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<b>IN THE SECOND DISTRICT COURT- WEBER COUNTY, STATE OF UTAH</b>	
<b>LELAND KIM MCCUBBIN, JR.,</b>  Petitioner,  vs.  <b>WEBER COUNTY and OGDEN CITY,</b>  Respondents.	<b>[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>   Case No. 140906014 RN  JUDGE MICHAEL DIREDA

Now before the Court is the Petition by Leland Kim McCubbin, Jr. under Utah Code Section 78B-9-104, the Post Conviction Relief Act (“PCRA”), to vacate his two convictions Utah Code Section 76-10-807, both based on violating the so-called Ogden Gang injunction. Pursuant to Utah Rules of Civil Procedure Rule 65C(o), the Court hereby issues these Findings of Fact and Conclusions of Law, grants the Petition, and orders that those convictions be vacated for the reasons herein.

#### **FINDINGS OF FACT**

1. 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.

2. 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, which was made permanent in August 2012 (both orders are referred to herein as “the Injunction” unless otherwise specified.)

3. 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 all of Ogden City. 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. 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.

4. 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. Rather, the Injunction’s restrictions became effective on the person immediately upon service, and the Injunction placed the burden 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.

5. 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.

6. Several individuals served with the preliminary Injunction brought a writ of extraordinary relief in the *Trece* case, arguing that the Injunction should be vacated for various reasons, including ineffective service.

7. On October 18, 2013, the Utah Supreme Court vacated the Injunction, reasoning 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, were therefore void *ab initio*. *See Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 43-60, 321 P.3d 1067.

8. The Utah Supreme Court’s Order in *Weber County v. Ogden Trece* was remitted to the district court on November 6, 2013.

9. On December 5, 2011, in Case Number 111803730 in Ogden City Justice

Court, Mr. McCubbin pleaded guilty to a charge of violating Utah Code Section 76-10-807, violation of an order enjoining a public nuisance, a class B misdemeanor. The order enjoining a public nuisance at issue was the Injunction. The basis for the charge was that Mr. McCubbin was in public in Ogden past 11 p.m.

10. In that case, Mr. McCubbin was sentenced to 60 days suspended in lieu of a fine. Mr. McCubbin later was delinquent in his fine payments and, on July 20, 2012, was sentenced to 60 days.

11. On January 4, 2012, in Case Number 111902997 in the Second District Court- Ogden, Mr. McCubbin pleaded no contest to a charge of violating Utah Code Section 76-10-807, violation of an order enjoining a public nuisance, a class B misdemeanor. At that time, Mr. McCubbin also pleaded no contest to two other class B misdemeanor offenses. He was sentenced to 180 days on each charge to run concurrently.

12. In April 2012, Mr. McCubbin undertook affirmative court proceedings in the *Trece* case to “opt out” of the Injunction. Upon finding that Mr. McCubbin was not a member of the Ogden Trece, the Court dismissed the Injunction against Mr. McCubbin without prejudice on April 26, 2012.

13. On September 19, 2014, Mr. McCubbin filed the present Petition and the Court ordered Respondents to respond.

14. On December 3, 2014, Weber County filed an Answer to the Petition that opposed the Petition and set forth several affirmative defenses. On December 4, 2014, Ogden City filed an Answer to the Petition, likewise opposing the Petition and asserting

several affirmative defenses.

15. On January 7, 2015, Mr. McCubbin sought leave to file memoranda in reply to Respondents' Answers. That motion has not yet been ruled upon.

16. No other pleadings have been filed in this matter.

17. On February 17, 2015, a hearing was held on Mr. McCubbin's Petition at 9:00 am in this Court.

18. After counsel for Mr. McCubbin made his argument, counsel for Weber County approached and indicated that the Respondents had decided not to oppose Mr. McCubbin's Petition and would agree to vacate his convictions.

19. In explaining the decision not to oppose, Weber County gave two reasons. First, the County explained that Mr. McCubbin had exercised the Injunction's "Opt Out" clause in 2012. Second, the County stated that the sentences Mr. McCubbin served on the convictions he seeks to vacate were served concurrently with sentences on other offenses.

20. Neither Respondent in this case had previously notified the Court or Mr. McCubbin of their intent not to oppose. Counsel for Mr. McCubbin did not oppose, of course, the Respondents' decision to withdraw their opposition and consent to vacate the convictions, but stated that a ruling by the Court on the Petition would still be appropriate.

21. When the Court inquired of Respondents whether the proposed order prepared by Mr. McCubbin should simply state that the order was for the reasons stated in the memorandum of authorities, Respondents opposed that concept, but did not argue

any defects with the merits of the memorandum of authorities.

22. The Court then pointed out that neither of the Respondents' proffered reasons to vacate Mr. McCubbin's convictions were among the express grounds to set aside convictions as set forth in Utah Code Section 78B-9-104, which Respondents acknowledged.

23. The Court then inquired of Respondents which ground they proposed for vacating the convictions, emphasizing that an "interest of justice" exception was not expressly stated in the PCRA. The Court further pointed out that Rule 65C(o) of the Utah Rules of Civil Procedure required that the Court prepare a findings of fact, conclusions of law, and order if the Court determined that a conviction should be vacated.

24. Respondents did not propose any ground to vacate Mr. McCubbin's convictions under Section 78B-9-104, but also did not indicate that they had withdrawn their decision not to oppose the vacating of Mr. McCubbin's conviction.

25. At the end of the hearing, the Court indicated to counsel for Mr. McCubbin that because Mr. McCubbin had prevailed, Mr. McCubbin should prepare a proposed order within 15 days.

## **CONCLUSIONS OF LAW**

### **A. MR. MCCUBBIN'S MOTION TO FILE REPLY BRIEFS IS GRANTED**

26. At the time of the hearing, the Court had not yet ruled on Mr. McCubbin's motion to file reply briefs. Since Respondents did not oppose this motion, it is granted, and the briefs and the accompanying materials are deemed filed.

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

27. Respondents have had ample opportunity to address the arguments asserted by Mr. McCubbin in support of his Petition, and they have done so in their Answers to his Petition. Further, it was Respondents' decision not to address the merits of the Petition at the hearing on this matter, but instead propose vacating the convictions on grounds not asserted in the Petition. The Court thus finds that it is proper to rule on the merits of Mr. McCubbin's Petition at this time without further briefing or hearings.

28. 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.”

29. Here, Mr. McCubbin's two convictions for violating the Injunction are

properly vacated under any and each of subsections (a), (b), and (f).

30. First, Mr. McCubbin's convictions for violating the Injunction violated the constitutions of Utah and United States because those convictions violate Mr. McCubbin's right to due process.

31. As the Utah Supreme Court ruled, the lower court in the *Trece* case 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).

32. This proposition holds true 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). Respondents have cited no authority to the contrary.



33. Accordingly, the convictions against Mr. McCubbin for violating the Injunction were obtained in violation of his state and federal due process rights because the district court had no power to issue that order in the first instance.

34. That the Injunction is void *ab initio* for lack of jurisdiction is alone sufficient to vacate Mr. McCubbin's convictions for violating the Injunction under subsection (a). The Court further notes, however, that the convictions were also obtained in violation of constitutional due process for two additional and alternative reasons.

35. First, the convictions violated Mr. McCubbin's due process rights because the Injunction failed to provide adequate pre-deprivation process on its face. Specifically, even assuming arguendo that the *Trece* court had jurisdiction to issue the Injunction, the Injunction was facially defective because it was effective immediately upon service without any prior hearing to determine whether Mr. McCubbin was an agent of or affiliate of the gang. The Injunction thus improperly placed the burden on Mr. McCubbin to disprove that he was affiliated with the Ogden Trece gang after he had already been subjected to the Injunction's restrictions on his personal liberties and placed at risk of criminal contempt. In an analogous situation in a case involving a similar injunction against a gang, the federal appeals court in *Vasquez v. Rackauckas*, 734 F.3d 1025, 1052 (9th Cir. 2013) concluded that there was a due process violation.

36. The Injunction's term barring individuals from using their eligibility to "opt out" of the Injunction as a defense in prosecution for violating the Injunction compounded the facial pre-deprivation due process problem. With this term, the Injunction, on its face, expressly considered and approved situations where people totally

unconnected to the Ogden Trece could be successfully prosecuted for contempt for violating the Injunction.

37. As another additional and alternative constitutional violation posed by Mr. McCubbin's conviction for violating the Injunction, the Injunction's lack of pre-deprivation process was also unconstitutional as applied to Mr. McCubbin. Again, even assuming *arguendo* that the Injunction was otherwise proper, Mr. McCubbin had evidence that he was completely unaffiliated with the Ogden Trece at the time he received the Injunction.

38. Once Mr. McCubbin took it upon himself to initiate process to "opt out" of the Injunction because he had completely left the gang years before, the district court in the *Trece* case dismissed Mr. McCubbin from the case. Had Mr. McCubbin been given process before he was subjected to the Injunction, he would have proven that, even if the Injunction were proper, which it was not, he should never have subjected to its limitations on his personal liberties.

39. Mr. McCubbin's conviction is additionally and in the alternative set aside under subsection (b). Simply put, 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.

40. Ogden City does not deny that the charge in its case against Mr. McCubbin stemmed from violating the Injunction's curfew. Likewise, Weber County does not deny that Mr. McCubbin was prosecuted for violating the Injunction's curfew, but argues that the Injunction also had a general prohibition against committing any

crime, which Mr. McCubbin allegedly did in that case. Of course, a court in equity may not grant to a governmental entity an injunction against an individual that is a blanket prohibition on breaking any law.

41. Being out in public in Ogden past 11 p.m. was conduct that 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).

42. The final additional and 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 *ab initio*. *See Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 60, 64.

43. Both prongs of subsection (f) thus apply to vacate 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.

44. Respondents argue that subsection (f) does not apply, but do so without any citation to authority. Instead, they essentially argue that the *Trece* case presented one of first impression, so it was not based on prior precedent. But while the *Trece* Order established the for the first time that the Ogden Trece was an unincorporated association subject to service under the Utah law, which was a previously contested question, it created that new rule by relying on prior precedent. *See Weber Cnty. v. Ogden Trece*, 2013 UT 62, ¶¶ 30-60.

45. Respondents also argue that the *Trece* ruling did not decriminalize violating all injunctions of public nuisances, making subsection (f) inapplicable. This argument misses the point; Mr. McCubbin's argument is not that the Court decriminalized violating any injunction of a public nuisance, but that it decriminalized a violation the Injunction. No one, for example, could be successfully prosecuted today for being in Ogden past 11 p.m. in violation of the Injunction. Subsection (f) thus applies in this case.

### **C. THE PCRA'S PROCEDURAL BARS DO NOT APPLY**

46. Mr. McCubbin's 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."

47. None of these procedural bars preclude relief here. In this case, the Utah Supreme Court has 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 appeal the Injunction during his criminal proceedings in the Second District Court or the Ogden City Justice Court, or in the district court proceedings in the *Trece* case.

48. Respondents contend that Mr. McCubbin could have raised arguments about the validity of the Injunction at his criminal proceedings for violating the Injunction, presenting a procedural bar. This argument fails. Any attempt by Mr. McCubbin to challenge the validity of the Injunction during his criminal proceedings would have been futile due to the collateral bar rule. Under the collateral bar rule, “a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding.” *Matter of Providence Journal Co.*, 820 F.2d 1342, 1346 (1st Cir. 1996).

49. Rather, an individual subject to an injunction he or she believes is invalid must generally first seek relief in the issuing court. As a non-party to the Injunction action, however, Mr. McCubbin had neither the right to be heard by the district court issuing the Injunction, nor the ability to directly appeal any aspect of the Injunction. Moreover, as a factual matter, the district court in the *Trece* case rejected requests to intervene by purported gang members and other third parties, as well as rejecting substantive challenges by served individuals to the merits of the Injunction.

50. Further, neither the Second District Court nor the Ogden City Justice

Court, the courts presiding over Mr. McCubbin's criminal proceedings, had jurisdiction to review any aspect of the district court's decision to issue the Injunction at the time of Mr. McCubbin's criminal proceedings. *See* Utah Code Section 78A-5-102 (limiting district court's appellate jurisdiction.)

51. No reasonable reading of Section 78(B)-9-106(1)(c) would require a criminal defendant to either raise or waive arguments that would have been futile as a legal matter at the time they would have been made. Yet this result is exactly the one sought by the County here. Accordingly, the procedural bar set out in Section 78(B)-9-106(1)(c) is inapplicable to this case.

52. Additionally, 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. Accordingly, Ogden City's contention that he could have proven he was not a gang member during the prosecutions for violating the Injunction, which presents a procedural bar, is without merit.

53. Further, the Utah Supreme Court remitted its Order in the *Trece* case ruling the Injunction void for lack of jurisdiction on November 6, 2013. That was long after the time for appeal in both of Mr. McCubbin's criminal cases had run. Accordingly, the one year statute of limitations in contained in the PCRA does not preclude this Petition, because the statute of limitations began to run on November 6, 2013 at the earliest.

**D. ALTERNATIVELY, MR. MCCUBBIN'S CONVICTIONS SHOULD BE SET ASIDE UNDER THE COURT'S POWER TO VACATE A CONVICTION IN THE CASE OF AN EGREGIOUS INJUSTICE**

54. For all of the reasons above, the Court rules that Mr. McCubbin is entitled to an order vacating his convictions under the terms of the PCRA itself.

55. Respondents, however, have proposed grounds for vacating the convictions that are not found in the PCRA. They did not contend that any of the procedural bars they invoked precluded vacating the Petition on these grounds. By doing so, they have implicitly acknowledged and conceded that courts retain an inherent power to vacate a conviction that would result in an “egregious injustice,” even in cases where the PCRA’s procedural bars apply.

56. Mr. McCubbin has also invoked this inherent power in support of setting aside his convictions, doing so in the alternative to his reasons under the PCRA.

57. Accordingly, even if the procedural bars of the PCRA applied in this case, which the Court rules they do not, Mr. McCubbin’s convictions should still be overturned because allowing them to stand would be an egregious injustice.

58. In two recent cases, the Utah Supreme Court strongly implied (though did not squarely hold) that in appropriate cases, courts have the power to grant post-conviction relief even if the PCRA’s procedural bars apply if denying relief would result in an egregious injustice, and the State did not contest this power in those cases. *See Gardner v. State*, 2010 UT 46, ¶ 93 (“The State acknowledges that this court retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would result in an egregious injustice.”) and *Winward v. State*, 2012 UT 85, ¶ 15 (“As was the case in *Gardner*, the State has not contested the existence of an ‘egregious injustice’ exception to the PCRA’s procedural limitations and neither

party has briefed the issue.”)

59. The *Winward* Court set out an extensive list of showings that a Petitioner must make to successfully affirm and invoke the egregious injustice exception. *See Winward*, ¶ 18.

60. Such showings are not needed here because Respondents have themselves implicitly affirmed and invoked the egregious injustice exception, as has Mr. McCubbin.

61. Specifically, in explaining their decision to agree to an order vacating Mr. McCubbin’s convictions, Respondents asserted two reasons: one that Mr. McCubbin had served his sentences on the convictions concurrently with other sentences, and two that Mr. McCubbin had “opted out” of the Injunction after his convictions. Mr. McCubbin, for his part, argues that allowing a conviction to stand under all of the circumstances would be an egregious injustice.

62. Neither of the reasons advanced by the Respondents are grounds expressly set out in the PCRA, and appear to invoke an “interest of justice” exception not found in the PCRA, which the Respondents acknowledged at the hearing on this Petition.

63. Further, though Respondents agreed to an order vacating the convictions, Respondents did not withdraw their assertion that Mr. McCubbin’s Petition was subject to the PCRA’s procedural bars, even after the Court gave them an opportunity to do so by asking if they agreed with the memorandum of authorities.

64. Putting these two concessions together, there is no doubt that the Respondents invoked the Court’s power to set aside a conviction on grounds not in the PCRA, even if the procedural bars apply. Mr. McCubbin has likewise, in the alternative,



called on the court to exercise this power in this case.

65. Accordingly, in addition to vacating these convictions by the terms of the PCRA itself, the Court also vacates these convictions because even if the PCRA's procedural bars apply, allowing these convictions to stand would result in an egregious injustice.

### **Conclusion**

For the all of the reasons stated herein, Mr. McCubbin's Petition is granted and his criminal contempt convictions for violating the Injunction are vacated. Respondents are ordered to undertake whatever steps necessary to effectuate this Order.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2015

SIGNED

NOTICE TO THE RESPONDENTS:

You will please take notice that the undersigned, attorney for Petitioner, will submit the above and foregoing Proposed Findings of Fact and Conclusions of Law to the Judge, for his signature upon the expiration of seven (7) days from the date of this notice unless written objection is filed prior to that time, pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure. Kindly govern yourself accordingly.

DATED this 2nd day of March 2015.

\_\_\_\_\_/s/ John Mejia\_\_\_\_\_  
JOHN MEJIA  
Attorney for Petitioner  
(Original signed copy mailed and  
emailed to Defendants)

CERTIFICATE OF MAILING

I hereby certify that I mailed and emailed a true and correct copy of the above and foregoing Proposed Findings of Fact and Conclusions of Law to the following:

**Christopher Allred**  
**WEBER COUNTY ATTORNEY'S OFFICE**  
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postage prepaid on this 2nd day of March, 2015.

\_\_\_\_/s/ John Mejia\_\_\_\_\_

John Mejia (Original signed copy mailed and  
emailed to Defendants)