp. 2015).[1]

INTRODUCTION

As part of his 2008 plea agreement, Wynn agreed to pay "many times more" than $100,000 to his securities fraud victims. Wynn agreed that his

[1]Unless otherwise stated all Utah code citations are to the current version.

attorney and the prosecutor would agree to and submit the final restitution figure by October 6, 2008. Three weeks before that date, the prosecutor sent a restitution figure of about $782,000—broken down by victims—to Wynn's counsel, asking that counsel let him know if he objected to the figure. Receiving no objection, the prosecutor submitted the figure to the trial court on October 6, 2008. Seventeen days later, the trial court—still without objection from Wynn—entered a restitution order for the submitted amount.

Nearly five years later, Wynn told a parole hearing officer that the entered $782,000 figure "sounds correct." Within a few weeks of that hearing, Wynn was notified that the Board of Pardons and Parole intended to hold him until his sentence expired, but would consider early release if he paid his restitution in full.

Nearly two years after the Board's decision and six-and-a-half years after the trial court's restitution order, Wynn—for the first time—challenged the accuracy of the restitution figure and the validity of his prison sentence in alternative motions to correct a clerical error under rule 30(b), to correct an illegal sentence under rule 22(e), and for relief from judgment under rule 60(b)(6).

STATEMENT OF THE ISSUES

1. Was the final unobjected-to restitution figure a clerical mistake under rule 30(b), Utah Rules of Criminal Procedure?

Standard of Review. What constitutes a clerical error under rule 30(b) presents a question of law, reviewed for correctness. *See State v. Rodrigues*, 2009 UT 62, ¶11, 218 P.3d 610.

2. Was Wynn's statutory prison sentence or his final restitution order manifestly or patently illegal under rule 22(e)?

Standard of Review. Whether a sentence is illegal under rule 22(e) is a question of law, reviewed for correctness. *See State v. Vaughn*, 2011 UT App 411, ¶9, 266 P.3d 202.

3. (a) The Post-Conviction Remedies Act (PCRA) provides "the sole remedy" for challenging a criminal conviction or sentence after a defendant has exhausted his legal remedies, including a direct appeal.

May Wynn, who never appealed, evade the PCRA's time and procedural requirements by filing a rule 60(b) motion?

(b) Alternatively, was Wynn's rule 60(b)(6) motion—filed six-and-one-half years after entry of the restitution order—brought within a reasonable time?

Standard of Review. A trial court's interpretation of which law applies is reviewed for correctness. *See Kell v. State*, 2012 UT 25, ¶7, 285 P.3d 1133. A trial court's ruling that a rule 60(b)(6) motion was not brought within a reasonable time is reviewed for an abuse of discretion. *See Menzies v. Galetka*, 2006 UT 81, ¶63, 150 P.3d 480.

4. Did the trial court properly deny Defendant's discovery motion after concluding that it lacked jurisdiction to grant relief under rules 30(b), 22(e), and 60(b)?

Standard of Review. This question presents a question of law, reviewed for correctness. *See State v. Nicholls*, 2006 UT 76, ¶3, 148 P.3d 990.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following rules and statutes are reproduced in Addendum A:

Utah R. Crim. P. 22(e)
Utah R. Crim. P. 30(b)
Utah R. Civ. P. 60(b)
Utah Code Ann. § 78B-9-101, *et. seq.* (Post-Conviction Remedies Act)

STATEMENT OF THE CASE

17 state felony charges

The State charged Wynn in 2006 with 19 felonies: three counts of second-degree felony securities fraud; three counts of third-degree felony securities fraud; eight counts of second-degree felony theft; two counts of

third-degree felony exploitation of an elder adult; two counts of third-degree felony witness tampering; and one count of second-degree felony pattern of unlawful activity. R1-2. The State dismissed the two witness tampering charges at preliminary hearing. R66-67. Wynn was bound over on the remaining 17 charges.

Securities fraud charges. According to the probable cause affidavit, Wynn sold securities in a scheme to "flip" vehicles and real property. R13-14. Wynn collected about $185,000 from at least six investors.[2] *Id.* Instead of using the money as promised, Wynn used it all for personal and unrelated business expenses. R14-15.

When soliciting funds, Wynn did not tell his investors several material facts, such as that (1) he had filed personal bankruptcy in 1989; (2) his company had filed for bankruptcy in 2002; (3) he had over $2 million in outstanding civil judgments; (4) he had a $163,860 tax lien against his property; and (5) he was delinquent on principal and interest payments to a previous investor. R15-16.

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[2]The information in fact names nine securities fraud victims. R1-10.

Theft charges. According to the probable cause statement, Wynn also collected $62,000 to buy automobiles for three victims.[3] R13-14. Wynn neither bought the promised vehicles nor returned the money. R14.

7 federal mail and securities fraud indictments and $15 million in restitution

In 2007, a few months after the state charges were filed, Wynn was indicted in federal court on seven counts of mail and securities fraud. R208-10. Wynn sought and received a continuance in the state case so that he could resolve the federal case first. R112.

On November 1, 2007, Wynn pled guilty in federal court to a single count of mail fraud. R208. The federal government dropped the other indictments and agreed not to seek criminal charges against Wynn for the acts underlying the state charges. R246-47. In his federal written plea statement, Wynn agreed to pay "full restitution in the aggregate amount as set by the Court. The government contends that the amount is $15,202,257.68 to the individuals identified in Exhibit 1, in the amounts identified in Exhibit 1." R246. This part of the written plea agreement was interlineated by Wynn's counsel. R246, 265. The agreement had originally set the $15.2 million figure as the final amount. R246, R265-66. Exhibit 1

[3]The information in fact names nine theft victims, seven of whom were also named as securities fraud victims. R1-10.

listed 185 investors, with individual balances ranging from less than $10,000 to over $300,000. R252-55.

Wynn was sentenced on March 17, 2008 to 60 months in federal prison. R276-85. Wynn's counsel had initially sought to continue sentencing until the parties had reached a firm restitution figure. R276-85, 294-97. He explained to the court that additional information about restitution had "been dribbling in here right up 'til last week." R278. But while he preferred to delay sentencing until they had a final figure, both Wynn's counsel and the prosecutor believed that, with more time, they would be able to agree on a final amount. R276-80.

The federal court preliminarily ordered Wynn to pay $15,202,257.68 in restitution, with the understanding that the amount could be amended by stipulation or, if necessary, after a hearing. R285. The parties agreed that Wynn could wait 60 days to surrender to federal prison so that he could give input on the final restitution figure. R276-85.

Wynn's counsel obtained three continuances for Wynn to surrender, until October 9, 2008, so that they could finalize restitution. R303-11. Ultimately, the parties never amended the federal restitution order. *See* R329-30, 351.

Wynn agreed to pay "many times more" than $100,000 in restitution for his state victims.

In August 2008, five months after his federal sentencing, Wynn reached a plea agreement in his state case. R123-130, R543:2-5. He pled guilty to two counts of second-degree felony securities fraud and two counts of third-degree felony securities fraud. R123-30, R543:2-5. The State dismissed the remaining 13 counts. R543:2.

The parties agreed that Wynn's state prison sentences would run concurrently to each other and to his five-year federal prison sentence.[4] R130. To ensure that the state prison sentence would run concurrently to the federal sentence, the trial court agreed to delay issuing a state commitment until after Wynn was scheduled to begin his federal commitment, on October 9, 2008. R543:3.

Wynn's state written plea agreement advised him of the potential maximum prison sentences he faced: 1-to-15 years on the two second-degree felonies and 0-to-5 years on the two third-degree felonies. R126.

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[4]The parties apparently obtained the trial court's approval of the plea and sentencing agreement in advance. *See* R543:2 (counsel stating "sentencing as we previously discussed"); R543:3 (court stating "I indicated to your attorney and the State's attorney that I would accept their sentencing recommendations"). Rule 11(i), Utah Rules of Criminal Procedure, allows parties to ask a judge in advance whether he will accept a proposed disposition.

Although Wynn was told that his state sentences would run concurrently with his federal sentence, no one told Wynn that he would not serve any prison time on the state sentences. R543:2-5.

The parties also agreed that Wynn would pay $100,000 in restitution at sentencing, with a "final amount of restitution to be determined by [October 6, 2008] between counsel." R130. Wynn's counsel assured the court that he and the prosecutor would "be able to stipulate on the [final restitution] figure." R543:2-3.

The trial court asked Wynn if he understood that he would be ordered to 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," and that the final amount would be based on an agreed-upon figure to be submitted when Wynn surrendered to federal prison. R543:3. Wynn replied, "Yes, sir." R543:3.

No one suggested that the restitution amount would be limited to the victims named in the counts that Wynn pled to or to the victims named in all the charged counts. R543:2-5. Wynn told the trial court that he had discussed "all the sentencing nuances" of his plea agreement with his attorney. R543:3-4.

After accepting Wynn's pleas, the trial court sentenced him to the agreed-upon statutory prison sentences and ordered him to pay "full and complete restitution," with the "stipulated amount" to be submitted by October 6, 2008. R543:5.

Wynn's counsel had over 30 days to object to the state restitution amount, but did not.

On October 6, 2008, the prosecutor submitted a request for a restitution order of $782,068.63. R134-35. He attached a list of 23 victims, with the amount owing to each victim. R138-40. The list included the 11 securities fraud/theft victims and one of the witness tampering victims named in the initial information. R138-40; R10-11. The prosecutor mailed a copy of the restitution request to Wynn's attorney on the day that he submitted it to the court. R136.

But the submitted request also represented that the prosecutor had already served Wynn's counsel with the proposed restitution figure three weeks earlier, on September 19, 2008, with a request that counsel contact the prosecutor if he objected to the figure. R135. Wynn's counsel never contacted the prosecutor. R135.

Nor did Wynn's counsel object to the proposed restitution order after it was filed with the court, even though the trial court waited 17 days to sign it. R141-45.

Five years later, Wynn told a Utah parole hearing officer that the state-ordered restitution figure "sounds correct."

Wynn was transferred to the Utah State Prison after he completed his federal five-year sentence. R334-35, 355. Wynn had a parole hearing on May 2, 2013. R333. The hearing officer told Wynn that her records showed that he owed $782,068.63 in restitution, that $100,000 of that had already been paid, and that a balance of $682,068 remained. R339. The hearing officer asked if her information was correct. *Id.* Wynn replied, "I haven't seen those figures, so it sounds correct." *Id.*

The hearing officer added that it looked like "there were 20 separate victims with losses ranging from 7,000 to $107,000 each." R340. She asked if Wynn wanted to add any information to that, or if that "pretty well sum[med] it up?" *Id.* Wynn said that he did not have that information in front of him, but agreed, "I think that sums it up." *Id.*

Given the large federal and state restitution orders, the hearing officer expressed concern that Wynn likely would never be able to pay much toward his restitution obligation. R350-55. The hearing officer also told Wynn that the Board was crediting his time in federal custody against his state prison sentence. R355.

Two weeks after the hearing, the Board issued an order setting Wynn's release date at the expiration of his 15-year sentences. R360. The

order stated that the Board would consider "an earlier release date upon verification of completion of all CAP programming and ... that the restitution owing is paid in full." *Id.* The order also stated that the Board's decision was "subject to review and modification" at "any time until actual release from custody." *Id.*; *see also* R361-62.

Wynn waited another two years
to challenge his restitution order and sentence.

About two years later, Wynn—represented by new counsel—filed a motion under rule 22(e) to correct an illegal sentence. R165-70. Wynn asserted that his sentence and restitution order were entered in violation of his right to the effective assistance of counsel and due process. *Id.* Wynn claimed that his sentence and the restitution amount were unconstitutional—and therefore illegal—because they were both "the product of ineffective assistance of counsel." R174. According to Wynn, it was "clear" that the parties had agreed that he would not serve any time in state prison and that counsel should have ensured that he did not. *Id.* In support, Wynn attached a declaration from the federal prosecutor, who stated he believed that the state prosecutor had "planned for the state sentence to run concurrent with and be identical in length to the federal sentence." R179-80. Wynn, however, attached no declaration from the state

prosecutor or his prior counsel about their understanding of the plea agreement. R179-368.

Wynn also asserted that his sentence was unconstitutional because the restitution order was "inaccurate" and his counsel had "entirely forfeited" his right "to an accurate determination of restitution in the state case." R174-75. Wynn did not suggest that the amounts assigned to each victim were wrong or that the prosecutor's calculations were wrong; he instead argued that restitution should have been limited to the victims named in the counts he pled to. R172. Wynn conceded that it was "not possible to determine from the restitution request and order how much money he owes as a result of those four counts, because the restitution amounts are aggregated." *Id.* Wynn suggested, however, that even accepting those aggregated amounts, he should owe at most only $183,116.18. *Id.*

Wynn also attached his own declaration to his motion. R181-186. In it, he acknowledged that he had expected the restitution calculation in both the federal and state cases "to be a complicated task" because his businesses "involved multiple investors," and his bookkeeping was "poor." R181-82. Wynn nevertheless "counted on" his attorney to figure out restitution after

he explained "the bookkeeping issues" to counsel and gave him what "limited records" Wynn had. R182.

Wynn declared that he had never seen "the data underlying the restitution calculation in state court." R186. Wynn also declared that he had not agreed to pay more restitution than that owed to the victims of the counts to which he had pled and that his attorney had never discussed the matter with him. *Id.* According to Wynn, he reported to federal prison in October 2008, "without knowing a final restitution figure in either the federal or state prosecution." R184.

After the State filed its opposition, Wynn added two alternative claims in his reply and in a new separate motion. First, he argued that the restitution amount was a clerical error that could be corrected at any time under rule 30(b), Utah Rules of Criminal Procedure. R443-44. Second, he argued that he was entitled to relief from the "default" restitution order under rule 60(b)(6). R436, 441-43.

At the same time he added these claims, Wynn filed a motion and request for discovery, seeking documents related not only to his plea negotiations and restitution, but also for any exculpatory evidence, investigative reports, criminal histories for Wynn and "any government

witnesses," and medical and mental health histories that might be in the prosecution's possession. R445-47.

The State asked the trial court to delay ruling on the discovery motion until after it ruled on Wynn's rule 22(e), 30(b), and 60(b) motions. R454. The State pointed out that if those motions were denied, the trial court would lack jurisdiction to grant relief in the underlying criminal case and Wynn would then be required to seek relief under the Post-Conviction Remedies Act, where he could then seek discovery. *Id.*

Trial court's ruling denying
rule 30(b), rule 22(e), and rule 60(b) relief

After full briefing and argument, the trial court denied all three of Wynn's motions. R501-09. The court denied the rule 30(b) claim because the $782,068.63 restitution amount was not a clerical error. R508. It denied the rule 22(e) motion because it concluded that an ineffective assistance of counsel claim did not render an otherwise legal sentence illegal. R503-06. It denied the rule 60(b) motion because it was untimely and because, under *Kell v. State*, 2012 UT 25, ¶25, 285 P.3d 1133, Wynn could seek relief only under the PCRA. R507.

Having concluded that Wynn was not entitled to relief under any of his theories, it determined that it lacked continuing jurisdiction over the

criminal case. R501, 508. It therefore denied Wynn's request to compel discovery. R508.

Wynn timely appealed the trial court's ruling. R515.

SUMMARY OF ARGUMENT

Wynn's rule 30(b), rule 22(e), and rule 60(b) motions all seek to circumvent the time limits of the Post-Conviction Remedies Act. The trial court recognized and properly rejected that attempt.

Point I. The trial court correctly rejected Wynn's claim that the final restitution amount was a clerical error under rule 30(b) that could be corrected at any time. The final restitution order bears none of the hallmarks of a clerical error. Wynn alleges no mathematical or recording error in the final amount. Nor could he. The final restitution amount accurately reflected the intent of the court and the parties that Wynn pay "full and complete restitution," based on the "stipulated amount submitted by October 6th," which Wynn acknowledged would be "many times more" than $100,000. At bottom, Wynn's argument is that the final amount resulted from a legal error—that he cannot be ordered to pay restitution for conduct he neither pled to nor agreed to be responsible for. But that claimed error is judicial—not clerical—in nature and thus cannot be corrected "at any time" under rule 30(b).

Point II. The trial court also properly rejected Wynn's rule 22(e) claims challenging the length of his prison sentence and the final restitution amount. In doing so, Wynn argues no illegality in the sentences themselves. Again, nor could he. The trial court imposed the statutory prison terms and entered a restitution amount that no objected to. Wynn instead argues that his prison sentence and the restitution order are unconstitutional—and therefore illegal—because they were "imposed through ineffective assistance of counsel."

Wynn's ineffective assistance challenges are not properly raised under rule 22(e). To fall under rule 22(e), a sentence must be "patently" or "manifestly" illegal. There is nothing "patently" or "manifestly" illegal about a statutory prison term that Wynn stipulated to or about a restitution order that on its face reflected what the parties had agreed to at sentencing. Moreover, the Utah Supreme Court has expressly limited constitutional challenges under rule 22(e) to facial challenges. Wynn's challenge is not a facial challenge to his sentence, but an as-applied challenge to his counsel's performance. As such, it cannot be raised under rule 22(e) "at any time."

Point III. The trial court properly denied Wynn's rule 60(b)(6) as an improper attempt to circumvent the PCRA and as untimely. The trial court correctly determined that it was bound to follow *Kell v. State*, 2012 UT 25,

285 P.3d 1133, which expressly held that rule 60(b) may not be used to circumvent the procedural and time bars of the PCRA. The trial court was also well within its discretion to find that six-and-one-half years after judgment was not a reasonable time to bring a rule 60(b)(6) motion.

Point IV. The trial court properly denied Wynn's discovery motion once it concluded that the final restitution amount was not a clerical error, that the restitution order and prison sentences were not illegal, and that Wynn could not challenge his sentence under rule 60(b). At that point, the trial court lacked continuing jurisdiction to do anything more in the criminal case.

ARGUMENT

Wynn's motions below and his arguments on appeal are nothing more than a transparent attempt to skirt the statutory time limits—which have long since expired—for collaterally challenging his sentence. Wynn had, but neglected, adequate and exclusive remedies under the Post-Conviction Remedies Act. But since his claims would be barred under the PCRA, he has tried to shoehorn his substantive collateral challenges into inapplicable procedural remedies. The trial court here recognized and properly rejected that attempt.

I.

THE TRIAL COURT PROPERLY DETERMINED THAT THE FINAL UNOBJECTED-TO RESTITUTION FIGURE WAS NOT A CLERICAL MISTAKE UNDER RULE 30(B)

Once a trial court "imposes a valid sentence" and enters a final judgment, it "ordinarily loses subject matter jurisdiction over the case." *State v. Rodrigues*, 2009 UT 62, ¶13, 218 P.3d 610 (citing *State v. Montoya*, 825 P.2d 676, 679 (Utah App. 1991)). A defendant wishing to challenge a valid sentence must timely appeal, *see Montoya*, 825 P.2d at 678-79, or timely seek relief under the Post-Conviction Remedies Act (PCRA), *see* Utah Code Ann. § 78B-9-101, *et. seq.*; Utah R. Civ. P. 65C(a). *See also State v. Prion*, 2012 UT 15, ¶20, 274 P.3d 919.

A trial court, however, does have continuing jurisdiction in the underlying criminal case to correct a clerical error "at any time" under rule 30(b), Utah Rules of Criminal Procedure.

Wynn missed the deadlines to appeal his restitution order, *see* Utah R. App. 4(a) (30-day time limit for appeal), or to seek post-conviction relief, *see* Utah Code Ann. § 78B-9-107 (one-year time limit from date cause of action accrued). Wynn thus invokes rule 30(b) to modify the $782,000 restitution figure as a mere clerical error. *See* Br. Aplt. 12-22.

But the restitution order here bears none of the hallmarks of a clerical error. Wynn alleges no recording or mathematical error apparent on the

face of the record. He contends only that the trial court could not, as a matter of law, order him to pay restitution for conduct he neither pled to nor agreed to be responsible for. Br. Aplt. 14-18. But that kind of error—the result of judicial reasoning—is the antithesis of a clerical error. The trial court thus rightly concluded that the restitution amount was not a clerical error under rule 30(b), and that the court therefore lacked jurisdiction to modify it.

A. A clerical error is a mechanical recording mistake that results in a judgment that does not reflect the court's actual intent.

"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 . . . ." Utah R. Crim. P. 30(b).

"'A clerical error is one made in recording a judgment [or order] that results in the entry of a judgment which does not conform to the actual intention of the court.'" *State v. Rodrigues*, 2009 UT 62, ¶15, 218 P.3d 610 (quoting *Thomas A. Paulsen Co. v. Indus. Comm'n*, 770 P.2d 125, 130 (Utah 1989)). A clerical mistake is "mechanical in nature," "apparent on the record," and "does not involve a legal decision or judgment" by the court. *Stanger v. Sentinel Security Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983) (internal quotation marks and citation omitted). The goal of rule 30(b) is "to correct clerical errors so that the record reflects what was actually 'done or

intended.'" *Rodrigues*, 2009 UT 62, ¶14 (quoting *Bishop v. GenTec, Inc.*, 2002 UT 36, ¶30, 48 P.3d 218).

Examples of clerical errors include mathematical miscalculations—whether by a party, clerk, judge, or jury; transcription errors in recording the judgment; and a judge's misstatement in pronouncing sentence. *See, e.g., Rodrigues*, 2009 UT 62, ¶¶15-34 (prosecutor's miscalculation of restitution); *Bishop*, 2002 UT 36, ¶¶6, 32 (jury's miscalculation of damage award); *Stanger*, 669 P.2d at 1206 (prevailing party's miscalculation of damages); *State v. Lorrah*, 761 P.2d 1388, (Utah 1988) (court clerk mis-transcribed announced by court); *State v. Perkins*, 2014 UT App 60, ¶¶10-16, 322 P.3d 1184 (judge intended to impose consecutive sentences, but inadvertently announced and entered concurrent sentences).

A clerical error—which a court may correct at any time—is different from a judicial error—which it may not. *Thomas A. Paulson, Co.*, 770 P.2d at 130. The distinction "'depends on whether [the error] was made in *rendering* the judgment [a judicial error] or in *recording* the judgment as rendered [a clerical error].'" *Rodrigues*, 2009 UT 62, ¶14 (quoting *Bishop*, 2002 UT 36, ¶32) (emphasis added); *see also Thomas A. Paulson, Co.*, 707 P.2d at 130. Unlike a clerical error, which results in a judgment that "does not

conform to the actual intention of the court," a judicial error in rendering the judgment "results in a substantively incorrect judgment." *Id.*

In assessing whether an error is clerical as opposed to judicial, Utah courts have generally focused on three things: "(1) whether the order or judgment that was rendered reflects what was done or intended, (2) whether the error is the result of judicial reasoning and decision making, and (3) whether the error is clear from the record." *Rodrigues*, 2009 UT 62, ¶14.

B. The restitution amount was not a recording mistake and its entry reflected the actual intent of the court.

Under the foregoing standard, nothing about the restitution order here looks like a clerical error. Wynn does not allege a mathematical or recording error. Br. Aplt. 15-22. He instead alleges that the restitution amount is the result of a legal error—that he cannot be ordered to pay restitution for conduct he neither pled to nor agreed to be responsible for. Br. Aplt. 16-17. That claimed error is judicial—not clerical—in nature.

1. The restitution order reflected the intent of the court and parties that Wynn pay "many times more" than $100,000.

First, as the trial court found, the order "reflects what was done or intended." *Rodrigues*, 2009 UT 62, ¶14. As a term of his plea agreement, Wynn agreed to pay restitution in an amount "to be determined by Oct. 6,

08 between counsel." R130; *see also* R543:3. Wynn said he understood that his final restitution would be "many times more" than the $100,000 he paid at sentencing. R543:3. The trial court expressed its intent to order "full and complete restitution," based on the "stipulated amount submitted by October 6th." R543:5. The trial court fulfilled its expressed intent—and that of the parties—when it signed the final restitution order submitted by the prosecutor.

Wynn asserts that the record cannot "properly" be "read as indicating that [the trial court] intended to enter an order for restitution beyond anything that Wynn agreed to." Br. Aplt. 15. Wynn argues that Utah law "allows for criminal restitution only for damages from offenses of conviction unless there is an agreement by the defendant to pay restitution beyond the offenses of conviction." Br. Aplt. 16. According to Wynn, he "did not agree to pay restitution to people other than the victims of the counts pled to." Br. Aplt. 17. In support, Wynn cites only his long-after-the-fact declaration, which he attached to his motion to set aside the restitution order. *Id.*

Wynn does not properly read the record. The only agreement on the record was that Wynn would pay restitution in an amount to be determined by counsel, and that the amount would likely be "many times more" than

$100,000. R130; R543:3-5. No one, including Wynn, ever suggested that the final amount would be limited to the victims named in the counts pled to or charged. R543:3-5. Rather, the parties clearly expressed that the final restitution would be based on counsel's future agreement.

Indeed, Wynn's argument is at odds with his own expressed anticipation that the final amount would be "many times more" than $100,000. Wynn now asserts that he owed only $138,116.18 to the victims named in the counts pled to and a total of $184,526 if the victims in all the charged counts are included. Br. Aplt. 27. Neither of those figures is "many times more" than $100,000; they are not even one times more. The final $782,000 figure, however, is "many times" more.[5]

Wynn's claim that he did not agree to the final restitution amount is also at odds with what he told the parole hearing officer, five years later. When the hearing officer asked him about the accuracy of the $782,000 restitution order, Wynn said that it "sounds correct." R339. And when the

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[5]Wynn's calculations of what he would owe to victims named in the case are incorrect. He bases his calculations on the figures alleged in the information. The information, however, did not purport to set out final and accurate restitution figures. Under the updated figures attached to the final restitution order, Wynn owes $266,526.18 if all the fraud and theft victims named in the information are included; he owes an additional $50,000 if the named victim from the dismissed witness tampering count is included. *See* R144-45.

hearing officer said that 20 victims were listed, "with losses ranging from 7,000 to $107,000 each," Wynn said, "I think that sums it up." R340. Wynn's lack of surprise at and his ratification of the $782,000 figure support the conclusion that Wynn agreed to the restitution amount as ordered.

Counsel's silence when the restitution order was submitted does not change that conclusion. If anything, counsel's silence—on this record—affirmatively supports it. First, absent contrary evidence, this Court must presume that counsel reasonably chose not to object because the proposed restitution was accurate and Wynn had agreed to pay it as part of his plea agreement. *See Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) ("absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'") (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). Wynn offered nothing below—such as his counsel's declaration—to support his assumption that counsel's silence was due to negligence instead of a conscious decision. *See Fairchild v. Workman*, 279 F.3d 1134, (10th Cir. 2009) ("Only in the most exceptional circumstances will we issue the writ without allowing counsel an opportunity to explain his conduct.").

Second, everything in this record supports the conclusion that counsel did not object to the restitution amount because Wynn had agreed

to it. The record shows that Wynn's counsel was on top of the restitution issue from the beginning. Counsel diligently sought to reach stipulated restitution amounts in both the federal and state prosecutions. He raised the issue at both sentencings and rather than blindly agreeing to the amounts, sought more time to review restitution. *See, e.g.*, R112, 130, 246-67, 265, 276-85, 303-11; R543:2-3. Indeed, counsel tried to continue the federal sentencing and thrice continued Wynn's surrender date solely for the purpose of resolving restitution with Wynn's input. R276-85, 303-11. All this belies Wynn's unsupported claim now that his counsel negligently allowed the final state restitution order to be entered without Wynn's input or approval.

In sum, all the record evidence shows that the final restitution order reflected not only the court's intent, but also Wynn's intent.

2. The restitution figure resulted from judicial reasoning and decision making, not from a mathematical or transcription error.

As stated, Wynn does not claim that the final restitution amount stemmed from miscalculation. He instead asserts a legal claim: that the final amount unlawfully included victims and amounts that he had not agreed to reimburse. Br. Aplt. 16-17. Recognizing and resolving a legal issue—or failing to do so—necessarily requires judicial reasoning. *See*

Rodrigues, 2009 UT 62, ¶25-27. And erroneously deciding a legal claim results in a substantive—or judicial—error, not a clerical one. *See id.* at ¶14.

Indeed, the Utah Supreme Court has held that a trial court engages in judicial reasoning just by setting restitution—even when it is agreed upon—and accepting the figures presented by a party. *Id.* at ¶¶25-27. In *Rodrigues*, a criminal non-support prosecution, the parties agreed that the defendant would pay child support arrearages from a certain date through the sentencing date. *Id.* at ¶26. The trial court accepted the arrearage figures as presented by the State, which turned out to have been miscalculated in Rodrigues's favor. *Id.*

The *Rodrigues* court held that the trial court's "determination of restitution" and its acceptance of "the figures presented by the State," required "judicial reasoning and decision making." *Id.* at ¶25-27. This is because a trial court "has discretion to adjust the amount of restitution agreed to by the parties in a plea agreement."[6] *Id.* at ¶26. *Rodrigues* nevertheless held that the erroneous restitution amount was a clerical error

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[6]*Rodrigues* adds the caveat that "any adjustment must fall within the 'conduct for which the defendant has agreed to make restitution as part of [the] plea agreement.'" *Id.* at ¶26 (quoting Utah Code Ann. § 76-3-201(4)(a) (2008)) (brackets in *Rodrigues*). The trial court here made no adjustment to the submitted restitution amount, but if it had, that too would have resulted from judicial decision-making.

because, based on the State's miscalculation, the court had "erroneously entered an amount of restitution that did not conform to its judicial determination." *Id.* at ¶26. In other words, the clerical error in *Rodrigues* resulted not from the court's judicial reasoning, but from the State's mathematical miscalculation. *Id.* at ¶27.

Here, like in *Rodrigues*, the trial court engaged in judicial reasoning when it decided to accept the parties' restitution agreement and to adopt the final unobjected-to restitution order as submitted by the State. But, unlike in *Rodrigues*, no one here has claimed that the submitted amount was based on a mathematical miscalculation. Rather, as stated, Wynn argues only that the trial court could not legally order him to pay restitution beyond that to which he had agreed. Br. Aplt. 16-17.

Wynn also argues that it is "clear that the restitution order is not the product of determination by counsel but was instead a default order," which required him to pay restitution for conduct he had not agreed to. Br. Aplt. 19. But while the parties' intent "may be taken into account in the clerical error analysis," ultimately, it is "the intent *of the court* or fact finder that is binding." *Rodrigues*, 2009 UT 62, ¶15 (emphasis added). As stated, the clear intent of the trial court here was to enter the restitution amount

that the parties agreed to. The trial court carried out that intent when it signed the final order.

And, as explained, the trial court here had every reason to believe that the final restitution order was "the product of determination by counsel," as opposed to a default order. Counsel represented to the trial court that by October 6th, he would reach a final restitution figure with the prosecutor that would be "many times more" than $100,000; the prosecutor submitted a final restitution figure that fit that bill by the promised date; and counsel never objected to the final figure, even though it had been served on him more than a month before the trial court signed it.

In sum, the trial court's entry of the final restitution order was based on judicial reasoning and decision making and was therefore not a clerical error.

3. No error is clear from the record.

Wynn argues that "the erroneous nature" of the restitution order "is clear from the record, for it does not reflect the agreement of Wynn, one of the two parties who should have been in agreement before the court signed the order." Br. Aplt. 20. Thus, in Wynn's view, his own lack of explicit approval of the figures equate to explicit contradiction of the prosecution's figures.

But, again, the only agreement "clear from the record" is that Wynn agreed to pay full restitution in an amount to be determined by his counsel and the prosecutor and that everyone anticipated that the final amount would be "many times more" than $100,000. Nothing was said about limiting the final amount to victims named in the counts pled to or charged. And the final order fell squarely within what the parties had represented to the trial court. And counsel—who had more than a month to do so—never objected to the proposed order. Given the prosecutor's request for input from counsel, the court could justifiably rely on counsel's silence as indicating his assent to the prosecutor's figures. And Wynn's later ratification of the final restitution amount gives after-the-fact confirmation that it was not in error.

In sum, nothing in the record suggests any error in the final restitution amount, let alone a clerical one. The trial court thus properly

concluded that the final restitution amount was not a clerical error under rule 30(b) and that the court therefore lacked jurisdiction to modify it.[7]

II.

THE TRIAL COURT PROPERLY CONCLUDED THAT THE STATUTORY PRISON SENTENCE AND THE FINAL RESTITUTION AMOUNT WERE NOT PATENTLY OR MANIFESTLY ILLEGAL UNDER RULE 22(E)

A trial court also retains continuing jurisdiction to "correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e). But rule 22(e) does not confer continuing jurisdiction on a trial court to entertain collateral attacks on a plea, conviction, or valid sentence. *See State v. Nicholls*, 2006 UT 76, ¶4, 148 P.3d 990; *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995); *Montoya*, 825 P.2d at 279. A defendant must pursue those attacks through a timely petition under the PCRA. *See* Utah Code Ann. § 78B-9-102(1) (stating that PCRA "establishes the sole remedy for any person who challenges a conviction or sentence for a criminal

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[7]Wynn also asserts that the final restitution order is "clearly erroneous because it does not account for or give [him] credit for the $100,000 in restitution he had paid at the time he pled and was sentenced." Br. Aplt. 20. But the order correctly sets out "the amount of full restitution" that Wynn had agreed to pay. R141. Wynn's $100,000 payment does not make that final figure incorrect; it merely reduces how much he still owes. And it appears that both the Board and the trial court have credited that payment against the final restitution amount. *See* R502 (trial court's ruling noting that final restitution figure included the $100,000 plus an additional $682,068); R339-40 (parole hearing officer noting that Wynn owes $682,086.63 in restitution).

offense and who has exhausted all other legal remedies, including a direct appeal"); Utah R. Civ. P. 65C(a) ("The [PCRA] sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal . . . or the time to file such an appeal has expired."). To be timely, Wynn had to file his collateral attack on the judgment within one year after his time to appeal expired. Utah Code Ann. § 78B-9-107(2)(a).

Again, having missed the deadline to appeal or file a post-conviction petition, Wynn argues that his statutory prison sentence and restitution order were illegal within the meaning of rule 22(e). Br. Aplt. 22-34. Wynn asserts that his prison sentence and restitution order are unconstitutional—and therefore illegal—because they were "imposed through ineffective assistance of counsel." Br. Aplt. 23-24. Regarding his prison sentence, Wynn contends that it is "clear that the parties agreed" he "would serve no time in the Utah State Prison as a result of his pleas in the state case," and that his counsel was constitutionally ineffective for not ensuring that this agreement was carried out. Br. Aplt. 27-28. Regarding the restitution order, Wynn contends that his counsel was constitutionally ineffective for defaulting on the final restitution order because Wynn had never agreed "to pay restitution for anything beyond the counts he pled to." Br. Aplt. 26.

Wynn's allegations are not properly raised under rule 22(e). To fall within rule 22(e), a sentence must be "patently" or "manifestly" illegal. *State v. Candedo*, 2010 UT 32, ¶9, 232 P.3d 1008. There is nothing "patently" or "manifestly" illegal about a statutory prison term that Wynn stipulated to or about a restitution order that on its face reflected what the parties had agreed to at sentencing.

And a claim that counsel was ineffective during the plea and sentencing process does not render a facially valid sentence illegal within the meaning of rule 22(e). Indeed, such a claim goes not to whether the sentence is illegal, but to whether it was erroneous. The trial court thus properly ruled that it did not have jurisdiction over Wynn's claims under rule 22(e).

A. Rule 22(e) applies only to patently or manifestly illegal sentences.

Because rule 22(e) allows a court to review an illegal sentence at any time, the Utah Supreme Court has "narrowly circumscribed" its reach "to prevent abuse." *State v. Telford*, 2002 UT 51, ¶5, 48 P.3d 228. The concern is that a broad construction of the rule would "sanction a fact-intensive challenge to the legality of a sentencing proceeding asserted long after the time for raising it in the initial trial or direct appeal." *State v. Prion*, 2012 UT 15, ¶20. "A parallel challenge to the proceeding leading to a defendant's

conviction, after all, would be time-barred, *see generally* Post-Conviction Remedies Act, Utah Code Ann. §§ 78B-9-106,-107, and it would make little sense to elevate challenges to sentencing proceedings over parallel challenges to the guilt phase of a trial." *Id.*

Rule 22(e), therefore, has been limited to "patently or manifestly" illegal sentences. *Candedo*, 2010 UT 32, ¶9. A "patently or manifestly" illegal sentence is one that is "'ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.'" *Id.* at ¶12 (quoting *State v. Yazzie*, 2009 UT 14, ¶13, 203 P.3d 984)). Typically, such a sentence occurs when "the sentencing court has no jurisdiction" or "when the sentence is beyond the authorized statutory range. *State v. Thorkelson*, 2004 UT App 9, ¶15, 84 P.3d 854.

A sentence may also be illegal under rule 22(e) if it is unconstitutional. *Candedo*, 2010 UT 32, ¶11; *Prion*, 2012 UT 15, ¶¶21-24; *State v. Houston*, 2015 UT 40, ¶¶20-26. Even so, not all constitutional attacks on a sentence may be brought under rule 22(e). *Houston*, 2015 UT 40, ¶21; *Prion*, 2012 UT 15, ¶21. Rather, the Utah Supreme Court has limited such attacks to "facial constitutional challenges to the sentence that do not

implicate a fact-intensive analysis." *Houston*, 2015 UT 40, ¶18. In other words, the constitutional challenge must "attack the sentence itself and not the underlying conviction," and it must "do so as a *facial* challenge rather than an as-applied inquiry." *Houston*, 2015 UT 40, ¶26 (emphasis added). The reason for *Houston's* limitation is to prevent the abuse that may come from being able to challenge an illegal sentence at any time. *Id.* at ¶23.

Houston gave several examples of facial challenges that could be appropriately brought under rule 22(e), such as a challenge to the indeterminate sentencing scheme under Utah's separation of powers clause; a claim that the sentence violated the cruel and unusual punishment clauses of the federal and state constitutions, "but only to the extent that the defendant argue[s] for 'a per se violation'"; or a claim that the sentence violated double jeopardy. *Id.* at ¶¶24, 26 (citing *Telford*, 2002 UT 51, ¶¶3-7; *Prion*, 2012 UT 15, ¶¶23-24). Those challenges attack "'facial defects'" that can "'easily be corrected without the need for factual development in the original trial court.'" *Id.* at ¶24.

Houston also cited an example of an inappropriate rule 22(e) constitutional challenge: "claims brought under the Sixth Amendment of the United States Constitution and article I, section 12 of the Utah Constitution," because "those clauses [do] not relate to sentencing." *Id.* at

¶26 (citing *Telford*, 2002 UT 51, ¶6). Other examples, of course, include "as-applied" constitutional challenges because they, unlike facial challenges, require the court to "delve into the record or make findings of fact." *Id.* at ¶26, 27.

B. The statutory prison sentences and restitution order are not patently or manifestly illegal.

The trial court here rightly concluded that Wynn's statutory prison sentence and restitution order are not patently or manifestly illegal. Indeed, both are facially valid.

1. Prison sentence challenge.

As a threshold matter, Wynn argues no illegality in the sentences themselves. Br. Aplt. 22-33. Nor could he. The trial court imposed the prison terms permitted by statute: 1-to-15 years on the second-degree felonies and 0-to-5 years on the third-degree felonies. And Wynn expressly agreed to those statutory prison terms. R126, 130; R543:2-5. The trial court also exercised its discretion to run the sentences concurrently to each other and to the federal sentence, as the parties requested. R543:2-5; R130. Thus, Wynn's prison sentences are facially valid.

Wynn instead argues that his prison sentence is illegal because the parties' plea agreement contemplated that he "would serve no time in the Utah State Prison as a result of his pleas in the state case," and his counsel

was ineffective for not ensuring that this intent was carried out by asking the court to impose probation instead of prison or by seeking a reduction of the second-degree felonies under Utah Code Ann. section 76-3-402. Br. Aplt. 27-28. Wynn reasons that his counsel's ineffectiveness rendered his facially-valid prison sentence unconstitutional and therefore illegal under rule 22(e). *Id.* at 23-25.

Wynn's "constitutional" challenge to his prison sentence is precisely the kind of challenge that *Houston* forbids. First, it is not a facial challenge to his sentence or to the statute under which he was sentenced. It is instead an as-applied challenge to his counsel's constitutional performance in procuring the facially-valid sentence. Such a claim is not a purely legal one that a court can resolve without further factual development. Rather, ineffective assistance of counsel claims are mixed questions of law and fact. *See, e.g., State v. Hutchings*, 2012 UT 50, ¶8, 285 P.3d 1183. As such, they do not attack "facial defects" that can "easily be corrected without the need for factual development in the original trial court." *Prion*, 2012 UT 15, ¶24. Ineffective assistance of counsel challenges to a sentence, therefore, could never be the kind of constitutional challenges allowed under rule 22(e), and Utah courts have never resorted to rule 22(e) to remedy a claim of ineffective assistance of counsel.

Indeed, allowing an ineffective assistance challenge to a sentence "at any time" would invite the very abuse that *Houston* sought to prevent. A defendant could potentially turn every facially legal sentence into a "patently or manifestly" illegal one merely by alleging that his counsel was unconstitutionally ineffective during the sentencing process. *Cf. State v. Rhinehart*, 2007 UT 61, ¶13, 167 P.3d 1046 ("As a practical matter, there is no alleged flaw in a guilty plea of a defendant represented by counsel that could not be attributed in some way to deficient representation."). If that were the rule, rule 22(e) would effectively have no limits.

Wynn's challenge to his sentence is improperly brought under rule 22(e) for another reason. Although he denies it, *see* Br. Aplt. 23, Wynn's challenge ultimately goes to the validity of his plea, not to the legality of his sentence. Wynn essentially asserts that he agreed to plead guilty on the understanding that any prison time served on state convictions would not exceed the five years imposed on his federal convictions. *See* Br. Aplt. 27. That, at best, alleges only a misunderstanding of the plea terms. It does not allege an error in the sentences that the trial court can correct.

"Although sentencing is a judicial function, under Utah's indeterminate sentencing scheme, the Board fixes the number of years to be served and grants parole within its sole discretion." *State v. Thurman*, 2014

UT App 119, ¶4 n.3. *See also Kelly v. Bard of Pardons*, 2012 UT App 279, ¶¶3-4, 288 P.3d 39, 41 (Board has non-reviewable constitutional authority to determine if and when a prison may be granted parole). Thus, the trial court here could limit Wynn's prison term to five years only by converting the second-degree pleas into third-degree pleas. But that would require a change to the pleas. And a defendant may not challenge his pleas under rule 22(e). *See Nicholls*, 2006 UT 76, ¶4; *Brooks*, 908 P.2d at 860.

In sum, Wynn's challenge to his prison sentence is improper under rule 22(e).[8]

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[8]In any event, Wynn could not overcome *Strickland*'s strong presumption that his counsel's performance was objectively reasonable or that any deficient performance did not prejudice him. *See Strickland*, 466 U.S. at 690. Nothing in the record supports Wynn's claim that the parties and the court all intended that he would serve *no* time on his state convictions. This Court may not rely on the absence of record evidence to find counsel ineffective. *See Burt v. Titlow*, 134 S.Ct. 10, 17 (2013). But the record shows the opposite, anyway. Wynn knowingly pled to two second-degree felonies with statutory prison terms of 1 to 15 years. Wynn was thus on notice that even if his sentences ran concurrently with his five-year federal sentence, he potentially faced an additional 10 years in state prison. If, as Wynn claims, the parties had all truly intended that he serve no prison time on his state sentences, they could have ensured that intent by allowing him to plead guilty only to third-degree felonies. Yet they did not. And while Wynn faults his counsel for not seeking other solutions—such as asking for probation or a 402 reduction, Br. Aplt. 27-28—he proffers no facts or authority that counsel have unilaterally achieved those results without the prosecutor's agreement. Telling, Wynn offered no declaration from the state prosecutor or his counsel that such an agreement was even possible.

2. Restitution amount challenge.

Wynn's rule 22(e) challenge to the restitution order suffers from the same flaws as his prison sentence and rule 30(b) challenges. Wynn argues that his sentence is "unconstitutional because the restitution ordered is inaccurate, and trial counsel was ineffective in entirely forfeiting Wynn's right to an accurate determination of restitution in the state case." Br. Aplt. 25.

As explained, Wynn's "constitutional" challenge is not a proper one under rule 22(e) because it does not involve a facial challenge to the restitution award. Rather, Wynn presents a fact-intensive challenge to his counsel's omission of an objection to the final restitution order.

In sum, Wynn has not shown that the final restitution order was illegal under rule 22(e).[9]

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[9]Wynn also could not prevail on an ineffective assistance claim regarding his restitution. First, as explained in Point I, Wynn has not shown that the final restitution is inaccurate, let alone that counsel was ineffective for not objecting to it. Second, Wynn proffered nothing below to prove that his counsel performed objectively unreasonably when he did not object to the final restitution order. Absent any contrary evidence, this Court must presume counsel's effectiveness. *See Burt*, 134 S.Ct. at 17. And, as explain in Point I, everything in this record supports that presumption.

III.

THE TRIAL COURT PROPERLY DENIED WYNN'S RULE 60(B)(6) MOTION BOTH AS UNTIMELY AND AS AN IMPROPER ATTEMPT TO CIRCUMVENT THE PCRA

Wynn alternatively sought to have his restitution order set aside under rule 60(b)(6), Utah Rules of Civil Procedure. Wynn argues that the trial court erred in deciding that his rule 60(b)(6) motion was untimely and an improper bid to circumvent the requirements of the PCRA. Br. Aplt. 34-44.

A. The trial court properly denied the rule 60(b) motion as an improper attempt to circumvent the PCRA.

The trial court relied on *Kell v. State* to conclude that Wynn could not use rule 60(b) to challenge the final restitution amount. R506-08. The Utah Supreme Court held in *Kell* that a rule 60(b) motion may not be brought in an attempt to evade the requirements of the PCRA. *Kell v. State*, 2012 UT 15, ¶¶25-30, 285 P.3d 1133. Thus, when the PCRA is in direct conflict with rule 60(b), the movant must proceed under the PCRA. *Id.*

The PCRA "establishes *the sole remedy* for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies including a direct appeal . . . ." Utah Code Ann. § 78B-9-102(1). The PCRA replaced "all prior remedies for review, including extraordinary or common law writs." *Id.*

The Utah Supreme Court, through its rulemaking authority, has mandated that Utah courts must apply the PCRA to the exclusion of all other remedies for collaterally attacking a criminal judgment. Utah R. Civ. P. 65C(a) (stating that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal . . . or the time to file such an appeal has expired").

And the supreme court has followed that mandate consistently. The *Kell* court, for example, held that "rule 60(b) may not circumvent conflicting statutory mandates if a statute occupies the field that would otherwise be controlled by rule 60(b)." *Kell*, 2012 UT 25, ¶28. Thus, while rule 60(b) "might be an appropriate avenue when the motion does not attempt to achieve relief that the PCRA would bar," rule 60(b) cannot act "as a substitute for a prohibited postconviction petition." *Id.*

The PCRA "occupies the field" in which Wynn seeks relief. Wynn's rule 60(b) motion sought relief from the restitution part of his sentence based on a claim that its entry resulted from his counsel's alleged ineffectiveness. R441-42. As stated, the PCRA is "the sole remedy" for a person to challenge a "sentence for a criminal offense" after he "has exhausted all other legal remedies, including a direct appeal." Utah Code

Ann. § 78B-9-102(1). And the PCRA gives petitioners an express remedy for a sentence that resulted from ineffective assistance of counsel. *Id.* § 78B-9-104(1)(a), (d). Because Wynn did not timely appeal his sentence, he had to pursue his challenge to that sentence under the PCRA and be subject to any time or procedural bars. *See Id.* § 78B-9-106, -107.

Wynn contends that he is "not trying to circumvent the PCRA." Br. Aplt. 41. "Rather," he asserts, "he is trying to obtain relief from a default judgment that entered through ineffective assistance of trial counsel." *Id.* But that is precisely the kind of claim that the PCRA covers. *Id.* § 78B-9-104(1)(a), (d).

Wynn suggests that *Kell*'s holding does not apply to him because the State "has never contended the PCRA would bar [his] claims for relief." Br. Aplt. 41. The State, however, cannot be expected to raise time and procedural bars under the PCRA when Wynn has yet to file a PCRA petition. And it is very likely that Wynn's challenge to his sentence six-and-a-half years after the fact would be foreclosed by the PCRA's one-year limitations period and its procedural default provisions. *See* Utah Code Ann. § 78B-9-107 (petitioner has one year after "cause of action has accrued" to file petition); *id.* § 78B-9-106 (setting out procedural bars).

In sum, the trial court correctly concluded that Wynn's rule 60(b) motion was an improper attempt to evade the requirements of the PCRA.[10]

B. The trial court also properly found that six-and-one-half years after judgment was not a reasonable time to bring a rule 60(b)(6) motion.

Rule 60(b), Utah Rules of Civil Procedure, allows a trial court, "in the furtherance of justice," and "upon such terms as are just," to "relieve a party . . . from a final judgment" for five specified reasons, including (1) excusable neglect, (2) newly discovered evidence, (3) fraud, (4) a void judgment, (5) a satisfied judgment, or (6) "any other reason justifying relief from the operation of the judgment." Utah R. Civ. P. 60(b). Wynn brought his motion under subsection (6).[11] R440-44. A motion under the first three subsections (excusable neglect, newly discovered evidence, and fraud) must be brought within three months after the judgment was entered. *Id.* A

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[10]The trial court also questioned whether it was even proper to file a rule 60(b) motion in a *criminal* case. R506 n.2. The trial court noted that *Kell* and the other cases cited below all dealt with rule 60(b) motions in PCRA actions, "which are *civil* in nature." *Id.* (emphasis added) (citing *Kell*, 2012 UT 253; *Menzies*, 2006 UT 81; *Honie v. State*, 2014 UT 19, 342 P.3d 182). The trial court acknowledged that civil procedural rules "may apply in criminal cases 'where there is no other applicable statute or rule.'" R506 n.2 (quoting Utah R. Civ. P. 81(e)). But here it appeared that "both Rule 22(e)," and the "PCRA" were "applicable to address [Wynn's] allegations." R506 n.2. The trial court ultimately did not answer that question because it resolved the case under *Kell*.

[11]Below, Wynn also alleged that subsection (1), excusable neglect, applied, but he withdrew that argument in his reply memorandum. R479.

motion under the remaining subsections must be made "within a reasonable time." *Id.*

That standard requires a party to have "acted diligently once the basis for the relief became available, and that the delay in seeking relief did not cause undue hardship to the opposing party." *Crane-Jenkins v. Mikarose, LLC*, 2015 UT App 270, ¶12, 799 Utah Adv. Rep. 7 (quotation marks and citation omitted). What constitutes a reasonable time under rule 60(b)(6) will depend on "'the facts of each case, considering such factors as the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties.'" *Menzies v. Galetka*, 2006 UT 81, ¶65, 150 P.3d 480 (quoting *Gillmor v. Wright*, 850 P.2d 431, 435 (Utah 1993)).

The trial court here found that Wynn did "not appear to have acted diligently" in pursuing a "possible relief from judgment." R507. The record—and even Wynn's own declaration—supported that finding. The restitution order was entered on October 6, 2008. Wynn filed his 60(b) motion in March 2015, almost six-and-one-half years later. Wynn asserted that he first learned about the final restitution amount at his May 2013 parole hearing. R184-186; R544:5. But he did not explain why he could not have learned of the restitution order before then. Indeed, his statement at

the parole hearing that the restitution amount "sounds correct," suggested that he did in fact know of it earlier. More importantly, even assuming that he did not, and could not with reasonable diligence, learn of the order sooner, he never explained why he waited for nearly another two years to file his 60(b) motion. That was reason alone for the trial court to find that the motion was not filed within a "reasonable time." *See Crane-Jenkins*, 2015 UT App 270, ¶12 (rule 60(b)'s "reasonable time" standard requires movant to act "diligently once the basis for the relief became available").

Wynn argues that the reason for his delay was that "no one provided" him "with a copy of the default restitution order or advised him as to its illegal nature until present counsel went to district court and copied the order and mailed it" to him "in December of 2014." Br. Aplt. 38. But Wynn admits that he learned of the final restitution order and amount at the parole hearing more than 18 months before then. He does not explain why he could not have, with reasonable diligence, procured a copy of the order sooner. Even after obtaining the copy, he waited another three months to file his 60(b) motion. And he cannot pin the reasonableness of his own diligence on his current counsel later telling him that the order was illegal. *Cf. Brown v. State*, 2015 UT App 254, ¶¶9-10, 361 P.3d 124 (holding under PCRA statute of limitations that "reasonable diligence" does not depend on

when petitioner "recognizes" the "legal significance" of known facts) (quotations and citations omitted). Even if he could, he does not show that it was reasonable to wait so long to obtain that advice.

Wynn also faults the trial court for not expressly addressing the "interest in finality" and "prejudice to the other parties" factors, which he says should be resolved in his favor.[12] Br. Aplt. 37-40. As explained, however, rule 60(b)'s "reasonable time" standard requires that the movant act "diligently once the basis for the relief became available." *Crane-Jenkins*, 2015 UT App 270, ¶12. Once the trial court found that Wynn had not acted diligently in pursuing rule 60(b) relief, it did not have to consider other factors to conclude that his motion was not filed within a reasonable time.

And Wynn is wrong that the State has no interest in the finality of his restitution order or that it would not be prejudiced by the order being set aside six-and-one-half years after its entry. The State entered into a plea agreement with Wynn in which it dismissed 13 felony counts in exchange for his pleas to four counts and an agreement to pay full restitution, which

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[12]Wynn also complains that the trial court did not consider the factors of "reason for delay" and "practical ability to learn of grounds earlier." Br. Aplt. 36-39. The trial court's discussion of Wynn's lack of diligence, however, addressed those factors and resolved them against him. *See* R507 (noting that Wynn gave no reasons or rationale for his delay in learning of the restitution order and filing his rule 60(b) motion).

as Wynn acknowledged at his plea hearing, would be "many times more" than $100,000.

Setting aside the final restitution order would remove a material term of the plea agreement and permanently deprive the State of the benefit of its bargain. And doing so would oblige the State to reinvestigate and re-prove the victims' complicated losses using stale evidence many years removed. Under these circumstances, a defendant could be confident that the provable amount would be lower for no other reason that document spoilage. Granting Wynn's requested relief would incentivize defendants to lull the victims and prosecution into a false sense of finality by tacitly approving the restitution order, only to cray foul after enough time has passed that the evidence will no longer support the award. That kind of gamesmanship is the precise evil that rule 60(b)'s reasonable diligence requirement bars.

Wynn asserts that the State's interest in the finality of the restitution order is not served so long as he is in prison and unable to work toward paying his restitution. Br. Aplt. 38-40. Wynn is right that the State has an

interest in having Wynn pay his agreed-upon restitution. But setting aside or reducing his restitution order would thwart, not serve, that interest.[13]

In sum, the trial court was well within its discretion in deciding that Wynn's rule 60(b)(6) motion was not brought within a reasonable time.

IV.

THE TRIAL COURT PROPERLY DENIED WYNN'S DISCOVERY MOTION AFTER IT DETERMINED THAT IT LACKED JURISDICTION TO CONSIDER HIS CHALLENGES TO HIS SENTENCE

Wynn finally argues that the trial court erred in denying his discovery motion on the ground that it lacked jurisdiction to do so. Br. Aplt. 45-46. Wynn reasons that because the trial court had jurisdiction "to consider its own jurisdiction," it necessarily had jurisdiction to order discovery. Br. Aplt. 44 (internal quotation marks and citation omitted).

---

[13]Wynn also asserts that the State would not be prejudiced by rule 60(b) relief because "the State's interest is for its prosecutors to integriously [sic] honor both the letter and the spirit of the plea agreement." Br. Aplt. at 40. The State is well aware of its professional and ethical obligations to honor its plea agreements and it takes those obligations seriously. The State disputes, however, Wynn's take on "the letter and the spirit of the plea agreement." As explained, the only agreement on the record is that Wynn agreed to pay full restitution in an amount to be agreed upon by the attorneys and that he anticipated that the amount would be "many times more" than $100,000. There is nothing dishonest or unethical about wanting to hold a criminal defendant to the letter and spirit of his agreement with the State.

But once the trial court concluded that the final restitution amount was not a clerical error, that the restitution order and prison sentences were not illegal, and that Wynn could not challenge his sentence under rule 60(b), the trial correctly determined that it lacked continuing jurisdiction to do anything in the criminal case—including ordering discovery. *See State v. Montoya*, 825 P.2d 676, 679 (Utah App. 1991) (once a trial court "imposes a valid sentence and final judgment is entered," it "loses subject matter jurisdiction over the case"). Once a court has determined that it lacks jurisdiction, it "retains only the authority to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989).

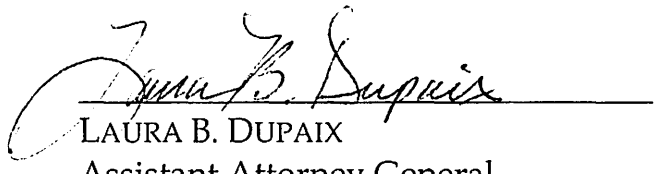
The trial court therefore properly denied the discovery motion.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on April 4, 2016.

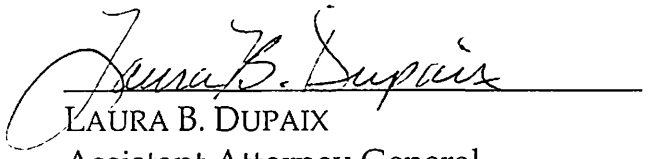
SEAN D. REYES
Utah Attorney General



LAURA B. DUPAIX
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 11,007 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



LAURA B. DUPAIX
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on April 4, 2016, two copies of the Brief of Appellee were

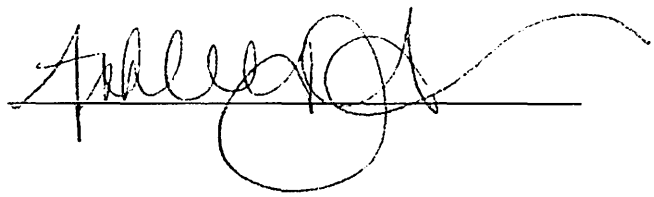
☑ mailed ☐ hand-delivered to:

Elizabeth Hunt
Elizabeth Hunt L.L.C.
569 Browning Ave.
Salt Lake City, UT 84105

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



ADDENDUM A

Constitutional Provisions, Statutes and Rules

Utah R. Crim. P. Rule Rule 22. Sentence, Judgment and Commitment

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the conviction, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

Utah R. Crim. P. 30. Errors and Defects

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(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.

Utah R. Civ. P. 60. Relief from Judgment or Order

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Utah Code Annotated § 78B-9-101. Title

This chapter is known as the "Post-Conviction Remedies Act."

Utah Code Annotated § 78B-9-102. Replacement of prior remedies

(1) This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:
(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;
(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or
(c) actions taken by the Board of Pardons and Parole.

Utah Code Annotated § 78B-9-103. Applicability--Effect on petitions

Except for the limitation period established in Section 78B-9-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Utah Code Annotated § 78B-9-104. Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:
(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;
(c) the sentence was imposed or probation was revoked in violation of the

controlling statutory provisions;
(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;
(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:
(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
(ii) the material evidence is not merely cumulative of evidence that was known;
(iii) the material evidence is not merely impeachment evidence; and
(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or
(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:
(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or
(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence. Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

Utah Code Annotated § 78B-9-105. Burden of proof

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Utah Code Annotated § 78B-9-106. Preclusion of relief--Exception

(1) A person is not eligible for relief under this chapter upon any ground that:
(a) may still be raised on direct appeal or by a post-trial motion;
(b) was raised or addressed at trial or on appeal;
(c) could have been but was not raised at trial or on appeal;
(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
(e) is barred by the limitation period established in Section 78B-9-107.

(2) (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.
(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

Utah Code Annotated § 78B-9-107. Statute of limitations for postconviction relief

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

Utah Code Annotated § 78B-9-108. Effect of granting relief--Notice

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.

(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Utah Code Annotated § 78B-9-109. Appointment of pro bono counsel

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Utah Code Annotated § 78B-9-110. Appeal--Jurisdiction

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78A-3-102 or 78A-4-103.

ADDENDUM B

Transcript of Plea/Sentencing Hearing

COPY

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

STATE OF UTAH ATTORNEY GENERAL, Plaintiff, vs. DENNIS T. WYNN, Defendant.	Case No. 061906774 FS

Sentencing
Electronically Recorded on
August 25, 2008

BEFORE: THE HONORABLE ROBIN W. REESE
Third District Court Judge

APPEARANCES

For the Plaintiff:

Neal E. Gunnarson
9120 Stillwater Cir.
Sandy, UT 84093
Telephone: (801)671-6222

For the Defendant:

Bradley P. Rich
YENGICH, RICH & XAIX
175 E. 400 S. #400
SLC, UT 84111
Telephone: (801)998-8888

Transcribed by: Natalie Lake, CCT

152 E. Katresha St.
Grantsville, UT 84029
Telephone: (435) 590-5575

PROCEEDINGS

(Electronically recorded on August 25, 2008)

MR. RICH: Could we turn to the Dennis Wynn matter?

THE COURT: Yes. I'll call that case. Counsel, I think I remembered what the offer from the State was. You mentioned it was two 2nd Degree Felonies, two 3rd Degree Felonies; is that correct?

MR. RICH: That's correct. We had drafted that as Counts I, II, V and VII. The remaining counts will be dismissed.

THE COURT: Okay.

MR. RICH: Stipulation for sentencing as we previously discussed.

THE COURT: Right.

MR. RICH: I've been over an affidavit, believe that he knows and understands the rights that he's waiving.

THE COURT: Now Mr. Rich, the sentencing was to be imposed today, is that --

MR. RICH: That's what we anticipate is that the Court will impose sentencing concurrent with the federal sentence which he's serving on October 6th, and not issue a commitment on that and leave open the issue of restitution until the date of that surrender. We'll be able to stipulate on the figure, acknowledging that he has herewith today tendered $100,000 towards restitution.

THE COURT: In certified funds?

MR. GUNNARSON: Yes, your Honor, I see that.

THE COURT: Okay. You're Mr. Dennis Wynn?

MR. WYNN: Yes.

THE COURT: Mr. Wynn, you've -- I know Mr. Rich is very thorough, so you've covered all this with him? You understand what you're pleading guilty to?

MR. WYNN: I do.

THE COURT: You've agreed to it?

MR. WYNN: I have.

THE COURT: I indicated to your attorney and the State's attorney that I would accept their sentencing recommendations, so you'll be given a sentence of two counts -- on two of the counts 1 to 15 years in prison to run concurrently and two other counts zero to five years in prison, all counts to run concurrently and to run concurrent with the federal time. I've agreed not to issue a commitment until you're scheduled to report on your federal commitment.

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.

THE COURT: You've discussed with Mr. Rich all of the

rights you're giving up, all the sentencing nuances, possible consecutive sentences, even though I've indicated I'll follow the recommendation. You understand all of that?

MR. WYNN: Yes, sir.

THE COURT: You agree that you're guilty of these charges?

MR. WYNN: Yes, sir.

THE COURT: If you're sentenced today, Mr. Wynn, as your attorney has requested, you lose the right to ask me to let you withdraw the guilty plea. The deadline for making a motion to withdraw the guilty plea is the date of sentencing. Since that day is today, then that right is gone as far as you're concerned. Do you understand that?

MR. WYNN: I do.

THE COURT: The form that Mr. Rich has probably prepared himself provided you, did you read it, Mr. Wynn?

MR. WYNN: I have, sir.

THE COURT: Do you agree to give up all of those rights?

MR. WYNN: I do.

THE COURT: The State's approved it as well?

MR. GUNNARSON: Yes, your Honor.

THE COURT: I'll approve it and note that Mr. Wynn has signed it. To the charges in Counts I and II, securities fraud, a 2nd Degree Felony, how do you plead, guilty or not guilty?

MR. WYNN: Guilty.

THE COURT: To the charges in Counts V and VII, securities -- let's see, one Count V is securities fraud, a 3rd Degree Felony, Count VII, theft. I guess that's been amended to a 3rd Degree Felony. It's shown as --

MR. GUNNARSON: It has been amended (inaudible).

THE COURT: Okay, a 3rd Degree Felony. How do you plead to those two charges?

MR. GUNNARSON: Guilty.

THE COURT: Guilty. I'll accept the guilty pleas. Anything else, Counsel?

MR. RICH: Nothing further.

THE COURT: I'll impose the sentences we agreed to, two 1 to 15s to run concurrent, two zero to fives to run concurrent, all sentences to run concurrent with each other on the federal sentence. I'll order that full and complete restitution be paid and the amount -- stipulated amount submitted by October 6th?

MR. RICH: That's correct.

THE COURT: Mr. Wynn will report to federal authorities on that date also to surrender; is that correct?

MR. RICH: That's correct. Thank you.

MR. GUNNARSON: Thank you, your Honor.

THE COURT: Let us give Mr. Wynn a copy of his sentence before he leaves, though. Mr. Rich, we can give that to you.

MR. RICH: That's correct.

(Hearing concluded)

ADDENDUM C

Final Restitution Order

E. NEAL GUNNARSON, Bar No. 1273
Assistant Attorney General
MARK L. SHURTLEFF, Bar No. 4666
Utah Attorney General
5272 South College Drive, Suite 200
Murray, Utah 84123
Telephone: (801) 281-1221
Facsimile: (801) 281-1224
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	**ORDER OF RESTITUTION**
Plaintiff,	:	
vs.	:	
DENNIS T. WYNN,	:	Case No. 061906774FS
Defendant.	:	Judge Robin Reese

Defendant Dennis Wynn appeared before the Honorable Robin Reese on the 25th day of August 2008 for a change of plea and sentencing. Plaintiff was represented by E. Neal Gunnarson, Assistant Attorney General, defendant was present and represented by his counsel of record Bradley Rich.

Pursuant to the Court's August 25, 2008 order, the State was required to submit the amount of full restitution to the Court by October 6, 2008, the date on which the defendant is to report to serve his sentence in his federal case.

After reviewing all pleadings in this matter, and after due consideration, the Court hereby enters the following:

PURSUANT TO UTAH CODE ANN. § 77-38a-202 AND § 77-38a-401, IT IS HEREBY ORDERED:

1) The defendant is ordered to pay restitution in this case in the total amount of $782,068.63 to those victims identified on Exhibit "A" attached hereto.

2) The defendant is hereby ordered to make monthly payments toward restitution in an amount to be determined between the parties once the defendant has been released from incarceration. Payments shall be made payable through the Office of the Utah Attorney General, Financial Crimes Prosecution Unit, 5272 South College Drive, Suite 200, Murray, Utah 84123, for disbursement to the victims in this case.

DATED this 23 day of Oct, 2008.

BY THE COURT:

ROBIN REESE
Judge, Third District Court

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of October, 2008, I caused a true and correct copy of the foregoing **"Order of Restitution"** to be served by the method(s) indicated below, upon the following:

Bradley P. Rich, Esq.
YENGICH, RICH & XAIZ
175 East 400 South, Suite #400
Salt Lake City, UT 84111

Scheree E. Wilcox

____X____ U.S. Mail, postage prepaid
_____ Overnight Express Mail
_____ Via Facsimile (#_____)
_____ Via Messenger

ADDENDUM D

Parole Hearing Transcript

HEARING

FOR DENNIS WYNN

Electronically recorded May 2, 2013
before Hearing Officer Jan Nicol

Transcribed by: Natalie Lake, CCT

152 E. Katresha St.
Grantsville, UT 84029
Telephone: (435) 590-5575

PROCEEDINGS

(Electronically recorded on May 2, 2013)

HEARING OFFICER: We're going to go ahead and get started. Today is the time and place set for a re-hearing for a Dennis Terry Wynn, offender No. 50251. Is that you?

MR. WYNN: That's correct.

HEARING OFFICER: All right. Welcome. My name is Jan Nicol. I'm hearing officer with the parole board, and I'll be conducting the proceedings today. Did you receive at least seven days prior notification of today's hearing?

MR. WYNN: I did.

HEARING OFFICER: Did you receive a blue disclosure packet?

MR. WYNN: I did.

HEARING OFFICER: Have you had a chance to read the materials given to you?

MR. WYNN: I have.

HEARING OFFICER: I am going to take sworn testimony from you today, so I do need to place you under oath. If I can get you to raise your right hand, please. Do you swear and affirm the information you're about to give is the truth, the whole truth and nothing but the truth?

MR. WYNN: I do.

HEARING OFFICER: Thank you. All right. I would like to reflect on the record we do have visitors in attendance today.

It looks like members of your family are here, Amy and David Carr, and it looks like Heather Fabian and Andrea --

MR. WYNN: Taunauta.

HEARING OFFICER: I can't say it, but welcome. We also have on behalf of the victims, we have Ryan Stephenson. It looks like you're here and you'd like to speak, and we will allow you an opportunity to do so, probably somewhere midway through the hearing.

All right. Mr. Wynn, as you have reviewed the blue disclosure documents, is there any corrections or errors you want to bring to the board's attention?

MR. WYNN: No.

HEARING OFFICER: So the information appears to be correct to you?

MR. WYNN: Yes.

HEARING OFFICER: Okay. Let me just kind of briefly explain what we're going to do. You already had what we'd consider an original hearing, but it was held in absentia because you were in federal custody at the time, so for the purposes of this hearing, it is a re-hearing, but we're going to somewhat treat it like an original hearing just because you were absent at the last one.

We're going to go over obviously why you're in prison. We'll discuss some of your history. I have some questions for you. It's also an opportunity for you to ask questions or made

additional statements or provide the board additional information you want them to consider. At the conclusion of this hearing I will be giving you a recommendation that I will be forwarding to the board. I don't make any of the decisions. Those are left to the five members of the board who will make a decision based on majority vote. There are five of them, so at least three of them have to agree. Usually you'll receive a decision within the next two to four weeks.

MR. WYNN: Okay.

HEARING OFFICER: Okay. Do you have any questions?

MR. WYNN: No.

HEARING OFFICER: Okay. The records indicate that you're here on one case. It's a 2006 case ending in 6774. It's security fraud, a 2nd Degree Felony, two counts, and security frauds, 3rd Degree Felony, two counts.

MR. WYNN: Correct.

HEARING OFFICER: Your expiration date is August 24th, 2023. Okay. Why don't you just kind of tell me in your own words -- I will read a summary of the information, but why don't you tell me in your own words what it is exactly you did.

MR. WYNN: How far -- do you want me to go back to the federal stuff? Do you want me to go just to the state stuff?

HEARING OFFICER: I just want you to summarize what you did.

MR. WYNN: I built a company for about 12 years, and

I -- we were privately funded, and it was a good business plan. I didn't pay close attention to how it was funded, and at the end of 12 years it failed.

I was in some disbelief about it failing and trying to keep it up, and I think I was in denial. I know I was in denial. There was a lot of pride trying to -- I had built this company. From there I moved forward trying to do some of the same things. I compartmentalized, and there was some denial. I tried to do car things with different people. I did some real estate things with different people that we had done in the company, and I over projected and it didn't work. I tried to keep things up that didn't really happen.

HEARING OFFICER: Are you finished?

MR. WYNN: Uh-huh.

HEARING OFFICER: Okay. Well, I've summarized and the offense was about four pages long, single spaced, so this is really a summary of that. Between June 2003 and October 2005 you offered or sold investments to at least six investors in the State of Utah and collected $184,526. Investors were either introduced to you through a common acquaintance, while others had known you for several years.

When you approached potential investors you generally told them their money would be used either to flip vehicles or real property. You claimed that through this vehicle program they would purchase vehicles at wholesale and then sell the

vehicles to purchasers with poor credit. You told investors you would arrange financing for purchasers at a fairly high interest rate and would split the interest with the investors. Some investors were told the vehicle title would secure their investments.

You also stated you could facilitate an investment similar to the vehicle program with real property. You said you would find foreclosed real property to purchase and sell the property for a profit. You claimed the profits would be continually reinvested in additional real property. You gave some investors an unsecured promissory note while other investors entered into verbal investment contracts with you.

Between November 2004 and June 2005 you offered to purchase automobiles for three individuals in the State of Utah and collected $62,000. You stated you could purchase automobiles from auctions and wholesale buyers through your Arizona Cyber Auto dealership.

Throughout your various dealings you never purchased vehicles or the real estate promised, and used the money for various business expenses, family members, family living expenses, cash and personal purchases. You failed to disclose a prior bankruptcy, $2 million in outstanding civil judgments, a tax lien filed in Arizona for 163,000, the loss of your real estate license and other delinquencies.

In addition to bilking investors, you were charged with

witness tampering. You contacted at least two employees during the investigation and basically told them to keep their mouth shut. You even threatened to implicate one of them in the charges. Does that sound accurate?

MR. WYNN: The witness tampering part, I was not aware that I was under investigation at that point in time, and they were employees, so I -- I had conversation with them, that's true, but I was not aware of investigation going on at that point in time.

HEARING OFFICER: But you still wanted them to keep their mouth shut?

MR. WYNN: Yeah.

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, so 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 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.

HEARING OFFICER: Okay. So kind of -- how did you go about -- because it sounds like many of these people were friends.

MR. WYNN: I worked for a financial planning company that a lot of those people were sent to me. I also had a friend who was a builder that I had some association with, and he had some -- he and I had an association, and he led me to some of that. He convinced me to take some of my past contracts and assign them to people.

So it had to do with -- it had to do with -- it had to do with the prior business dealings that I had. We had created contracts. We had built a business over a long period of time. We were buying cars for bad credit people, so it was at the end of all of that coming apart that this all took place.

HEARING OFFICER: I guess -- how did you justify it to yourself at the end of each day when you weren't really delivering any product?

MR. WYNN: Well, we actually still had contracts at that point in time. We had cash flow. I had two separate corporations, one in Utah, one in Arizona. We were still a dealer. You know, I -- pride and denial set in. There was -- I -- you know, some disbelief that I couldn't do what I had been able to do in the past. I had had a large organization and things fell apart.

I -- you know, I believed I could do the things that I had promised to do, or I had never made the promises to do them. Even though I wasn't able to perform, you know, part of that was I had compartmentalized, you know. I believed -- I believed in what I was doing. I had bought cars. I had done the things that I promised these people that I had done. My company had done them. I -- it wasn't something that I, you know, hadn't done before.

HEARING OFFICER: Okay, because one -- when one looks at it, it almost appears like you were recruiting a victim to help pay for your next paycheck. I mean that's kind of how it looks, because basically you recruit a victim, their money went into your account, you spent it all because your account was in the hole when you got it, usually. You'd spend it all, and then -- I mean it was obvious you weren't going to use the victim's money

to buy anything because the money was spent.

MR. WYNN: We had -- you know, we still had cash flow coming in. We still had an amount of cash flow coming in. It -- I know that's how it appears. That's -- that's -- that was not my intent. I know that's how it appears, and that's how it ended up being.

You know, I've looked at it long and hard. I've spent 55 months looking at and wondering about it and trying to figure it out. I was in denial that I could make things happen that weren't going to hap -- that wasn't going to happen, but they were things that I literally had done and completed and done in the past. It was things that my business had done that were -- you know, we went to the auction, we bought cars, we had bad credit people, we did all of those things.

So part of it was just a sense of everything falling apart at that point in time in my life. There were lots of -- the business had fallen apart. I was left with all of the -- I was literally left with all of the weight of taking care of everything, a business that I was under a lease in Arizona, employees -- I had over 80 employees at one point in time, and all of the equipment, all of the files and all of the things to take care of, and I was just trying to hold up too many pieces all at the same time.

HEARING OFFICER: Yeah, but it seems that you were holding them up at the cost of a lot of victims.

MR. WYNN: Well, I realize that's how it appears, and that's what ended up happening.

HEARING OFFICER: Were you honest with any of these people at any point in their transactions with them?

MR. WYNN: I felt like I was honest with them in the transactions and -- you know, it ended up I couldn't do what I said I could do.

HEARING OFFICER: How are you proposing you're going to pay back this restitution, because not only do you have the restitution on the state case, but there's also the restitution on the federal case.

MR. WYNN: I've spent, you know, a good time of time in the last 55 months really reviewing and looking at not only my weaknesses but my strengths. In 1998 I did live talk radio shows, I created an infomercial, I have a car program that I created that's a good car program. It was well ahead of its time. I've worked on business plans in preparation to put it on the internet and to do some positive things with it. I have -- I've not only looked at what I've done, but I've looked at what I could do to repay these people in the last 55 months, and I've worked hard at it.

HEARING OFFICER: Okay. So you don't have a specific plan in mind?

MR. WYNN: I plan on using a car program that I created and that is an actual car program to help pay these people back.

I have a program --

HEARING OFFICER: Okay. Is that going to involve trading, selling, leasing vehicles?

MR. WYNN: It's basically information and it's on the internet.

HEARING OFFICER: Okay, but what I asked you is is that going to involve trading, selling or leasing?

MR. WYNN: From my standpoint? No.

HEARING OFFICER: Uh-huh, because I don't think it's going to be allowed.

MR. WYNN: From my standpoint, no. It's going to be information that's given to people.

HEARING OFFICER: Okay. How are you going to profit off of information?

MR. WYNN: From -- well, there will be dealers that are involved that will have to do transactions, but that will be away from me.

HEARING OFFICER: I think anytime that you have any contact with any kind of fiduciary type funds, there's going to be question about what you're doing.

MR. WYNN: My information won't be fiduciary funds.

HEARING OFFICER: So you're not going to be collecting any funds at all?

MR. WYNN: Payment for information.

HEARING OFFICER: Okay. So hypothetically speaking, if

you are to get out at some point and be able to pay restitution, what is a reasonable amount that you're going to be able to pay in a given month?

MR. WYNN: I don't know. I don't know the answer to that right now, because I -- like I said, I've been out of the market for a long period of time. Technology has changed things a great deal. I'm going to have to take a look at where things are at this point in time.

HEARING OFFICER: Did you liquidate all your assets to pay your restitution?

MR. WYNN: I've liquidated -- everything I have is gone.

HEARING OFFICER: Okay. Let's take a break right here and we'll allow Mr. Stephenson to speak.

MR. STEPHENSON: Thank you for the opportunity.

HEARING OFFICER: I do have to place you under oath before we start.

MR. STEPHENSON: Okay.

HEARING OFFICER: So if I can just get you to state your full name on the record for me, please.

MR. STEPHENSON: Ryan Wesley Stephenson.

HEARING OFFICER: Thank you. Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. STEPHENSON: I do.

HEARING OFFICER: Thank you. Okay. The time is yours. Go ahead.

MR. STEPHENSON: Thank you for the opportunity to be here. I wrote a letter. I'm going to read it.

HEARING OFFICER: Okay.

MR. STEPHENSON: Before I do, I have three words for you, Dennis. We forgive you, and I hope that sinks deep. It's hard to do, but we forgive you, and I want your family to know that. I'm going to read my letter and then I'm going to share a few thoughts. This is hard for me to be here.

HEARING OFFICER: Okay.

MR. STEPHENSON: As Dennis and I unloaded bags of rock salt out of the BMW into our empty carless garage, my 3-year-old son stood on the landing in front of our home to that same garage. He said four words that I'll never forget, and I don't think Dennis will either. He was 4. "Dennis, you're a liar."

I started to apologize and correct him, when Dennis replied, "It's okay." Those words were so true. My son had the courage to say what I couldn't. Today it's our turn. I say it now with no hesitation. I owe it to my family. Dennis, you were a liar. You were a thief. You nearly destroyed what we had worked so hard for, but we came out victors.

Dennis has lied to us the day he came here -- until the day he came here. He has never told us the truth as to what he did with our money. Even today, he hasn't told that truth. He led us this way and that way, always providing a wee bit of hope. Excuse after excuse rolled from his tongue. It led us down a

path of false hope and lost dreams. He was a thief of our money, a thief of our opportunity and most of all a thief of our time. These will never be turned. Washington Irving, a great American author said this: A sharp tongue is the only edge tool that grows keener with constant use. Indeed, we were witness to this very truth.

Days after the sickening realization set in, I received a blessing from my church leaders who counseled us to move forward. We have. Blessings have come our way. Opportunity and job growth have been ours. Burdens have been lightened as we've tried to move forward and forget this tragedy, yet two things have prevented a complete separation from our experience. The false hope of ever receiving what was once ours, and our total forgiveness of Dennis. We know that our devil -- our debt will never be paid back. The dollar value of Dennis's restitution is too great. If we continue to have hope in something we know will never come to pass will only rob us of more time.

Today Peggy and I offer our complete forgiveness to you, Dennis. We hold no malice. Our hope has turned to something different, something more worthwhile, something brighter. It does not include you. Our hope for you is to heal. Our children have remembered you in their prayers, praying that you will become someone of character.

We ask the justice system to erase from Dennis's restitution the portion of funds (inaudible) for our family. We

do not want a monetary settlement. We have been strained by the spirit long enough, and now consider ourselves and Dennis free from this debt. We were once Peter. We don't want to become Paul. I speak of an age old adage of which we are all familiar. Peggy and I want no part of restitution if it means theft from another to fill our pockets with that which is the root of all evil.

Our fear is that Dennis will begin where he left off. This comes from the lie we continued to hear to the time of his incarceration. There is a continued inability to accept responsibility for his actions which lead one to believe he's yet to change his behavior. The two words which could soften any heart, those that show true sorrow were never spoken. Those two words were I'm sorry. I'm sorry were those two words which never rolled off of his tongue. Even without hearing it, we still forgive.

As Peggy and I address the board of pardons, we are advocates for one to have a second chance. We do stand and plead for Dennis's release, yet do not stand and plead for his continued incarceration. This is a burden that you must carry. It is a decision that you must make and we do not envy you.

If it is decided that Dennis is no longer a threat of committing this crime toward any other, then we have a specific responsibility to accept this decision. If the feelings are to the contrary and Dennis continues to be incarcerated, we will

also support the board's decision. There will be no celebration on our part either way. We remember your family in our prayers. We ask the Lord's blessings to be upon all of you in this difficult time.

After I wrote this letter, my wife and I had an opportunity to get away for a couple of days and had these feelings that if Dennis can pay back to everybody else but us, it serves no purpose for him to continue to be incarcerated in a legal way. If he can pay it back in a legal way. If the pattern continues, then we've failed the system. That's the board's decision, and we support you whichever way we go. Once again, Dennis, we forgive you. Thank you.

HEARING OFFICER: Would you mind if the bailiff made a copy of your testimony? Would that be okay?

MR. STEPHENSON: That would be fine. Some of it is written, some of it is not.

HEARING OFFICER: That's okay. I appreciate it. Thank you. Mr. Wynn, do you have any comments?

MR. WYNN: I'd like to tell Mr. Stephenson I'm sorry. I've -- you know, I've spent 55 months looking at this scenario and working hard at correcting thought processes, and doing all that I could to change who I am. I basically have done that through finding myself spiritually, working hard at accepting responsibility and moving forward so that I could benefit my family and benefit those that I've hurt.

There isn't a day that goes by that I don't and haven't prayed for not only the victims, but that I haven't worked hard at making changes in my own life by studying and looking at, praying, working at, doing all that I could to make sure that I understood where I was at and why the decisions that I made were made, how they affected people.

HEARING OFFICER: How much impact do you think it really has if you say sorry after he basically asked for -- I mean basically says you haven't.

MR. WYNN: I don't know what else to do. I mean I --

HEARING OFFICER: Well, and you may be indeed sorry, but sometimes apologies, if they don't come on their own accord, they're kind of empty.

MR. WYNN: I understand that.

HEARING OFFICER: You know, he has the analogy that I actually wrote on my paper, because it is kind of a Peter and Paul type thing. I mean you were robbing from Peter to pay Paul. Some victims got paid from each other, and it just kind of went on and on and on.

I don't know. You know, I don't think you certainly -- like most people who commit fraud -- have the ability to pay for it, okay. There's a couple of types of scenarios that go into play. There's those who don't have the ability to pay for it or those that have the ability and don't want to pay for it, so I don't know where you fall in that, but you owe a lot of money.

I mean the federal system is $15 million. So when he comments that he doesn't think he's going to get his money back, I mean he's absolutely right. Short of some type of miracle or somebody else getting ripped off, I mean if you have some idea of how you think that's going to get paid, you certainly feel free to share it, but the fraud cases I've dealt with over the years, you just don't see no return of $15 million. So I guess I'd like to know, where did you spend it?

MR. WYNN: The $15 million is first of all, not an accurate figure, but --

HEARING OFFICER: Okay. Well, let's just stay with the state money. Where did you spend it? Where did you spend $184,000?

MR. WYNN: I -- you know, it's -- I don't know. I don't know at this point in time. I accept responsibility, but you know, I don't know. I don't have an accounting for it in front of me. It's been -- I don't know.

HEARING OFFICER: Okay. What would you like to tell the board today, if anything.

MR. WYNN: That I'm -- you know what, that I'm not the same person that I was 55 months ago, that I've spent a lot of time contemplating and looking at, asking my Heavenly Father for forgiveness, studying, trying to prepare, look at a way that I could take care of my obligations and responsibility, but basically to be a different person.

I've spent a lot of time reading, I've spent a lot of time studying, I've spent a lot of time preparing, I've spent a lot of time serving. I've tried to do everything that I could to change my own heart and to be a different person than I was when I came in. I was angry and prideful. I created a lot of problems when I came in -- before I came in. I'm not the same person today.

HEARING OFFICER: Okay. How do you think that's going to change in terms if you were to be out? How are you going to change?

MR. WYNN: How am I going to change?

HEARING OFFICER: Yeah. What is it that we're going to see in outward form?

MR. WYNN: I'm a different person today. I think different. I'm concerned about the people that I've hurt. I'm trying to do the right things every day. I don't know what else to do.

HEARING OFFICER: All right. This case, as I previously mentioned, carries an expiration date of 2023. The guideline on the case -- now a guideline, just so everybody is aware what a guideline is, it's just kind of a general mark the board uses to decide when to consider releasing somebody. Yours is March of 2010. So that's already come and gone.

I don't know that it probably even applies in the case because the board will go above it or below it depending on

aggravating or mitigating circumstances, and there's certainly a lot of aggravating circumstances. One, just the amount of money by itself is aggravating, and the number of victims, and the fact that there's, you know, other similar type activities going on.

So it has already exceeded the guidelines, and I'm guessing it's going to exceed the guidelines by more. I'm sure at some point the board is probably going to extend you a parole with an expectation that you start to pay back some of this, but we're also very realistic in terms of what, you know, the victims are going to get in the end. Would we like them to be whole? Yes, we would. Short of you I guess pulling, you know, a rabbit out of a hat some offshore account, I don't think they're going to get paid. So -- but I do expect you to do some more time, okay.

I personally haven't come to a recommendation, but my guess is, you know, the board may be considering something several years down the road. At such time, if they do order a parole, it's going to have conditions that state specifically you're not to deal with fiduciary funds. It may even be as specific to say you're not to be dealing in automobiles, because that's where a lot of this deception happened. Certainly what we don't want you to do is to leave and go get a job doing the same thing that you were doing to get you into this to begin with. But we also don't want to incapacitate you to the point where you can't work, either. So any comments?

MR. WYNN: I would ask the board to take into consideration the amount of time that I've spent and now more time is going to make any effect on -- positive effect on me, how it impacts my family and how it also impacts the victims because of, you know, the inability to even work to pay or help them at all.

HEARING OFFICER: Let's just hypothetically, let's just say you pay $100 a month, okay? I want you to kind of visualize yourself as a victim, because we have to divide it amongst the victims. Just for easy calculation purposes, let's say there's 10 victims, and you pay $100 a month. How would you feel as a victim if you got a $10 check in the mail each month?

MR. WYNN: I guess it's better than nothing at this point in time.

HEARING OFFICER: And that's your comment, okay, because I deal with victims on a regular basis, and I'm sorry, it's kind of insult for a victim to get $10 in the mail. It may be an effort on your behalf, but not only is it very insignificant, but it's also a reminder every single month when you get the $10 check of what happened to you. It -- you know, it can make people very bitter.

So as a victim, sometimes getting $10 in the mail is not worth it. Sometimes it's far more worth it just to have you sit there. Those are the things we look at and we have to weigh at our agency. So I just share that with you, because that's kind

of what we kind of think about. Do we want restitution paid? It's actually our No. 1 priority, but we also have to think about is it really going to happen, and you know, I've had a victim get a dollar check in the mail, okay. That's what happens with fraud (inaudible) because there's no much restitution, there are so many victims by the time you disburse it.

So it -- oftentimes you end up getting a very insulted victim, and I don't blame them, because if I had to remember it every month when I got that little check in the mail, that would be frustrating. I can understand where Mr. Stephenson is coming from. Sometimes you just have to accept that you are not going to get it because then you can -- you can go on with life, and it doesn't become the burden that bears you down.

So anyway, that's -- those are the things that the board takes into consideration. We understand you've spent a significant time in federal custody, but I'm going to tell you, had you spent the entire time here, I don't know that you'd be getting out, because we're considering it. This runs concurrent to your federal time. So those are things the board will take into consideration, but I'm just going to tell you, you may need to prepare to be spending some more time. What that is, I don't know, okay? If you have anything further, I'll let you comment. Otherwise, we'll close the proceedings.

MR. WYNN: I don't have anything further.

HEARING OFFICER: Okay. You'll get the board's decision

in a few weeks, then. Thank you.

(Hearing concluded)