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**IN THE SECOND DISTRICT COURT- WEBER COUNTY,  
STATE OF UTAH**

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**LELAND KIM MCCUBBIN, JR.,**

Petitioner,

vs.

**WEBER COUNTY and OGDEN CITY,**

Respondents.

**Memorandum of Authorities in  
Support of Petition for Relief Under  
the  
Post-Conviction Remedies Act  
Utah Code Section 78B-9-101, et seq.  
Utah Rule of Civil Procedure 65C**

Case No. \_\_\_\_\_  
Judge \_\_\_\_\_

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In support of his Petition to vacate his convictions of Utah Code Section 786-10-807 pursuant to the Post-Conviction Remedies Act, Utah Code Section 78B-9-101, *et seq.* and Utah Rule of Civil Procedure 65(C)(d), Leland Kim McCubbin Jr., through his attorneys, submits this memorandum of authorities.

**FACTUAL BACKGROUND**

On August 20, 2010, Weber County filed a complaint in the Second District Court of Utah against the Ogden Trece gang in Case Number 100906446 (the “*Trece* case”). Weber County claimed that the gang could be sued as an “unincorporated association”

and requested an order declaring the gang a public nuisance, as well as an injunction abating the public nuisance. As the Utah Supreme Court would later rule in 2013, however, Weber County did not properly effectuate service on the gang, instead employing alternative service that was ineffectual. *See Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 43-60, 321 P.3d 1067. As a result, the Court held that because the district court never obtained jurisdiction in the *Trece* case, the court's orders over the course of the case were void *ab initio*. *See id.* ¶ 60.

Prior to that ruling, however, the *Trece* case continued. On August 20, 2010, the same day the complaint was filed, the district court issued a temporary restraining order against the Ogden Trece, which the court later extended. On September 28, 2010, the court granted a preliminary injunction against the Ogden Trece (the "Injunction"), which was made permanent in August 2012. Persons subject to the Injunction had various restrictions placed on their constitutionally protected activities when they were within an area of twenty-five square miles, consisting of virtually the entire Ogden City limits. For example, those subject to the Injunction were not allowed to be in any public place between 11 p.m. and 5 a.m. except to attend church, work, school, or an admission-charging "entertainment event," or because of an emergency. (Injunction, attached as Ex. 1, at 4.) Persons served were further not allowed to drive, sit, stand, walk, gather, or appear anywhere in public (except in school or church) with any "known member" of Ogden Trece. *Id.* at 2.

The Injunction did not require a pre-service hearing to determine whether a person to be served with the Injunction was actually an agent of or otherwise affiliated with the Ogden Trece gang. Rather, the Injunction's restrictions became effective on the

person immediately upon service, and the burden was placed on the individual served to initiate proceedings to disprove the propriety of subjecting him or her to the Injunction's restrictions under the Injunction's "Opt Out" provision. *Id.* at 6-7. The Injunction further stated that even if an individual being prosecuted for contempt of the Injunction was eligible to "Opt Out" at the time of the alleged violation or when the charge was filed, he or she could not raise that eligibility as a defense against that charge. *Id.* at 6. Accordingly, even people with absolutely no connection to the Ogden Trece gang could be subject to conviction of criminal contempt by merely being served with the Injunction and failing to abide by all of its terms.

Several individuals served with the Injunction brought a writ of extraordinary relief in the *Trece* case, arguing that the Injunction and permanent injunction should be vacated for various reasons, including the above-mentioned ineffective service. On October 18, 2013, the Utah Supreme Court vacated the Injunction and permanent injunction. *See Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 43-60, 321 P.3d 1067. As discussed, the Court reasoned that because Weber County had not properly served the Ogden Trece gang with process to initiate the suit, the district court had no jurisdiction in the suit: the court's orders, and specifically the Injunction and the permanent injunction, were therefore void *ab initio*. *See id.* The Utah Supreme Court's Court's Order was remitted to the district court on November 6, 2013. (*See* Order of Remittitur, attached as Ex. 2.)

#### **FACTS REGARDING MR. MCCUBBIN**

Mr. McCubbin was a member of the Ogden Trece gang, but he was "jumped out," or left gang membership, in 2008. (McCubbin Affidavit, attached as Ex. 3, at ¶ 1.) Mr.

McCubbin received a copy of the Injunction while he was incarcerated the Utah State Prison in 2010. (*Id.* at ¶ 2.) At the time he received the Injunction, he was housed in a high security area of the prison away from those identified as members of the Ogden Trece. (*Id.*) Mr. McCubbin was released from prison in 2011.

On December 5, 2011, in Case Number 111803730, Ogden City charged Mr. McCubbin with violating Utah Code Section 76-10-807, violation of an order enjoining a public nuisance (*i.e.*, the Injunction), a class B misdemeanor. The alleged violation of the Injunction stemmed from Mr. McCubbin being in public in Ogden after 11 p.m. (*Id.* at ¶ 3.) In the same case, Mr. McCubbin was also charged with violating Utah Code Section 76-9-701(1), intoxication, a class C misdemeanor.

On January 4, 2012, Mr. McCubbin pleaded no contest to the charge of violating the Injunction in Case Number 11803730. Pursuant to a plea agreement, Ogden City dismissed the class C misdemeanor charge for intoxication against Mr. McCubbin. Mr. McCubbin received a 60-day sentence suspended in lieu of a \$500 fine on the violation of the Injunction in Case No. 11803730. Mr. McCubbin later went into arrears in paying that fine, and on July 20, 2012, he was sentenced to 60 days in jail or a fine of about \$250. The 60-day sentence imposed at that hearing has run concurrently with his present prison sentence on unrelated charges. (*See* Docket Sheet for Case Number 111803730, attached hereto as Ex. 4, at 7.)

On December 27, 2011, in Case Number 111902997, the State of Utah charged Mr. McCubbin with violating Utah Code Section 76-10-807, violation of an order enjoining a public nuisance, a class B misdemeanor. (*See* Docket Sheet for Case No. 111902997, attached hereto as Ex. 5, at 1.) Again, the injunction at issue was the

Injunction and the charge stemmed from Mr. McCubbin being in public in Ogden past 11 p.m. (*See* Probable Cause Statement in Case No. 111902997, attached hereto as Ex. 6.)

The State of Utah also charged Mr. McCubbin in that case with violations of Utah Code 76-5-102.4(2)(A)(I), assault against a police officer, a class A misdemeanor, Utah Code Section 76-8-305, interfering with arresting officer, a class B misdemeanor, and Utah Code Section 76-6-206(2)(A), attempted criminal trespass, a class B misdemeanor.

On January 4, 2012, Mr. McCubbin pleaded no contest to violating the Injunction in Case Number 111902997. He also pleaded no contest to the interference and attempted criminal trespass charges. Pursuant to a plea agreement, the State of Utah dismissed the charge of assault against a police officer against Mr. McCubbin.

Mr. McCubbin was sentenced to 180 days in jail on each charge in Case Number 111902997, to run concurrently with each other. (*See* Docket Sheet for Case No. 111902997 at 4.)

In April 2012, Mr. McCubbin undertook affirmative court proceedings in the *Trece* case to “opt out” of the Injunction. At an April 11, 2012 hearing, Mr. McCubbin proved that he was not a member of the Ogden Trece gang, becoming the first person to successfully use the Injunction’s Opt-Out provision. (McCubbin Aff. at ¶ 4.) The court’s order reflecting its findings at that hearing issued on April 26, 2012 (*See* “Order to Dismiss Under Opt-Out Provision of Gang Injunction,” dated April 26, 2012, attached as Ex. 7.)

On April 13, 2012, Mr. McCubbin made a motion to reduce his sentence for violating the Injunction in Case Number 111902997. At the hearing on April 18, the court agreed that Mr. McCubbin was not a gang member and suspended 60 days from

Mr. McCubbin's overall sentence, ordering him released that day. (*See* Docket in Case Number 111902997 at 4.)

Mr. McCubbin is presently incarcerated at the Central Utah Correctional Facility. He is currently serving sentences on convictions not at issue in this Petition, but has also served 60 days concurrently for the conviction against him for violating the Injunction in Case Number 111803730.

## **ARGUMENT**

### **A. MR. MCCUBBIN MEETS THE REQUIREMENTS TO VACATE HIS INJUNCTION-RELATED CONVICTION UNDER SECTION 78B-9-104**

Under Utah Code Section 78B-9-104,

“[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; [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.”

Here, Mr. McCubbin's convictions for violations of the Injunction should be vacated under subsections (a), (b), and (f).

First, Mr. McCubbin's convictions for violating the Injunction violated the Utah and United States Constitutions because the district court issuing the Injunction did not establish personal jurisdiction over the Ogden Trece gang, the party that it was purporting to enjoin. *See Ogden Trece* at ¶64. Under Utah law, "[i]t is fundamental that disobedience of an order of court which was issued without jurisdiction cannot be the basis of a finding and judgment for contempt." *Mellor v. Cook*, 597 P.2d 882, 884 (Utah 1979) (footnote citations omitted). Such is likewise true under the United States Constitution: "It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt." *United States v. Shipp*, 203 U.S. 563, 573 (1906) (citations omitted). This proposition holds true, of course, because constitutional due process demands that a court have power over a person before making decisions that implicate the person's rights. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant be given adequate notice of the suit and be subject to the personal jurisdiction of the court.") (internal citations omitted); *see also Jackson Const. Co. v. Marrs*, 2004 UT 89 ¶ 8 (stating that "if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs.") (internal quotation marks and citations omitted). Accordingly, allowing Mr. McCubbin to be punished for violating the Injunction would violate his due process rights because the district court had no power to issue that order in the first instance.

That the Injunction is void for lack of jurisdiction is alone enough to vacate Mr. McCubbin's convictions for violating the Injunction. There are three alternative grounds to do so, however, in this case. First, in addition to the due process violation just described, Mr. McCubbin was also denied due process because he was not given a chance to contest his supposed membership in the gang or to show that he was "jumped out" of the gang before being subjected to the Injunction's restrictions on his liberty. This lack of pre-deprivation process was unconstitutional both on its face and as applied to Mr. McCubbin.

As to the facial problem with the Injunction, the Ninth Circuit recently addressed this question in a case involving another so-called "gang injunction," *Vasquez v. Rackauckas*, 734 F.3d 1025 (9th Cir. 2013). In *Vasquez*, the court held that because the gang injunction there placed substantial rights at risk but denied the enjoined persons adequate pre-deprivation process, the injunction could not be enforced because it was unconstitutional. *Id.* at 1052. Likewise here, the Injunction imposed restrictions implicating many constitutional rights, including free expression and free association, but gave no adequate pre-deprivation process to protect them. In fact, on its face, the Injunction expressly considered and approved situations where people totally unconnected to the Ogden Trece could be successfully prosecuted for contempt for violating the Injunction.

The Injunction's lack of pre-deprivation process was also unconstitutional as applied to Mr. McCubbin because he had evidence that he was not a member of the Ogden Trece gang at the time he received the Injunction. Once Mr. McCubbin took it upon himself to initiate process to show he should not have been served, the court agreed.



Had Mr. McCubbin been given process before he was subjected to the Injunction, he would have been able to prove that he was not a gang member.

The second alternative ground for setting aside Mr. McCubbin's conviction is under subsection (b). That is, Mr. McCubbin was prosecuted for activity that was constitutionally protected. In particular, both of Mr. McCubbin's contempt charges were based on his being in a public place in Ogden past 11 p.m. in violation of the Injunction. That conduct was clearly within Mr. McCubbin's First Amendment and due process rights. *See, e.g., Ruff v. Marshall*, 438 F. Supp. 303, 305 (D. Georgia 1977) (striking down broad curfew law as inconsistent with the constitution). *See also In re J.M.*, 768 P.2d 219, 221 (Colo. 1989) ("Because these liberty interests are fundamental, the state must establish a compelling interest before it may curtail the exercise of such rights by adults . . . "); *Anonymous v. City of Rochester*, 915 N.E.2d 593, 598 (N.Y. 2010) (distinguishing strict scrutiny applicable to adult curfews from intermediate scrutiny applicable to minor curfews).

The final alternative ground for setting aside Mr. McCubbin's conviction is under subsection (f). Specifically, in the *Trece* case, the Utah Supreme Court ruled that the Ogden Trece gang was an unincorporated association that was amenable to service, but that the County had failed to properly serve the gang as an entity, and as a result, the Injunction was void. *See Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 60, 64. Either prong of subsection (f) thus applies to these convictions. First, prior precedent regarding the requirements of service of process under Utah law compelled the Court's ruling. Second, because it voided the Injunction, the Court's ruling directly decriminalized the behavior that subjected Mr. McCubbin to the criminal contempt conviction, in particular,

the ability to be out in public in Ogden past 11 p.m. after being served with the Injunction.

**B. NONE OF THE BARS TO RELIEF UNDER SECTION 78B-9-106 APPLY TO MR. MCCUBBIN**

Mr. McCubbin's present Petition is not barred under Utah Code Section 78B-9-106. Under Section 106, a petition may be denied if it is based on a 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."

None of these bars preclude relief here. In this case, the Utah Supreme Court has already ruled that nobody except the Ogden Trece gang had the right to appeal the issuance of the Injunction. *Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 26, 28. Thus, Mr. McCubbin had no standing to directly appeal the Injunction during his criminal proceedings in this court or the Justice Court, or in the district court proceedings in the *Trece* case. Moreover, the Injunction precluded Mr. McCubbin from raising the fact that he was not a member of the Ogden Trece gang as a defense to the charges of violating the Injunction. Further, the Court did not find the Injunction void for lack of jurisdiction until October 18, 2013, nearly two years after Mr. McCubbin's criminal proceedings at issue here were concluded and the time for appeal elapsed.

Accordingly, in December 2011 and January 2012, when he was charged and was convicted of the charges of violating the Injunction, Mr. McCubbin had no standing to directly appeal the Injunction's propriety. He thus could not have, and did not, raise any

defects with the Injunction in his criminal proceedings. Nor has he filed any previous motions to vacate these convictions. Moreover, it was not until November 6, 2013 — less than a year ago— that the Utah Supreme Court’s decision ruling that the Injunction was void was remitted to the district court. This Petition accordingly meets Section 107’s one-year statute of limitations.

### **CONCLUSION**

For the foregoing reasons, Mr. McCubbin’s Petition should be granted and his criminal contempt convictions for violating the Injunction should be vacated.

Respectfully submitted this 19th day of September, 2014.

SIGNED

s/ John Mejia

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