No. 20200917-SC

IN THE UTAH SUPREME COURT

STATE OF UTAH,

Appellee,

v.

STEPHEN RIPPEY,

Appellant.

Brief of *Amicus Curiae*
Utah Association of Criminal Defense Lawyers
In Support of Appellant Stephen Rippey

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CONSENT FOR AMICUS FILING

The Court granted permission for amicus briefing on May 30, 2022. All parties received timely notice of the intent for this filing.

STATEMENT OF AUTHORSHIP

In compliance with Utah Rule of Appellate Procedure 25(e)(6), this brief has been authored by members of the Utah Association of Criminal Defense Lawyers (UACDL), specifically Dallas Young, Staci Visser, and David Ferguson. No party or party's counsel authored this brief in whole or part nor has UACDL received any financial contribution for the filing of this brief.

INTEREST OF AMICUS CURIAE

UACDL is an organization that works to improve the legal profession and to protect, and at times reform, the Utah criminal justice system. Among the goals described in UACDL's mission statement, UACDL seeks to achieve justice and dignity for defense lawyers, defendants, and the criminal justice system itself; to protect and insure by rule of law those individual rights guaranteed by the Utah and United States Constitutions; and to concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedures. *See* Mission Statement.[1]

This case concerns UACDL because it directly affects the rights of the largest population of convicted criminal defendants in the State of Utah—those who enter into plea bargains to resolve their case(s). It is of paramount importance to UACDL that the rights of these defendants be protected in all stages of their case(s). This includes the right to meaningful appellate review. In the view of UACDL, Utah's current statutory scheme for reviewing pleas offers an illusion of

[1] *Available at* http://www.uacdl.org/mission-statement (last visited 11/13/2022).

protection but in practice, leaves defendants and the judiciary stripped of this constitutional right.

INTRODUCTION

> "*It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.*"[2]

Guilty pleas are a critical part of the criminal justice process. A truism recognized by the Supreme Court a decade ago is "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[3] It should follow that guaranteeing the constitutional rights of a defendant entering a guilty plea is of perhaps the greatest import in our criminal justice system. It should follow that substantive and procedural rules and statutes would protect those constitutional rights. In Utah they do not.

Criminal pleas are more than a solitary hearing with a perfunctory colloquy. From both a criminal defense and constitutional perspective, pleas should be the culmination of the expeditious disclosure and review of evidence, defense investigation, skilled negotiation, and comprehensive client communication. "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."[4] It is

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[2] *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

[3] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134 (2012).

[4] *Brady v. United States*, 397 U.S. 742, 748 (1970).

for this reason guilty pleas only stand scrutiny if they are voluntarily and intelligently made.[5]

The plea standard encompasses a litany of constitutional rights most often referred to as "trial rights." In truth, these are also "plea rights." For example, defendants are entitled under the Sixth Amendment to counsel during plea negotiations and plea entry.[6] This counsel, whether appointed or privately retained, is bound by the constitutional duty to provide effective assistance, which in and of itself contains myriad obligations, including the duties to know the law and to investigate the case.[7] The government must also satisfy constitutional directives in pleas. Due Process requires the State to fully disclose evidence.[8] Prosecutors are also bound by plea agreements.[9] Even the physical conditions of how a plea is taken is of constitutional concern.[10]

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[5] *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[6] *See Lee v. United States*, 137 S.Ct. 1958 (2017); *Frye*, 466 U.S. at 144; *Lafler,* 566 U.S. at 169-70.

[7] *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[8] *See, e.g., Brady,* 373 U.S. at 87.

[9] *See Santobello v. New York*, 404 U.S. 257 (1971).

[10] *See Boykin*, 395 U.S. at 242 (plea hearings must be public).

All of these rights are protected by one overarching constitutional right afforded defendants: the right to an appeal.[11] The right to an appeal is "essential to a fair criminal proceeding[,]" and is "to be carefully protected" by Utah Courts, and not "lightly forfeited."[12]

But the plea process for many Utah defendants, many of whom are indigent, is something entirely different. As an association of criminal defense advocates, we are acutely aware of the systemic, cultural, economic, and other social forces that coalesce to influence prosecutors, clients, and defense attorneys to deviate from constitutional norms. And it is from this awareness that UACDL supports Appellant's position that this Court should take the opportunity to address the constitutional deficits in how this critically important aspect of the justice process has been insulated from substantive appellate review.

I. Dispelling Logical Fallacies Underlying the PWS Jurisdictional Bar.

The plea withdrawal statute ("PWS") requires defendants to move to withdraw their plea prior to sentencing in order for their plea to be subject

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[11] *See* Utah Const. art. I, § 12; art. VIII, § 5.

[12] *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985).

to review on direct appeal.[13] Any challenge to the plea or the proceedings leading up to it not made prior to sentencing may only be challenged through the post-conviction process.[14] The inherent problem with the PWS's direct appeal time restriction is the fallacy that defendants *should* and *can* know of issues impacting the constitutional validity of their plea prior to sentencing. The way the criminal defense system currently works in Utah makes that virtually impossible.

A. Time and the Control of Information.

It is no secret that prosecutors, and really the justice system as a whole, favor quick resolution of cases. Large caseloads favor not just plea bargaining, but also fast plea bargaining to reduce both prosecutors' and defense attorneys' caseloads.[15] Thus, plea offers are frequently made quickly after a case is filed, at a time when "defense attorneys are generally at an informational deficit compared to prosecutors, who at the early stages

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[13] Utah Code § 77-13-6(b).

[14] *Id*. § 77-13-6(c).

[15] *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865 (2000) (prosecutors choose plea bargaining in response to crushing workloads); Kelsey S. Henderson, *Defense Attorneys and Plea Bargains*, *in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 37, 45 (Oxford University Press 2019) (citing study).

of proceedings typically have access to a full police report, interview statements, and evidence."[16] Further, evidence disclosure rules are not consistently upheld for purposes of plea bargaining, including court rulings that hold a prosecutor need not disclose *Brady/Giglio* evidence[17] in the same manner before a defendant accepts a plea bargain as would be necessary prior to trial.[18]

Relatedly, plea offers are often made contingent upon defendants' waiver of their constitutional right to a preliminary hearing.[19] "The fundamental purpose served by the preliminary examination is the ferreting

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[16] *See* Henderson, *supra* n.15, at 45 (citing study).

[17] Under *Brady,* the prosecutor must disclose exculpatory evidence to the defendant, which includes impeachment evidence, promises and other consideration given to witnesses. 373 U.S. at 87-88; *see also, Giglio v. United States,* 405 U.S. 150, 154 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence"); Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 N.W. U. L. Rev. 261, 265 (2011) ("Overburdened prosecutors likely fail to comply with several constitutional and statutory obligations" such as inadvertent failure to disclose exculpatory evidence).

[18] *See e.g., Medel v. State*, 2008 UT 32, ¶ 24 ("in cases where the defendant pleads guilty . . . his constitutional right to evidence is even more limited") (citing *United States v. Ruiz*, 536 U.S. 622, 633 (2002)).

[19] *See* Utah Const. art. I, § 12.

out of groundless and improvident prosecutions."[20] The State is required at this hearing to adduce evidence to support the charges against the defendant. Even though the standard of proof at a preliminary hearing is vanishingly low,[21] defendants are often required to waive this constitutional right to see the evidence against them in the pursuit of a plea offer. It is common knowledge amongst the Utah defense bar that requiring the prosecution to satisfy this constitutional burden may result in a less favorable plea offer, or no offer at all.[22]

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[20] *State v. Anderson*, 612 P.2d 778, 783-84 (Utah 1980).

[21] *See, e.g., State v. Homer*, 2017 UT App 184, ¶ 9.

[22] Even when a defendant is afforded her right to a preliminary hearing, the information gleaned at the hearing is often insufficient to produce a knowing and voluntary plea later. Due to constitutional amendments, statutory and rule changes, and developing caselaw, Defendants are no longer entitled to "confront" witnesses at the preliminary hearing, and exceptions for the admission of reliable hearsay have evolved into the prosecution engaging in what is colloquially referred to as "paper prelims" where the prosecution produces a few short paragraphs in a written "1102 Statement" in order to satisfy their burden in even the highest-level felony cases. *E.g., State v. Timmerman*, 2009 UT 58, ¶¶ 14-16; Utah R. Evid. 1102. And when the prosecution elects to present the testimony of an alleged victim by 1102 evidence, there is usually nothing the defense can do about it. *E.g., State v. Lopez,* 2020 UT 61, 474 P.3d 949. With or without a preliminary hearing, there is cause for concern as to what information the State has produced, and if it is sufficient to support a knowing and voluntary plea.

Less information and less time prior to plea also necessarily limit counsel's ability to research the applicable law and investigate valid defenses. In effect, this leads to a higher probability of defense counsel missing something, or, in some cases, neglecting their constitutional duty to investigate the case in favor of speedy resolution.[23]

Finally, once a plea is entered, the already limited flow of information about the merits of the case generally stops because the case is no longer a matter of controversy. Outside of what may be required to achieve a goal in sentencing, such as a governmental entity completing a pre-sentencing investigation or gathering mitigation evidence, no additional information is necessary. Moreover, defendants may simply waive the time for sentencing on the advice of counsel and choose to be sentenced during the same hearing as their plea. It is unlikely that in either scenario, where a defendant is almost always represented by the same counsel at sentencing that represented the individual in entering the plea, that a defendant is going to learn something in the time before sentencing that would form a basis to challenge the plea.

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[23] *See* Moore, J., Plano Clark, V.L., Foote, L.A., & Dariotis, J.K., *Attorney-Client Communication in Public Defense: A Qualitative Examination*, CRIM. J. POLICY REV. (2019).

This is all to say that defendants are incentivized (or pressured) to accept less information about their case in pursuit of a rough and ready plea bargain. The result is that defendants often have incomplete information about their cases prior to the time bar in the PWS, and are more likely to learn of problems *after* sentencing when it is too late to do anything about it under the PWS. This reality stems from the fact that the information a defendant knows prior to pleading and through sentencing is primarily sourced from their attorney. And it is this assistance of counsel (or lack thereof) that commonly forms the basis to request to withdraw the plea in the first place.

B. Meaningful Consultation with Counsel.

Relatedly, "defense attorneys might not have many opportunities to meet with their clients before a plea decision is made."[24] This is particularly true for in custody clients who, as discussed below, face a host of pressures to plead early, without the information needed to make a knowing and willful plea.

Given the pressure to enter a guilty plea early in the case our clients face, limited contact with counsel contributes to two results. First, defense

[24] *See* Henderson, *supra, n.*15, at 45 (citing study).

counsel has insufficient information from the client to inform strategic decisions such as what avenues of investigative inquiry are important to the case.[25] Second, given the information deficit, defendants may base their plea decision on an unduly limited understanding of the nature of the charges, the facts, potential defenses, and the likely potential consequences of entering a plea.

As part of our role to provide constitutionally effective counsel, defense attorneys must adequately investigate cases and consult with our clients.[26] When these things do not occur and it harms the client, these failures serve as a basis for a finding of ineffective assistance of counsel and, in some cases, overturning a conviction.[27] This should be no less true for

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[25] A defense attorney has the duty to "consult with the defendant on important decisions[,] and keep the defendant informed of important developments in the court of the prosecution." *State v. Classon*, 935 P.2d 524, 533 (Utah Ct. App. 1997) (citing *Strickland*). And "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quoting *Strickland*, 466 U.S., at 688).

[26] *See* Moore, J., *supra* n. 23, at 17-20 (noting the importance of when, how long, and how often an attorney communicates with the client).

[27] *See, e.g., Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (counsel failing to know law and perform basic research "is a quintessential example of unreasonable performance under *Strickland*"). *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel deficient where failure to uncover records beneficial to defendant's case based on incorrect interpretation of state law); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (counsel deficient where decision to forgo pretrial

clients that enter into a plea than those convicted at trial. A conviction based on a guilty plea following the uninformed advice of counsel who, unbeknownst to the client, has not performed his constitutional duty should no less troublesome than ineffective assistance at trial.[28] Indeed, UACDL can conceive of no principled reason to treat the rendition of ineffective

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discovery was based on counsel's mistaken belief that State obliged to take the initiative and turn over all inculpatory evidence to defense); *Gregg v. State*, 2012 UT 32, ¶ 26 (when counsel fails to reasonably investigate and present evidence crucial to the defense, prejudice occurs when evidence would have affected entire evidentiary picture); *State v. J.A.L.*, 2011 UT 27, ¶¶ 24, 27, 28 (ineffective assistance when counsel failed to analyze and present exculpatory physical evidence; counsel's duty to investigate is not optional, it is indispensable and "failing to investigate because counsel does not think it will help does not constitute a strategic decision, but rather an abdication of advocacy")

[28] Some defense attorneys advise their clients to plead before they know even the basics of the case. *See e.g., Gailey v. State,* 2016 UT 35, ¶ 1 (over the course of a few hours, defendant entered her initial appearance in the district court, was appointed counsel, waived her right to a preliminary hearing and trial, pled guilty, waived the waiting period for sentencing, and received judgment and sentence). Some attorneys fail to advise the client properly of the incarceration consequences of a guilty plea. *See State v. Willis,* 2021 UT App 142, ¶ 5. Some attorneys fail to consider the impact medication regimes might have on how well the client understands the impact of a guilty plea. *State v. Brown,* 2021 UT 11, ¶ 4. Some attorneys pressure their clients into taking a deal and inaccurately relate crucial aspects of the deal. *State v. Mullins,* 2005 UT 43, ¶ 3. Some attorneys are less than responsive to reasonable requests by their client to access legal authorities to aid their attempts to understand the process. In point of fact, the Petitioner in this case, Mr. Rippey, ran up against this very thing as he tried to vindicate his constitutionally guaranteed rights. *See Aplt.* Exhibit 1.

assistance at trial so differently than ineffective assistance rendered prior to a guilty plea, which is precisely what the PWS does. And just like a defendant convicted at a jury trial, the errors that may have occurred in the plea bargaining and plea phases of criminal proceedings will likely never come to light unless the case is reviewed by independent appellate counsel.

C. Pressure of Incarceration

The pressure that pretrial detention places on an accused defendant is just as obvious as it is immense. The world doesn't stop turning just because you got arrested. An incarcerated individual faces the prospect of lost income, the loss of a job, damage to the reputation and goodwill of a business, loss of professional licensure or other professional discipline, loss of driving privileges, defaulting on financial obligations and the related legal actions, missing the birth of a child or the death of a loved one, missing out on schooling requirements, missed opportunities to get into treatment facilities, disruptions to special dietary needs, disruptions to medication regimes, withdrawal symptoms from both prescribed and elicit substances, and the list goes on. It should come as no surprise then that "[i]n an effort to be released, criminal defendants detained pretrial feel more inclined to

accept plea bargains than criminal defendants who have been released pretrial."[29]

"Defendants detained pretrial are more likely to enter guilty pleas regardless of actual guilt because of the coercive effects of long detentions" and "[i]n fact, detained defendants plead guilty twice as much as released defendants in order to secure their release."[30] Related to the informational deficit problems, those defendants who are in custody pretrial are "[e]ffectively cut off from communication with persons outside the detention facility, the incarcerated defendant is unable to arrange meetings with witnesses who could testify in his defense, to assist in the investigation of his case, or to provide his attorney with the facts to support a counter-narrative of the events leading to the criminal charge(s) against him."[31]

This additional pressure is all the more concerning given the tendency of prosecutors to "over-charge" offenses in anticipation of later plea

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[29] Alexander Shalom, *Bail Reform As A Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 921 (2014) (citing authority).

[30] Lydette S. Assefa, *Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform*, 108 J. CRIM. L. & CRIMINOLOGY 653, 668 (2018).

[31] Clara Kalhous, John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 801 (2012).

bargaining, combined with the recent legislative overhaul of the bail statutory scheme in Utah. While perhaps not the original intent of the bail revisions, the standard of proof required to hold a defendant without bail when charged with a felony is less than clear.[32]

D. The Plea Process Itself.

With an expedited plea process comes the paperwork, but with less time to review it and discuss the consequences. Even if more time is spent, the plea forms themselves are problematic given that forms used to describe pleas and plea offers "are frequently written at an eighth-grade level or higher", though on average, "defendants read at or below the sixth-grade level."[33] This does not even account for language barriers that regularly arise. And while cognitive ability could surely have some bearing on the decision to plead, the prevalence of higher-order vocabulary and legalese

[32] Utah Code § 77-20-201(1)(c) (requiring "substantial evidence to support the charge" and clear and convincing evidence of either danger or likely to flee to hold without bail); *but see Randolph v. State*, 2022 UT 34, ¶¶ 7-14 (upholding substantial evidence finding where State relied largely on probable cause statement and SANE exam results produced during preliminary hearing, despite defendant's contrary evidence).

[33] Miko Wilford and Annmarie Khairalla, *Innocence and Plea Bargaining, in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 140 (Oxford University Press 2019) (citing studies).

make it difficult for almost anyone to understand the plea forms and the plea process itself.[34]

And although Utah's plea forms do advise the defendant of their right to appeal the sentence and the time limit for doing so, and also advise that "any challenge to [a] plea made after sentencing must be pursued under the Post-Conviction Remedies Act," criminal defendants are not told anything about what PCRA is, what it entails, and crucially, not told of the time limits for filing or the fact that there is no right to counsel in seeking relief. In essence, criminal defendants are not advised by the court or in the form itself that by entering a plea, they are waiving their right to the assistance of counsel for any further challenge if a motion to withdraw is not filed prior to sentence.

Again, the plea process is plagued by the overwhelming potential for a defendant to simply not know.

CONCLUSION

Given the pressures and reality of the plea system in Utah, it is silly to think defendants who have legitimate reasons to challenge their pleas will know of them prior to sentencing. UACDL promotes remedies that reflect

[34] *Id.*

reality and treats similarly situated defendants the same. The PWS is the opposite, creating an arbitrary distinction amongst convicted defendants by treating differently those who deserve to have their constitutional rights -- including the fundamental constitutional right to effective assistance of counsel-- meaningfully enforced, and those who don't. This distinction is unconstitutional, particularly when considering the problems inherent with the plea system as it currently exists. All convicted defendants have the same constitutional rights and all deserve meaningful enforcement.

There will no doubt be costs in undoing the damage the plea withdrawal statute has caused but "sometimes we must pay substantial social costs as a result of our commitment to the values we espouse."[35] The time has come for this Court to do away with the plea withdrawal statute and find a better, constitutional, way.

DATED this 14th day of November 2022.

On behalf of UACDL

/s/ Dallas Young
Dallas Young
Staci Visser
David Ferguson

[35] *United States v. Salerno*, 481 U.S. 739, 767 (1987) (J. Marshall and J. Brennan, dissenting).

CERTIFICATE OF DELIVERY

I hereby certify that on the 14th day of November 2022, a true and correct copy of the foregoing *Amicus Brief* was filed electronically with the Utah Supreme Court at supremecourt@utcourts.gov and served by email on the following:

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_____

CERTIFICATES OF COMPLIANCE

I, DAVID FERGUSON, certify that:

This brief complied with the type-volume limitation of Utah R. App. P. 25(e)(f) and 24(a)(11), I certify this contains 4,977 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word in Times New Roman 13 point.

I also certify that any Public Version of this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(h).

/s/ David Ferguson
DAVID FERGUSON
Executive Director, UACDL

Exhibit 1

IN THE UTAH COURT OF APPEALS

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Stephen Rippey,	)	ORDER
	)	
Petitioner and Appellant,	)	Case No. 20110783-CA
	)	
v.	)	
	)	
State of Utah,	)	
	)	
Respondent and Appellee.	)	

This matter is before the court upon Appellant's motion, filed November 7, 2011, for appointment of counsel.

There is no statutory or constitutional right to counsel in a civil petition for post-conviction relief. See Hutchings v. State, 2003 UT 52,¶20,84 P.3d 1150.

Now, therefore, IT IS HEREBY ORDERED that Appellant's motion is denied.

Dated this 8 day of November, 2011.

FOR THE COURT:

James Z. Davis,
Presiding Judge

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CUCF GRIEVANCE OFFICE

1

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MEMORANDUM

TO: STEPHEN RIPPEY #188454

DATE: April 17, 2013

RE: CONTRACT SERVICES

In order to help you understand the services we are able to provide to you, please note that our contract with the Department of Corrections provides for assistance with initial pleadings for meritorious 1983 civil rights complaints, 65B petitions for extraordinary relief relating to conditions of confinement, 65C petitions for post-conviction relief, and 2254 habeas corpus for post-conviction issues exhausted at the Utah court level.

Our contract provides that we will review and draft the pleadings if we find them meritorious. If in our opinion the pleadings lack merit, we do not provide assistance with drafting the pleadings. However, if you still want the pleadings filed, we assist with the copying and filing of completed documents with the court at our expense.

25¢/Page per copy

We provide some research on issues that we are not familiar with, or that are unique to a certain claim. However, we are not a law library and do not provide case law unless pivotal to a certain claim.

We provide legal copies for inmates who submit either a witnessed money transfer or, if indigent, a Duplication of Legal Papers that has been verified by an official in your housing unit. Also, we transfer inmate to inmate legal mail when appropriate.

CONTRACT ATTORNEYS

1

NOTICE REGARDING LEGAL SERVICES

Laws, including statutes of limitations, can and do change. Do not rely upon information or legal materials that you may have received in the past. Before filing any initial pleading in state or federal court regarding post conviction relief or conditions of confinement, always check with the contract attorneys or other competent legal authority to obtain current information concerning the status of the law. Failure to do so may result in your action being dismissed with prejudice

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Received 11/19/14

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MEMORANDUM

TO: STEPHEN RIPPEY #188454

DATE: November 10, 2014

RE: REQUESTED LEGAL SERVICES

Please be advised that your request for services researching a legal issue for curiosity sake is beyond the scope of our contract. Our contract deals solely with issues related to your incarceration: writs of Extraordinary Relief, Post-Conviction Relief, and civil rights issues related to your conditions of confinement while a Utah State Prison inmate.

If you need legal assistance with any other type of matter, such as bankruptcy, paternity, divorce, etc., you will need to contact a private attorney.

Thank you,

CONTRACT ATTORNEYS

1

NOTICE REGARDING LEGAL SERVICES

Laws, including statutes of limitations, can and do change. Do not rely upon information or legal materials that you may have received in the past. Before filing any initial pleading in state or federal court regarding post conviction relief or conditions of confinement, always check with the contract attorneys or other competent legal authority to obtain current information concerning the status of the law. Failure to do so may result in your action being dismissed with prejudice.