

2016

**Robert Kuchcinski, an Individual, Plaintiff/Appellant v. Box Elder County, a Political Subdivision of the State of Utah; And the Office of the Box Elder County Sheriff, an Administrative Subdivision of Box Elder County, Defendants/Appellees**

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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ROBERT KUCHARCINSKI, an individual,

Plaintiff/Appellant

v.

BOX ELDER COUNTY, a political  
subdivision of the state of Utah; and THE  
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COUNTY SHERIFF, an administrative  
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Defendants/Appellees

Appellate Case No. 20160674-SC

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**BRIEF OF PLAINTIFF/APPELLANT**

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**ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
CACHE COUNTY, STATE OF UTAH  
The Honorable Brian Cannell, Presiding  
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FRANK D. MYLAR, ESQ.  
ANDREW HOPKINS, ESQ.  
MYLAR LAW  
2494 Bengal Blvd.  
Salt Lake City, Utah 84121  
Ph: (801) 858-0700  
*Mylar-Law@comcast.net*  
*Attorneys for Defendants/Appellees*

PHILLIP W. DYER, ESQ.  
BENJAMIN R. DYER, ESQ.  
DYER LAW GROUP PLLC  
648 East 100 South  
Salt Lake City, Utah 84102  
Ph: (801) 363-5000  
*phil@dyerlawgroup.com*  
*ben@dyerlawgroup.com*  
*Attorneys for Plaintiff/Appellant*

JAMES E. HARWARD, ESQ.  
W. EARL WEBSTER, ESQ.  
AMY WILLIAMSON, ESQ.  
HARWARD & ASSOCIATES  
6715 S 1300 E, Suite 250  
Cottonwood Heights, Utah 84121  
Ph: (801) 506-3800  
*earl.webster@harwardlaw.com*  
*james.harward@harwardlaw.com*  
*amy.williamson@harwardlaw.com*  
*Attorneys for Plaintiff/Appellant*

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## **JURISDICTIONAL STATEMENT AND IDENTIFICATION OF PARTIES**

This Court has jurisdiction pursuant to U.C.A. §78A-5-102(6) (2010), which provides “Appeals from the final orders, judgments, and decrees of the district court are under Sections 78A-3-102 and 78A-4-103.” Further, U.C.A. §78A-3-102(3)(k) (2009), provides that this Court has appellate jurisdiction over “appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.”

There are three (3) parties to this action/appeal – Robert Kuchcinski (“Appellant”), Appellant in this appeal and Plaintiff in the First District Court Proceedings below; Box Elder County (“the County”) and the Office of the Box Elder County Sheriff (the “Sheriff’s Office”) are the Appellees in this appeal and Defendants in the First District Court Proceedings below. Unless otherwise specified, Box Elder County and the Office of Box Elder County Sheriff are referred to collectively herein as “Appellees.”

## **ISSUES AND APPLICABLE STANDARDS OF REVIEW**

**Issue 1.** Did Appellant demonstrate the elements required under *Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, 16 P.3d 533, to proceed with his claim for monetary damages under the Utah Constitution?

**Standard of Review.** Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). “An appellate court reviews a trial court’s ‘legal conclusions and ultimate grant or denial of summary judgment’ for correctness...and views ‘the facts and all

reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.”  
*Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600, 601.

**Issue 2.** Did the District Court err in granting Summary Judgment by entering a factual finding that Appellant could not show any flagrant violation of his Utah constitutional rights by the Appellees?

**Standard of Review.** Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). “An appellate court reviews a trial court's ‘legal conclusions and ultimate grant or denial of summary judgment’ for correctness...and views ‘the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.’”  
*Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600, 601.

**Issue 3.** Did the District Court err in granting summary judgment in favor of Appellees by entering a factual finding that Appellant could not identify a specific individual who flagrantly violated Appellant’s constitutional rights?

**Standard of Review.** Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). “An appellate court reviews a trial court's ‘legal conclusions and ultimate grant or denial of summary judgment’ for correctness...and views ‘the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.’” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600, 601.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

The primary issue in this case is whether an innocent man, Appellant, who was jailed for 17 days without being hailed before a justice of the peace or magistrate for any purpose and then summarily released is entitled to a determination by a jury of his peers as to whether such actions give rise to a claim for monetary damages under the Utah Constitution. The specific issues in this case relate to the District Court's interpretation of this Court's holdings in *Spackman* and *Jensen Ex. Rel. Jensen v. Cunningham*, 2011 UT 17, 250 P.3d 465.

Appellant respectfully submits that he met the *Spackman* factors and that the District Court improperly granted the Appellees' Motion for Summary Judgment. Specifically, Appellant submits that the District Court erroneously substituted its judgment for that of the jury when it dismissed Appellant's claim based upon the District Court's factual findings that Appellant could not show a flagrant violation of his constitutional rights. Further, Appellant respectfully submits that the District Court erred in broadly interpreting this Court's decision in *Spackman* to effectively grant blanket immunity to Appellees from liability by requiring the identification of a specific actor. Finally, Appellant respectfully requests that this Court explicitly hold that the definition of "flagrant violation" extends to include instances where a systematic series of events, without specific individual acts by any one (1) human actor, caused a deprivation of Appellant's constitutional rights in this unique case and is actionable under *Spackman* against a governmental agency.

**B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW**

Initially, Appellant filed a Complaint in Federal District Court in and for the District of Utah, Case No. 1:13-cv-00084-RJS, based upon the same factual allegations but alleging violations of Appellant's federal civil rights under 42 U.S.C.A. §1983, as well as the state law claims (the "Federal Complaint"). R. 142-151. Appellees, represented by the same trial counsel as in the District Court Proceedings, moved to dismiss the Federal Complaint on the grounds that Appellant could not identify any individual whose acts gave rise to a §1983 claim or, alternatively, a policy or procedure that gave rise to a §1983 claim. After hearing oral argument, Appellant's federal civil rights claims were dismissed with prejudice by the Honorable Robert J. Shelby, but Appellant's state claims were dismissed, without prejudice, with a virtual directive from Judge Shelby to refile his state law claims in Utah State Court. R. 153.

This appeal arises from the summary judgment issued by the First District Court (the "District Court") dismissing, with prejudice, all of Plaintiff's state law claims in case number 150100424 (the "District Court Proceedings"). R. 984-986. Appellant filed his Complaint in Third District Court on April 28, 2015 (the "State Complaint"). R. 1-16. Following motion practice, venue of the District Court proceedings was changed to the First Judicial District Court in and for Cache County, Logan Department. R. 68-69. After change of venue, Appellees filed its Motion for Summary Judgment and Memorandum in Support and Request for Hearing on January 22, 2016 ("Motion for Summary Judgment"). R. 86-153. A hearing was held on April 5, 2016, which addressed

Appellee's Motion for Summary Judgment and resulted in the entry of a partial ruling on the Motion for Summary Judgment. R. 868-886. However, the District Court ordered the parties to provide additional briefing regarding questions interposed during oral argument. After the parties submitted additional briefing, a second hearing was held on April 26, 2016. R. 911-929. The District Court again requested additional briefing on the issue of whether the filing of an Information at an earlier time would trigger a different result and if failing to file the Information within seventeen (17) days constitutes a flagrant violation of Appellant's constitutional rights. R. 941.

After a final round of briefing, the District Court held a hearing on June 27, 2016. At the conclusion of the June 27<sup>th</sup> hearing, the District Court entered its factual findings and legal determinations, dismissed all of Plaintiff's claims with prejudice and requested that Appellees' counsel prepare an order that "encompasses the Court's full decision." R. 1067-8. The District Court entered the Final Order and Judgment Granting Summary Judgment (the "Final Order") on July 18, 2016. R.984-986. Appellant therefore relies upon the Final Order in framing the arguments hereinbelow.

### **C. FACTS**

On the afternoon of June 16, 2012, Appellant, age 64, was operating a tractor-trailer rig on Interstate 15 near Tremonton, Utah. R. 121-122, 260, 267. While operating the tractor-trailer, a can of soda pop shifted in the cab and Appellant adjusted the steering wheel causing the truck to temporary drift out of its lane of travel. *Id.* A concerned citizen phoned the Utah Highway Patrol ("UHP") and informed them of Appellant's

failure to maintain his lane of travel, resulting in UHP Trooper Eric Ellsworth (“Trooper Ellsworth”) effecting a stop of Appellant’s vehicle. *Id.* After pulling into an appropriate place to bring his tractor-trailer to a stop, Appellant exited the vehicle. *Id.* The concerned citizen provided a statement to Trooper Ellsworth, after which Trooper Ellsworth cited Appellant for Failure to Stay in One Lane, a class C misdemeanor under U.C.A. §41-6a-710(1) (2009). R.3. Despite the fact that a citation had already been issued, Trooper Ellsworth thereafter requested that Appellant submit to a portable breathalyzer test, which Appellant passed. R.267. Appellant contends that Trooper Ellsworth muttered something to the effect of “Well, that can’t be right” when Appellant passed the portable breathalyzer test. R. 3, 260, 368.

Even though a citation had already been issued and Appellant had passed the portable breathalyzer test, Trooper Ellsworth requested Appellant submit to a series of field sobriety tests due to what appeared to be Appellant’s poor balance and slow, deliberate speech patterns. R. 121, 267. What Trooper Ellsworth did not know was that Appellant suffered from Otitis Media with Eustachian Tube Dysfunction – an inner ear infection that markedly degrades the person’s balance. R. 260-261, 267, 279, 283. Due to Appellant’s inner ear infection, Appellant failed the balance-related field sobriety tests and Trooper Ellsworth arrested Appellant on suspicion of driving under the influence. R. 260-261, 267.

Trooper Ellsworth transported Appellant to the Box Elder County Jail (the “Jail”) and remanded him into the custody of the Sheriff’s Office for detention. R. 121. During

the booking process, Appellant voluntarily submitted to a blood draw for the purposes of screening Appellant for intoxicating substances. R. 261, 266. At 7:38 p.m. on June 16, 2012, Trooper Ellsworth filed his probable cause statement with the Brigham City Justice Court (the “Justice Court”) but, due to the fact that it was a Saturday evening, Appellant was not afforded a probable cause hearing that night. R. 121-122.

The next morning, Sunday, June 17, 2012, the Justice Court held a hearing on whether probable cause existed to detain Plaintiff and, at 9:30 a.m., the Court entered its findings and order approving the detention of Appellant and setting his bail without Appellant being present. R. 124. Appellant was not informed of the probable cause proceeding on June 17, 2012, provided legal counsel, nor was he transported with the other inmates, or afforded the opportunity to personally appear before the Justice Court to challenge the facts underlying Trooper Ellsworth’s probable cause statement, or present evidence as to the appropriateness of the bail amount. R. 261. In fact, the Sheriff’s Office never made Appellant aware of the amount of bail that had been set by the Justice Court or gave him notice of the bail amount. *Id.*

After the Justice Court set Appellant’s bail, Appellees “lost” Appellant in the Jail through a series of circumstances that involved multiple actors who each contributed to Appellant’s continued imprisonment for 17 days. After not informing Appellant of the amount of his bail, the Sheriff’s Office did not transport Appellant to the Justice Court with the other inmates on Wednesday, June 20, 2012. R. 262. It was not until thirteen (13) days after his booking that Appellant was made aware, in a phone call with his



fiancé, about the amount of his bail. R. 1014. The following Wednesday, June 27, 2012, the Justice Court was closed because the presiding Justice Court Judge was unavailable and there was no alternative judge assigned to the Justice Court. R. 261. During a phone call with his fiancé (which was recorded, monitored and subsequently transcribed), Appellant expressed that, as far as he knew he had tested negative for intoxicating substances and expressed his confusion regarding his continued imprisonment and misunderstanding regarding the reason for his continued detention. R. 340.

In fact, during the phone call with his fiancé, an unidentified Jail personnel reminds Appellant that he will not be allowed to appear before a judge due to the upcoming Fourth of July holiday, to-wit:

Appellant: “[N]one of this is very clear to me as to what is, uh, happening, what’s not happening here, uh, I thought I was going to be seeing uh, a judge and getting this ironed out way back Wednesday. But then...they said this Wednesday and the judge, they told me, just, uh, yesterday, that the judge was on vacation, so of course, he wasn’t seein’ anybody at that time, and then now...”

Jail Personnel (Background): And this commin’ Wednesday.

Appellant: Huh?

Jail Personnel (Background): And this commin’ Wednesday’s shot.

Appellant: So this, and, this commin’ Wednesday is the Fourth of July, so of course that’s out too. All I know is that I’m held here until, uh, we get this cleared up.” R. 333. (Emphasis supplied).

Finally, on Monday, July 2, 2012, a fellow inmate suggested that Appellant contact the inmate’s attorney, Art Lauritzen, Esq. R.262. That same day, Mr. Lauritzen contacted the Box Elder County Prosecutor to inquire as to Appellant’s case. *Id.* Upon learning of

Appellant's continued incarceration, the Box Elder County Prosecutor contacted the Justice Court and requested Appellant's immediate release. *Id.* At this point, Appellant had been incarcerated for 16 days but there had been no formal charges filed against Appellant as of July 2, 2012. R. 131-135. The next day, Tuesday, July 3, 2012, the Justice Court issued its Release of Appellant without requiring the posting of *any* bail or bond. R. 168.

Due to the length of his incarceration, as well as allegations of driving under the influence, Appellant's employment as a tractor-trailer driver was terminated. R. 263. Upon returning to his home in Arizona, Appellant began to experience symptoms of Post-Traumatic Stress Disorder, for which the root cause was driving. R.263, 375-386. Appellant's extended incarceration rendered him unable to drive a vehicle without experiencing intense, debilitating anxiety and panic attacks that prevented him from safely operating a motor vehicle. *Id.* As of the filing of the Complaint, Appellant was still unable to operate a motor vehicle for more than 30 to 45 minutes without experiencing anxiety and panic that prevented him from safely operating a motor vehicle. *Id.* As a result of his incarceration, Appellant lost his job as an over-the-road driver – the only career he has known in his adult life. R. 263. Appellant thus suffered both financial and emotional damages as a result of his prolonged incarceration. In support of his financial and emotional damages, Appellant retained experts who determined that, as a result of his 17 day incarceration, he lost, at a minimum, \$72,440.00 in earnings and suffered from Post-Traumatic Stress Disorder. R. 404-414, 568-579.

## **SUMMARY OF ARGUMENTS**

Appellant respectfully submits that the facts that were placed before the District Court satisfy the factors set forth by this Court in *Spackman*. Regarding the first factor, Appellant respectfully submits that he was entitled to be admitted to bail, be informed of the amount of bail and have an opportunity to challenge the amount of bail and factual support for the setting of bail. Appellees thereafter “lost” Appellant in the jail and Appellees did not transport him to the regularly scheduled Justice Court hearings. Lastly, the Information against Appellant was not filed until some fifteen (15) days after being released from the Jail. Appellant respectfully submits that the systematic failure of Appellees constitutes a flagrant violation of his constitutional rights. Appellant respectfully submits that there is no other adequate remedy for Appellant besides money damages inasmuch as the employees/officers of Appellees are protected by either absolute judicial immunity or immunity under the Utah Governmental Immunity Act. Lastly, equitable relief is insufficient because he has been released from the Jail such that an injunction, petition for habeas corpus or other equitable relief was and is wholly inadequate to protect the Appellant’s rights or redress his injuries. Additionally, Appellant respectfully submits that the language in *Spackman* and *Jensen* does not require the identification of specific human actors in order to proceed to a jury trial on a constitutional tort claim and requests this Court clarify and so hold in this case. Finally, Appellant asserts that the definition of “flagrant violation” under *Spackman* should be determined to include instances where a systematic series of events, without specific

identifiable wrongful acts by a specific human actor, is sufficient to present a jury question for a flagrant violation of Appellant's constitutional rights.

## **ARGUMENT**

### **I. Appellant met the elements of *Spackman* such that the District Court erred in granting Appellee's Motion for Summary Judgment.**

The Utah Rules of Civil Procedure explicitly provide that "summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Appellant respectfully submits that the District Court erred in granting Appellees' Motion for Summary Judgment and denying Appellant the right to put his case before a jury of his peers.

In *Spackman*, this Court reaffirmed the long held principle first recognized in Utah common law in 1898 that, where there is no "no express statutory right to damages for one who suffers a constitutional tort," the "Utah Courts employ the common law." *Spackman* at ¶20. In applying the common law, Utah courts must first analyze whether the constitutional provisions upon which at Plaintiff relies is self-executing, a finding which "allow[s] for awards of money damages." *Id.* at ¶19. Thus, the *Spackman* test is summarized in *Jensen* as follows:

¶ 58. In order to recover damages for the violation of a constitutional provision under *Spackman*, a plaintiff must clear two hurdles. First, the plaintiff must prove that the constitutional provision violated is "selfexecuting." *Id.* ¶ 18. Next, a plaintiff must establish the following three elements: (1) the plaintiff "suffered a 'flagrant' violation of his or her constitutional rights;" (2) "existing remedies do not redress his or her injuries;" and (3) "equitable relief, such as an injunction, was and is wholly inadequate to protect the

plaintiff's rights or redress his or her injuries.” *Id.* ¶¶ 23-25. Because the common law authority to award damages for constitutional violations invokes policy considerations, a court's discretion in imposing monetary damages should be “cautiously and soundly” exercised. *Id.* ¶ 21. As a result, the *Spackman* test is intended “[t]o ensure that damage actions are permitted only ‘under appropriate circumstances.’” *Id.* ¶ 22. *Jensen*, at ¶ 58.

In the second Cause of Action in Appellant's Complaint, Appellant alleged violations of his Due Process rights under the Utah Constitution, Article I § 7 which the *Spackman* decision affirmatively held to be self-executing and incident to his constitutional right to bail under Article I, § 8 of the Utah Constitution. R. 12-13.

In particular, Appellant alleged that he was not timely admitted to bail which is a fundamental right protected under Article I, § 8 of the Utah Constitution, to-wit: “[a]ll persons charged with a crime shall be bailable...” Utah Const. Art. I, § 8(1). This Court has held that Article I, § 8 “affirms the fundamental right to bail of one accused of a crime; and it does so in mandatory terms.” *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976). In *Scott*, this Court cited to Article I, Section 26 of the Utah State Constitution and highlighted that the, “provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise,” which, consistent with *Jensen* and *Spackman*, would make Article I, §8 a self-executing clause under the Utah Constitution. *Id.*<sup>1</sup> Moreover, the Utah Legislature has explicitly provided that, in

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1. In *Scott*, this Court affirmed that, because “the right to bail is a fundamental right, the State must sustain the burden of proving the accused is within one of the exceptions.” *Scott*, at P.2d 236. (emphasis supplied). The exceptions set forth in Article I, Section 8 are persons “charged with a capital offense,”... “a felony while on probation or parole, or

“criminal prosecutions the defendant is entitled:...[t]o be admitted to bail in accordance with provisions of the law...” U.C.A. § 77-1-6(h)(1980). (Emphasis supplied). The Supreme Court of the United States has recognized the same requirement – that an accused person be admitted to bail – exists in federal law. In *Stack v. Boyle*, the Supreme Court of the United States recognized that an accused person has a right to challenge the amount of bail based upon the finding that the setting of \$50,000.00 in bail – higher than the fine of \$10,000.00 that would have been imposed had the accused been convicted – deprived the defendant of the right to be admitted to bail. In so holding, the Supreme Court recognized the right to bail is a long-held American principle:

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 3, 96 L. Ed. 3 (1951). (Emphasis supplied)(Internal citations omitted).

Justices Jackson and Frankfurter joined in the decision of the Court in *Stack* and further reaffirmed that the right to bail as a means to prevent incarceration while trial is pending:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are

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while free on bail awaiting trial on a previous felony charge” or where “there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or the community or is likely to flee the jurisdiction of the court...” Utah Const. Art. I, § 8(1)(a-c). Appellant respectfully submits that none of the exceptions are applicable in this case.

punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. *Stack v. Boyle*, 342 U.S. 1, 7–8, 72 S. Ct. 1, 5, 96 L. Ed. 3 (1951). (Emphasis supplied).

The Bail Statute in effect at the time of Appellant’s imprisonment explicitly provides that a “person charged with or arrested for a criminal offense shall be admitted to bail as a matter of right...” and requires that the “initial order denying or fixing the amount of bail shall be issued...by the magistrate or court presiding over the accused's first judicial appearance.” U.C.A §77-20-1(3)(a)(2008).<sup>2</sup> (Emphasis supplied). Thus, being admitted to bail contemplated a first “judicial appearance,” which Appellant never received prior to being released from jail after 17 days.

Additionally, the applicable Utah Rules of Criminal Procedure require that, “When any peace officer or other person makes an arrest with or without a warrant, the person arrested shall be taken to the nearest available magistrate for setting of bail.” Utah R. Crim. P. 7(b) (2012). Instructively, the 2012 version of Rule 7(c)(1) provided that, “In order to detain any person arrested without warrant, as soon as is reasonably feasible but in no event longer than 48 hours after the arrest, a determination shall be made as to whether there is probable cause to continue to detain the arrestee.” (Emphasis supplied). However, Rule 7(c)(1) was revised by this Court in 2014 and the “reasonably feasible” time period has now been shortened to 24 hours and new Rule 7(c)(4) requires a detained

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2. The Bail Statute has been revised multiple times since Appellant’s imprisonment and does not now include the language set forth hereinabove. Appellant respectfully submits that this further bolsters Appellant’s contention that the right to bail is constitutional, less the Legislature alter or restrict a person’s right to bail as explicitly set forth in Article 1,

person to be released after 24 hours “if a probable cause statement is presented to a magistrate more than 24 hours after the arrest... unless the delay was caused by a bona fide emergency or other extraordinary circumstances.” *See*, Utah R. Crim. P. 7(c)(1) and 7(c)(4)(2014). Appellant respectfully submits that the Utah Constitution, the Bail Statute and the Rules of Criminal procedure are clear – a person has a constitutional right, upon his/her arrest and incarceration, to be *personally* and *promptly* taken to a judge/magistrate for a determination as to the probable cause to continue his/her incarceration and be admitted to bail or released from jail. Appellant has met the first hurdle in the *Spackman and Jensen* analysis because the fundamental right to be admitted to bail under Article I, § 8 of the Utah Constitution is also self-executing.

Thus, the analysis turns to the three (3) elements that a plaintiff must establish under *Spackman* to proceed with a private suit for monetary damages: 1) “that he or she suffered a “flagrant” violation of his or her constitutional rights,” 2) “that existing remedies do not redress his or her injuries,”<sup>3</sup> and, 3) “that equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff’s rights or redress his or her injuries.” *Id.* at ¶23.

This Court has recognized that the flagrant violation of a plaintiff’s constitutional rights is not a “constrained” standard requiring a plaintiff cite to “clear precedent on point

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§8 of the Utah Constitution.

3. Appellant notes that the Final Order did not reach the remaining *Spackman* two (2) elements – existing remedies and equitable relief. Appellant has, however, addressed those factors in cautious optimism that the Court will desire to reach those issues in this appeal.



that specifically recognizes the claimed right and applies it to analogous facts.” *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 67, 250 P.3d 465, 482. Rather, in *Jensen*, this Court stated that it could “conceive of instances where a defendant's conduct will be so egregious that it constitutes a flagrant violation of a constitutional right even in the absence of controlling precedent.” *Id.* Appellant respectfully submits this case is one such instance in which the Appellees’ systematic conduct was so egregious and unreasonable that Appellant should have been granted a right to try his case before a jury of his peers. It is important to note that U.C.A. §77-20-1, et seq. (2008) (the “Bail Statute”) has been revised multiple times since Appellant’s incarceration, including in 2013, and does not now include some of the key language discussed in this Brief.

A. Appellant suffered a flagrant violation of his Constitutional Due Process rights.

Appellant respectfully submits that the series of events which unfolded after Appellant’s arrest constitute acts that are so egregious and unreasonable as to constitute a flagrant violation of his constitutional rights. The series of events begins when Appellant is incarcerated and, without being admitted to bail, Appellant’s bail was unilaterally set by the Justice Court without an appearance before the Justice Court Judge. For reasons that cannot be readily explained by Appellees, the information regarding the amount of bail was also never communicated to Appellant by anyone. Thereafter, Appellant should have been transported to the Justice Court on June 20, 2012, with the other inmates for an initial appearance before the Justice Court to inform Appellant that he had been purportedly “admitted” to bail and his bail amount that had been previously set without

his participation in a hearing. Again, for reasons that cannot be explained by Appellees, the Sheriff's Office did not transport Appellant to the Justice Court for an initial appearance. On the next date set for regular bail proceedings, June 27, 2012, the Justice Court Judge was unavailable and Appellant was again not admitted to bail. In fact, Appellant was never admitted to bail, but he was almost immediately released by the Justice Court after inquiries from Mr. Lauritzen to the Box Elder County Attorney who then contacted the Justice Court. Appellant respectfully submits that, upon the series of events set forth herein, Appellant successfully met his burden under *Spackman* that the denial of his fundamental right to be admitted to bail was a flagrant violation of his constitutional rights under Article I, § 7 and Article I, § 8 of the Utah Constitution.

i. Appellees' Series of Events are "Flagrant"

Appellant was booked into the Jail on two (2) charges, including driving under the influence of alcohol, drugs, or a combination of both or with specified or unsafe blood alcohol concentration under U.C.A. §41-6a-502 (2010) (the "D.U.I. Statute") and the failure to stay in one lane of travel for which he had been cited. At the time of his arrest, Appellant submitted to a blood test that would return a finding that Appellant was not under the influence of any intoxicating substances preventing him from safely operating a motor vehicle. R. 239; R. 492-494. The day after his arrest, the Justice Court set Appellant's bail based upon the statement of probable cause of Trooper Ellsworth without Appellant being personally present or initially appearing before the Court. Appellant's

bail was set at \$1,350.00<sup>4</sup> - nearly twice the mandatory fine of \$700.00 required by the D.U.I. Statute under which Appellant was charged and which charges were subsequently dismissed by the Justice Court.

After the Justice Court set Appellant's bail, Appellees "lost" Appellant in the Jail through a series of circumstances that involved multiple actors who each contributed to Appellant's continued incarceration for 17 days – far beyond the mandatory jail sentence of "not less than 48 consecutive hours" that would have resulted from a conviction under the D.U.I. Statute. *See*, U.C.A. §41-6a-505(1)(a)(i)(A)(2005). Appellant was not transported to the Justice Court on the next scheduled hearing date – Wednesday, June 20, 2012, and the Justice Court Judge was thereafter unavailable on Wednesday, June 27, 2012.

After Appellant's bail was set, he was entitled to: a) notice of the amount of his bail under U.C.A. §77-20-1(3)(a)(2008); and, b) the opportunity to challenge both the amount of his bail and the evidence in support of the bail order under U.C.A. §77-20-1(5)(a-c)(2008). Having never had a hearing or notice in the first instance, Appellant had no opportunity to seek a modification of his bail before being released.

The Bail Statute allowed a person to challenge his/her bail via a motion to modify "at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing..." U.C.A. §77-20-1(5)(a) (2008). Although a magistrate or court

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4. In fact, it appears that, after a close examination of hand written annotations on the Box Elder County Jail Pre-Booking Form Appellant's, the Appellees were unsure as to whether Appellant's bail was set at \$1,350 or \$1,415.00. R. 171.

may “rely upon information contained in...any sworn probable cause statement...” in setting bail, the Bail Statute explicitly requires that a magistrate or court hearing a motion to modify bail set in reliance on a sworn probable cause statement to ensure that “each party is provided an opportunity to present additional evidence or information relevant to bail.” U.C.A. §77-20-1 (5)(c) (2008). (Emphasis supplied).

Despite the fact that Appellant is constitutionally and statutorily entitled to be provided notice of his bail and an opportunity to challenge the basis of the bail as well as the amount, Appellant was never personally informed of the amount of the bail by the Appellees nor was Appellant ever provided the opportunity to challenge the amount of his bail and/or the factual allegations from Trooper Ellsworth’s probable cause statement during his incarceration. In fact, Appellant learned of the amount of his bail for the first time thirteen (13) days after he was booked into Jail after his fiancé obtained the information from a bail bondsman. Necessarily then, a person charged with a crime (i.e., Appellant) must be given notice of the amount of bail or the fundamental right of that person to challenge his detention and/or the amount of bail would be, effectively, a legal nullity.

Although Appellees successfully argued below that the Sheriff’s Office’s relied upon the Justice Court’s original order setting bail (and contended that bail hearings routinely took place on Wednesday such that it was simply not possible for Appellant to be brought before the Justice Court on any other day), the Release Order that alternatively ordered Appellant’s release from Jail is dated July 3, 2012 – a Tuesday. Appellant

respectfully submits that, had Appellant been promptly admitted to bail by the Appellees, collectively, he would have been given notice of the amount of his bail such that his incarceration could have been challenged, he could/would have been released or he could have bailed out.

Appellant respectfully submits that the setting of bail before a magistrate without the accused present, failing to inform the accused of the amount of his bail and failing to allow an accused to challenge the amount of bail or the facts that give rise to the setting of bail is so egregious and unreasonable as to constitute a flagrant violation of Appellant's basic and fundamental Constitutional Right to Due Process under Article I, § 7 of the Utah Constitution and the Fundamental Right to Bail under Article I, § 8 of the Utah Constitution. Despite the fact the Utah Constitution clearly provides that the right to bail is a fundamental right and the Legislature has statutorily provided that the accused is entitled to the right to challenge the bail by presenting additional information and evidence to the Court, the District Court dismissed Appellants claims related to the denial of his Due Process rights due to the Appellees' lack of notice to Appellant of the amount of his bail, declining to transport him before the nearest judge/magistrate for a setting of bail as well as Appellant's opportunity to contest his bail. Appellant respectfully submits that the Court erred in dismissing Appellant's second Cause of Action and respectfully requests this Court reverse the District Court's Final Order and remand for a jury trial on the merits of Appellant's constitutional tort claims.

Thus, the Justice Court's action was the first domino in this series of events that led to the unconstitutional incarceration of Robert Kuchinski for 17 days.

- ii. The Sheriff's Office had a duty to receive, take charge of, keep and transport prisoners and adopt and implement a written policy or procedure regarding admission of prisoners to the Jail.

Appellant respectfully submits that the Sheriff's Office has a duty to take charge and keep prisoners in accordance with the law, including to track inmates and ensure that they do not languish in the Jail without being provided an opportunity to appear before a magistrate in accordance with their constitutional rights. The Sheriff's Office has acknowledged that, for reasons the Sheriff's Office cannot explain, there was no written policy or procedure in place to ensure that those arrested in the custody of the Sheriff's Office were not received, kept and transported to their appearance before a magistrate or judge in accordance with U.C.A. §17-22-1, et. seq.(1933) (the "Sheriff Statute").

The absence of a written policy is confounding given the explicit requirements the Utah Legislature has placed on the Sheriff's Office. First, and most importantly for the purposes of determining constitutional liability, the sheriff in a county "serves as the chief executive officer of each police local district and police interlocal entity within the county." U.C.A. §17-22-2(3)(b)(i)(2009). Thus, the Sheriff's Office has an obligation to use the jail for "the detention of persons charged with crime and committed for trial" or "the confinement of persons by other authority of law;"<sup>5</sup> U.C.A. §17-22-4(1)(b &

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5. Due to the fact that Appellant was never committed for trial and there was never an information filed prior to his release from Jail, it is unclear as to which provision of this statute properly classified Appellant. However, the Sheriff's Office was clearly a

c)(1993). The Sheriff's Office is also required to "take charge of and keep the county jail and the jail prisoners" and "receive and safely keep all persons committed to his custody, file and preserve the commitments of those persons..." U.C.A. §17-22-2(1)(g&h)(2009). Likewise, the Sheriff's Office must "attend county justice courts if the judge finds that the matter before the court requires the sheriff's attendance for security, transportation, and escort of jail prisoners in his custody." U.C.A. §17-22-2(1)(e)(2009). Failure to comply with the obligations under any of the aforementioned provisions of the Sheriff Statute may subject the Sheriff's Office, and its officers and employees, to being charged with a Class A misdemeanor. U.C.A. §17-22-2(2)(2009). Lastly, the Utah Legislature required that the Sheriff's Office "shall adopt and implement written policies for admission of prisoners to the county jail." U.C.A. §17-22-5(1)(2004).

Despite the explicit statutory requirements that the Sheriff's Office take charge of, receive and safely keep Jail prisoners and ensure their transport and escort to the Justice Court, as well as promulgate policies regarding admission of prisoners, the Sheriff's Office has acknowledged that it had not implemented a written policy or procedure for the tracking of prisoners. The District Court's Order dismissed Appellant's claim against the Sheriff's Office and "any of its employees" with prejudice on the grounds that the Sheriff's Office and its employees "were following a facially valid court order in detaining Plaintiff and that there was a valid bail order." However, the District Court's Order misses the mark – Appellant's claim against the Sheriff's Office was not based

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"keeper" of Appellant for seventeen (17) days, regardless of designation.

*solely* on whether there was a valid court order, but that the Sheriff's Office failed to take charge of and keep Appellant, transport and escort Appellant to the Justice Court on January 20, 2012, to be properly admitted to bail as required by the Utah Constitution and implement a written policy or procedure for the tracking of the Jail's prisoners. The Sheriff's Office's failure to promulgate or implement any such written policy or procedure, and apparent total disregard for the statutory obligations of the Sheriff's Office was one of the direct and proximate causes of Appellant becoming "lost" in Jail.

In dismissing Appellant's claims against the Sheriff's Office at the hearing on April 26, 2016, the District Court stated,

As it relates to liability on the part of the Cache County [sic] Sheriff's Office and/or the deputies at the jail, the Court is specifically finding that the Sheriff's Office and the deputies at the jail and those parties are not liable as they -- for any claim by the Plaintiff related to a breach of Mr. Kuchcinski's constitutional rights.

The Court specifically finds that there is a facially valid order as it relates to the probable cause statement and bail established by Judge Christensen, and therefore immunity would apply to those particular defendants and the Court rules as such. R. 915.

While it may seem tempting, at first blush, to grant immunity to the Sheriff's Office on the grounds that it relied upon the Justice Court's initial setting of bail, the obligations of the Sheriff's Office do not simply stop at the point that they receive an order regarding bail. The Sheriff's Office must file and preserve the commitments of those persons and arrange for their transport and escort to the Justice Court. As is acknowledged by the Appellees, the Justice Court held its weekly criminal hearings the

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Wednesday after Appellant was arrested and the remainder of the inmates at the Jail were taken before the Justice Court. Appellant, for reasons unexplained, was simply left behind by the Sheriff's Office. Appellant respectfully submits that the act of simply leaving an inmate in the Jail constituted a flagrant violation of his constitutional rights.

Thus, the Sheriff's Office return was the second domino in this series of events that led to the unconstitutional incarceration of Robert Kuchinski for 17 days.

- iii. The County's failure to ensure the availability of a replacement magistrate and sufficient staff to ensure Appellant's transfer to the Justice Court.

Despite Appellees' contention to the contrary, the County does have clear statutory obligations in requesting the creation of, and maintaining, operating standards of the Justice Court. In accordance with statute, this Court has recognized that, "[j]ustice courts are distinct from traditional district courts in a number of respects. For example, justice courts are created by municipalities or counties..." *Lucero v. Kennard*, 2005 UT 79, ¶ 10, 125 P.3d 917, 922. (Emphasis supplied). Prior to the creation of the Justice Court, the County was statutorily required, as a third class county,<sup>6</sup> to file "a written declaration with the Judicial Council" and demonstrate to the Judicial Council that "the proposed justice court will be in compliance with operating standards as established by statute and the Judicial Council." U.C.A. § 78A-7-102(3)(a & c) (2012).

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6. Third Class Counties are those counties classified as having "a population of 31,000 or more but less than 125,000..." U.C.A. § 17-50-501(2)(c) (2004). The United States Census Bureau counted 48,975 residents in Box Elder County and estimated the population at 52,907 as of July 1, 2015. See, <http://www.census.gov/quickfacts/table/PST045215/49003>. Box Elder County is thus a Third Class County.

Included in the procedures required to be established by the County prior to the certification of the Justice Court, the County was required to ensure the enactment of procedures to establish or maintain the Justice Court “for the following minimum standards:”

- (iv) sufficient local peace officers to provide security for the justice court and to attend to the justice court when required;
- (v) sufficient clerical personnel to serve the needs of the justice court;
- (vi) sufficient funds to cover the cost of travel and training expenses of clerical personnel and judges at training sessions mandated by the Judicial Council;
- (viii) for each judge of its justice court, a current copy of the Utah Code, the Utah Court Rules Annotated, the justice court manual published by the state court administrator, the county, city, or town ordinances as appropriate, and other legal reference materials as determined to be necessary by the judge. Utah Code Ann. § 78A-7-103 (2012).

Furthermore, the County was required to demonstrate the need for the Justice Court to the Judicial Council, including addressing factors such as “case files...availability of law enforcement agencies and court support services, proximity to other courts, and any special circumstances.” U.C.A. § 78A-7-102(3)(b) (2012).

Thus, the County’s contention that it does not control the Justice Court is simply not supported by the statutory mandate that the County establish and ensure appropriate policies and staffing for the Justice Court. The plain reading of U.C.A. §78A-7-102 & 103 requires the County to establish, at a minimum, procedures to maintain sufficient local peace officers to attend Justice Court which would, presumably, be delegated to the Sheriff’s Office. The County likewise was required to maintain clerical personnel “to serve the needs of the justice court” which could have ensured that a replacement judge

would be available on what was clearly a pre-planned absence on the part of the Justice Court Judge.

As was noted by Appellant's counsel below during oral argument, Appellant is not contending that the justice court judges are precluded from emergency situations or pre-planned absences. However, Appellant respectfully submits that, where the County is required to maintain appropriate peace officers and court personnel for the orderly functioning of the Justice Court, the County must likewise bear responsibility in ensuring that a judge is present to conduct the routine and constitutionally mandated functions of the Justice Court. For the County to argue that it has no obligation to ensure the presence of a magistrate judge for those arrested and charged within the County's boundaries would vitiate the purpose of the justice courts, the proceedings of which are bound by requirements of Due Process.

The County's failure to have a replacement magistrate on June 27, 2012, was the third domino in this series of events that led to the unconstitutional incarceration of Robert Kuchinski for 17 days.

iv. The County Attorney did not file an Information without delay.

Rule 7(b) of the Utah Rules of Criminal Procedure also requires that, "If an information has not been filed, one shall be filed without delay before the magistrate having jurisdiction over the offense." Utah R. Crim. P. 7(b) (2012). Despite the requirement that an Information be filed without delay, the Information in Appellant's case was not filed until July 18, 2012 – fifteen (15) days after his release from Jail.

Although Appellant does not believe this Court has addressed the failure to file an Information in the context of a constitutional tort claim, it has opined as to how the failure to file an Information in the context of criminal cases in holding that a failure to file an Information does not implicate the right to a speedy trial under the United States Constitution in state criminal cases. In *State v. Hales*, this Court held that a “defendant must show both (1) actual prejudice and (2) delay for the purpose of gaining a tactical advantage or for other bad faith motives.” *State v. Hales*, 2007 UT 14, ¶ 44, 152 P.3d 321, 332. However, this Court made and recognized the important distinction, that until a person is arrested the “a citizen suffers no restraints on his liberty and is not the subject of public accusation,” and thus, “his situation does not compare with that of a defendant who has been arrested and held to answer.” *Id.* at ¶42.

In recognizing the distinction between failure to file information against a detained or imprisoned person and a person who is not detained, this Court cited to the Supreme Court of the United States’ holding in *United States v. Marion*, wherein the Court held that, to “legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime.” *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971). In fact, the Supreme Court of the United States acknowledged that the very harm that occurred to Appellant might result from an arrested person being denied the speedy filing of an Information, to-wit:

Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

*Id.* (Emphasis supplied).

Just as the Supreme Court of the United States foreshadowed in *Marion*, the County Attorney's failure to file an Information led, at least in part, to Appellant's incarceration for seventeen (17) days, the termination of his life-long employment, the significant loss of income and financial resources and Appellant suffering from Post-Traumatic Stress Disorder. Appellant respectfully submits that the failure to file an Information until fifteen (15) days after Appellant's release constitutes a flagrant violation of his constitutional rights.

Thus, the County Attorney's failure to file an Information was the fourth domino in this series of events that led to the unconstitutional incarceration of Robert Kuchinski for 17 days.

B. No existing remedies redressed Appellant's injuries.

As is noted throughout Appellees' pleadings, the Utah Governmental Immunity Act shields governmental entities, and their officers, agents and employees, from liability for the flagrant violations of his constitutional rights set forth in Section A hereinabove. More specifically, the Justice Court Judge and those "who perform functions closely related to the judicial process" are absolutely immunity from suit. *Sanders v. Leavitt*, 2001 UT 78, ¶ 19, 37 P.3d 1052, 1056. The County is immune from suit under the Utah Governmental Immunity Act for the actions or omissions of its employees for the false imprisonment, abuse of process, infliction of mental anguish, the institution or prosecution of any judicial proceeding, even if malicious or without probable cause and

the incarceration of Appellant in the Jail. U.C.A. § 63G-7-301(4&5)(2008). The County's Attorney has absolute judicial immunity from suit as well as the protections in the Utah Governmental Immunity Act for the actions or omissions of its employees for the false imprisonment, abuse of process, infliction of mental anguish, the institution or prosecution of any judicial proceeding, even if malicious or without probable cause and the incarceration of Appellant in the Jail. U.C.A. § 63G-7-301(4&5)(2008). The Sheriff's Office is explicitly immune from suit for any claim by Appellant regarding the Sheriff's Office's actions or omissions of its employees for the false imprisonment, abuse of process, infliction of mental anguish and incarceration of Appellant in the Jail. U.C.A. §63G-7-301(4&5) (2012).<sup>7</sup>

To the extent that Appellant could have identified one specific actor who proximately caused the flagrant violations of Appellant's constitutional rights, he/she, too would be immune because neither the County nor the Sheriff's Office promulgated, implemented and/or enforced appropriate policies and procedures to prevent the exact circumstances that give rise to Appellant's claims. Specifically, the Utah Governmental Immunity Act provides that "each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function." U.C.A. §63G-7-201(1) (2012). Thus, in so much as the County and the Sheriff's Office failed to properly promulgate, implement and/or enforce

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7. Appellant's case is, obviously, complicated even further by the fact that the Sheriff died during the pendency of the proceedings below.

appropriate policies and procedures, the employees of the Appellees were acting under color of authority and are immune from suit.

Lastly, and to the extent that Appellee invited either Judge Shelby or the District Court to err in dismissing Appellant's claims, Appellant respectfully submits that the Invited Error Doctrine prevents Appellee from relying on an error it invited either Judge Shelby or the District Court to make in obtaining absolute, blanket immunity for the Appellees. Specifically, Appellees' counsel argued to the District Court that "a Federal Court has already dismissed those Federal Due Process claims with prejudice. So this Court – it's the same operative facts. So it should be able to dismiss the Utah Due Process claim for the same reasons." R. 990. This Court has routinely affirmed that "a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error..." *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742, 744. To the extent that Appellees' counsel below invited either Judge Shelby or the District Court to err, Appellant respectfully submits that it cannot now take advantage of that error and seek blanket immunity for Appellees.

Finally, in *Jensen*, this Court has already noted that dismissal of Federal Civil Rights Claims under 42 U.S.C 1983 does not collaterally estop a Plaintiff from pursuing claims for damages under the Utah Constitution. *Jensen* at ¶49.

C. Equitable relief, such as an injunction, was and is wholly inadequate to protect the Appellant's rights or redress his injuries.

Regarding whether Appellant can show that equitable relief was and is wholly inadequate to protect his rights or redress his injuries, Appellant respectfully submits that

there was no plausible means by which Appellant could have sought equitable relief. As is set forth hereinabove, Appellant (who was not represented by counsel until just one day before his release) was not even aware of the amount of his bail such that he did not have any practical opportunity to challenge the amount of his bail. Likewise, a *habeas corpus* action would have been wholly inadequate because Appellant was incarcerated for 17 days – enough time to do substantial harm to his mental and financial wellbeing, but not enough time to seek an injunction or other equitable relief in a district court. Even the District Court acknowledged that the duration of Appellants’ incarceration made a habeas corpus petition difficult: “I mean, because it’s a lim – we’re talking about a time of limited duration and being able to process...a habe – and I’m throwing things out that you haven’t thought about, but I’m going to have to wrap my mind around remedies..” R. 1023. (Emphasis supplied).

The Utah Court of Appeals has addressed the issue of equitable relief under *Spackman* in *Friedman v. Salt Lake County* and *Intermountain Sports, Inc. v. Department of Transportation*. In *Friedman*, the Utah Court of Appeals found that equitable relief was available to a prisoner who was instructed to clean writing from his cell wall on the Sabbath. *Friedman v. Salt Lake Cty.*, 2013 UT App 137, ¶ 3, 305 P.3d 162, 163–64. In finding that the plaintiff in *Friedman* had available to him equitable relief, the Utah Court of Appeals held that he could have sought an “injunction to change the prison rules regarding work on an inmate's Sabbath...[or] the option to file a rule 65B petition for extraordinary relief.” *Id.* at ¶19. This case is factually distinguishable from *Friedman*



inasmuch as 1) Appellees acknowledge that there were simply no policies or procedures for Appellant to challenge; 2) the plaintiff in *Friedman* was a convicted felon incarcerated for a period of at least five (5) months – a timeframe in which it is reasonably practicable to bring a claim for injunctive relief as opposed to Appellant’s seventeen (17) day incarceration; and, 3) Appellant was innocent of the criminal charge that led to his incarceration.

In *Intermountain Sports*, the Utah Court of Appeals held that the plaintiff had not established that an injunction or other equitable relief was wholly inadequate to protect its interests due to the fact that “Intermountain could have sought an injunction to enjoin UDOT's purported discriminatory actions.” which occurred from July of 1997 to May of 2001. *Intermountain Sports, Inc. v. Dep't of Transp.*, 2004 UT App 405, ¶ 20, 103 P.3d 716, 721. The duration of the harm in *Intermountain Sports* equally distinguishes that case from Appellant’s case. Appellant also notes that the plaintiff in *Intermountain Sports* was a company alleging violations of the takings clause, while Appellant has alleged violations of his Due Process rights to be admitted to bail and receive notice of the amount of bail he must post to be freed from jail. Appellant respectfully submits that the incarceration of an innocent person for seventeen (17) days is factually and legally distinguishable from a company’s potential loss of property value.

**II. The District Court erred by entering a factual finding that Appellant could not show a flagrant violation of his Utah constitutional rights because the District Court found Appellees complied with former Rule 7(c)(4) of the Utah Rules of Criminal Procedure.**

In ¶ 4(a) of the Final Order, the District Court dismissed Appellant's Second Cause of Action, *inter alia*, against the County based upon his finding that the County had complied with the then existing version of Rule 7(c)(4) of the Utah Rules of Criminal Procedure, to wit:

**“Rule 7. Proceedings before magistrate...**

(c)(4) The presiding district court judge shall, in consultation with the Justice Court Administrator, develop a rotation of magistrates which assures availability of magistrates consistent with the need in that particular district.

The schedule shall take into account the case load of each of the magistrates, their location and their willingness to serve.”

(Emphasis Supplied).

The record is clear that the District Court improperly relied upon its knowledge of facts outside of the record in determining that Appellant's constitutional rights had not been flagrantly violated. For instance, counsel for Appellee acknowledged during oral argument that the Court was relying on speculation in regard to the unavailability of the Justice Court judge, to-wit:

THE COURT: Okay, but if we boil it down, though, it really wasn't a forgetfulness issue —

MR. HOPKINS: Uh-huh.

THE COURT: — in the Court's mind. It was a timing issue.

MR. HOPKINS: Uh-huh.

THE COURT: You have a judicial officer taking time off, is what I read and what I understood —

MR. HOPKINS: Uh-huh, uh-huh.

THE COURT: — and not being available —

MR. HOPKINS: And that's — that's speculative to some degree. We don't really know.

THE COURT: Well, maybe I'm reading between the lines, but that's —

MR. HOPKINS: Uh-huh.

THE COURT: — that's a question for this Court, and if that were the case —

MR. HOPKINS: Uh-huh.

THE COURT: -- who's responsible for that judicial officer's calendar? Is Box Elder County responsible for a judicial officer's calendar? R. 997-998. (Emphasis supplied)

Additionally, the District Court also relied upon his personal knowledge, including his knowledge and understanding regarding judicial rotations with the Justice Court Judge,<sup>8</sup> in making a factual finding that there had not been a flagrant violation of the Appellant's constitutional rights:

Hearing on April 5, 2016

THE COURT: -- who's responsible for that judicial officer's calendar? Is Box Elder County responsible for a judicial officer's calendar?

MR. HOPKINS: Actually if you go back to Rule 7 here --

THE COURT: Uh-huh.

MR. HOPKINS: -- it talks about that in paragraph (c)(4), where it talks about the presiding District Court Judge in consultation --

THE COURT: Yes, and we --

MR. HOPKINS: -- with the Justice Court Administrator.

THE COURT: -- yes, and we have a balance and we have rotation and we have an assignment that, I mean, I have a copy of it, and I know I'm backup this month.

MR. HOPKINS: Uh-huh.

THE COURT: I'll be on with Judge Marks later in the year and Judge Christensen-

MR. HOPKINS: Uh-huh.

THE COURT: -- and we rotate that around. I get that and I understand that. This came as a -- as a case for Justice Court in Box Elder and not for --

MR. HOPKINS: Yes, I believe so.

THE COURT: -- yeah, not for District Court direct. R. 998-999.(Emphasis supplied).

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THE COURT: Let me express this. I have some sense, and I can't rely on it, that Judges provide coverage for each other interpersonally.

MR. WEBSTER: Okay.

THE COURT: And so --

---

8. Given that the District Court Judge shares a rotational assignment with the Justice Court Judge, Appellant respectfully submits that the District Court may have had an obligation to recuse himself from the case. For the Court's reference, Judge Brandon J. Maynard recused himself from the case due to his previous employment as a prosecutor for the County and his familiarity with the underlying facts. R. 56-57.

MR. WEBSTER: But the County is the age -- the County is the in --

THE COURT: That's not before me, but I have that question.

MR. WEBSTER: Uh-huh.

THE COURT: If they -- if Judges work that out personally between them, again, is it not an issue of a judicial officer missing something for which they have immunity for versus not, and whether that has to be explored either by the Court or otherwise? R. 1018. (Emphasis supplied).

Hearing on June 27, 2016

THE COURT: That's what's hard here, because I don't want to -- I don't want to create liability for someone other than the person that may be responsible. If the Judge goes on vacation and doesn't have coverage -- not that that happened here, but that seems like that happened here -- the Judge is responsible for his calendar. R. 1048.

\*\*\*

THE COURT: I cannot hold Box Elder County responsible and liable in this situation, especially has not been shown that the results would have been any different -- well, I don't even have to go there. But if the Judge is not available, frankly there's no one for the jail, there's no one for the prosecutor to process the plaintiff in front of. That's the basis of my ruling. You know, if I'm wrong, I'm wrong, Counsel. R. 1068.

Appellant respectfully submits that, in this instance, the District Court erred in substituting its judgment for what constitutes egregious and unreasonable conduct with the judgment of the jury. That error is made even more flagrant by the District Court's repeated reference to his personal knowledge regarding judge rotations and the interpersonal agreements between judges for covering each other's schedules, during which he acknowledged that he, himself, would be a replacement judge for the District Court Judge later that year. R. 998-999. Appellant respectfully submits that, especially in this case where allegations that the actions of a judge contributed to a constitutional tort claim for the deprivation of a Plaintiff's Constitutional Due Process rights, it was improper for the District Court to substitute his judgment for what constitutes an

egregious or unreasonable violation of Appellant’s Constitutional rights for the judgment of the jury.

**III. The District Court erred in granting summary judgment based upon a finding of fact that Appellant must, but could not, identify a specific individual who flagrantly violated Appellant’s constitutional rights.**

In the face of a lack of additional guiding precedent regarding the interpretation of *Spackman*, the District Court found that Appellant could not identify a specific individual who flagrantly violated Appellant’s constitutional rights.

The District Court found upon a single sentence in finding that Appellant was required to name a specific individual actor: “The requirement that the unconstitutional conduct be “flagrant” ensures that a government employee is allowed the ordinary “human frailties of forgetfulness, distractibility, or misjudgment without rendering [him or her] self-labile for a constitutional violation.” *Spackman* at ¶ 23, R. 941. During oral argument, the Court stated that the foregoing language in *Spackman* “would be rendered meaningless if a constitutional offender was not specifically named.” R. 941-942.

However, in the *Spackman* opinion, this Court noted that in the disjunctive, that relief might be considered against a governmental agency without the necessity of having to award relief against an employee:

“We urge caution in light of the myriad policy considerations involved in a decision to award damages against a governmental agency and/or its employees for a constitutional violation.” *Spackman* at p. 7, ¶24. (Emphasis supplied).

Appellant respectfully submits that the District Court’s Final Order dismissing Appellant’s claims expanded the holding in *Spackman* to provide what would be

tantamount to blanket immunity to every government entity in the event that a plaintiff could not name, with specificity, the single, specific individual whose sole actions constituted a flagrant violation of a citizen's constitutional rights.

In essence, accountability for Constitutional violations of the rights of Utah citizens will not be actionable in Utah against a governmental entity because the Utah Legislature did not grant a waiver of liability for violation of a person's civil rights under U.C.A. §63G-7-301(5)(b)(2008). Thus, only this Court can fashion a remedy for the violation of Constitutional rights under the Utah Constitution against a Utah governmental entity. In essence, as shown above, the “Dominos” that set in action the damages caused to Appellant by the Justice Court Judge’s denial of admitting Appellant to bail followed by the Sheriff Office’s losing Appellant in the jail with the Magistrate Judge then not appearing for Court and the County Attorney not promptly filing an Information are meaningless. Such a travesty cannot be sanctioned when the series of events are all clearly established Constitutional rights and the contours of those rights should have been known by a “reasonable” Justice Court Judge, Sheriff and County Attorney who should be held accountable for their flagrant deviation from that reasonable standard. And, from Appellant’s perspective the jury should decide whether the County should be held accountable for Appellees’ misdeeds.

## CONCLUSION

The District Court erred by dismissing Plaintiff's Complaint. This Court should reverse the dismissal of Plaintiff's Second Cause of Action and remand with instructions to set the matter for a jury trial regarding Appellees violation of Appellant's Constitutional Rights under Article 1, § 7 and Article 1, § 8 of the Utah Constitution with the jury to determine the amount of damages to be awarded in favor of Appellant that were directly and proximately caused by his 17 days of incarceration in the Box Elder County Jail.

DATED this 3<sup>rd</sup> day of February, 2017.

HARWARD & ASSOCIATES



James E. Harward, Esq.  
W. Earl Webster, Esq.  
Amy Williamson, Esq.  
*Attorneys for Plaintiff/Appellant*

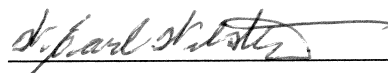
DYER LAW GROUP PLLC



Phillip W. Dyer, Esq.  
Benjamin R. Dyer, Esq.  
*Attorneys for Plaintiff/Appellant*

### CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with the type-volume limitation pursuant to Rule 24(f)(c)(1) of the Utah Rules of Appellate Procedure. The countable number of words in Appellant's Brief is 10,080 words.

  
W. Earl Webster, Esq.




**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of February, 2017, a true and correct copy of the foregoing **BRIEF OF PLAINTIFF/APPELLANT** was served by the method indicated below, to the following:

Frank Mylar, Esq.  
Andrew Hopkins, Esq.  
MYLAR LAW OFFICE  
2494 Bengal Blvd.  
Salt Lake City, Utah 84121  
*Counsel for all*  
*Defendants/Appellees*  
*mylar-law@comcast.net*

(    ) Electronic Cm/ECF Notification  
( X ) U.S. Mail, Postage Prepaid  
(    ) Hand Delivered  
(    ) Overnight Mail  
(    ) Facsimile  
( X ) Email

  
\_\_\_\_\_  
W. Earl Webster, Esq.



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**IN THE UTAH SUPREME COURT**

---

ROBERT KUHCINSKI, an individual,

Plaintiff/Appellant

v.

BOX ELDER COUNTY, a political  
subdivision of the state of Utah; and THE  
OFFICE OF THE BOX ELDER  
COUNTY SHERIFF, an administrative  
subdivision of Box Elder County,

Defendants/Appellees

Appellate Case No. 20160674-SC

---

**ADDENDUM TO BRIEF OF PLAINTIFF/APPELLANT**

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**ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
CACHE COUNTY, STATE OF UTAH  
The Honorable Brian Cannell, Presiding  
District Court Case No. 150100424**

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## **A. Constitutional Provisions**

### **Utah Const. Art. I § 7**

No person shall be deprived of life, liberty or property, without due process of law.

### **Utah Const. Art. I § 8**

(1) All persons charged with a crime shall be bailable except:

- (a) persons charged with a capital offense when there is substantial evidence to support the charge; or
- (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or
- (c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

### **Utah Const. Art. I § 26**

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

## **B. Statutes**

### **U.C.A §17-22-1, et. seq.(1933)**

“Process” as used in this chapter includes all writs, warrants, summonses and orders of the courts of justice or judicial officers. “Notice” includes all papers and orders, except process, required to be served in any proceeding before any court, board, commission or officer, or when required by law to be served independently of such proceedings.

### **U.C.A §17-22-2 (1)(e)(2009)**

(1) The sheriff shall:...

- (e) attend county justice courts if the judge finds that the matter before the

court requires the sheriff's attendance for security, transportation, and escort of jail prisoners in his custody, or for the custody of jurors;

**U.C.A §17-22-2(1)(g&h)(2009)**

(1) The sheriff shall:...

(g) take charge of and keep the county jail and the jail prisoners;

(h) receive and safely keep all persons committed to his custody, file and preserve the commitments of those persons, and record the name, age, place of birth, and description of each person committed;

**U.C.A §17-22-2(2)(2009)**

(2) Violation of Subsection (1)(j) is a class C misdemeanor. Violation of any other subsection under Subsection (1) is a class A misdemeanor.

**U.C.A §17-22-2(3)(b)(i)(2009)**

(b) A sheriff in a county which includes within its boundary a police local district or police interlocal entity, or both:

(i) serves as the chief executive officer of each police local district and police interlocal entity within the county with respect to the provision of law enforcement service within the boundary of the police local district or police interlocal entity, respectively;...

**U.C.A. §17-22-4(1)(b&c)(1993)**

(1) The common jails in the several counties shall be kept by the sheriffs, and shall be used for:

(a) the detention of persons committed to jail to secure their attendance as witnesses in criminal cases;

(b) the detention of persons charged with crime and committed for trial;

(c) the confinement of persons committed for contempt, or upon civil process, or by other authority of law; and

(d) the confinement of persons sentenced to imprisonment upon conviction of crime.

**U.C.A. §17-22-5(1) & (4) (2004)**

(1) Except as provided in Subsection (4), the sheriff shall adopt and implement written policies for admission of prisoners to the county jail and the classification of persons incarcerated in the jail which shall provide for the separation of prisoners by gender and by such other factors as may reasonably provide for the safety and well-being of inmates and the community. To the extent authorized by law, any written admission policies shall be applied equally to all entities using the county correctional facilities.

...

(4) This section may not be construed to authorize a sheriff to modify provisions of a contract with the Department of Corrections to house in a county jail persons sentenced to the Department of Corrections.

**U.C.A. §17-50-501(2)(c)(2004)**

A county with a population of 31,000 or more but less than 125,000 is a county of the third class

**U.C.A. §41-6a-502(2010)**

(1) A person may not operate or be in actual physical control of a vehicle within this state if the person:

- (a) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
  - (b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
  - (c) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.
- (2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.
- (3) A violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6a-510.
- (4) Beginning on July 1, 2012, a court shall, monthly, send to the Division of Occupational and Professional Licensing, created in Section 58-1-103, a report containing the name, case number, and, if known, the date of birth of each person convicted during the preceding month of a violation of this section for whom there is evidence that the person was driving under the influence, in whole or in part, of a prescribed controlled substance.

**U.C.A. §41-6a-505(1)(a)(i)(A)(2005)**

(1) A person may not operate or be in actual physical control of a vehicle within this state if the person:

- (a) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
- (b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
- (c) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) A violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6a-510.

(4) Beginning on July 1, 2012, a court shall, monthly, send to the Division of Occupational and Professional Licensing, created in Section 58-1-103, a report containing the name, case number, and, if known, the date of birth of each person convicted during the preceding month of a violation of this section for whom there is evidence that the person was driving under the influence, in whole or in part, of a prescribed controlled substance.

**U.C.A. §41-6a-710(1)(2009)**

On a roadway divided into two or more clearly marked lanes for traffic the following provisions apply:

(1)(a) A person operating a vehicle:

(i) shall keep the vehicle as nearly as practical entirely within a single lane; and

(ii) may not move the vehicle from the lane until the operator has reasonably determined the movement can be made safely.

(b) A determination under Subsection (1)(a)(ii) is reasonable if a reasonable person acting under the same conditions and having regard for actual and potential hazards then existing would determine that the movement could be made safely.

**U.C.A. §63G-7-201(1)(2012)**

(1) Except as may be otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.

**U.C.A. §63G-7-301(4)(2008)**

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.

**U.C.A. §63G-7-301(5)(2008)**

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;



- (b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;
- (d) a failure to make an inspection or by making an inadequate or negligent inspection;
- (e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (f) a misrepresentation by an employee whether or not it is negligent or intentional;
- (g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (h) the collection of and assessment of taxes;
- (i) the activities of the Utah National Guard;
- (j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (k) any natural condition on publicly owned or controlled lands;
- (l) any condition existing in connection with an abandoned mine or mining operation;
- (m) any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;
- (n) the operation or existence of a pedestrian or equestrian trail that is along a ditch, canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river, if:
  - (i) the trail is designated under a general plan adopted by a municipality under Section 10-9a-401 or by a county under Section 17-27a-401;
  - (ii) the trail right-of-way or the right-of-way where the trail is located is open to public use as evidenced by a written agreement between the owner or operator of the trail right-of-way, or of the right-of-way where the trail is located, and the municipality or county where the trail is located; and
  - (iii) the written agreement:
    - (A) contains a plan for operation and maintenance of the trail; and
    - (B) provides that an owner or operator of the trail right-of-way or of the right-of-way where the trail is located has, at minimum, the same level of immunity from suit as the governmental entity in connection with or resulting from the use of the trail.
- (o) research or implementation of cloud management or seeding for the clearing of fog;
- (p) the management of flood waters, earthquakes, or natural disasters;
- (q) the construction, repair, or operation of flood or storm systems;

- (r) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6a-212;
- (s) the activities of:
  - (i) providing emergency medical assistance;
  - (ii) fighting fire;
  - (iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (iv) emergency evacuations;
  - (v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or
  - (vi) intervening during dam emergencies;
- (t) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources--Division of Water Resources; or
- (u) unauthorized access to government records, data, or electronic information systems by any person or entity.

**U.C.A. §77-1-6(h)(1980)**

(1) In criminal prosecutions the defendant is entitled:...

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

**U.C.A. §77-20-1, et. seq.(2008)**

(1) A person charged with or arrested for a criminal offense shall be admitted to bail as a matter of right, except if the person is charged with a:

(a) capital felony, when the court finds there is substantial evidence to support the charge;

(b) felony committed while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when the court finds there is substantial evidence to support the current felony charge;

(c) felony when there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community, or is likely to flee the jurisdiction of the court, if released on bail; or

(d) felony when the court finds there is substantial evidence to support the charge and it finds by clear and convincing evidence that the person violated a material condition of release while previously on bail.

(2) Any person who may be admitted to bail may be released either on the person's own recognizance or upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court that will reasonably:

- (a) ensure the appearance of the accused;
  - (b) ensure the integrity of the court process;
  - (c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and
  - (d) ensure the safety of the public.
- (3)(a) The initial order denying or fixing the amount of bail shall be issued by the magistrate or court issuing the warrant of arrest or by the magistrate or court presiding over the accused's first judicial appearance.
- (b) A person arrested for a violation of a criminal protective order issued pursuant to Section 77-36-2.5 may not be released prior to the accused's first judicial appearance.
- (4) The magistrate or court may rely upon information contained in:
- (a) the indictment or information;
  - (b) any sworn probable cause statement;
  - (c) information provided by any pretrial services agency; or
  - (d) any other reliable record or source.
- (5)(a) A motion to modify the initial order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit any victim to be notified and be present.
- (b) Hearing on a motion to modify may be held in conjunction with a preliminary hearing or any other pretrial hearing.
- (c) The magistrate or court may rely on information as provided in Subsection (4) and may base its ruling on evidence provided at the hearing so long as each party is provided an opportunity to present additional evidence or information relevant to bail.
- (6) Subsequent motions to modify bail orders may be made only upon a showing that there has been a material change in circumstances.
- (7) An appeal may be taken from an order of any court denying bail to the Supreme Court, which shall review the determination under Subsection (1).
- (8) For purposes of this section, any arrest or charge for a violation of Section 76-5-202, aggravated murder, is a capital felony unless:
- (a) the prosecutor files a notice of intent to not seek the death penalty; or
  - (b) the time for filing a notice to seek the death penalty has expired and the prosecutor has not filed a notice to seek the death penalty.

**U.C.A §77-20-1(3)(a)(2008)**

(3)(a) The initial order denying or fixing the amount of bail shall be issued by the magistrate or court issuing the warrant of arrest or by the magistrate or court presiding over the accused's first judicial appearance.

**U.C.A. §77-20-1(5)(a-c)(2008)**

(5)(a) A motion to modify the initial order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit any victim to be notified and be present.

(b) Hearing on a motion to modify may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(c) The magistrate or court may rely on information as provided in Subsection (4) and may base its ruling on evidence provided at the hearing so long as each party is provided an opportunity to present additional evidence or information relevant to bail.

**U.C.A. §78A-3-102(3)(k)(2009)**

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

...

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

**U.C.A. §78A-5-102(6)(2010)**

(6) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78A-3-102 and 78A-4-103.

**U.C.A. §78A-7-102(3)(a-c)(2012)**

(3)(a) Municipalities or counties of the third, fourth, or fifth class may create a justice court by demonstrating the need for the court and filing a written declaration with the Judicial Council on or before July 1 at least one year prior to the effective date of the election.

(b) A municipality or county establishing a justice court shall demonstrate to the Judicial Council that a justice court is needed. In evaluating the need for a justice court, the Judicial Council shall consider factors of population, case filings, public convenience, availability of law enforcement agencies and court support services, proximity to other courts, and any special circumstances.

(c) The Judicial Council shall certify the establishment of a justice court pursuant to Section 78A-7-103, if the council determines:

(i) a need exists;

(ii) the municipality or county has filed a timely application; and

(iii) the proposed justice court will be in compliance with all of the operating standards established by statute and the Judicial Council.

**U.C.A. §78A-7-102(2012)**

(1)(a) For the purposes of this section, to “create a justice court” means to:

(i) establish a justice court; or

(ii) establish a justice court under Title 11, Chapter 13, Interlocal Cooperation Act.

(b) For the purposes of this section, if more than one municipality or county is collectively proposing to create a justice court, the class of the justice court shall be determined by the total citations or cases filed within the territorial jurisdiction of the proposed justice court.

(2) Municipalities or counties of the first or second class may create a justice court by filing a written declaration with the Judicial Council on or before July 1 at least two years prior to the effective date of the election. Upon demonstration of compliance with operating standards as established by statute and the Judicial Council, the Judicial Council shall certify the creation of the court pursuant to Section 78A-7-103.

(3)(a) Municipalities or counties of the third, fourth, or fifth class may create a justice court by demonstrating the need for the court and filing a written declaration with the Judicial Council on or before July 1 at least one year prior to the effective date of the election.

(b) A municipality or county establishing a justice court shall demonstrate to the Judicial Council that a justice court is needed. In evaluating the need for a justice court, the Judicial Council shall consider factors of population, case filings, public convenience, availability of law enforcement agencies and court support services, proximity to other courts, and any special circumstances.

(c) The Judicial Council shall certify the establishment of a justice court pursuant to Section 78A-7-103, if the council determines:

(i) a need exists;

(ii) the municipality or county has filed a timely application; and

(iii) the proposed justice court will be in compliance with all of the operating standards established by statute and the Judicial Council.

(4)(a) A municipality that has an established justice court may expand the territorial jurisdiction of its justice court by entering into an agreement pursuant to Title 11, Chapter 13, Interlocal Cooperation Act, with one or more other municipalities, or the county in which the municipality exists.

(b) A justice court enlarged under this section may not be considered as establishing a new justice court. An expanded justice court shall demonstrate that it will be in compliance with all of the requirements of the operating standards as established by statute and the Judicial Council before the justice court expands.

(c) A municipality or county seeking to expand the territorial jurisdiction of a justice court shall notify the Judicial Council:

(i) no later than the notice period required in Section 78A-7-123, when the expanded justice court is a result of the dissolution of one or more justice courts;  
or

(ii) no later than 180 days before the expanded court seeks to begin operation when the expanded justice court is a result of other circumstances.

(d) The Judicial Council shall certify the expansion of a justice court if it determines that the expanded justice court is in compliance with the operating standards established by statute and the Judicial Council.

(5) Upon request from a municipality or county seeking to create a justice court, the Judicial Council may shorten the time required between the city's or county's written declaration or election to create a justice court and the effective date of the election.

(6) The Judicial Council may by rule provide resources and procedures adequate for the timely disposition of all matters brought before the courts. The administrative office of the courts and local governments shall cooperate in allocating resources to operate the courts in the most efficient and effective manner based on the allocation of responsibility between courts of record and not of record.

**U.C.A. §78A-7-103(2012)**

(1) The Judicial Council shall ensure that:

(a) procedures include requirements that every municipality or county that establishes or maintains a justice court provide for the following minimum operating standards:

(i) a system to ensure the justice court records all proceedings with a digital audio recording device and maintains the audio recordings for a minimum of one year;

(ii) sufficient prosecutors to perform the prosecutorial duties before the justice court;

(iii) adequate funding to defend all persons charged with a public offense who are determined by the justice court to be indigent under Title 77, Chapter 32, Indigent Defense Act;

(iv) sufficient local peace officers to provide security for the justice court and to attend to the justice court when required;

(v) sufficient clerical personnel to serve the needs of the justice court;

(vi) sufficient funds to cover the cost of travel and training expenses of clerical personnel and judges at training sessions mandated by the Judicial Council;

(vii) adequate courtroom and auxiliary space for the justice court, which need not be specifically constructed for or allocated solely for the justice court when existing facilities adequately serve the purposes of the justice court; and

(viii) for each judge of its justice court, a current copy of the Utah Code, the Utah Court Rules Annotated, the justice court manual published by the state court administrator, the county, city, or town ordinances as appropriate, and other legal reference materials as determined to be necessary by the judge; and

(b) the Judicial Council's rules and procedures shall:

(i) presume that existing justice courts will be recertified at the end of each four-year term if the court continues to meet the minimum requirements for the establishment of a new justice court; or

(ii) authorize the Judicial Council, upon request of a municipality or county or upon its own review, when a justice court does not meet the minimum requirements, to:

(A) decline recertification of a justice court;

- (B) revoke the certification of a justice court;
- (C) extend the time for a justice court to comply with the minimum requirements;
- or
- (D) suspend rules of the Judicial Council governing justice courts, if the council believes suspending those rules is the appropriate administrative remedy for the justice courts of this state.

## **C. Rules**

### **Utah R. Crim. P. 7(b)(2012)**

(b) When any peace officer or other person makes an arrest with or without a warrant, the person arrested shall be taken to the nearest available magistrate for setting of bail. If an information has not been filed, one shall be filed without delay before the magistrate having jurisdiction over the offense.

### **Utah R. Crim. P. 7(c)(1)(2014)**

(c)(1) In order to detain any person arrested without a warrant, as soon as is reasonably feasible but in no event longer than 24 hours after the arrest, a determination shall be made as to whether there is probable cause to continue to detain the arrestee. The determination may be made by any magistrate, although if the arrestee is charged with a capital offense, the magistrate may not be a justice court judge. The arrestee need not be present at the probable cause determination.

### **Utah R. Crim. P. 7(c)(4)(2014)**

(c)(4) The presiding district court judge shall, in consultation with the Justice Court Administrator, develop a rotation of magistrates which assures availability of magistrates consistent with the need in that particular district. The schedule shall take into account the case load of each of the magistrates, their location and their willingness to serve.

### **Utah R. Civ. P. 56(a)(2016)**

(a) **Motion for summary judgment or partial summary judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.





The Order of the Court is stated below:

Dated: July 18, 2016  
12:46:33 PM

/s/ BRIAN CANNELL  
District Court Judge



Frank D. Mylar (5116)  
Andrew R. Hopkins (13748)  
Mylar Law, P.C.  
2494 Bengal Blvd.  
Salt Lake City, Utah 84121  
Phone: (801) 858-0700  
FAX: (801) 858-0701  
Mylar-Law@comcast.net

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

<b>ROBERT KUCHCINSKI,</b>  Plaintiff,  v.  <b>BOX ELDER COUNTY, et al.,</b>  Defendant.	<b>FINAL ORDER AND JUDGMENT GRANTING SUMMARY JUDGMENT</b>  Case No. 150100424  Judge Brian Cannell
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This matter comes before the Court on Defendant's *Motion for Summary Judgment* and Plaintiff's *Motion for Partial Summary Judgment as to Liability Reserving Amount of Damages to Trail*. The Court held a hearing on the motions on April 5, 2016. At the hearing, Plaintiff was represented by W. Earl Webster and Amy L. Williamson, and Defendant was represented by Frank D. Mylar and Andrew R. Hopkins. The Court took the matter under advisement.

The Court held an additional hearing on the motions via telephone on April 26, 2016. Plaintiff was represented by W. Earl Webster, and Defendant was represented by Frank D. Mylar

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and Andrew R. Hopkins. At that hearing the Court entered partial summary judgment in favor of Defendant and ordered further briefing.

The Court held a final hearing on the motions on June 27, 2016. Plaintiff was represented by W. Earl Webster and Amy L. Williamson, and Defendant was represented by Andrew R. Hopkins. Having considered the foregoing, it is hereby **ORDERED**:

1. Plaintiff's Negligence claim is **DISMISSED WITH PREJUDICE**. Plaintiff withdrew this claim in briefing, and it is also barred by the Utah Governmental Immunity Act, Utah Code Ann. § 63G-7-101 to -904 (2016).

2. Plaintiff's False Imprisonment claim is **DISMISSED WITH PREJUDICE**. The Court finds that this claim is barred by Utah Code Ann. § 63G-7-201(4)(b) and (j) (2016).<sup>1</sup> In addition, the existence of Probable Cause to detain Plaintiff as found by the state justice court also bars this claim in this case.

3. All claims against Defendant Box Elder County Sheriff's Office and any of its employees are **DISMISSED WITH PREJUDICE** from this suit. The Court finds that the Box Elder County Sheriff's Office and its employees were following a facially valid court order in detaining Plaintiff and that there was a valid bail order.

4. All claims against Defendant Box Elder County are **DISMISSED WITH PREJUDICE** based upon the following factual findings:

a. Plaintiff received a Probable Cause determination in procedural compliance with Utah Rule of Criminal Procedure 7(c)(4).

b. Even if Plaintiff was not brought before a judge in a timely manner, counsel for Box Elder County do not control court calendars because of the separation of powers between the County and the judicial system. Box Elder County has no duty to ensure judges

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are available.

c. Plaintiff cannot identify any Box Elder County individual who flagrantly violated his Utah constitutional rights.

d. Plaintiff cannot show any flagrant violation of his Utah constitutional rights by Box Elder County.

For the foregoing reasons, the Court enters judgment in favor of Defendant Box Elder County. All of Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

THE ELECTRONIC SIGNATURE OF THE COURT IS AT THE TOP OF THE FIRST PAGE OF THIS ORDER  
AND JUDGMENT

Approved as to form:

*/s/ W. Earl Webster*

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W. Earl Webster  
Attorney for Plaintiff


In 2012 when the events of this lawsuit occurred, these statutory immunities were located at Utah Code Ann. § 63G-7-301(5)(b) and (j) (2012). However, as related to this matter there are no substantive difference in the immunities provided between the 2012 and 2016 versions.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of February, 2017, a true and correct copy of the foregoing **ADDENDUM TO BRIEF OF PLAINTIFF/APPELLANT** was served by the method indicated below, to the following:

Frank Mylar, Esq.  
Andrew Hopkins, Esq.  
MYLAR LAW OFFICE  
2494 Bengal Blvd.  
Salt Lake City, Utah 84121  
*Counsel for all*  
*Defendants/Appellees*  
*mylar-law@comcast.net*

(    ) Electronic Cm/ECF Notification  
( X ) U.S. Mail, Postage Prepaid  
(    ) Hand Delivered  
(    ) Overnight Mail  
(    ) Facsimile  
( X ) Email

  
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W. Earl Webster, Esq.