

2015

**Reginald Williams, Paintiff–Appellant v. Utah Dept. Of Corrections,  
Respondent–Appellee**

Utah Court of Appeals

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No. 20140623-CA

In the Utah Court of Appeals

Reginald Williams

Plaintiff — Appellant

v.

Utah Dept. of Corrections

Respondent — Appellee

Appellant's Brief

Appeal from a final order dismissing petition for extraordinary relief in Third District Court, case number 110918680, Honorable L. A. Dever presiding.

Reginald Williams, 4620  
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Draper, UT 84020

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List of Parties

Petitioner and Appellant

Reginald Williams

Respondent and Appellees

David J. Angerhoffer

Matthew B. Anderson

Alfred C. Bigelow

Larry Bussio

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Utah Dept. of Corrections

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## Jurisdiction

Reginald Williams ("Appellant"), appeals from the district court's order dismissing his "Second Amended Petition" ("Petition"), against the Utah Dept. of Corrections ("UDC"), and others ("Appellees"). This Court's jurisdiction is based on Utah Code Ann. 78A-4-103.

## Issues Presented

- I. Did trial court err in dismissing Petitioner's claims raised in his Second Amended Petition that he was denied constitutionally mandated legal assistance by the UDC and the Contractor by improperly defining the purpose of Rule 65B and misinterpreting the facts of the petition?
  - A. Determinative law: Utah R. Civ. P. R. 65B; Homer v. Morris, 684 P.2d 64 (Utah 1984); Wickham v. Fisher, 629 P.2d 896 (Utah 1981); Preece v. House, 866 P.2d 508 (Utah 1984); Murray v. Giarratano, 492 U.S. 1 (1989); Bound v. Smith, 430 U.S. 817 (1977); Utah Admin. Code, R251-707-3; Renn v. Utah State Bd. of Pardons, 904 P.2d 667 (Utah 1995)
- II. Did court abuse its discretion in not granting Petitioner extraordinary relief against the UDC for failing to perform an act required by law as a duty of office?
  - A. Determinative law: Utah Admin. Code, R251-707-3; Preece, 866 P.2d at 511; Rule 65B(d)(2)(B); Renn, 904 P.2d at 683; Rule 65B(b)(3); Blackham v. Snelgrove, 3 Utah 2d 157 (1953); Bounds; 430 U.S. at 828; White v. Kautzky, 386 F.Supp. 2d 1042 (N.D. Iowa 2005); FDr 12/02.02



III. Did trial court abuse its discretion in not granting Petitioner extraordinary relief against the UDC for abusing its discretion to confiscate the Petitioner's privileged legal documents?

A. Determinative law: Rule 65B(d)(2)(C); U.S. v. Cohen, 796 F.2d 20 (2d Cir. 1986); U.S. v. Defonte, 441 F.3d 92 (2d Cir. 2006); Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001); Cody v. Weber, 256 F.3d 764 (8th Cir. 2001)

IV. Did the trial court err in not disqualifying the Utah Attorney General's Office from participating in this action?

A. Determinative law: U.S. v. Defonte, 441 F.3d 92 (2d Cir. 2006); Williams v. TWA, Inc., 588 F. Supp. 1037 (W.D. Mo. 1984); MMR/ Wallace v. Thames, 764 F. Supp. 712 (D.Conn. 1991); Winfield, 128 P.3d 1171; FDr 14/02.10(Q)(1), (2), (7), (9), (10).

V. Did the trial court err in denying the Court of Appeals' order awarding Appellant costs for case number 20120025-CA?

A. Determinative law: Utah R. App. P., Rule 34.

B. Standard of Review

This appeal seeks to address issues with mixed questions of law and abuses of discretion. Questions of law does not require this court to defer to the district court's conclusions. Casida v. Deland, 866 P.2d 599 (Utah Ct. App. 1993). Dismissal of petitions for extraordinary relief is reviewed for an abuse of discretion. Vorher v. Henroid, 2011 UT App. 199, ¶ 7.

Rule 65B provides remedy to challenge conditions of confinement within the prison system that deny constitutional rights. Wickham v. Fisher, 629 P.2d 896 (Utah 1981); Homer v. Morris, 684 P.2d 64 (Utah 1984). Administrative agencies' failures to comply with the agency's own rules may also be remedied by Rule 65B. Preece v. House, 866 P.2d 508, 511 (Utah 1994). A prisoner need not challenge conditions of confinement to bring a Rule 65B petition. Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 682 (Utah 1995). Specifically, Rule 65B provides extraordinary relief against an administrative agency that exceeds its jurisdiction or abuses its discretion. Utah R. Civ. P. 65B(d).

When reviewing a petition for extraordinary relief dismissal is appropriate "only if it clearly appears that [Appellant] can prove no set of facts in support of his claim." Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990). Rule 65B requires that petitions contain a short, plain statement of facts on the basis of which the petitioner seeks relief. Utah R. Civ. P. 65B(b)(3). Pro se litigants' pleadings must be held to a less stringent standard than those drafted by lawyers. State v. Winfield, 2006 UT 4, ¶ 19, 128 P.3d 1171 (holding that pro se litigants should be "accorded every consideration that may reasonably indulged").

The trial court abused its discretion when it failed to recognize Rule 65B's remedies to challenge UDC's abuses of Appellant's constitutional rights, failed to "accept the [petition's] facts as true and draw all reasonable inferences from those facts in a light most favorable to" the Appellant. Peck v. State, 2008 UT 39, ¶ 2, 191 P.3d 4. The trial court also abused its discretion by dismissing the petition in contravention of the standards elucidated in Colman, 795 P.2d at 624 and Winfield, 128 P.3d at 1171.

Additionally, 65B remedies are appropriate when there is no other plain, speedy and adequate remedy available. *Gilley v. Blackstock*, 2002 UT App. 414 P.3d 305. Administrative remedies must first be exhausted before mandamus will lie. *Levie v. Sevier County*, 617 P.2d 331 (Utah 1980). The petition alleges the Appellant exhausted UDC's administrative grievance process regarding all claims in the petition.

C. Preservation of the Issues

The issues presented here were preserve in the Appellant's Second Amended Petition ("SAP"). R. 704-725. They are also preserved in Appellant's Motion to: (1) Disqualify Counsel, (2) Sever Claims, and (3) Amend Petition ("Mot. to Disq."). R. 335 - 344.

Issues are also preserved in "Petitioner's Reply Memorandum to the Respondents' Opposition to Petitioner's Motion to: (1) Disqualify Counsel; (2) Sever Claims; and (3) Amend Petition and Petitioner's Motion for Award of Costs. ("Reply")." R. 518-538. And also preserved in Petitioner's "Objections to Court's Denial of Petitioner's Motion to Disqualify Counsel" ("Objections") R. 677-681. Finally, issues are preserved in the Court's Minute Entries, R. 229-33, 669-71, . . . Rulings, R. 515-17, 641-55, 693-99 757-66 and trial court's Final Order 773-75.

## Statement of the Case

### Nature of the Case

Appellant filed a petition for extraordinary relief under Rule 65B in district court. The petition challenges UDC's failures to provide Appellant constitutionally mandated legal assistance and follow the agency's own rules. Appellant also sought disqualification of the Utah Attorney General's Office as counsel for the Appellees'.

### Procedural History and Disposition Below

On July 21, 2011, Appellant filed a petition for extraordinary relief. Williams v. DOC, et al., Case No. 110918680. R. 1 - 34. . The petition sought to require UDC to: enforce a contract between UDC and the Contractor to provide Appellant legal assistance to pursue claims in federal court against UDC and the Contractor; comply with its own regulations to place the ITFA out for bid; and review of record requests denials under the Utah Governmental Records Access Management Act. Id.

On December 13, 2011, the district court, without ordering service on the Respondents, dismissed the petition. R.263-67. Trial court: failed to address Petitioner's Motion to Recuse filed on October 4, 2011. R.105-11. Petitioner timely appealed. R. 311-12.

On June 27, 2013, this Court reversed and remanded the district court's dismissal based on its failure to address the Motion to Recuse. Williams v. DOC, 2013 UT App 159 ¶17. On June 25, 2015, the Appellant motioned this Court to award him cost of the appeal. On September 6, 2013, the Court granted Appellant's cost motion. Remittitur was issued on September 12, 2013.

On August 6, 2013, Petitioner served his Mot. to Disq. R.335. On September 17, 2013, the district court received Appellant's First Amended Petition ("FAP"). R.560-82. On May 6, 2014, the district court dismissed the FAP. R.693-99. On May 22, 2014, Petitioner served his SAP. R.704-25. On January 21, 2014, the district court dismissed Petitioner's Mot. to Disq. R.641-55. On July 1, 2014, the district court dismissed the SAP. R.757-66. Petitioner timely filed notice of appeal. R.770-72.

## Determinative Constitutional Provisions, Statutes and Rules

Determinative statutes and rules are contained within the body of the brief.

## Statement of Facts

The Petitioner is now a prisoner held in the Utah State Prison Draper, Utah. R.705. The Petitioner is seeking relief

under Rule 65B(d)(2)(B) and (C), Utah R. Civ. P. R. 704. The Petitioner alleges the Respondents' actions threatens his interests to be provided constitutionally mandated legal assistance, protect his funds held in the Inmate Trust Fund Account ("ITFA"), discontinue the Dept. of Corrections' ("DOC"), abuse of discretion in confiscating prisoners' privileged legal material and deliberate falsification of official records. R. 706-720.

The Petitioner has exhausted the UDC administrative grievance process regarding the claims in the petition. R. 704. No other plain, speedy and adequate remedy is available for relief.

The Petitioner submitted several requests to the UDC contract attorney ("Contractor") to receive legal assistance. R. 706-8, 710, 711, 713, 717. In each instance the Contractor refused to provide Petitioner any assistance. R. 708, 710, 712, 717. UDC has entered into a contract ("Agreement"), with the Contractor to provide UDC prisoners legal assistance. R. 126-42.

The Petitioner reported to UDC that he required alternative legal assistance based on filing a complaint against the Contractor. R. 166, 167, 169. UDC refused to provide Petitioner alternative legal assistance. R. 171. Petitioner has alleged the Contractor's failure to comply with all provisions of the Agreement has refused him the right to access to the courts. R. 709, 713, 717. UDC has no policies to ensure the Contractor complies with the provisions of the Agreement.

UDC holds prisoner funds in the ITFA. R. 181. UDC regulations mandate placing the ITFA out for bid every three to five years with the winning offeror awarded a contract to hold the ITFA. Id. The ITFA has not been placed out for bid for twenty years, is currently held without a contract. R. 171, 179, 714. Currently, the ITFA is uninsured from fraud, loss or expropriation. R. 714.

On March 31, 2011, UDC officials confiscated all the legal materials of the Petitioner and placed them "in 5 evidence bags and sealed." R.186. During confiscation of the documents the Petitioner informed UDC officials the documents contained privileged legal materials that included work product for litigation against UDC and the Contractor. R.188, 540, ¶ 5. Respondents concede that Petitioner placed them on notice of his concern with permitting the Contractor access to his privileged documents. R. 495, ¶¶ 9, 10. UDC officials did not give Petitioner any opportunity to surrender the alleged contraband as required by UDC policy. R. 449, §§ M(1), (4), (5).

On April 1, 2011, the Contractor "reviewed" Petitioner's legal documents and found them "mixed together." R. 191. The Contractor threatened the Petitioner with disciplinary action for "combining these materials in the 'privileged legal' pouch...." Id. The trial court identified several documents in Petitioner's confiscated legal materials as qualified as work product. R. 647, 648. UDC policy only permits the Contractor or UDC staff to "review"/read/search a prisoner's legal materials. R. 450 § Q(1), 451, §§ Q(7), (10). On April 4, 2011, Respondent Anderson, an attorney with the Utah Attorney General's Office, searched and read portions of the Petitioner's legal documents. R. 415, ¶ 2, 419, ¶¶ 25, 29. All of the confiscated documents were contained in "one garbage bag" and "remained in the warden's office ... [until] April 4, 2011. R. 418, ¶ 24, 502, ¶ 10. The Contractor and Respondent Anderson did not sign the chain of custody sheet accompanying the legal materials. R. 190.

### Summary of the Argument

Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief. Rule 65B, provides for relief against an administrative agency that has abused its discretion, failed to perform an act required by law or

refused the petitioner the use and enjoyment of a right which the petitioner is entitled.

The Petitioner contends he is entitled to be provided legal assistance by the UDC through the Contractor. UDC and the Contractor have breached the terms and conditions of the Agreement which resulted in the denial of Petitioner's constitutional right to access to the courts, freedom of religion, equal protection of the law and due process. Trial court abused its discretion by dismissing the petition without service and not granting the Petitioner his requested relief.

Petitioner also contends his property interest in his funds held in the ITFA are threatened by UDC's failure comply with its own regulation to place the ITFA out for bid and award of valid contract. Without a contract ITFA funds are subject loss and misuse. The trial court abused its discretion by dismissing the petition's ITFA claim because the claim did not "test the lawfulness of imprisonment, and the propriety of any related proceedings [.]"

Petitioner also contends the UDC abused its discretion by confiscating his privileged legal documents and surrendering them to their counsel, an attorney in the State Attorney General's Office. Respondents participated in a cover up by falsifying official records regarding possession of the legal documents. The trial court abused its discretion by making erroneous findings of fact regarding Respondents' conduct during confiscation/reading of legal documents, classification of documents as "privileged", denying Petitioner's motion to disqualify counsel and denying Petitioner the choice to seek relief as the Petitioner desires.

Petitioner has exhausted UDC's administrative remedies process for all claims in the petition and has no other plain, speedy and adequate remedy available.



## Argument

- I. The Trial Court Erred In Dismissing Petitioner's Claims Raised In His Second Amended Petition That He Was Denied Constitutionally Mandated Legal Assistance By The UDC And The Contractor By Improperly Defining The Purpose Of Rule 65B And Misinterpreting The Facts Of The Petition.

The trial court dismissed Claims 2-6 and 9, from the Second Amended Petition ("SAP"), on grounds which included finding that the purpose of Rule 65B relief is to test the lawfulness of imprisonment, Petitioner sustained no actual injury, and Petitioner is not entitled to legal assistance beyond the preparation of initial pleadings. R. 760, 761, 762, 764.

From the trial court's final order of dismissal it appears the trial court misinterpreted the facts of the petition thus failing to accept the allegations in the petition as true. The trial court's misinterpretations included finding Petitioner's claims did not request the Contractor to prepare initial pleadings, that the Petitioner is not entitled to receive legal assistance from the Contractor to prepare initial pleadings for other than Rule 65B and that the Petitioner is unable to compel UDC and the Contractor to comply with all provisions of the Agreement. R. 760, 761, 762, 763, 764.

The Petitioner challenges the trial court's dismissal of his petition for extraordinary relief brought under Rule 65B(d). When "no other plain, speedy and adequate remedy is available," courts may grant extraordinary relief. Utah R. Civ. P. 65B. "Relief may extend to abuses arising within the prison system that constitute a denial of an inmate's constitutional rights." *Barney v. Dept. of Corrections*, et al., 1999 UT App 171 citing *Homer v. Morris*, 684 P.2d 64, 67 (Utah 1984); *Wickham v. Fisher*, 629 P.2d 896, 900 (Utah 1981).

Rule 65B relief is also appropriate when an administrative agency fails to comply with its own rules. *Preece v. House*, 866 P.2d 508, 511 (Utah 1994).

- A. UDC and the Contractor have failed to provide Petitioner constitutionally mandated legal assistance.

The Constitution guarantees prisoners a right to access to the courts. *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989) ("The prisoner's right of access has been described as a consequence of the right to due process of law and as an aspect of equal protection." "The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

The State of Utah made a policy decision to provide UDC prisoners access to courts through contract attorneys. Utah Admin. Code, R251-707-3(4). UDC implemented the Agreement with the Contractor to assist prisoners "in drafting and filing pleadings in both federal and state courts in the form of complaints in lawsuits designed to test either the legality of their incarceration or conditions of confinement at the facility." R.133. The Agreement states "[a]ssisting inmates shall consist of the following," conducting legal research and secure case law and other authority, make photocopies of legal material at UDC expense. R. 133, 134.

The SAP alleges the Petitioner sought legal assistance from the Contractor to vindicate condition of confinement civil rights claims including religious freedom violations and equal protection violations which he wanted to file under 42 U.S.C. § 1983 and a Rule 65B action to compel UDC to comply with

its own rules. R. 707. The SAP alleges the Petitioner requested for the Contractor to prepare an initial pleading on September 11, 2010 and May 3, 2013 for 42 U.S.C. § 1983 actions. R. 707, 708. The Contractor refused to prepare the initial pleadings, failed to conduct any research regarding the Petitioner's claims and refused to provide him requested case law. R. 707-710.

The Utah Governmental Records Access Management Act ("GRAMA"), permits a person to appeal record requests aggrievements by an administrative agency to the district court. Utah Code Ann. 63G-2-404(2)(a). "The petition for judicial review shall be a complaint governed by the Utah Rules of Civil Procedure [.]". Id. at 5 (3). On August 13, 2012, the Petitioner submitted a request to the Contractor to prepare a petition to challenge a UDC records request aggrievement pursuant to U.C.A. 63G-2-404(2)(a). R. 717. The Contractor refused to prepare the initial pleadings for the GRAMA appeal petition. Id.

The Utah Governmental Immunity Act requires "[a]ny person having a claim against a governmental entity, or against its employee ... shall file a written notice of claim with the entity before maintaining an action," in court. U.C.A. 63G-7-401(2). On May 16, 2011, the Petitioner requested the Contractor to prepare a notice of claim for confiscation of his privileged legal papers. R. 713, 100. On May 16, 2011, the Contractor refused to prepare the notice of claim. R. 713, 102. The Agreement requires the Contractor to prepare "motions, orders, or like documents usually considered necessary to bring legally effective pleading before a court [.]". R. 132. The United States Supreme Court "requires prison authorities to assist inmates in the preparation and filing of meaningful legal paper [.]". Bounds, 430 U.S. at 828.

In Claims 2, 5, 6, and 9 the Petitioner contends UDC's and the Contractor's refusals to provide him legal assistance

denies him access to the courts. R. 707-708, 712-713, 717.

- B. The trial court abused its discretion in refusing the Petitioner the right to receive constitutionally mandated legal assistance to which he is entitled by improperly defining the purpose of Rule 65B and not accepting the facts of the petition as true.

In the trial court's dismissal of Claim 2 the court failed to analyze or acknowledge the petition's allegation that the Contractor failed to prepare an initial pleading to file a civil rights complaint under 42 U.S.C. § 1983. R. 760. All allegations in the petition are accepted as true and the petition should be dismissed "only if it clearly appears that the [petitioner] can prove no set of facts in support of his claim." *Colman v. Utah Land State Land Bd.*, 795 P.2d 622, 624 (Utah 1990). The Petitioner requested the Contractor prepare an initial pleading on two occasions. R. 707, 708. The Contractor refused to prepare the pleadings. R. 708.

In Claim 5 the Petitioner contends UDC failed to provide him alternative legal assistance to prepare an initial pleading regarding the Contractor's refusal to provide legal assistance. R. 712-713. UDC has no regulations to ensure the Petitioner receives legal assistance for claims against the Contractor. The Petitioner is required "to request the Contractor to assist him in drafting an initial pleading against" itself. R. 712. Such a requirement is clearly a conflict of interest. "A conflict of interest exists when counsel [may]... make choices advancing other interests to the detriment of his client." *State v. Belfour*, 2008 UT App 410, ¶ 33, 198 P.3d 471. The trial court found Petitioner's claim "self-contradictory." R. 762. Simply, UDC is required to "assist inmates in preparing and filing initial pleadings[.]" R251-707-3(1). Claim 5 addresses UDC's lack of policy regarding Contractor conflicts of interest. The trial court unreasonably dismissed Claim 5 without considering the

aspect of how the Petitioner would receive legal assistance from UDC to prepare initial pleadings against the Contractor. Nor did the trial court address Petitioner's claim of conflict of interest against the Contractor to bring this action. In the trial court's analysis, the Petitioner is precluded from extraordinary relief by requesting extraordinary relief. Cf. *Rhodes v. Robinson*, 408 F.3d 559, 569, (9th Cir. 2005) (prisoner not "precluded from prosecuting the very claims he was forced to exhaust").

The trial court found Petitioner's Claim 5 request to require the Contractor to provide legal assistance to prepare a notice of claim under U.C.A. 63G-7-101 et. seq., inappropriate for Rule 65B relief. An action against a state employee may not be maintained without filing a notice of claim. 63G-7-401(2). The Agreement defines pleadings as "documents usually considered necessary to bring legally effective pleadings before a court." R.132. The filing of a notice of claim is a "necessary" document preparatory to filing an action in the Utah courts. Without a notice of claim any action against a state employee is meaningless, a nullity. The law requires UDC to provide legal assistance in the "preparation and filing of meaningful legal papers...." *Bounds*, 430 U.S. at 828. The trial court unreasonably denied Petitioner extraordinary relief to receive legal assistance to prepare a notice of claim by finding that Rule 65B was inappropriate to mandate UDC/Contractor to provide the legal assistance.

The trial court found Petitioner's Claim 9 failed "to test the lawfulness of imprisonment, and the propriety of any related proceedings[.]" R. 764. Citing *Northern v. Barnes*, 825 P.2d 696, 698 (Utah Ct. App. 1992). Extraordinary relief is available where a petitioner does not challenge legality of detention, lawfulness of sentence or conditions of confinement. *Barney*, 1999 UT App 171, citing *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 682 (Utah 1995). Relief under 65B extends to violations of a prisoner's constitutional

rights. *Homer*, 684 P.2d at 67, *Wickham*, 629 P.2d at 900. The trial court's finding that Rule 65B relief is not available to compel UDC/Contractor to provide the Petitioner constitutionally mandated legal assistance to prepare a petition to file in the district court, to challenge a UDC abuse of discretion, is unreasonable and an abuse of discretion. UDC/Contractor are required to provide the Petitioner the legal assistance to prepare the petition described in Claim 9. *Bounds*, 430 U.S. at 828. The trial court's dismissal of Claim 9 relieves the Respondents of that obligation.

In asserting that prison authorities have violated a prisoner's right to access to the courts he must demonstrate the actual injury of the lack of "the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis v. Casey*, 518 U.S. 343, 356 (1996). The Supreme Court of the United States held: "showing an actionable claim 'has been lost or rejected...or prevented,' is an injury. *Id.*

Petitioner was injured. In Claim 2 the Petitioner asserted that he requested the Contractor prepare an initial pleading to file a 42 U.S.C. § 1983 action against UDC regarding violation of right to freedom of religion, equal protection and due process. R. 707. He later sought the Contractor's assistance to prepare initial pleadings to file a 42 U.S.C. § 1983 action regarding the ITFA, denial of governmental redress and retaliation for speech activities. R. 708. In Claim 5 the Petitioner asserted the he requested legal assistance from UDC to prepare an initial pleading against the Contractor for refusing to prepare an initial pleading for Claims 2, 6 and 9. R. 712. In Claim 6 the Petitioner asserted that he requested the Contractor prepare a notice of claim for filing against UDC officials under U.C.A. 63G-7-101 et. seq. R. 762-763. In Claim 9 the Petitioner asserted he requested the Contractor prepare an initial pleading to file a petition against UDC in Utah's district court under U.C.A. 63G-

2-404(2)(a). The Petitioner's claims asserted in Claims 2, 5, 6 and 9 from the SAP were "lost, rejected or prevented" by UDC's and the Contractor's refusal to confer the capability of bringing the claims. Such refusal constitutes denial of access to the courts.

II. The Court Abused Its Discretion In Not Granting Petitioner Extraordinary Relief Against The UDC For Failing To Perform An Act Required By Law As A Duty of Office.

The State of Utah made a policy decision to abandon the use of law libraries in favor of providing prisoners legal assistance through contract attorneys paid by UDC. R251-707-3(4). To implement R251-707-3, UDC entered Contract 086341 with the Contractor. R.126. Contract 086341 was in effect during the relevant time of the claims made in the petition. The Utah Administrative Code along with the Agreement impose a duty upon UDC and the Contractor to provide the Petitioner all the services contained in the contract. Extraordinary relief is available when an administrative agency fails to comply with its own rules. Preece, 866 P.2d at 511.

The Petitioner challenges the trial court's dismissal of Claims 1, 3, 4, 7, and 8 from the SAP. The trial court abused its discretion by refusing to grant extraordinary relief when UDC refused to perform acts required by law. Rule 65B(d)(2)(B), Utah R. Civ. P. In deciding whether to grant extraordinary relief a court must look to the nature of the relief sought, the circumstances alleged in the petition, and the purpose of the type of writ sought. Renn, 904 P.2d at 683. The trial court failed to consider the purpose of the type of writ sought.

A. UDC's failure to comply with the Utah Administrative Code and the terms and conditions of the Agreement entitle the Petitioner to extraordinary relief.

The SAP alleged in Claim 1 that the Contractor charged the Petitioner fees to photocopy legal documents without authorization. R. 705-706. The Administrative Code and the Agreement require UDC to pay the costs for prisoner legal assistance. R25-707-3(4), R. 134, 136. UDC failed to comply with its duty to pay the costs of Petitioner's photocopies of legal documents as required by its own policy and the Agreement, thus he is entitled to extraordinary relief.

In dismissing Claim 1 the trial court failed to consider the circumstances alleged in the petition, as required by Renn. The trial court found "allegations must be enough to raise a right to relief above a speculative." Citing *Bell v. Twombly*, 550 U.S. 544 (2007). R. 759. First, the court's ruling failed to identify any pleading deficiency in Claim 1. Rule 65B requires that petitions "contain a short, plain statement of the facts on the basis of which the petitioner seeks relief." Utah R. Civ. P., 65B(b)(3). Claim 1 of the SAP identifies who (the Contractor), what (unauthorized photocopy fees), when (from April 1, 2008) and how (charging the Petitioner) of his allegations. R. 705-06. Under the pleading standard of the Utah Rules of Civil Procedure, Petitioner need only give fair notice of the nature and basis of his claims. *Blackham v. Snelgrove*, 3 Utah 2d 157 (1953). Claim 1 meets the standard set forth in the Rules and law.

The SAP alleged in Claim 3 that UDC has failed to regulate the monitoring of the performance of the Agreement. The Agreement has a provision mandating the designation of UDC "staff to oversee the Contractor's performance[.]" R. 136. The failure to promulgate and enforce policies "to oversee the Contractor's performance"



has resulted in the Contractor's repeated default of the terms and conditions of the Agreement. R. 709. The Petitioner was injured in his access to the courts by the Contractor's Agreement defaults. Id. UDC's lack of policy to monitor the Contractor's performance provides the no mechanism to report Contractor defaults.

In dismissing Claim 3 the trial court failed to consider the circumstances alleged in the petition as required by Renn. The trial court found "the purpose of extraordinary relief under Rule 65B is to test the lawfulness of imprisonment[.]" R. 761. Claim 3 contends that by failing to oversee the Contractor's performance, UDC has failed to perform an act required by R251-707-3. The trial court unreasonably dismissed Claim 3 without considering that the Petitioner was entitled to extraordinary relief based on UDC's failure to comply with its own rules. Extraordinary relief is available if an administrative agency does not follow its own rules. Preece, 866 P.2d at 511.

The SAP alleged in Claim 4 that the Contractor failed to provide the Petitioner court rules, case decisions and statutes to litigate actionable claims in state and federal court. R. 710. The right to access to court imposes an affirmative duty on prison officials to help prisoners prepare and file legal papers. Bounds 430 U.S. at 828. The State has determined that "a law library shall not be provided...." R251-707-3(6). Rather, "the primary means of access to legal services shall be provided by contract attorneys paid by the Department." Id. at 5 (4). UDC and the Contractor are parties to the Agreement, established to "furnish adequate law libraries or adequate assistance from persons trained in the law." Bounds at id. The contract attorneys are the functional equivalent of the "adequate law libraries" mandated in Bounds. The Agreement requires the Contractor to perform the services of a law library which include conducting legal research and providing copies of cases and court rules. R. 133.

The Supreme Court, the Administrative Rules and the Agreement all obligate the Contractor to be the functional equivalent of a law library. The Petitioner contends the Contractor has refused to provide him services equivalent to a law library and he has been injured by the failure. *White v. Kautzky*, 386 F. Supp. 2d 1042, 1057 (N.D. Iowa 2005) (a prison's legal assistance violates prisoner's access to court rights by precluding the minimal amount of legal research necessary to provide advice to a prisoner to present his claims to the court.)

In dismissing Claim 4 trial court fail to consider the circumstances alleged in the petition as required by Renn. The trial court found "Petitioner is not entitled to assistance beyond the preparation of initial pleadings." R. 762. The trial court unreasonably dismissed Claim 4 without considering the law and UDC's own rules mandate providing the Petitioner the functional equivalent of an "adequate law library." The trial court abused its discretion by not granting the Petitioner extraordinary relief he was entitled when UDC failed to comply with its duty to provide Petitioner the functional equivalent of a law library. Though the trial court insists Petitioner is only entitled to initial pleadings, the record shows that the Contractor's own process requires "[n]ecessary legal research" to be completed before draft pleadings are commenced. R. 161. Legal research is required to "provide reasonably competent legal advice" to assist a prisoner in preparing an initial pleading. *White*, 386 F. Supp. 2d at 1057.

The SAP alleged in Claim 7 that UDC failed to place the ITFA out for bid as mandated by UDC policy. R. 714. UDC policy FDr 12/02.02 (C), requires the ITFA to be placed out for bid. R. 181. The ITFA "contains the personal funds of inmates and, until transferred to the general funds, the profits from commissary sales[.]" R. 208. The ITFA holds "millions of offender dollars." *Id.* Funds held in the ITFA are held without any terms or conditions. R. 179. UDC policy requires

the ITFA to be contracted "with the financial institution which offers the most favorable combination of terms and services." R.181, FDr 12/02.02(B), .03(A), .03(C). The current ITFA holder is not contracted and "was chosen 20 years ago because of their geographic location to both prison locations..." R.179. The SAP alleges the Petitioner's funds held in the ITFA "have been used to pay the obligations of other prisoners and the State." R. 714. Petitioner contends that without contractual mandates his ITFA funds are subject to total loss or misuse. Id.

In dismissing Claim 7 trial court failed to consider the circumstances alleged in the petition as required by Renn. The trial court found the "Petitioner has not demonstrated that his ITFA claims are appropriate as a claim for extraordinary relief. R.763. The trial court unreasonably dismissed Claim 7 without considering UDC's own rules mandate placing the ITFA out for bid. Nor did the trial court consider SAP allegation that Petitioner's ITFA interests are threatened by misuse and loss based on UDC's failure to comply with its duty to bid the ITFA. The trial court abused its discretion by not granting the Petitioner extraordinary relief he is entitled based on UDC's failure to place the ITFA out for bid.

The SAP alleged in Claim 8 that UDC officials deliberately falsified reports and documents in regards to the Petitioner and confiscation of his privileged legal materials. R. 715-16. UDC policy mandates that:

"No UDC member shall knowingly and intentionally : 1. falsify any official report or enter any inaccurate, false, or misleading information... 2. prepare, sign and/or submit a false report, statement, or affidavit."

UDC policy AE 02/07.05 (C)(1), (C)(2). The Petitioner contends that after placing UDC officials on notice that his legal materials contained privileged information regarding litigation against the

Contractor and UDC, Respondents Bussio, Bigelow, Freestone, Angerhoffer and Anderson submitted a fraudulent chain of custody sheet, an incident report with false information and failed to report relevant information to conceal possession and reading of Petitioner's privileged legal documents by the Contractor and UDC's counsel, Respondent Anderson. R.716. The false and misleading information in the official government records deprived the Petitioner the means to challenge prohibited conduct by the Respondents and provided the trial court the grounds to dismiss Petitioner's motion to disqualify counsel. R.646, 647, 649. Acts of fabrication of evidence and cover ups of misconduct violates due process and access to courts. Christopher v. Harbury, 536 U.S. 403, 414 (2002).

In dismissing Claim 8 the trial court failed to consider the circumstances alleged in the petition as required by Renn. The trial court found that it had addressed the allegations in its "Ruling of January 21, 2014." R.764. The trial court did not address the question of Respondents falsifying documents or failing to report relevant information as required by UDC policy. Instead, the trial court used information from the false information to justify its January 21, 2014 Ruling. See above. The trial court unreasonably dismissed Claim 8 without considering that Respondents' violated UDC regulations by filing false reports regarding confiscating the Petitioner's privileged legal materials. The trial court abused its discretion by not granting the Petitioner extraordinary relief to mandate UDC require prison officials to correct the falsified documents in UDC's files regarding confiscation of the Petitioner's legal material.

III. The Trial Court Abused Its Discretion In Not Granting Petitioner Extraordinary Relief Against The UDC For Abusing Its Discretion To Confiscate The Petitioner's Privileged Legal Documents?

The UDC created a policy to manage prisoner property, including legal material. R.446. The policy permits confiscation of the legal materials only upon multiple violations of the contraband prohibition and after the prisoner is given an order to surrender any contraband from the legal materials. R.449. Upon confiscation of prisoner's legal materials UDC policy mandate inspection by the Contractor. R.451, 134. On April 1, 2011, the Contractor claimed to have reviewed Petitioner's confiscated legal materials finding them "mixed together." R.190. UDC policy and the Agreement required the Contractor to remove any contraband from the legal materials. The Contractor did not inform UDC that the Petitioner's legal material contained only "legal-public" documents for over thirty (30) days. R.400.

The SAP alleges in Claim 10 that UDC abused its discretion by violating its own rules to confiscate his legal materials. R.718. Further, Petitioner contends surrendering his privileged legal materials to Respondent Anderson, UDC's counsel and the Contractor violated his right to privacy of his privileged legal information. Id. Cell searches to obtain non-security information violates Fourth Amendment. U.S. v. Cohen, 796 F.2d 20 (2d Cir.1986); U.S. v. Defonte, 441 F.3d 92, 94 (2d Cir.2006); Gomez v. Vernon, 255 F.3d 1118, 1131 (9th Cir. 2001). The Petitioner asserts he was injured by Respondents Anderson's and the Contractor's breach of the confidentiality of his legal materials which give them an unfair advantage in litigating this action. R.718. Cody v. Weber, 256 F.3d 764, 769 (8th Cir. 2001) (read prisoners legal papers constitute injury).

There was no legitimate penologic justification to confiscate all the Petitioner's legal materials. The alleged contraband had been in the Petitioner's possession for 45 days and posed no threat to the security and management of the institution. The Petitioner offered to surrender any contraband in his legal material to UDC officials during confiscation. R.495, 540. The Contractor after reviewing each document in Petitioner's legal materials and declaring them all

"legal-public", was required to separate out any contraband. In fact, the Respondents represented to this Court that Respondent Anderson did not view any of the Petitioner's legal materials and the Contractor retrieved the contraband documents and returned them to UDC. See UDC Answer Brief, Case No. 20120025 at 8. UDC policy provide no authority for the Attorney General's Office to possess and read a prisoner's legal materials. Surrendering Petitioner's legal material to its counsel served no purpose for UDC but to net confidential information regarding litigation against UDC and others.

In dismissing Claim 10 the trial court failed to consider the circumstances alleged in the petition as required by Renn. The trial court found Claim 10 was an attempt to re-argue motions served on the trial court on October 4, 2011 and August 6, 2013. R. 164. The claims alleged in Claim 10 were asserted in the initial petition for extraordinary relief filed on July 21, 2011. R. 21-22. The claims were integral to the petition before either motion were filed. The trial court did not address the questions of the propriety confiscating the Petitioner's legal material in violation of UDC policy and surrendering the legal materials to its counsel, the Attorney General Office, to be searched and read. The trial court unreasonably dismissed Claim 10 not considering if the Respondents abused their discretion in confiscating Petitioner's legal material and violating his right to privacy in his privileged legal material. The trial court abused its discretion by not granting Petitioner extraordinary relief to ensure his legal documents would not be confiscated in violation of UDC policy and not surrendered to the Attorney General's Office.

#### IV. The Trial Court Erred. In Not Disqualifying The Utah Attorney General's Office From Participating In This Action.

The Petitioner sought to have the entire Utah Attorney General's

Office (AG) disqualified from this action. R.105, 335, 336. Petitioner asserts that during the preparation of the petition for this action the Respondents, in violation of UDC policy, confiscated all the Petitioner's legal materials that include notes on trial preparation strategy and draft petitions of this action. R. 575, 718. UDC policy only permits confiscation of legal materials upon multiple violations of the contraband rule and refusal of the prisoner to surrender any contraband from the legal pouch. R. 449. UDC does not permit contents of prisoner's legal pouches to be read by any UDC staff member. R. 447. UDC policy and the Agreement only permits the Contractor to read a prisoner's legal materials. R. 450-451, 134. On April 4, 2011, Assistant Attorney General Anderson searched and read the Petitioner's confiscated legal materials. R. 419. Two days after searching and reading Petitioner's legal materials, Respondent Anderson emailed a Zions Bank official regarding Petitioner's challenges of ITFA procurement, which was the exact challenge put forth in his initial petition, amended petition and SAP. R. 19, 571, 714. Respondent Anderson only seized documents concerning ITFA procurement from Petitioner's legal material. R. 206.

Attorney can be disqualified for breach of confidentiality. *Cade v. Zions First Nat. Bank*, 956 P.2d 1073, 1081 (1998). Disqualification is determined by: "(1) whether the disclosing party had 'confidential or privileged information pertaining to [the movant's] trial preparation and strategy'; (2) whether the disclosing party disclosed that information to opposing counsel; (3) whether, in light of such disclosure, opposing counsel's 'continued representation... threaten[s] to 'taint' all further proceedings in this case.'" *Id.* citing *MMR/Wallace Power & Indus. v. Thames Assocs.*, 764 F. Supp. 712, 724 (D.Conn.1991). The Petitioner contends his confiscated legal materials: (1) contained confidential or privileged information; (2) were disclosed by UDC and Contractor to the AG, UDC's counsel; and (3) UDC gained an unfair advantage to defend itself in this litigation, thus threatening to taint all further proceedings in this case. The decision to grant or deny a

motion to disqualify counsel. State v. Gray, 851 P.2d 1217, 1227 (Utah Ct. App. 1993). The trial court abused its discretion by failing to disqualify the AG from this action.

- A. Petitioner's legal materials contained confidential or privileged information.

When UDC officials confiscated Petitioner's legal material he informed them the documents contained confidential work product for future litigation against UDC and the Contractor. R.336-37, 349, 351, 188, 540. The trial court also determined Petitioner's legal materials contained work product and other privileged information at the time of confiscation. R. 647, 648. Nothing in the record indicates Petitioner's work product or privileged information was separated from the legal pouches. Whether the confiscated legal materials contained confidential or privileged information has not been and can not be disputed. An attorney is precluded from "acquiring, inadvertently or otherwise, Confidential or privileged information about his adversary's litigation strategy. MMR 764 F. Supp. at 718. Supposing, even in the event that "the attorney might have acquired [privileged] information... it is the court's duty to order the attorney disqualified." Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

- B. The Contractor and UDC disclosed the Petitioner's privileged and confidential legal materials to the AG, UDC's counsel.

On April 1, 2011, the Contractor reviewed all Petitioner's confiscated legal materials, noting the "material was found mixed together." R.190. The Contractor stated that under the Agreement they are required to "separate the material into four categories, 'legal-public', 'legal-privileged', 'non-legal' and 'contraband.'" R.190. The Contractor admonished the Petitioner "that combining these materials in the 'privileged legal' pouch could result in disciplinary against [the Petitioner]." The Contractor sent Respondent Bigelow the results of the



review at that time. R.190. The chain of custody for the confiscated legal materials shows: (1) the documents did not leave the Warden's Office from March 31, 2011 to April 4, 2011; (2) categorized items remained together as "ITEM # 1-5", there is no indication of any category from the Contractor's review; and (3) the Contractor and Respondents Bigelow and Anderson did not sign the chain of custody sheet. R.191. Respondents Anderson and Bigelow searched and read the Petitioner's legal materials from "one garbage bag full of legal pouches[.]" in the Warden's Office. R. 418, 498, 502. Respondent Bussio retrieved all of the Petitioner's legal materials from Respondent Anderson and returned them to the Petitioner. R.196. None of the documents identified by the trial court as work product or privileged were retrieved from any other location during Respondent Bussio's return of the legal materials. The identified work product and privileged information remained with the legal materials after confiscation, through the Contractor's review and into the AG's possession. Over thirty (30) days after reviewing Petitioner's legal materials, the Contractor formally informed Respondent Bigelow all documents were "legal - public" documents. R.403. The Contractor's finding contradict the trial court's findings that letters from the Petitioner to the Contractor were privileged and were among the confiscated legal materials. R.647.

C. The AG's continued participation in this action threatens to taint all further proceeding in this case.

The Petitioner contends the UDC's counsel's possession and reading of his legal materials give UDC an unfair advantage in defending itself against this action. Cody, 256 F.3d at 769. When the AG took possession of Petitioner's legal materials his entire strategy to prosecute this action was exposed. "[U]nrestricted access to [Petitioner's] trial strategies and tactics, have a devastating effect on the outcome of the litigation." MMR, 764 F. Supp. at 727. "Even if, as [Respondent] maintains, no confidential information was actually disclosed," the Petitioner and other UDC prisoners would be under

threat the AG has the ability to seize legal materials containing confidential or privileged information. Such a state of affairs has the potential of chilling prisoners' ability to maintain confidential or privileged information in their legal pouches. This Court recognizes that the mere threat of taint is sufficient for a ground to disqualification. Cade, 956 P.2d at 1081.

- D. The trial court abused its discretion by unreasonably not granting Petitioner's motion to disqualify UDC's counsel, the AG.

Denial of a motion to disqualify counsel is reviewed for abuse of discretion. *State v. Gray*, 851 P.2d 1217, 1227 (Utah Ct. App. 1993). In denying Petitioner's Motion to Disqualify Counsel (R. 335), the trial court based its decision on his initial Motion to Recuse (R. 105-III), instead of his renewed motion to disqualify counsel. R. 643. Trial court incorrectly found Petitioner's legal materials were confiscated "in conjunction with UDC policy." R. 645. Trial court incorrectly found that none of the Petitioner's work product and confidential and privileged information were provided to UDC and its counsel the AG. R. 646, 648, 649. Trial court incorrectly found that breaches of confidentiality alone do not taint the validity of proceedings. R. 650. Trial court failed to analyze Petitioner's disqualification motion based on breach of confidentiality.

- i. The Petitioner filed a Motion to Recuse, requesting the AG to be disqualified from this action on October 4, 2011 based on UDC and the AG breached the confidentiality of his legal materials. Petitioner erroneously based the motion on shared confidences. On August 6, 2013 Petitioner renewed the motion, basing the motion on breach of confidentiality. R. 338-39. In determining the merits of the disqualification motion the trial court based its denial of the motion on the grounds "that neither McClellan nor Rules 1.9, 1.10 or 1.11." R. 653. The trial court did not consider disqualification based on breach of confidentiality as articulated in MMR, 764 F.Supp. at 724.

ii. UDC policy only permits confiscation of prisoners' legal material under specific conditions and after ordering the prisoner to surrender any suspected contraband. Policy also only permits the Contractor to read prisoners' legal materials. There is no exception for the AG to read prisoners' legal materials, regardless of how they are classified. The trial court found Petitioner's legal materials were properly seized and surrendered to AG. Trial court determined several documents met the definition of confidential or privileged work product but unreasonably found the Contractor did not "forward" the privileged materials to the AG. The record shows and the Contractor admits, all Petitioner's legal materials, including those the trial court determined were privileged, were forwarded to the AG. Had the Contractor "reviewed" each of documents and "categorized" them as "legal-privileged", "legal-public" or "contraband" as UDC policy and the Agreement require, there would have been no need to surrender the Petitioner's legal materials to the AG.

iii. Petitioner claims the breach of his legal materials provided UDC an unfair advantage in defending themselves against the claims in this action. Courts have found the breach of confidentiality alone can taint the integrity of an entire case. MMR, 764 F.Supp. at 727. Courts have also found that prisoners are injured by the claim that prison officials gained an unfair advantage in litigation by reading prisoners' legal materials. Cody, 256 F.3d at 768. The trial court unreasonably determined that Petitioner's request for relief in judicial or administrative proceedings has been denied due to the breach of confidentiality. R. 650. Petitioner contends he is prejudiced by UDC's counsel having access to his tactics and strategy for this action. The trial court takes the position that a prisoners legal materials can be seized and read by the AG as long as they are returned "to make timely filings, or

was [not] barred access to courts..." R.650. In this case reading of the work product was an access to court violation. Cody, 256 F.3d at 769.

v. The Trial Court Erred In Denying The Court of Appeals' Order Awarding Appellant Costs for Case Number 20120025-CA:

On September 6, 2013, this Court ordered the Appellees to pay Appellant's costs incurred on appeal for case number 20120025-CA. The Petitioner submitted a bill of costs to the trial court as ordered by this Court. R.591-608. In itemizing his costs Petitioner sought "copy fees, postage and research material" expenses. R.592. The trial court denied Petitioner's motion for costs. R.697.

In denying the motion for costs the trial court cited the timeliness of the motion a failure to itemize and verify his costs incurred during the appeal. R.697. The trial court unreasonably denied the cost motion because the Petitioner is being held to the standard of a trained attorney. As a pro se litigant should be accorded every consideration that may reasonably be indulged. State v. Winfield, 2006 UT 4, ¶ 19, 128 P.3d 1171.

First, the Petitioner in regards to the trial court's finding that the cost motion was untimely, Petitioner previously informed the court the Respondents were taking up to thirty (30) days to provide copies in this action. R.617. Petitioner contends any delay in filing his bill of costs was due to Respondents' photocopy process. It should also be noted did not articulate any prejudice due to delay in filing the bill of cost or costs motion.

Second, the trial court sought to require Petitioner to produce a meticulous and detailed report regarding the costs he incurred on appeal. R.697. The Petitioner contends the information deman-

ded by the trial court is solely in the Respondents' possession. The Petitioner submitted the only documents which the UDC Accounting Office has made available to him to verify his costs. R.595. The Petitioner does not have personal access to UDC's accounting records system from which his fund were drawn to pay his appeal costs. Nor is UDC willing to create a report with

### Conclusion

The Respondents' bad faith efforts to conceal the custody and character of the Petitioner's privileged work product and confidential legal materials have made this litigation more complicated than necessary. The real issue is simple: Respondent was denied extraordinary relief to receive mandated legal assistance, require UDC to perform a duty required by law, require UDC to comply with its own rules and prevent confiscation and reading of his legal materials by the AG. Respondent respectfully requests that he be granted extraordinary relief on all his claims asserted in the petition. In the alternative, he requests the AG be disqualified and remand this matter for an evidentiary hearing to determine the merits of his claims.

Respectfully submitted this 8th day of January, 2015.

*Reginald Williams*

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, to the Attorney General's Office, at 160 East 300 South, P.O. Box 140856, Salt Lake City, Utah 84841-140856, on this 23<sup>rd</sup> day of January, 2015.



Signature