

1975

Larry Shelmidine and Charlene Polly Cook v. Charles A. Jones : Amicus Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LARRY SHELMIDINE, et. al., :

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Plaintiffs-Respondents, :

CHARLENE POLLY COOK, :

BRIGHAM YOUNG UNIVERSITY
J. Keuben Clark Law School

Intervenor, : Case No. 14152

-vs- :

CHARLES A. JONES, et. al., :

Defendants-Appellants. :

BRIEF OF AMICUS CURIAE

An Appeal From the Judgment Entered in the Third
Judicial District Court, In and For Salt Lake County,
State of Utah, The Honorable Stewart M. Hanson Jr.,
Judge, Presiding

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY SHELMIDINE, et. al., :
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Intervenor, : Case No. 14152
-vs- :
CHARLES A. JONES, et. al., :
Defendants-Appellants. :

BRIEF OF AMICUS CURIAE

THE INTEREST OF THE AMICUS CURIAE

The Utah Civil Liberties Union is a branch of the American Civil Liberties Union, an organization dedicated to the preservation of individual liberty under law. Your amicus has entered this case in order to urge to the Court its view on the important constitutional issues raised by this case.

STATEMENT

The amicus accepts the Statement of the Nature of the Case, Disposition in the Lower Court, Relief Sought on Appeal and Cross Appeal, and Statement of Facts contained in the other briefs in this case. In the interest of brevity, those statements will not be restated here.

Amicus curiae urges that the Court affirm the decision below. "That the practise . . . which allows nonlawyer or lay justices of the peace to impose a jail sentence or imprisonment constitutes a denial of a criminal defendant's right to a fair trial. . . ." Affirmance of that ruling would leave open the issue of the constitutionality of trial before lay justices of the peace in cases involving only fines of less than three hundred dollars. Affirmance of the decision below would thus have minimal impact on the Utah judicial system and leave to future decision any questions about the constitutionality of trial before a justice of the peace in matters involving fines alone. Such a distinction is supportible in principle given the significance to anyone of even a short deprivation of liberty and the priority of liberty as a value to be protected under our system of justice.

Our contention in this case is founded on guarantees of due process contained in both the State and Federal Constitutions; Utah Constitution, Article I Section 7, United States Constitution, Fourteenth Amendment.

ARGUMENT

POINT I

DUE PROCESS OF LAW REQUIRES THAT A JUDGE IN A CRIMINAL CASE IN WHICH A JAIL SENTENCE MAY BE IMPOSED BE TRAINED IN THE LAW.

When in 1215 at Runymede, King John was forced by his barons to sign the Magna Carta, he swore to two propositions relevant to this case:

No free man shall be taken, imprisoned, diseased . . . or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land. Chapter 39.

We will appoint as justiciaries, constables, sheriffs or bailiffs only such men as know the law of the land and will keep it well. Chapter 45.¹

Magna Carta has often been called the foundation of our liberty and the cornerstone of our law. These characterizations are true, not because the specific rules and standards apply to modern time -- though some like those above still do -- but because Magna Carta represents a principle, that the sovereign is itself subject to law, that citizens have rights which government must recognize though on occasion it be inconvenient to do so. When King John promised his subjects due process of law and the appointment of judges who knew the law, he was promising that as sovereign he would follow procedures which were just and lawful in applying the law of the land. Today, the rights of citizens to justice pursuant to law, transcend convenience, transcend even the comfort and inertia of established practice when

¹ A. E. Dick Howard, Magna Carta. Text and Commentary 43, 45 (1964).

it can be shown that established practice has, by reason of changing times and changing circumstances become inconsistent with the due process of law. Your amicus submits this brief to urge that, in 1975 constitutional guarantees of due process derived in part from the Magna Carta include the right to be tried by a judge trained in the law, and capable, as today only a law trained person can be, of knowing the law and applying it competently.

The concept of due process is not a static and fixed concept. If Magna Carta remained but a feudal compact, it would be meaningless today. Due process has grown and changed with the time truly reflecting in the words of Justice Powell in Johnson v. Louisiana, 406 U.S. 356, 467, (1972) that:

Due process, as consistently interpreted . . . commands that citizens subjected to criminal process in state courts be accorded those rights that are fundamental to a fair trial in the context of our American scheme of justice.

In State v. Phillips, No. 13816, Sept. 15, 1975, Justice Ellett concurring, quotes Daniel Webster's classic explanation of due process, "law of the land", in the Dartmouth College case, 4 Wheat. 518, 581, as follows:

[A] law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.

This Court recognized over 80 years ago that constitutional standards derived from the common law changed and developed with the development of our society. In Hess v. White, 9 Utah 61 (1893) this Court interpreting the right to jury trial held unanimous verdict was not required in civil cases. The Court said, per curiam, at page 68, quoting from

Hurtado v. California, 110 U.S. 516:

The Constitution of the United States was ordained, it is true by descendants of Englishmen who inherited the traditions of English law and history; but it was made for an undefined and expanding future and for a people gathered and to be gathered from many nations and of many tongues . . . There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mold and shape it into new and not less useful forms.

While the Court in Hess v. White was speaking to the claim that the Constitution barred a modern change not known at common law, less than unanimous verdicts in civil cases, what it said applies equally to a practice known at common law no longer consistent in modern society with basic standards of right and justice.

In Powell v. Alabama, 287 U.S. 45,(1932), Justice Sutherland for a unanimous court recognized that a right to counsel in a capital case was part of due process of law guaranteed to state citizens by the federal Constitution. Justice Sutherland so ruled though, as he recognized, the right to counsel in felony cases was not recognized by the common law of England and seems not to have been unanimously recognized by the thirteen colonies before the Declaration

of Independence. But said Justice Sutherland at page 67:

The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'... is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment.

Justice Sutherland goes on to state the requisites of due process at page 68:

It never has been doubted by this Court or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.

In 1835 Justice Story of the United States Supreme Court sitting as Circuit Justice in the case of United States v. Battiste, 24 Fed.Cas. 1042 (No. 14,545) rejected the rule that jurors were free to disregard rulings and instructions of the judge in reaching a verdict on the facts.

Justice Story said at page 1043:

I hold it the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts and the court as to the law . . . Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.

Are counsel for appellants prepared to assert that the lay justices of this state, without essential legal training, without access to the law books and materials available to city court judges and district judges can provide a defendant raising legal defenses an adequate and effective resolution of his legal claims according to the fixed law of the land and not the law as the justice of the peace "may understand it or choose from ignorance or accidental mistake to interpret it."

Of course the due process clause does not guarantee against all possibility of error and even law trained judges, like law trained lawyers, are not beyond possibility of error. But the constitutional guarantees of due process, like the procedures of law generally, are designed to at least minimize the likelihood of error.

The contention of your amicus in this case is simple. The right to be heard includes the right to a reasonable probability of being understood. Our legal system contemplates that a defendant charged with a crime has a right to be heard asserting defenses of law as well as fact. He is accorded the right to trial by jury to hear his factual assertions, equally he is entitled to have his legal claims resolved by a judge. Justice Sutherland in Powell v. Alabama continues at page 68:

What then, does a hearing include? . . .
The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the

intelligent and education layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Your amicus contends for a simple proposition if a non lawyer is generally incapable of defending himself, he is also unlikely to be capable of judging the legal claims of others. The proposition is so obvious it seems almost silly to urge it. Judges must be trained and knowledgeable in the law. Unless a judge is trained and knowledgeable in the law, how can he be expected to follow the arguments of counsel or evaluate competing arguments urged by counsel on each side, on the holding of a case, or the meaning of a statute less than clear on its face. How can one not trained in the law be expected to recognize when a question must be researched by the reading of cases, or where the cases may be found, or when found, what they stand for? Legal ability is a necessary qualification for a judge and legal ability is learned only by legal education and the practice of law.

Due process of law guaranteed to a defendant in a criminal case by the State and Federal Constitutions includes a right to "a fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed. 942 (1955). This is not a guarantee of a trial free from error or possibility

of error but it certainly is a guarantee of a trial before a judge who is reasonably qualified to recognize and prevent or correct error. In Frank v. Mangrum, 237 U.S. 309, 35 S. Ct. 582, 59 L.Ed. 969 (1915), the Court, recognizing that not all error violated due process, restated the requirement of due process as fundamental rights including "the right to be heard according to the usual course of law in such cases." 237 U.S. at 334-5. Your amicus contends that the right to be heard includes a reasonable chance of being understood. Due process would be violated by trial before a judge who did not understand the language which the lawyers spoke and in which the statutes and cases were written. But as any first year law student knows, law itself is a special language, arduously mastered, which must be learned if lawyer talk is to be understood and statutes and cases applied as they are meant to be applied. As Justice Larsen stated for this Court in Christianson v. Harris, 109 U. 1, 163 P.2d 314 (1945):

Many attempts have been made to further define 'due process' but they all resolve into the thought that a party shall have his day in court -- that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or defense. . .

In 1975, with the state of complexity of the law today, only a judge "learned in the law" is capable of serving as a "competent court" before whom a defendant may have the opportunity of establishing his defense.

In Murchison, supra, the Court emphasized that "[O]ur system of law has always endeavored to prevent even the probability of unfairness." 349 U.S. at 136.

[E]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L.Ed. 749 (1927). While in Tumey and Murchison, the Court dealt with judicial interest in the case which might preclude impartial justice, its conclusions apply as well to factors rendering the judge incapable of applying the law however impartially he tries.

In Gordon v. The Justice Court for the Yuba Judicial District, 12 Cal.3rd 232, 115 Cal. Rep. 632, 525 P.2d 72 (1974), the California Supreme Court struck down California's lay justice of the peace system, relying on Tumey and Murchison and concluding that whatever justification for laymen judges existed in the 1800's the practice no longer comports with due process of law in light of modern conditions and when measured by modern standards.

The Utah Constitution recognizes the importance of legal training and experience for judges. The Constitution requires that every justice of the Supreme Court and every district judge be "an active member of the bar, in good standing, learned in the law." Utah Constitution, Art. VIII, §§ 2,5.

As to justices of the peace, the Constitution does not mandate that they not be learned in the law, but leaves the issue for

legislative resolution. Why did the framers of the Utah Constitution, recognizing the importance of legal learning for judicial competence not require it for justices of the peace as well as for district judges and supreme court judges? Perhaps as suggested in the Gordon case, supra, it was the lack of lawyers in the still young state and the difficulty of travel on inadequate roads if litigants had to travel to where a lawyer was available; perhaps it was the English tradition of lay justices capable of serving effectively in minor cases in a time when there was much less law and what there was was simpler. If these were the reasons, they no longer apply. There is no shortage of lawyers, there are now two law schools in the state capable of training as many lawyers as the state needs, and the development of modern transportation would make it possible to rely on city court judges in the county seat in every county. More significantly, when we compare the state of the law in 1896 with the state of the law in 1975, it is clear that only a truly exceptional and gifted person could master the law sufficiently to serve as a competent judge if he lacked both formal legal training and experience in the practice of law.

In January 1896 when the Utah Constitution went into effect, there were twelve bound volumes of the Utah Reports and 160 bound volumes of the United States Reports. The Compiled Laws of Utah of 1888 consisted of two volumes including the laws of Congress applicable to the territory of Utah. Today there are 153 bound volumes of Utah Reports

and 418 bound volumes of United States Reports (through July 1974). The Utah Code Annotated consists of ten volumes. A new volume of the Pacific 2nd Reports is published every few weeks as are the Federal Supplements, the Federal Reporters and the regional reporters for each of the regions in the nation. The opinions of the United States Supreme Court for the 1973-74 term completed last July fill some 3,000 plus pages (including memorandum opinions) of volume 93 of the Supreme Court Reporter. Preceding the cases in Volume 93 is a 157 page summary of the Court's decisions in the 1972 term.

In a speech delivered to the American Bar Association at its meeting in August 1973, Chief Justice Burger, reporting on the state of the federal courts noted that between 1953 and 1973 the number of "full signed opinions" issued by the Supreme Court each year had more than doubled (65 full signed opinions in 1953; 140 in 1973). During the same twenty year period the number of cases docketed annually in the Court had risen from 1,463 in 1953 to 4,640 in 1973.² Chief Justice Burger began his remarks with a quotation from Dean Roscoe Pound in 1906, "[T]he work of the American courts in the 20th century could not be carried on with methods and procedures of the 18th and 19th centuries."³

We are in the midst of an explosion of legal materials, legal decisions and newly developing law. As the legal

² Burger, Report on the Federal Judicial Branch, 93 Sup. Ct. Rep. 3291 (1974).

³ Ibid. at 3291.

materials proliferate the tasks of lawyering and judging become increasingly onerous. Fortunately the law trained judge can rely upon the briefs and arguments of counsel and his own training and experience in resolving new and difficult questions of law. But what does a justice of the peace without legal training do when faced with a conflict between counsel or when counsel refers to a line of case precedents said to establish a proposition of law?

A class B misdemeanor, triable by Utah Statutes before a law trained city judge or a non-law trained justice of the peace may raise issues of statutory interpretation, the relevance and significance of case precedents, questions of federalism and the applicability of United States Supreme Court decisions on federal Constitutional questions. Utah law prohibits the practice of law by one not admitted to the bar, U.C.A. 78-51-25. As reenacted in 1963, the statute eliminated a previous exception permitting non-lawyers to serve as county attorneys. Yet we still permit persons not qualified to be lawyers to serve as justices of the peace. Perhaps the practice could once have been defended by a view that minor crimes necessarily involve only simple legal issues. That view is no longer supportable in fact. The Supreme Court spoke to this point in Argersinger v. Hamlin, 407 U.S. 25, 33, (1972):

We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more . . .

Argersinger holds that due process requires appointment of counsel for an indigent defendant, absent knowing and intelligent waiver, whenever the defendant faces the possibility of a sentence to imprisonment. The Court's holding compels a parallel conclusion, that due process requires trial before a law trained judge in similar cases, since without a judge competent to rule on the legal issues in his case, the defendant's right to counsel will be rendered ineffective in any case which involves substantial issues of law.

POINT II

THE INCOMPETENCE OF THE NON LAW TRAINED JUSTICE OF THE PEACE IS AGGRAVATED BY THE STATE'S FAILURE TO PROVIDE SUCH JUSTICES WITH ACCURATE RESOURCES AND ASSISTANCE IN RENDERING LEGAL DECISIONS.

At the time of the district court's decision below, the means provided by the state to shield the justices from legal error resulting from their lack of learning in the law was a Manual for Justices of the Peace in the State of Utah prepared by Brigitte M. Bodenheimer in 1956. While the manual is written in a lucid and simple style, it is today hopelessly outdated and affirmatively misleading, as a few examples will show. The non law trained judge faced with a question of law and no means or ability to resolve it is likely to rely heavily on the representations of the County Attorney. The manual expressly approves this practice.

On page 14 the following advice appears:

There will no doubt be many occasions, however, when the answer to his problem cannot be found in this book. In such case it is recommended that the justice get in touch with the county attorney of his county who is the legal advisor of the county's precinct officers.

Again at page 59:

The defendant is often not represented by counsel in a justice court. County attorneys are accustomed to that fact and are generally able to play the role of both prosecutor and defense attorney with fairness to both sides. (Emphasis added).

Given such advice in his manual it should be no surprise if a justice of the peace resists appointing a second defense attorney (one in addition to the prosecutor) for an indigent defendant. At page 71, advice on instructing the jury:

Sometimes after the justice has finished his instructions to the jury, one or both attorneys may ask him to add further charges to the jury, which the attorney reads to him. The justice then says: 'I so charge' or 'I refuse to so charge.' If he is in doubt on how to rule, the county attorney, if present, will generally come to his aid. (Emphasis added)

The effect of this advice in the official Manual is to invite the "neutral" judge to defer, when out of his legal depth, to the decision of one of the litigant's counsel. The right to decision by an impartial tribunal is denied in fact whenever the untrained judge is called upon to decide a question of law without the knowledge or training to decide it: in that situation he is officially advised to rely upon the prosecutor! Defendant's right to be heard in his own

defense in effect becomes his right to be heard by opposing counsel!

A cautionary statement on the role of the county attorney does appear in the manual, in chapter 11 on Preliminary Hearings, page 89:

The Justice will often seek the guidance of the county attorney: he must not forget however that the county attorney is obligated to represent one side in the proceedings and to prosecute the defendant with all legitimate means at his disposal while it is the duty of the magistrate to stay above the parties as an impartial judge.

This advice, however, in addition to being inconsistent with that quoted above, comes in the chapter related to preliminary hearings of felony cases and indictible misdemeanors. It does not appear in the chapters relating to criminal trials. In Salt Lake County, where preliminary hearings are held in Salt Lake City Court rather than before a justice of the peace, the justice will have little or no immediate occasion to read chapter 11.

In September 1975, a new Manual for Justices of the Peace was issued, published by the State Court Administrator. This Manual is a considerable improvement over the one in use at the time of the judgment below but it does not solve the problem. The new Manual itself states in a preface by Richard B. Peay, State Court Administrator, dated August 25, 1975:

One word of caution should be noted. This manual is not intended to take the place of a compilation of Utah laws. It refers to the Utah Code in almost every paragraph and is designed to be used in conjunction with the Code. The

Code is as indispensable to the justice of the peace as it is to any other judge in the State. It is realized that more than half of the justices do not have ready access to a complete and up-to-date Utah Code. . . (Emphasis added)

Thus we have the new manual replacing an outmoded and obsolete manual designed to be used in conjunction with the Utah Code which is not available in its entirety to more than half of the justices of the peace in the State. But even if Codes were available or, indeed, well stocked and well maintained law libraries to supplement the new Manual for Justices of the Peace, that would not be sufficient for one could no more expect a person not trained in the law to function as judge merely because supplied with law books than one could expect a layman to function effectively as a surgeon when supplied with medical instruments.

POINT III

A REQUIREMENT THAT JUSTICES OF THE PEACE BE TRAINED IN THE LAW IS CONSISTENT WITH OTHER PROVISIONS OF UTAH LAW REQUIRING SPECIAL TRAINING OR EXPERIENCE IN THE PRACTICE OF PROFESSIONS AFFECTING OTHER PEOPLE'S LIVES.

The laws of the State of Utah prohibit one not admitted to the bar from practicing law. U.C.A. § 78-51-25. Similarly, Utah laws provide requirements of education, training or experience for a number of other professions: physicians U.C.A. § 58-12-2; dentists U.C.A. § 58-7-2; plumbers U.C.A. § 58-18-2; veterinarians U.C.A. § 58-28-2; public school teachers U.C.A. § 53-2-15, 16, 21; pharmacists U.C.A. § 58-17-2; professional engineers U.C.A. § 58-22-12; practicing psychologists U.C.A. § 58-23-2; Machine-generated OCR, may contain errors. U.C.A. § 58-8-2, 3.

While special exceptions are made in some of these provisions in general, they reflect a requirement of professional education before one can practice a profession on other people (or in the case of veterinarians, animals). This, in turn, reflects a sensible judgment, that in our modern world with public education generally available to those who seek it, education for a profession can legitimately be made a pre-condition to the practice of such professions. Recently indeed, this court in Gibb v. Dorius, ___ U. ___, 533 P.2d 299, (1975) held that the withdrawing of blood from the human body for the purpose of determining the alcoholic or drug content of the blood was the practice of medicine and had to be done by or under the supervision and direction of a physician. The court so ruled interpreting U.C.A. § 41-6-44.10. It would seem anomalous that in the enforcement of the laws against drinking and driving a sample of blood cannot be removed from the human body except by one acting in accordance with standard medical practice but in the enforcement of those very same laws, a person can lose his liberty for up to six months upon the judgment of a judge with no training or learning in the law.

Of course, there are justices of the peace without legal training whose natural intelligence or talents for law may compensate for lack of formal legal education or other legal training. Such persons no doubt exist just as there are persons whose natural gifts as teacher or healer might make them effective public school teachers or physicians despite the lack of professional education. But the possible existence of such persons would hardly justify compelling one to attend school taught by

a teacher without formal training or compelling one to submit to an operation by an enthusiastic and possibly gifted amateur. Yet the person charged with the crime before a nonlawyer justice is compelled to submit to the professional ministrations of one without professional training. We submit that the court below was correct in ruling that one facing loss of liberty in such a hearing was denied due process of law. Indeed, the Code of Judicial Conduct approved and adopted by the Justices of this Court on March 1, 1974, specifically provides in Canon 3:

A judge should be faithful to the law and maintain professional competence in it.

Can a justice of the peace without legal training be expected to be faithful to the law, to maintain a professional competence he never initially obtained? Or, are justices of the peace exempted from the Code of Judicial Conduct applicable to other judges. The ruling of the court below, we urge, is a ruling that one faced with the possibility of loss of liberty is entitled to trial before a judge subject to Canon 3 of the Code of Judicial Conduct and for whom that Canon has meaning in that he could reasonably be expected to meet it.

POINT IV

AFFIRMANCE OF THE DECISION BELOW WILL IMPOSE NO UNDUE BURDEN ON THE ADMINISTRATION OF JUSTICE IN THIS STATE BY REASON OF RECENT LEGISLATION ALREADY IN EFFECT.

A court adjudicating a claim of constitutional right is often faced with the unfortunate prospect that recognition of the right asserted can only be achieved at the cost of considerable inconvenience or difficulty to other substantial interests. Happily, in the present case the Court can affirm

the decision below without burdening the administration of justice in the State. By reason of a statute enacted by the Legislature which took effect on July 2, 1975, the right recognized by the Court below is now also accorded by statute. The statute, U.C.A. Special 1975 Supplement § 78-5-4 provides:

(b) (1) Notwithstanding any provision of this code relating to jurisdiction or venue of justice courts, every defendant shall be accorded the right to be tried and sentenced by a judge who is a member of the Utah state bar in any matter wherein the judge may have the option of imposing a jail sentence. If, upon being advised of this right at the time of arraignment, the defendant waives this right, the judge may then proceed to hear the matter and, where warranted, may impose a jail sentence. Unless such a waiver is executed by the defendant, the case shall be forthwith transferred to the nearest or most convenient court in that county, which is presided over by a judge who is a member of the Utah state bar.

The statute would seem to reflect a judgment of the Utah Legislature consistent with the position of the court below, that a defendant facing trial before a justice of the peace who may impose a jail sentence, has a right, unless waived, to trial before a law-trained judge. Of course, the decision below may have been a factor in the enactment of the legislation. But it is significant that the legislation was enacted so promptly following the decision below and before appellate review of that decision. Appellants urge in their briefs against the decision below that there are several counties in the state where there are no practicing lawyers. This point hardly seems significant in view of the statute which in any event requires trial before a law-trained judge unless waived where defendant faces a possibility of imprisonment. The statute applies throughout the state and has been enforced since July 2, 1975. Apparently,

the Legislature determined there were no insuperable burdens to providing trial before a law-trained judge in the situations covered by the statute. There is nothing to indicate the legislative judgment has proven faulty nor in any event will the decision in this case affect procedures in counties without lawyers while the statute remains in effect.

Appellants' contention concerning the absence of lawyers in several counties in the state actually argues against their position. It was bad enough facing trial before a judge without legal training anywhere in the state, but it must have been even worse in counties where neither the defendant nor, indeed, the justice of the peace himself had ready access to legal consultation. The county without lawyers is likely as well to be a county without law books other than, of course, the outmoded 1956 version of the Manual for Justices of the Peace. The appellants' contention seems to be in a county without lawyers it is better to proceed in whatever fashion necessary to dispose of cases rather than to arrange to bring two or possibly three lawyers in to hear such cases. A defense attorney, a county attorney, and a law-trained judge. Your amicus contends that to a legal system concerned with justice as well as convenience, the appropriate judgment is that made by the Legislature in the new statute. A defendant facing possibility of imprisonment has the right to trial before a law-trained judge unless he waives that right.

POINT V

THE DECISION BELOW IS CONSISTENT WITH UTAH STATUTE AND AUTHORITATIVE COMMENTARY ON THE LAW. IT IS ALSO CONSISTENT WITH RECENT JUDICIAL OPINIONS IN OTHER STATES.

The Utah Judicial Code, pursuant to the recently enacted statute, U.C.A. Special 1975 Supplement § 78-5-4, recognizes that:

Every defendant shall be accorded the right to be tried and sentenced by a judge who is a member of the Utah state bar in any matter wherein the judge may have the option of imposing a jail sentence.

This is the very right, recognized by the court below, that amicus is contending for! Ignoring the statutory right, appellants argue that there is a presumption of constitutionality to the denial of such a right based upon the presumption of constitutionality of legislative judgments. It is difficult to see how a presumption of constitutionality can be applied to what is no longer the law, especially when the law was changed to recognize the very right recognized by the court below. If the issue raised on this appeal has not been mooted by the new statute, the statute still has some bearing -- if nothing else -- in terms of the legislative judgment of whether there is a right to trial before a judge who is a member of the bar in cases where a jail term may be imposed.

The new statute is consistent with a long history of criticism of the justices of the peace not trained in the law. Forty-nine years ago, Chester H. Smith wrote in his article, The Justice of the Peace System in the United States, 15 Cal. L.Rev. 118, (1926), cited on page 9 of one of the briefs of

appellants, that:

While the justice of the peace system has a long history and has been firmly embedded in the fundamental law of the states, yet it is an anachronism in our jurisprudence the perpetuation of which cannot be justified. 15 Cal. L. Rev. at p. 140 (Emphasis added).

Smith concludes his article with the following recommendation at p. 141:

If our states are to realize the ideal of Magna Charta . . . there must be state wide abolition of the office of justice of the peace. This can be accomplished . . . most affectively by constitutional enactment. (Emphasis added).

Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey wrote in a book published for the National Conference of Judicial Councils in 1949, Minimum Standards of Judicial Administration, at p. 306 that:

The recommendation that the present justice of the peace system should either be eliminated or greatly improved epitomizes all recommendations of every study made of that system.

Your amicus does not urge the abolition of the justice of the peace system, but its improvement, by affirmance of the decision below, limiting the power of justices of the peace in criminal cases, a limitation now recognized in Utah by statute. This limitation is consistent with the standards declared by the American Bar Association. In the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, (1972), it is provided in Standard 1.2:

The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the code of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice.

The American Bar Association's Project on Standards for Court Organization (1974) recommends in Section 1.21(a) that all persons selected as judges:

. . . should have a broad general and legal education and should have been admitted to the bar.

The decision of the Supreme Court of California in Gordon v. Justice Court for the Yuba Judicial District, supra, has been discussed above in Point I. That the California decision is not an isolated phenomenon is shown by a very recent decision of the Supreme Court of Tennessee, Perry v. Banks, 521 S.W.2d 549 (1975). The case involved an appeal from a ruling of the Chancery Court, enjoining two nonlawyer candidates for county judge from being issued a certificate of election, in the event either should be the apparent election winner, on the ground that, as nonlawyers, they were not eligible to hold the office of county judge. On appeal, the Supreme Court of Tennessee ruled that the case was rendered moot because neither of the nonlawyer candidates was elected; instead a third candidate, a qualified lawyer was elected. Two of the five Justices of the Tennessee Supreme Court dissented from the ruling that the issue was moot. In an opinion by Justice Henry the two dissenters presented their view on the merits of the appeal. They were prepared to rule that a county judge did not, under Tennessee law have to be a lawyer but could not constitutionally preside in cases wherein a citizen could be deprived of his liberty. They said at page 555:

We further hold that for a non-attorney judge to preside over any criminal trial, . . . or any other proceeding wherein a citizen may be deprived of his liberty,

is violative of the Fourteenth Amendment to the Constitution of the United States and Article 1, Sec. 8 of the Constitution of Tennessee.

The advancing standards of due process compel this conclusion.

The provision of the Constitution of Tennessee cited by Justice Henry, Article 1, Section 8 provides in the very words of Magna Carta:

That no man shall be taken or imprisoned. . . or in any manner destroyed or deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

While the opinion of two of the five Justices of the Supreme Court of Tennessee does not, of course, establish the law of that state, it may be regarded as a significant indication of Tennessee law, particularly where the other justices do not speak to the issue because they find it moot. Certainly the opinions in Perry v. Banks, supra, call into question the authority of Ditty v. Hampton, 490 S.W.2d 772 (Tenn. Ct. of App. 1972) cited in appellants' briefs. It should be noted that Ditty v. Hampton was a decision of the Tennessee Court of Appeals, an intermediate court, and its decision cannot be considered authoritative in light of the opinions of the Supreme Court of Tennessee in Perry v. Banks, supra.

A final comment on and quotation from Justice Henry's opinion in Perry v. Banks, supra, seems appropriate. In Justice Henry's view "the advancing standards of due process compel the conclusion" that, unless he is a lawyer, a county judge

. . . may not preside over . . . any . . . proceeding wherein a citizen may be deprived of his liberty. 521 S.W.2d at p. 555.

This is the position urged in this case by amicus curiae. It is also what is now required, unless waived by defendant, by the new Utah statute. We urge this Court to recognize no lesser standard for the State of Utah.

CONCLUSION

Amicus curiae respectfully urges the Court to affirm the decision of the district court in this case.

Respectfully submitted,

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