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

IN THE UTAH SUPREME COURT

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	Appellate Case No. 20160674-SC

REPLY BRIEF OF PLAINTIFF/APPELLANT

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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INTRODUCTION

In 2014, this Court reduced the timeframe for an arrested person to be taken to the nearest available magistrate for the setting of bail from 48 hours to 24 hours under Rule 7 of the Utah Rules of Criminal Procedure. Appellees' Brief makes it clear that Appellees believe that the timeframe should reasonably be set at seventeen (17) days. Appellant respectfully submits that it should be up to a jury of his peers, not a judge ruling on a motion for summary judgment by making findings of fact, to determine whether a municipality's failure to bring an arrestee before a magistrate constitutes a flagrant violation of an arrestee's constitutional rights.

Importantly, Appellees' Brief does not respond to Appellant's assertion that the District Court erred in granting Appellees' Motion for Summary Judgment based upon a finding of fact that Appellant did not suffer a flagrant violation of his constitutional rights. Appellees spend ample time reviewing the factors in *Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, 16 P.3d 533 and deflecting from the issue of the District Court's *factual* findings that underpin its granting Appellees' Motion for Summary Judgment, yet fail to argue that the District Court appropriately made findings of fact regarding the flagrant nature of Appellant's continued jailing.[1] Appellees' failure to address the District Court's factual findings is especially confounding when considering that the Appellant submitted an affidavit in the proceedings below averring that he was

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1. At one point, Appellees even go so far as to argue that Appellant had a duty to marshal facts – a procedural point that would and should be well taken had there been a trial. *See*, Appellees Brief at page 15. There was, however, no trial.

never informed of the amount of the bail set by the Justice Court– a contention not refuted by Appellees.

ARGUMENT

I. The issues raised in Appellant's Brief were preserved below.

Appellant respectfully submits that the issues addressed in Appellant's Brief were preserved in the proceedings below and that Appellant's Brief contains citations to the relevant portions of the record demonstrating that those issues were raised and preserved. Appellees are aware that these issues were raised and preserved, as Appellees' counsel has remained the same throughout these proceedings, but Appellees continue to argue that technicalities foreclose Appellant from obtaining any relief for the denial of his constitutional rights, ostensibly in an attempt to obtain blanket immunity for Appellees. Notably, Appellees do not argue that the issues regarding the interpretation and application of *Spackman* were not raised or preserved, but that they were not specifically cited to in one portion of Appellant's Brief. Appellees argue, without citation to any supporting case law,[2] that not citing to the preservation in one specific portion of Appellant's Brief is fatal to Appellant's appeal. However, this Court has indicated that it may also look to "the argument second of their brief" that contain "citations to the record

2. This Court has refused to rule on cases where an Appellant failed to cite to specific preservation in the record where the issue was not raised and preserved below or where the Appellant thereafter argues plain error. Inasmuch as Appellant cited to the preservation of the arguments throughout Appellant's Brief, it is clear that Appellant raised and preserved the issues addressed in Appellant's Brief and is not asserting plain error here. *See*, *Don Juan* at ¶¶21-22, 844.

showing that the claim was actually preserved." *Ortega v. Ridgewood Estates LLC*, 2016 UT App 131, ¶ 27, 379 P.3d 18, 25, cert. denied sub nom. *Ortega v. Ridgewood Estates*, 384 P.3d 568 (Utah 2016) citing to *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 101, 299 P.3d 990. Importantly the, "purpose of the preservation requirement is to put the district court on notice of an issue and provide it with an opportunity to rule on it." *Donjuan v. McDermott*, 2011 UT 72, ¶ 20, 266 P.3d 839, 843. As demonstrated below, Appellant's Brief contains relevant record cites demonstrating that the issues raised in Appellant's Brief were, in fact, preserved below and that the District Court was on notice of the issues before it and made rulings which are now the subject of this appeal.

Appellant would first note that, as set forth in Appellant's Brief at footnote 3, the District Court's Final Order did not reach the second and third Spackman factors, as the Final Order (drafted by Appellees) made a *finding of fact* that Appellant had not suffered a flagrant violation of his constitutional rights. Thus, Appellant respectfully submits that the threshold issue before this Court is whether the District Court erred in granting summary judgment (based upon findings of fact) that Appellant had not suffered a flagrant violation of his constitutional rights. The First Issue in Appellant's Brief – "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?" –was clearly preserved and is referenced in the "Course of the Proceedings and Disposition Below" section of Appellant's Brief, wherein Appellant

cited this Court to the Final Order in which the District Court made the "factual finding" that, "Plaintiff cannot show any flagrant violation of his Utah constitutional rights by Box Elder County." *See*, Appellant's Brief at 6-7, citing to the Final Order (R. 984-986) and Appellant's Supplemental Brief in Response to Questions Raised by the Court Following April 5, 2016 Hearing on Cross Motions for Summary Judgment ("Appellant's Supplemental Brief") R. 868-886. Appellant's Supplemental Brief below explicitly argued that "retaining Plaintiff in Jail was a flagrant violation of Plaintiff's due process rights." R. 876. Appellant's Supplemental Brief thereafter spends no less than nine (9) pages arguing that the Appellees committed flagrant violations of Appellant's constitutional rights for various reasons, including that Appellant was "never been hailed before a magistrate…" R. 876 at FN 2.

Regarding the second *Spackman* factor – no other existing remedies – this issue was also raised and preserved in Appellant's Supplemental Brief as well as at oral argument. Appellant's Brief at 7, R. 879. Lastly, Appellant's Supplemental Brief cited to the arguments entertained by the District Court regarding the third *Spackman* factor – equitable relief as being wholly inadequate –during oral argument when the District Court inquired as to whether a potential habeas corpus claim was sufficient to satisfy the third *Spackman* factor. The Court specifically stated that it was "going to have to wrap my mind around remedies" after stating "we're talking about a time of limited duration and being able to process a habe[as]" corpus action." Appellant's Brief at 32-33; R. 1023. During that exchange, the Court specifically inquired of counsel, "let's talk for just a

second. Habeas corpus…you're wrongfully imprisoned. Habeas corpus under the State of Utah, the law, is available." R. 1022. Appellant's counsel argued, however, that Judge Shelby, in fact, found that a habeas corpus action was "not available." R. 1024. The District Court clarified – "So your position still is for it to be a remedy it would have to be one that is actual[ly] available to…the party." R. 1024. It is clear from the record below that the First Issue on appeal was preserved below.

Regarding the Second Issue in Appellant's Brief – "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?"– the thrust of this argument, and the repeated contention by Appellant in opposing Appellees' Motion for Summary Judgment below, is that the factual issue of whether Appellees' actions constituted a flagrant violation of Appellant's constitutional rights is a question for a jury of Appellant's peers, not for a judge to decide. R. 697, 957. This argument was clearly preserved.

Regarding the Third Issue in Appellant's Brief – "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?" – Appellant's Brief also cites to the hearing wherein the Appellant argued, and the Court addressed, that naming a specific governmental employee is necessary to satisfying the *Spackman* factors. *See*, Appellant's Brief at 38, R. 941-942. The oral argument was held after the Court requested the parties address this specific

issue, which was briefed in Appellant's Supplemental Brief and thus the issue was raised and preserved. R. 879.

Appellees also contend that Appellant has raised new issues – that Article 1, Section 8 of the Utah Constitution (the "Bail Clause") is self-executing, that being admitted to bail is meant to serve as a first judicial appearance as well as "interpretation" of the Bail Statute and the Sheriff Statute. However, those issues are not "new" issues or arguments, but were all raised in the proceedings below: that the Bail statute is self-executing by Appellant (R. 444); whether being admitted to bail serves as a first judicial appearance by Appellees (R. 996-997); interpretation of the Bail Statute by Appellant (in the Complaint at R.12 and upon further briefing at R. 436-37); and, that the Sheriff had an obligation to ensure Appellant was tracked and transported to the Justice Court (R. 241-245). Appellees are aware of the arguments set forth in Appellant's Brief because they were all addressed in no less than two (2) rounds of briefing and oral argument below, yet argues those issues were not raised or preserved. Appellant respectfully submits that the issues were preserved below and Appellees' argument is contradicted by the record below.

II. Appellees' Brief requests this Court to reach issues not presented in Appellant's Brief.

Despite the fact that Appellees have not filed a cross-appeal, Appellees' Brief invites the Court to go beyond the issues before it and hold that the Appellees cannot be liable under United States Supreme Court precedent interpreting 42 U.S.C. §1983 (the "§1983 analysis"); to hold that the right to an arraignment to hold that Appellees are

judicially immune or, alternatively, to hold that the right to an arraignment is not guaranteed by the Utah Constitution. Appellees' Brief at 44-54.

A. Application of §1983 analysis is improper as it relates to Appellant's Utah constitutional law claims.

Appellees invite the Court to apply a §1983 analysis to Appellant's Utah constitutional claims, arguing that the relief afforded under §1983 is "substantially the same" as Appellant's state law claims. What Appellees truly seek is to apply collateral estoppel to the denial of Appellant's federal claims in order to deny Appellant's state law claims. This approach has been explicitly rejected by this Court in *Jensen ex rel. Jensen v. Cunningham*, to-wit: "The determinations made by the federal judge, under federal law, regarding the materiality of the facts or the inferences that could be drawn from those facts were not dispositive as to questions arising under state law." *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 44, 250 P.3d 465, 477. In *Jensen*, this Court entertained the exact same argument – that it should apply the standard for §1983 claims to Utah constitutional claims – and held that "the standards for state and federal constitutional claims are different because they are based on different constitutional language and different interpretive case law." *Id.* at ¶45, 477-478. This Court continued that, while the U.S. and Utah Constitutions are "substantially the same, similarity of language 'does not indicate that this court moves in 'lockstep' with the United States Supreme Court's [constitutional] analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution." *Id.* at ¶46, 478

citing *Bailey v. Bayles*, 2002 UT 58, ¶ 11 n. 2, 52 P.3d 1158. (*Bailey* is relied upon by Appellees in requesting affirmation of the Final Order on other grounds.)

Moreover, the Eighth Amendment to the United States Constitution is simpler than the Bail Clause, which includes exceptions to the right to bail for capital crimes, probationers, parolees, danger to the community or a risk of fleeing the jurisdiction.[3] Indeed, the necessity of the Bail Clause is made clear in *State v. Kastanis*, wherein this Court reviewed its history and stated that the "outright repeal of section 8 [the Bail Clause] might inadvertently extinguish a general presumption in favor of allowing release on bail prior to conviction of a crime..." *State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993). This Court thereafter acknowledged that the exceptions to the Bail Clause "by inference guaranteed bail to all others as a matter of right." *Id.* (Emphasis supplied).

Ultimately, it is "[t]his court, not the United States Supreme Court, [which] has the authority and obligation to interpret Utah's constitutional guarantees ... and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language." *Jensen* at ¶46. (Emphasis supplied). This Court thereafter went on to reject the very application of the law that Appellees now request because analysis of

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3. The Eighth Amendment to the United States Constitution provides, simply, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In contrast, the Utah Constitution provides exceptions for, "(1)(a) persons charged with a capital offense....(b) persons charged with a felony while on probation or parole...(c) persons charged with any other crime, ...if there is substantial 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." Utah Const. art. I, § 8.

§1983 claims "must be based on the language of the Federal Constitution" whereas "to recover monetary damages for a violation of the Utah Constitution, a plaintiff must demonstrate that the provision violated by the defendant is self-executing and then must establish" the three *Spackman* factors. *Id.* at ¶47. Analysis of the *Spackman* factors "must be based on the language of the Utah Constitution." *Id.* at ¶48. Appellant respectfully submits that this Court has made it clear that analysis of Utah constitutional claims applies the primacy approach and is an independent analysis of a parties' Utah constitutional law claims.

B. Appellant's lack of a policy for the tracking of inmates makes proving a claim against an individual virtually impossible.

Appellees' Brief also argues that Appellant cannot identify a constitutionally defective policy or training by Appellees and therefore Appellant's claims must fail by law. However, Appellant cannot identify a policy because there were apparently no policies for the tracking of inmates promulgated by Appellees. Appellees' Brief attempts to piggyback the legal analysis regarding Appellant's 42 U.S.C. §1983 action in asserting that Appellant could only be successful if he could prove that Appellees acted "pursuant to official municipal policy" which caused Appellant's injury. Appellees Brief at 45.

Not only is Appellees' argument improper inasmuch as it attempts to shoehorn an inapplicable federal law analysis in support of denying a Utah constitutional claim but also fails because the Appellees have admitted that there were simply no policies ever promulgated. Specifically, Appellees cannot cite to an actual policy promulgated by Box Elder Sheriff J. Lynn Yeates (R. 156) or Commander Sandy Huthman (the officer

responsible for the "overall administration of the Jail" - R. 161) regarding the tracking of inmates entering and leaving the Jail but merely that it was the general "policy of the Box Elder County Jail to accept custody of arrestees who are lawfully presented by an arresting officer." R. 156, 161. Appellant respectfully submits that this Court should not sanction the Appellees violations of Appellant's Utah constitutional rights when that very violation results from their own disregard of their statutory obligations. Such a ruling would only incentivize governmental entities to ignore their constitutional and statutory obligations to the citizens of Utah as well as those traveling within Utah's borders.

C. The Deliberate Indifference Standard.

Appellees request the Court to apply the deliberate indifference standard to claims for violations of an arrested person's rights enshrined in the Bail Clause. However, the deliberate indifference standard was applied by this Court in *Bott* because it "protects prisoners from cruel and unusual punishments..." *Bott* at 740. (Emphasis supplied). Arrested persons are not prisoners. Arrestees are constitutionally entitled to legal counsel, the right to cross-examine and confront witnesses against them and a trial before jury of their peers. And, most importantly, before exercising all of their constitutional rights, they are constitutionally entitled to personally appear before a magistrate and be admitted to bail where he/she is informed of the charges, advised of the amount of bail and inquired of as to whether he/she can afford an attorney.[4] Arrested persons are

4. In order for a habeas corpus petition to "be available," a person needs to be "present" before a court. It is not disputed that this never occurred in this case for seventeen (17) days.

presumed innocent until proven guilty. Appellant therefore submits that the deliberate indifference standard is specific to prohibitions against cruel and unusual punishment of *prisoners*, not the right of an arrested person to bail, and is inapplicable to claims brought under the Bail Clause.

D. Appellees are not judicially immune.

Appellees argue out of one side of their mouth that, due to the separation of powers amongst the three branches of the government, Appellees do not control the Justice Court's calendar and are not liable in any way for the failures of the Justice Court while arguing out of the other side of their mouth that they are judicially immune from suit for failing to ensure Appellant's right to an arraignment and notice of the setting of bail. Appellant respectfully submits that Appellees cannot have it both ways – Appellees either do not control the Justice Court, and thus are not judicially immune, or exercise control of the Justice Court in which case they owed an obligation to Appellant to ensure he was arraigned and admitted to bail. Nonetheless, and most importantly, if the Appellees are granted judicial immunity, Appellant truly would be deprived of any remedy for the violation of his constitutional rights and there would be no other party against whom he could seek redress.

E. The right to an arraignment is guaranteed under the Due Process Clause of the Utah Constitution.

Appellees cite to *United States v. Coffman*, 567 F.2d 960, 961 (10th Cir. 1977) in support of the argument that Appellant does not have a constitutional right to an arraignment under the Utah Constitution. However, the appellant in *Coffman*

"acknowledged before going to trial that he had been given a copy of the indictment" and did "not claim that he was not fully prepared for trial" such that the Court determined he was not prejudiced by the lack of an arraignment. Conversely, in the case at bar, Appellant explicitly argues that he was prejudiced by the failure of the Appellees to admit Appellant to bail, arraign Appellant of the charges against him and provide notice of the amount of bail that had been set. Thus, the facts in *Coffman* are inapplicable here as is the holding in *Coffman*.

Moreover, the Federal Rules of Civil Procedure have been clarified by case law since the holding in *Coffman*, and the notes to Rule 10 provides that, "[r]ead together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment." *See*, notes to 2002 Amendments to Fed. R. Crim. P. 10, citing to *Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990). The annotations continue, "A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing." *Id.* As is clear from the interpretation of Fed. R. Crim. P. 10, the right to be personally present at an arraignment is a constitutional right, not an option subject to the convenience of the governmental entity in charge of an arrested person.

F. The record demonstrates that the actions of Appellees directly harmed Appellant.

Appellees again contend that a federal standard – the "direct causal link" standard which requires proof that the municipality was the "moving force" behind the violation –

should be applied in this case. Appellees argue that, because the Sheriff and the County were not personally aware of Appellant's arrest, Appellees cannot be held liable. Setting aside, again, that the Appellees are attempting to apply legal standards for claims under a §1983 analysis rejected in *Jensen*, the Supreme Court of the United States held that a municipality may be liable if "the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 1389, 137 L. Ed. 2d 626 (1997) (Emphasis supplied). In Appellant's case, the Bail Clause mandates the fundamental constitutional right to bail and the Bail Statute makes it a class B misdemeanor to fail to ensure that an arrested person is brought before a magistrate. *See*, U.C.A. §77-7-23(4) (1997). Thus, even assuming *arguendo* that the direct causal link standard applied, the actions taken by Appellees or their authorized decision makers satisfy that standard.

III. Article 1, Section 8 of the Utah Constitution is Self-Executing.

Despite Appellees' arguments to the contrary, Appellant respectfully submits that this Court's precedent on due process and bail support Appellant's contention that the Bail Clause is self-executing. Notably, Appellant cannot provide any case law to the contrary. However, this Court has recognized that the Bail Clause "has been a part of this State's highest law since statehood" and that, despite amendments clarifying the burden of proof, it has in no way been "repudiated or altered the traditional right of one's

entitlement to bail..." *Chynoweth v. Larson*, 572 P.2d 1081, 1082 (Utah 1977). In *Chynoweth*, this Court stated that, at a bail hearing, "the prosecutor may present proof in affidavit form or, as in this case, in the depositional form described to oppose the release of those accused but not over the accuseds' objection." *Id.* (Emphasis supplied). Obviously, and in order to object, a person must be present at a bail hearing and presented with the information the prosecutor has submitted supporting a bail recommendation lest the accused's right to object to the evidence is rendered illusory under *Chynoweth*.

Appellees argue that the Bail Clause is not self-executing because that the Bail Clause is a "general principle" that "does not supply the means for putting bail into effect" and instead requires "statutory implementing legislation." Appellees' Brief at 27. This Court, however, has rejected such a stringent application of the self-executing analysis. In fact, in *Spackman* this Court cited to *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990), which reversed over thirty (30) years of Utah precedent dating back to *Fairclough v. Salt Lake County*, 10 Utah 2d 417, 354 P.2d 105 (1960). In *Colman*, this Court recognized that, "[t]he people of Utah established the Utah Constitution as a limitation on the power of government." *Colman* at 634-635. This Court concluded that "article I, section 22 needs no legislation to activate it; it is mandatory and obligatory as it is." *Id.* Likewise, the right to bail pending trial has been recognized by this Court as "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) (Emphasis supplied). Like the Takings Clause, the Bail Clause is a limitation on the power of

government – in the case of the Bail Clause, it is a limitation on the power of the government to incarcerate an arrested person indefinitely pending trial. The right to be free from incarceration pending trial is a recognized, *fundamental* liberty which was enshrined in Utah's Constitution from the outset and is thus, Appellant submits, self-executing.

Appellees argue that the enactment of the Bail Statute weighs in favor of finding that the Bail Clause is not self-executing is also directly contradicted by this Court's precedent because the Bail Statute is supplementary legislation. In *Bott v. DeLand*, this Court held that Article I, Section 9, the Unnecessary Rigor/Cruel and Unusual Punishment Clause (the "Unnecessary Rigor Clause"), is self-executing. In so holding, this Court explicitly stated that, "the fact that the legislature may enact supplementary legislation to further protect or regulate a right in a constitutional provision does not prevent the provision from being self-executing." *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) abrogated by *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533. (Emphasis supplied). Appellant respectfully submits that this Court's previous case law supports Appellant's contention that the Bail Clause, which this Court has held to be mandatory and which proscribes the fundamental right to bail, is self-executing.

IV. The *Spackman* Factors.

A. Whether Appellant's suffered a flagrant violation of his constitutional rights is a question for the jury.

Appellees do not reply to Appellant's contention that this issue should be submitted to a jury of Appellant's peers, but rather that Appellant must identify a specific actor or individual in order to move forward with his claim. However, Appellees' continued argument that a claim for damages for violation of a right under the Utah Constitution requires the identification of an actor would result in depriving Appellant of any right to bring a claim because individual government employees are immune from suits alleging that they violated a person's rights under the Utah Constitution. In fact, this Court has held that a summary judgment is proper even where there existed "a special relationship and consequent duty" for the municipality to protect the plaintiff from a dangerous mentally ill patient on the grounds that the Governmental Immunity Act "grants immunity to all persons performing governmental functions..." *Higgins v. Salt Lake Cty.*, 855 P.2d 231, 240 (Utah 1993) overruled by *Scott v. Universal Sales, Inc.*, 2015 UT 64, 356 P.3d 1172. Inasmuch as there is no waiver of immunity in regard to Appellant's constitutional claims, even if Appellant were to be able to identify a specific individual, that individual would be immune from suit. Thus, Appellant would still be left without recourse for the flagrant violation of his Utah constitutional rights under Appellees' theory.

B. There are no other existing remedies available to Appellant.

Appellant notes that this factor was not reached by the District Court and is therefore not before the Court. Notwithstanding Appellees' argument to the contrary, Appellees took the position in Federal Court that Appellant had no remedy available to him under 42 U.S.C. §1983. The District Court acknowledged that it was apparent from Appellees' successful motion to dismiss Appellant's federal claims that Appellant had no remedy in federal court, to-wit: "I don't think I could take the position, hey, and ignore the fact that the plaintiff presently doesn't have a 1983 action available to him..." R. 1002. In fact, the District Court acknowledged that Appellees' argument that Appellant had an existing remedy was "illusory," stating "If it's a remedy that might be available, where you stipulate to no, it's really not available, then how is there another remedy available? It's a little bit circular." R. 1003. (Emphasis supplied). Appellant respectfully submits that, as recognized by the District Court, Appellees cannot seek and obtain dismissal of Appellant's Federal constitutional law claims and thereafter assert that Appellant has an existing remedy available to him via Federal constitutional law claims.

C. Equitable relief was not available to Appellant.

Appellant notes that this factor was likewise not reached by the District Court and is therefore not before the Court, but is being addressed nonetheless as a matter of caution. Appellees assert, without citation to supporting case law, that Appellant sought no equitable remedy and therefore cannot now claim that one was not available. However, even the District Court acknowledged the tenuous nature of Appellees

argument, specifically stating that "we're talking about a time of limited duration and being able to process a habe[as]" corpus action. R. 1023. Appellant respectfully submits the notion that he – an unrepresented person arrested just before one of the biggest American holidays of the year – would have been able to successfully bring a habeas action in sufficient time to achieve his release and not have the issue mooted is unpersuasive. Even if Appellant had filed a habeas action the day after his arrest, Utah R. App. P. 20 allows for the respondent to "answer the petition or otherwise plead within ten days after service of a copy of the petition" which would then be set for oral argument. Utah R. App. P. 20(b)(2). The notion that Appellant could have brought a pro se[5] habeas corpus action during the time he was incarcerated, while complying with the procedure for a habeas action would be completed before Appellant's release, is simply not feasible. Alternatively, in emergency situations, a petition could be filed "with a justice or judge of the court." However, given that the Justice Court was not open for Appellant to be personally present to be admitted to bail, a habeas action to the Justice Court would likewise have been futile. Utah R. App. P. 20(b)(1). Appellant therefore submits that it was not realistic for Appellant to successfully bring a habeas action before his release such that he did not have an equitable relief available to him.

5. Had there been an initial admission to bail and determination as to whether Appellant would be entitled to appointed legal counsel, this argument might have merit.

V. Appellees do not Claim that Appellant was ever provided notice of the *amount* of bail.

One glaring omission from Appellees' Brief is any reference to a fact, supported by the record, that Appellant was ever provided notice of the *amount* of his bail by any government actor prior to his arraignment in July. In fact, Appellant submitted an affidavit to the contrary confirming, under oath, that the amount of bail set by the Justice Court was never communicated to him. R. 424. The District Court even acknowledged that "there's a *factual* issue about whether plaintiff had notice that bail had been set." R. 992.[6] Despite the acknowledgment by the District Court that there remained a factual dispute as to whether Appellant had been provided notice of the amount of bail, the District Court then went on to find that, "the fact is that his -- he was able to post bail for his crime, because the Judge had set bail. So it was followed. Bail had been set, so the words of the bail clause were followed." *Id.* (Emphasis supplied). Appellant respectfully submits that the setting of bail without providing notice to the arrested person of the amount of their bail is tantamount to not granting bail whatsoever, as the incarcerated person would have no way of gauging how to make appropriate arrangements for the posting of bail or whether posting bail is even feasible. Appellant respectfully submits that a failure to provide notice of the amount of bail to an arrested person is *substantively* the same as failing to admit an arrested person to bail altogether.

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6. This factual dispute also goes to the flagrant issue that should be decided by the jury.

VI. A citation is not the legal equivalent of an Information.

Appellees erroneously argue that the DUI citation issued to Appellant is the "statutory equivalent of an Information." when, in fact, a citation *may*[7] be used as an information but is not the same as an information. Appellees' Brief at 34. U.C.A. §77-7-21 (2009) provides that a citation "may be used in lieu of an information to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited." The fact the statute states that a person may plead guilty, no contest or be sentenced clearly demonstrates the Legislature's intent that the arrested person is to be personally present, regardless of whether the arraignment takes place upon issuance of a citation clearly contemplates being admitted to bail or released. Importantly, the citation in this case was not used as the Information or the arresting officer would have been required to take the Appellant immediately before a magistrate.

The sections subsequent to U.C.A. §77-7-21 further support Appellant's argument that a personal appearance is required. U.C.A. §77-7-23 (1997) – titled "Delivery of prisoner arrested without warrant to magistrate" – provides that when, "an arrest is made without a warrant by a peace officer...the person arrested shall be taken without unnecessary delay to the magistrate in the ...the municipality in which the offense occurred..." and further requires that an "information stating the charge against the person shall be made before the magistrate." U.C.A. §77-7-23(1)(a) (1997). (Emphasis supplied).

Despite Appellees' repeated contention that personally appearing before a magistrate is not material to a person's right to bail or an arraignment, the statute explicitly addresses the procedure in the event a magistrate is unavailable, to-wit:

> "If the justice court judge of the precinct or municipality...is not available, the arrested person shall be taken before the magistrate within the same county who is nearest to the scene of the alleged offense...who may act as committing magistrate for arraigning the accused, setting bail, or issuing warrants." U.C.A. §77-7-23(1)(b) (1997)(Emphasis supplied).

In fact, the requirement of an appearance before a magistrate is so strict that the Legislature made failure to comply a class B misdemeanor. *See*, U.C.A. §77-7-23(4). This Court likewise emphasized compliance with the arraignment procedures in reversing the denial of a petition to prohibit the pursuit of a drunk driving complaint because it "is not the defendant's duty to prove" that he was not taken to the appropriate magistrate, "but only to claim that this was not done, since it is the state's duty to prove beyond a reasonable doubt that it followed statutory interdictions..." *Wells v. City Court of Logan City, Cache Cty.*, 535 P.2d 683, 684 (Utah 1975).

The clear language of the applicable statutes, and this Court's interpretation, betrays Appellees' preferred interpretation of the requirement that Appellees ensure an arrested person's arraignment and being admitted to bail (that the simple submission of citation sufficient satisfies Appellees obligations) and instead makes it clear that the Legislature intended that an arrested person be *personally* brought before a magistrate.

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7. By using the discretionary term "may," the Legislature gave discretion that was not used in this case as an Information was later filed in July.

Assuring an arraignment via personal appearance before a magistrate is a constitutional measure meant to assure that an arrested person is hailed before a neutral judicial officer who can inform the arrested person of their right to bail, the amount of their bail and ensure that the arrested person understands their constitutional rights. The phrase "without unnecessary delay" would be made a legal nullity if Appellees' interpretation were adopted, as allowance for a seventeen (17) day delay in arraigning an arrested person would not necessitate the U.C.A. §77-7-23(1)(b)'s alternative arraignment procedure. Moreover, arraignments now regularly take place via videoconferencing easing any potential burden that Appellees might assert prevents the transfer of an arrested person from the jail to the courthouse.

VII. The District Court Judge explicitly based his ruling on facts not in the record.

Appellees' Brief further alleges that there is "nothing in the record that suggests that the Justice Court attempted to have a hearing with Plaintiff present" and that "if Plaintiff were transported sooner by Defendant, he would have arrived at a vacant courthouse." Appellees' Brief at 22. However, because the full facts were never developed during the course of a trial, Appellees' Brief does not, and cannot, cite to any portion of the record that supports the notion that Appellant would have been transported to an empty court room had he been transported in the regular course of the Jail's functioning. Despite the lack of factual support, however, the District Court explicitly relied on such factual representations by the Appellees in reaching its decision to grant the Motion for Summary Judgment when the District Court stated on the record that,

> So based on the Court's prior ruling, together with finalizing that question mark from paragraph 7, 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. I just can't subject Box Elder County to liability without identifying that actor nor that -- appropriately that fragrant [sic] act." R. 1067-68.

As is clear from the record below, and despite Appellees' protestations to the contrary, the District Court relied upon "facts" proffered by Appellees – facts which should have been presented via testimony and subjected to cross examination before a jury, who would then be in the best position to determine whether Appellant should be awarded damages, and in what amount, for being incarcerated for seventeen (17) days without being admitted to bail.

CONCLUSION

The District Court erred in replacing the jury as the finder of fact. This Court should reverse the District Court's Final Order and remand with instructions to set the matter for a jury trial regarding Appellees' violation(s) of Appellant's Constitutional Rights under Article I, § 7 and Article I, § 8 of the Utah Constitution.

DATED this 5th day of June, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply 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 5,958 words.

/s/ Phillip W. Dyer
Phillip W. Dyer, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2017, a true and correct copy of the foregoing **REPLY 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 (2 copies) ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (X) Email

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