

2017

## To the Clerk of the Court From Kurtis Andersen

Utah Court of Appeals

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2-2-17

APPELLATE COURTS

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To the Clerk of the Court,

20100670-CA

I apologize for having to ask you this again. I am an indigent inmate at the Utah State Prison and can only get 2 copies of legal briefs, motions, etc. from the Contract Attorney's. Would you please make the required number of copies and distribute them where they need to go? I appreciate your help in this matter. The Contract Attorney office says they only can provide 2 copies and that is their contract with the prison.

Thank you for your help

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## Statutes and Rules

1	Utah R. Civ. P. 65(B)
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10	Rule 56(c), Fed. R. Civ. P.

## References

4	60 AM. JUR. 2d Penal & Corr. Insts. § 143
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## IN THE UTAH COURT OF APPEALS

Kurtis Andersen,  
Petitioner - Appellant

Reply to Respondents  
Brief - Appeal of  
Summary Judgment

V

Case No. 20160676-LA

SCOTT CROWTHER, Warden,  
Utah State Prison,  
et al., Defendant/Respondent -  
Appellee

Petitioner, Kurtis Andersen, pro se, respectfully asks the Court to Please accept this Reply to Respondents Brief. I will state my position as clearly as I can.

### Parties Involved

The parties involved include several Department of Corrections employee's besides defendant Scott Crowther. They are listed in the petitioner's 65(B) Petition. The et al. on each submitted caption shows this.

### Reply

Defendant's current counsel, Burnett, (hereafter Burnett) Statement of Relevant Facts, Footnote 1, pg. 2

of Respondents Brief: Burnett states, "the following relevant facts are taken verbatim from the background facts as stated by the trial court in its Ruling and Order, R. 598-601. Andersen has not specifically challenged those facts." This is incorrect. Petitioner Andersen has challenged several of those alleged facts, as well as putting forth his own relevant facts, as outlined in his Appeal.

Burnett uses Superintendent V. Hill to support his position that, "Andersen's argument fails because he seeks a review of the record and a weighing of evidence." Respondents Brief, pg. 9. Superintendent Mass. Corr. Inst. Walpole V. Hill, 472 U.S. 445, 455 (1985) (ascertaining whether there is some evidence that supports the finding does not require an examination of the entire record, an independent assessment of the credibility of the witnesses, nor a weighing of the evidence. "Instead the relevant question is whether there is evidence in the record that could support the conclusion reached by the disciplinary board").

Of course there has to be some evidence to support a finding. If there was no evidence then there wouldn't be a finding. But even if there is some evidence that supports whatever finding the hearing officer decides on, he still cannot exclude exculpatory evidence brought forth by the prisoner unless there is a hazard to institutional safety or correctional goals.

The petitioner's argument is not a "weighing of the evidence." His argument is the fact that he was denied due process by not being allowed to present the evidence in the first place. There is no evidence to weigh, when the evidence

— Is not even allowed. Ascertaining whether there is some evidence has no bearing on not being allowed to present evidence in his or her defense.

The denial of documentary or witness evidence to a prisoner in a disciplinary hearing when there is nothing hazardous to institutional safety or correctional goals have been ruled a denial of due process. *Wolff v McDonnell*, 418 U.S. 539, 566-94 S.Ct. 2963 (1974) (holding, among other requirements, that the prisoner be allowed to call witnesses and present documentary evidence in his or her defense, providing that doing so is not "unduly hazardous to institutional safety or correctional goals").

— *Rasheed-Bey v Duckworth*, 969 F.2d 357, 361 (7th Cir. 1992)

"Beginning with *Wolff*, the Supreme Court established the minimum requirements of procedural due process to be afforded to prisoners in disciplinary proceedings." "Furthermore, this Court has held that an inmate is also entitled to disclosure of exculpatory evidence, unless that disclosure would unduly threaten institutional concerns." *Mendoza v Miller*, 779 F.2d 1287 (7th Cir. 1985), *cert denied*, 476 U.S. 1142, 106 S.Ct. 7251 90 L.Ed. 2d 697 (1986).

The prison has never asserted the asked for evidence is in any way hazardous to institutional safety or correctional goals.

See Ruling and Order, pg. 3, number 9; "Nowhere does the hearing

— officer explain his decision to not allow Petitioner to call witnesses, present video recordings, or review written reports."

In a case extremely similar to the petitioner's (the entire case is in the petitioners Appeal, Addendum 15); Howard V U.S. Bureau of Prisons, 487 F.3d 808, 813-814 (10th Cir. 2007) ["The Bureau has never asserted, and the record before us does not support, a conclusion that producing the videotape alleged by Mr. Howard to have recorded the incident would be "unduly hazardous to institutional safety or correctional goals," Wolff, 418 U.S. at 566, 945.Ct. 2963. The DHO's unjustified refusal to produce and review it deprived Mr. Howard of the process due him. "We note that at least one other circuit has vigorously enforced a long-standing rule requiring government disclosure of exculpatory evidence in prison disciplinary proceedings unless that disclosure would unduly threaten institutional concerns." ID; Chavis V Rowe, 643 F.2d 1281, 1285-86 (7th Cir. 1981) (holding that officials' failure to disclose materially exculpatory evidence in a ~~prison~~ prison disciplinary proceeding violates the inmate's due process rights and is not harmless error); 60 A.M. JUR. 2d Penal & Corr. Insts. § 143 (noting that "depriving a prisoner [of] an opportunity to present exculpatory evidence" violates due process, citing Chavis)."]

Burnett's use of Todd V Sorensen also clearly states, "what due process prisoners are entitled to in prison disciplinary proceedings." (Brief of Respondent, pg. 7)

## Relevancy of Evidence

The defendant claims the petitioner identified himself as 'Jason Lynn' Anderson on March 6, 2015, to get his



medication.

The petitioner has alleged that he has never identified himself as 'Jason Lynn' Anderson.

Burnett states, pg. 6, 7, "Even if the videos existed, they would not have shed light on the question of whether Andersen stated he was a different inmate to obtain that inmates prescribed medication because the videos did not include audio." This is incorrect. Audio is not necessary to prove the petitioner did not identify himself as 'Jason Lynn Anderson.'

First, the petitioner alleged that the video evidence shows the prison medical technicians, visually, giving him the medicine that shows positive on a U.A. of February 19, 2015.

Second, the petitioner has alleged that the very same medical technician (med-tech) who was working on March 6, and who made the claim of misrepresentation, is shown, visually, giving the petitioner medication for the two different Anderson's (son's) at the same time, at the same pill lines, on multiple occasions.

The evidence shows, visually, the petitioner receiving the wrong Anderson's medication, daily, from January 27, 2015, to March 6, 2015. There are several other med-tech's shown administering this incorrect medication during this time frame, while also administering medicine correctly prescribed to the petitioners, at the same time.

Irrefutable, visual, video images.

The petitioner has alleged that the two Andersen's (son's)

medicine distribution records show the exact same pattern.

Burnett fails to mention the medicine distribution history evidence.

The petitioner has written, verified permission to use the other Anderson's distribution history. Even with this permission granted by Jason Lynn Anderson, the prison has still refused to produce it.

This evidence, the receiving of two different Andersen's (son's) medications at the same pill lines, gives conclusive proof that the petitioner could not have claimed to be either 'Kurtis' Andersen or 'Jason Lynn' Anderson. If he would have claimed to be either one, then he would have received only that Andersen's (son's) medicine. He would not have received both at the same time. The video images shows him receiving both.

This evidence clearly supports what the witnesses would have testified to: That at the time frame from January 27, 2015, to March 6, 2015, the established regular practice of medicine distribution was stating your last name and never required to show picture ID, which every inmate is issued.

This established practice is against prison policy. The video evidence also show this no showing of ID before receiving medicine.

This testimony is clearly exculpatory. This is in direct opposition to Burnett's statement in his Summary of Argument, pg. 6, claiming that the witness testimony would have been "non-exculpatory."

This issue was raised in both disciplinary hearings, both subsequent appeals, the 65(B) Petition, Summary Judgment Reply and the subsequent Appeal of Summary Judgment, making Burnett's statement, "an issue that was neither raised nor relevant," pg. 6, incorrect.

Burnett makes two statements about 'witness identification.' Pg. 6, "Andersen did not ask for an identified witness..." and pg. 9, "But Andersen did not specifically identify any particular witness." This is incorrect.

The petitioner specifically identified a 'specific' group of inmates, any of which would testify to the exact same conditions of the medicine distribution practice. Statement of Relevant Facts, pg. 3, number 7.

The petitioner was moved from Lone Peak housing, where the group of witnesses were, before he knew he would need to use them in his defense. He didn't get a chance to get their exact names and prison ID numbers.

Miller V Duckworth, 963 F.2d 1002-05 n.2 (7th Cir. 1992) (prisoners cannot be required to identify witnesses immediately upon receiving notice of charges). Kingsley V Bureau of Prisons, 937 F.2d 26, 31 (2d Cir. 1991) (prisoner did not know witnesses' names, but officials had a list of them).

This prison certainly had a list of the inmates who received medication at Lone Peak housing during that time frame.

All of this evidence is material and relevant. All was raised at the time of the disciplinary hearings, as well as throughout these proceedings. All of it goes to the heart of the petitioner's lawsuit.

### Petitioner's Due Process Rights Were Violated By The Challenged Disciplinary Proceedings

Petitioner has consistently held that the prison has exculpatory evidence in their exclusive control that they have refused to produce. The first documented request for this evidence came at the May 8, 2015, disciplinary hearing, a mere 40 days after the petitioner received disciplinary notice on March 30, 2015.

The prison, and the prison's counsel, has refused to turn over this evidence to date.

This evidence includes the other Anderson's medicine distribution history, which the petitioner has written, verified permission to use. Even with this permission granted by Jason Lynn Anderson, the defendant has still refused to produce it.

There is a policy that directs the prison as to the making, storing, and eventual disposition, of video evidence. This is also evidence the prison has refused to produce.

To date there has been no verified documentation provided by the defendant Scott Crowther that the video recordings requested as evidence, beginning from the first disciplinary hearing of May 8, 2015, to the present, have in fact been destroyed.

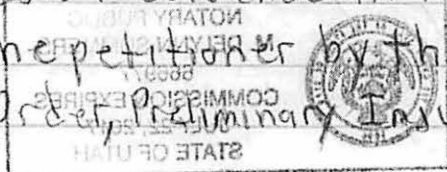
The petitioner has consistently maintained throughout these proceedings that the words, "no available camera recording," and, "there are presently no video recordings," are not verification that the prison has in fact destroyed the made recordings and that they are no longer in existence.

The petitioner asserted in his Motion to Deny Respondents Summary Judgment, "for the record, the prison is highly motivated to keep this information from being publicly known." (Page 4, mark 5)

Any reference or statement from Burnett, or any other defense counsel, that the video evidence no longer exists is an unsubstantiated statement.

The words, "no longer exists," and, "non-existent video recordings," are words that have been produced by defendants counsel's and have no basis in fact.

The prison has been obligated to preserve the camera evidence, first, according to their own prison policy and second, according to the rules of evidence in these legal proceedings, as outlined to the petitioner by the district court. (4-18-16, Ruling and Order, Preliminary Injunction Motion)



The prison has never claimed or asserted the asked for evidence is in any way hazardous to institutional safety or correctional goals.

The petitioner argues that all of this evidence is material and relevant to his lawsuit.

These material facts are in dispute.

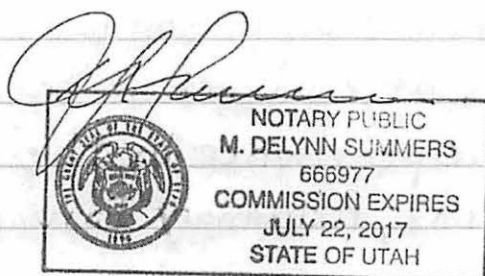
Rule 56(a), Utah R. Civ. P. and Rule 56(c), Fed. Rule Civ. P.; Summary Judgment is to be granted only if the record before the court shows "that there is no genuine dispute as to any material facts and that the moving party is entitled to judgment as a matter of law."

### Conclusion

For the foregoing reasons stated, the petitioner asks this Court to affirm the Appeal of Summary Judgment.

Dated this 2 day of February 2017.

Kurtis Andersen  
Kurtis Andersen  
pro se



# Certificate of Service

I do hereby certify, under the penalty of perjury, that a true and accurate copy of the foregoing Reply to Respondents Brief, Case NO. 20160676-CA, was mailed postage prepaid to the following:

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450 S. State Street  
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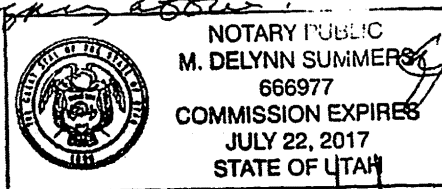
Appellant invokes the mailbox rule pursuant to U.R. Civ. P. 4(g).

Dated this 2 day of ~~January~~ <sup>February</sup>, 2017.

Kurtis Andersen

Kurtis Andersen

Andersen, Kurtis appeared before ~~PROSEC~~ this 2nd Day Feb. 2017 and is known to me through personal knowledge to be the person signing above.



[Signature]  
Notary Public

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