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

LELAND KIM MCCUBBIN, JR.,

Petitioner,

vs.

WEBER COUNTY and OGDEN CITY,

Respondents.

**[SECOND PROPOSED] FINDINGS
OF FACT AND CONCLUSIONS OF
LAW**

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 of 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 asserted 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. 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.

4. On October 18, 2013, the Utah Supreme Court issued a opinion in the *Trece* case 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 id.*, ¶¶ 43-60.
5. The Utah Supreme Court's Order in *Weber County v. Ogden Trece* was remitted to the district court on November 6, 2013.
6. 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.
7. 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.
8. 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.

9. 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.
10. On September 19, 2014, Mr. McCubbin filed the present Petition and the Court ordered Respondents to respond.
11. 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. Mr. McCubbin moved to file a reply brief in response to these answers but that motion has not yet been resolved. No further briefing was submitted by either party before the first hearing in this matter.
12. A hearing was held on the Petition on February 17, 2015. At that hearing, Respondents stated that they were willing to stipulate to the relief sought, but not on the grounds asserted by Mr. McCubbin. After failing to come to a ground that Mr. McCubbin, Respondents, and Court could all mutually agree on during the hearing, the Court

ordered Mr. McCubbin to prepare a proposed order.

13. Mr. McCubbin later submitted a proposed order in which he proposed that the Court adopt all of the grounds he asserted for relief. Respondents objected to the early filing of that order, and also objected to the merits of the proposed order. Mr. McCubbin then filed a response to Respondents' objection, which Respondents moved to strike that response.
14. On April 22, 2015, the Court held a hearing on Respondents' objection to the proposed order and also addressed the outstanding motions.
15. With respect to Respondents' objections to the proposed order, the Court sustained them in part and overruled them in part. The substance and reasoning for this ruling is contained in the Conclusions of Law below.
16. With respect to the outstanding motions, the court denied Mr. McCubbin's motion to file a reply to the answers as moot, overruled Weber County's objection to the premature filing of the proposed order as moot, and denied Weber County's motion to strike Mr. McCubbin's response to Respondents' objections to allow Mr. McCubbin an opportunity to be heard on Respondents' objections.

CONCLUSIONS OF LAW

A. MR. MCCUBBIN MEETS THE REQUIREMENTS TO VACATE HIS INJUNCTION-RELATED CONVICTION UNDER UTAH CODE SECTION 78B-9-104(1)(a) and (f)(i)

17. Under Utah Code Section 78B-9-104(1),

[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...

(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.

18. Mr. McCubbin contends that his two convictions for violating the Injunction are properly vacated under any and each of subparagraph (a), (b), and (f)(i) and (ii). Respondents suggest that in the alternative, the convictions should be vacated under subparagraph (e), but only as a one-time concession that would not control in any other case. Respondents have also withdrawn their argument that any procedural bar applies in this case.

19. For the reasons below, the Court rules that the convictions are properly set aside under subparagraph (a) and (f)(i), but that it would not be appropriate to set them aside under any of subparagraphs (b), (e), or (f)(ii).

20. First, relief is therefore appropriate under subparagraph (a). As ruled by the Utah Supreme Court in the *Trece* case, “[b]ecause the County did not serve any of Trece’s officers or managing or general agents or their functional equivalent and did not establish a sufficient factual basis for service by publication under rule 4, Trece was not properly served. And Trece was the only defendant

named in the lawsuit. Because the district court lacked jurisdiction over the only named defendant, the Injunction is void.” 2013 UT 62, ¶ 60.

21. The Utah Supreme Court thus held that the district court lacked jurisdiction over the named defendant, the Ogden Trece gang, rendering the Injunction void. Here, the convictions were obtained and the sentences were imposed against Mr. McCubbin in violation of the federal and state constitutions, as the Injunction was void for lack of jurisdiction due to improper service. Absent jurisdiction obtained through proper service, Mr. McCubbin could not have been charged with violating the Injunction.
22. The Court rules that it would not be appropriate to vacate the convictions under subparagraph (b). The Utah Supreme Court in *Trece* did not analyze the constitutionality of the statute permitting counties to abate public nuisances via the Injunction. Nor did it analyze whether or not the Trece gang and its members were engaging in conduct that could be considered as constitutionally protected. As the Utah Supreme Court did not analyze those questions, it would be inappropriate for the Court to reach these questions here.
23. The third ground Mr. McCubbin proposes for setting aside his conviction is subparagraph (f). The court finds that relief is

appropriate under subparagraph f(i), as the Utah Supreme Court announced a new rule in the *Trece* case, but not under subparagraph f(ii), as the Court did not reach the merits of the Injunction.

24. As stated in *Winward v. State*, 2012 UT 85, ¶ 30, 293 P.3d 259, “[w]hen the U.S. Supreme Court announces a new rule that provides a petitioner with a newly recognized cause of action, he may file a motion to vacate his sentence within one year from the date of the decision.” (Citing Utah Code §§ 78B–9–104(1)(f)(i), –107(1), –107(2)(f).)
25. Moreover, under *Teague v. Lane* 489 U.S. 288, 301 (1989), “a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.” (Citations omitted).
26. In its *Trece* opinion, Utah Supreme Court arguably broke new ground by announcing that the Ogden Trece gang by conducting business under a common name qualified as an unincorporated association amenable to suit. Having established that, the Court analyzed the plain language of Rule 4d of the Utah Rules of Civil Procedure and existing legal precedent relating to service of process on officers of unincorporated associations. It held that “[b]ecause the County did not serve any of Trece’s officers or

managing or general agents or their functional equivalent and did not establish a sufficient factual basis for service by publication under rule 4, Trece was not properly served.” *Weber Cnty.*, 2013 UT 62, ¶ 60.

27. Since Mr. McCubbin was charged with violating a void Injunction, an Injunction that might have been considered valid subsequent to proper service recognized under the new rule, he qualifies for relief under subparagraph (f)(i).¹
28. The Court rejects relief under subparagraph (f)(ii). The Utah Supreme Court did not analyze the merits of the Injunction in the *Trece* case. Certainly, Mr. McCubbin directly benefited from the *Trece* Court’s determinations, as he could not be held criminally liable for violating a void Injunction. This, however, appears to be only an ancillary effect of the *Trece* Courts’ procedural determination. The *Trece* Court’s rule regarding service on a gang as an unincorporated association did not reach the question of whether the conduct that comprises the elements of the crime for which Mr. McCubbin was convicted was criminal or not. That question remains open and perhaps ripe for analysis if the Respondents chose to reinstate the Injunction and effect proper

¹ Because the Court finds that relief is available under the PCRA, it has no occasion to reach the question of whether there is an “egregious injustice” exception to the PCRA and whether it applies here.

service on the Ogden Trece gang.

29. The Court also rejects Respondents' proposal that subparagraph (e) can be used a basis to vacate Mr. McCubbin's convictions in this case only. To the extent that Respondents seek to categorize the Utah Supreme Court's *Trece* opinion as new evidence, the Court finds this to be inappropriate. According to Black's Law Dictionary, "evidence" is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." Black's Law Dictionary, 10th Ed. (2010).
30. The Utah Supreme Court's determination the Injunction is void *ab initio* is a legal determination that serves as binding legal precedent and cannot be considered as evidence here, especially for the one-time concession that the Respondents seek to offer as an alternative. It is difficult for this Court to consider that the Utah Supreme Court's decision in the *Trece* case could not be used in other PCRA actions, as it represents vertical *stare decisis* applicable to other cases.
31. At the April 22, 2015 hearing, Respondents suggested for the first time that the "new evidence" to support vacating the convictions under subparagraph (e) might be that Respondents may not have known that Mr. McCubbin was not a member of the Trece gang

until he opted out. Making such a determination at this time, however, is inappropriate, since Mr. McCubbin has stated that he has evidence to the contrary. Because relief is clear under subparagraphs (a) and (f)(i), moreover, the Court need not reach this evidentiary question.

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.

THE COURT'S SIGNATURE APPEARS AT THE TOP OF THE FIRST PAGE OF
THIS DOCUMENT

CERTIFICATE OF MAILING

I hereby certify that on June 4, 2015, I mailed a true and correct copy of the Proposed Findings of Fact and Conclusions of Law ("Proposed Order") to the following:

Christopher Allred
WEBER COUNTY ATTORNEY'S OFFICE
2380 WASHINGTON BLVD., STE 230
OGDEN, UTAH 84401

Michael S. Junk
Ogden City Prosecutor's Office
310 26th Street
Ogden, UT 84401

Note that I also sent and emailed Mr. Allred and Mr. Junk a prior version of Proposed Order on May 13, 2015, which was substantively identical in all respects to the Proposed Order filed herewith, with the only difference being that the signature and date line at the end of the prior version has been replaced with the language mandated by URCP 10(e) in the Proposed Order.

Dated: June 4, 2015

___/s/ John Mejia_____