

1975

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 16 1976

LARRY SHELMIDINE, et al., :

Plaintiff-Respondents, :

CHARLENE POLLY COOK, :

Intervenor, :

VS- :

CHARLES A. JONES, et al., :

Defendants-Appellants. :

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14152

FILED

JUL 23 1975

Clerk, Supreme Court, Utah

BRIEF OF APPELLANTS

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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IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
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| CHARLENE POLLY COOK, | : | |
| Intervenor, | : | Case No. |
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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY J. SHELMIDINE, et al., :

Plaintiffs-Respondents, :

CHARLENE POLLY COOK, :

Intervenor, :

Case No.

-VS- :

CHARLES A. JONES, et al., :

Defendants-Appellants. :

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

The appellants, Justices of the Peace of Precincts in Salt Lake County, State of Utah, appeal from the action of the District Court, Third Judicial District, granting respondents, defendants in criminal cases, an extraordinary writ of prohibition precluding the appellants as justices of the peace not being lawyers from imposing imprisonment or jail sentences on conviction of an offense otherwise within their jurisdiction.

DISPOSITION IN THE LOWER COURT

The respondents filed a petition for extraordinary relief by way of writ of prohibition in the District Court, Third Judicial District, Salt Lake County, State of Utah, against the appellants. The action as originally filed was filed as a class action. The respondents sought a final order prohibiting any of the appellants from presiding over a criminal trial where a jail sentence may be imposed absent a waiver from

the respondents. An answer was duly entered by the Salt Lake County Attorney's Office for the appellants in their official capacity and thereafter an entry of appearance was filed by Robert D. Moore, as attorney for the appellants personally. An application was duly made to have the matter certified as a class action. A motion to intervene on behalf of Charlene Polly Cook was subsequently filed and granted. The respondents' motion to certify the case as a class action was subsequently withdrawn but thereafter reinstated. The court on the 21st day of May, 1975, denied certification of the matter as a class action and thereafter the case was submitted on each party's motion for summary judgment. The trial court entered a memorandum decision on the 3rd day of June, 1975, and an extraordinary writ was thereafter entered prohibiting the appellants from imposing jail sentences or imprisonment on the respondents in the event the respondents were convicted of the charges pending against them.

STATEMENT OF FACTS

The relevant facts before the trial court consisted of the allegations of the respondents' complaint and admitted by appellants that respondents, Larry J. Shelmidine and John R. Reeves, were charged with the crime of driving under the influence of intoxicating liquor. The case against Shelmidine was set for trial before Justice of the Peace Charles A. Jones on January 16, 1975, at 2:30 p.m. and the trial of Reeves before Lynn D. Bernard on March 25, 1975. Both of the respondents plead not guilty and are residents of Salt Lake County. The appellants are justices of the peace exercising precinct jurisdiction in Salt Lake County. At the time of the hearing on motion for summary judgment, it was stipulated that none of the appellants was a member of

the Bar of the State of Utah. On the basis of the facts presented and the contentions of the respondents that appellants could not exercise jurisdiction over respondents, the trial court rendered a memorandum decision in which it found:

Justice of the peace courts in Utah, manned by non-lawyer judges, are courts of convenience, particularly in isolated rural areas typical of most of this state in which there are few, and sometimes no attorneys.

. . . .

Modern transportation and communication have considerably alleviated much of the problem earlier encountered in effectuating a viable means of administering effective and speedy justice on the misdemeanor level. Nevertheless, of the 29 counties in Utah there are still eight counties with two or less resident attorneys and five counties with no resident attorney, for lawyers, whose livelihood is dependent upon the services they are able to render to people, have tended to settle in the more populous regions of the state, requiring the inhabitants in many areas to travel some considerable distance to obtain legal counsel. The impact of this on the administration of misdemeanor offenses -- the very type of offense with which a limited-jurisdiction, lay justice of the peace most frequently deals -- is immediately apparent: One-third of the counties of the state do not have enough resident lawyers to staff the justice courts and still have a prosecutor and defense counsel.

. . . .

If one is entitled, under the growing concepts of Due Process and fair trial, to legal counsel in a misdemeanor case where there is a possibility of imprisonment, Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2066, 32 L.Ed. 2d 530 (1972), see also Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1953), the Due Process, the right to a fair trial and the right to counsel likewise mandate that under such circumstances only a lawyer-judge, qualified by training, background, and experience to comprehend and utilize counsel's legal arguments, can impose a sentence of imprisonment.

This Court therefore finds and holds that the practice under Utah law which allows non-lawyer or lay justices of the peace to impose a jail sentence or right to a fair trial in violation of the mandate of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

. . . (T)he defendants are prohibited as lay judges from imposing imprisonment and jail sentence upon a conviction of the offenses over which they otherwise have jurisdiction.

Respondents have asserted by way of statement of respondents points on cross appeal under Rule 74 and 75d, Utah Rules of Civil Procedure that the trial court erred in not directing that the writ of prohibition prevent defendants from hearing any criminal trials involving charges which may result in jail sentence.

POINT I

THE JUSTICE OF THE PEACE SYSTEM IN THE STATE OF UTAH IS ESTABLISHED BY CONSTITUTIONAL AND LEGISLATIVE PROVISIONS AND IS THEREFORE PRESUMPTIVELY CORRECT AND SHOULD NOT BE RULED UNCONSTITUTIONAL IN THE ABSENCE OF A COMPELLING FEDERAL DEMAND.

The judicial power in the State of Utah is vested in the Senate sitting as a court of impeachment, the Supreme Court, District Courts and Justices of the Peace as well as other inferior courts established by law. Article VIII Section 1 Constitution of Utah. Justice of the peace courts have been part of the judicial system of Utah from territorial days. In the Matter of Wiseman, 1 Utah 39. The tradition of justice courts carried over into statehood with express recognition in the Constitution in Article VIII Section 8 which provides:

The Legislature shall determine the number of justices of the peace to be elected, and shall fix by law their powers, duties and compensation. The jurisdiction of justices of the peace shall be as now provided by law, but the Legislature may restrict the same.

And Article VIII Section 9 of the Constitution of the State of Utah provides for appeals from final judgments of the justice of the peace in civil and criminal cases to the district courts on both questions of law and fact. The Legislature of the State of Utah has made provisions for the establishment of various types of justices courts. § 10-6-74 Utah Code Annotated, 1953, provides for the appointment of city or town justices and Title 78 Chapter 5, Utah Code Annotated, 1953, provides for the jurisdiction and qualification of justices courts. § 17-18-5 Utah Code Annotated, 1953, provides that the Board of County Commissioners shall divide the county into precincts for the purpose of electing justice of the peace and constables. The justice of the peace must reside and hold court in the precinct, city or town for which he was elected or appointed. § 78-5-1, Utah Code Annotated, 1953. City and town justices of the peace have exclusive original jurisdiction of cases arising by reason of a violation of any city or town ordinance. Criminal jurisdiction of justices courts is provided in § 78-5-4 Utah Code Annotated, 1953, and, in effect, provides for misdemeanor jurisdiction of fines up to \$299 or imprisonment not to exceed six months or both. § 78-3-5 Utah Code Annotated, 1953, gives the district court jurisdiction to entertain appeals in criminal and civil cases from final judgments of the district court in accordance with the constitutional provisions heretofore mentioned. Consequently, the Utah Constitution and Statutes provide a comprehensive system for the functioning and operation of justices courts. Under these circumstances, there is a strong presumption of constitutionality attendant to the Utah justice of the peace system. Tintic Standard Mining Co. v. Utah County, 80 Utah 491, 15 P.2d 633 (1932);

Norville v. State Tax Commission, 98 Utah 170, 97 P.2d 937 (1940); Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449 (1967); United States v. National Dairy Products Corp., 372 U.S. 29 (1963). In this instance, a presumption of reasonableness accompanies the exercise of the police power by the State. Gibbons & Reed Co. v. North Salt Lake, 19 Utah 2d 329, 431 P.2d 559 (1967). The party assailing the legislative classification as arbitrary has the burden of showing it to be so. State v. J.B. & R.E. Walker, 100 Utah 523, 116 P.2d 766 (1941).

Consequently, the party plaintiffs below have the burden of overcoming the presumption of the validity of the Utah justice of the peace system. In attacking the legality of having a lay justice of the peace hear a case in which a jail sentence may be imposed, or as the trial court ruled prohibiting a lay justice from imposing a jail sentence, the respondents relied exclusively on the Federal Constitution. Only if principles of federal constitutional law overcome the presumption of validity can respondents prevail in this appeal.

POINT II

THE UTAH PROCEDURE WHICH ALLOWS A LAY JUSTICE OF THE PEACE TO PRESIDE AT A CASE INVOLVING A MATTER IN WHICH A JAIL SENTENCE COULD BE IMPOSED, OR TO IMPOSE A JAIL SENTENCE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Respondents contend that a denial of due process of law results when a lay justice of the peace is allowed to preside in a case in which a prison sentence could be imposed. The trial court apparently concluded that there was such a denial of due process of law if a prison sentence was actually imposed. It is submitted that neither conclusion is required by the due process clause of the Fourteenth Amendment to the United States Constitution.

History

Lay justices of the peace have long been part of the English common law tradition. In Holdsworth, History of English Law, Vol. One, The Judicial System, it is observed with reference to the establishment of justices of the peace:

In fact, the duties of the justices have for a long time past depended much more upon a mass of statute law than upon their commission; and, for the miscellaneous governmental and judicial duties which were thus devolved upon them, a professional lawyer was not needed. The duties were done by the country gentry; and the office of justice of the peace thus afforded an excellent training for the knight of the shire.

More recently, justices of the peace have been more representative of all classes of the community in England. Holdsworth, supra, page 292. However, it is noted:

But the justices still retain their judicial powers, and some small remnant of those administrative powers which gave them, in the sixteenth, seventeenth, and eighteenth centuries, entire control over the local government of the country.

In Giles, The Criminal Law, Rev. Ed. 1961, page 101, it is observed:

Apart from these professional salaried magistrates, the work of the magistrates' courts is done by the lay justices advised by a clerk who is either a solicitor or barrister.

It would seem that the use of lay magistrates and justices of the peace in criminal and civil matters has a long history in English law. Hardin, A Social History of English Law, p. 71-73 (1966).

The American colonialists borrowed heavily from English legal tradition.¹/ In Friedman, A History of American Law, 1973, it is observed:

In a common-law system, judges make at least some of the law, even if their theory denies this fact. American statesmen were not naive; they knew that it mattered what the judges believed and who they were. How judges were to be chosen and how they were to act was a political issue in the Revolutionary generation, at a pitch of intensity rarely reached before or since. State after state -- and the federal government -- fought political battles on issues of selection and control of the bench.

The bench was not homogeneous. Judges varied in quality and qualification, in level and place, from local justices of the peace to the Supreme Court Chief Justice. English and colonial tradition had room for lay judges, as well as for judges learned in law. Lay judges flourished both at the top and the bottom of the pyramid.

. . .

The lay judges were not necessarily politicians, though this was ordinarily the case. But they were invariably prominent local men. William E. Nelson has studied the background and careers of the eleven men who served as justices of the superior court of Massachusetts between 1760 and 1774, on the even, that is, of the Revolution. Nine had never practiced law; six had never even studied law. All, however, of these lay judges had 'either been born into prominent families or become men of substance.' Stephen Sewall, chief justice in 1760, was the nephew of a former chief justice; he had served thirteen years as a tutor at Harvard College.

The base of the pyramid was even more dominated by laymen. Lay justice did not necessarily mean popular or unlettered justice at the trial-court level. The English squires were laymen, but hardly men of the people. Lay justice in America had something of the character of rule

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1. § 68-3-1 Utah Code Annotated, 1953, adopts the common law of England as the law of the State of Utah except to the extent that it is in conflict with constitutional or statutory law or inconsistent with the natural and physical conditions of the state and this applies to criminal procedure as well. State v. Dean, 69 Utah 268, 254 Pac. 142 (1927).

by the squires. Nor was lay justice necessarily informal. Laymen, after years on the bench, often soaked up the lawyer's jargon and tone. After all, lawyers frequently came to the bar after the briefest of clerkships and with little more than a smattering of Blackstone. Lay judges, then, did not absorb their law much differently than the average trained lawyer.

It goes without need of citation that lay judges are prevalent today throughout the United States and in many remote areas are absolutely essential to a reasonable functioning of a judicial system. Smith, The Justice of the Peace System in the United States, 15 Cal. L. Rev. 118 (1927).

As the trial court noted in the instant case, five counties of the State of Utah have no resident attorney and eight counties of the twenty-nine counties in Utah have two or less resident attorneys. It may be concluded that the historical use of lay judges was a recognition of necessity. To the extent that respondents contend that due process requires a lawyer judge in certain instances, there appears to be no historical justification for such a position.

Due Process in Misdemeanor Cases

The jurisdiction of justices of the peace in Utah is relatively limited. Imprisonment may be imposed but may not exceed six months. A fine of up to \$299 may also be imposed. This standard is similar to the federal petty offense statute. 18 U.S.C. 13. In Duncan v. Louisiana, 391 U.S. 154 (1968), the Supreme Court ruled that the Sixth Amendment right to trial by jury was applicable to the states under the due process clause of the Fourteenth Amendment. However, in Duncan, by dicta, the court asserted that petty offenses did not require jury trials. The same position was taken in Baldwin v. New York, 399 U.S. 66 (1970). Most recently, in United States v. Goeltz, 513 F.2d 193

(10th Cir. 1975), the Tenth Circuit Court of Appeals ruled that there was no right to jury trial under the Sixth Amendment in a criminal case that merely involved a petty offense. Consequently, the severity of the penalty is to some degree a measure of the extent to which due process requires a particular procedure. Even today in the federal system, there is no mandatory requirement that United States magistrates be members of the local bar. 28 U.S.C. § 631(b).

It is submitted that if the right to a jury trial is not so fundamental as to be encompassed within due process in a petty offense case, that there could be no requirement in a petty offense case for a lawyer judge.

Due Process in Criminal Cases in General

The United States Supreme Court has recognized that in most instance the states are free to establish whatever procedures they feel are best suited for the interests of its people in the disposition of criminal cases. Snyder v. Massachusetts, 291 U.S. 97 (1934). The critical focus in this case is not whether the due process clause of the Federal Constitution is applicable to state criminal cases since it is clear it is. Rochin v. California, 342 U.S. 165 (1952). Rather, this case raises the question as to what degree of process must be followed. See, Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975). Generally, the United States Supreme Court has said that due process requires a particular procedure when to deny the procedure would be a denial of "fundamental fairness shocking to the universal sense of justice." Kingsella v. United States, ex rel Singleton, 361 U.S. 234 (1960).

The Supreme Court of the United States has as yet never imposed a requirement that a magistrate have any particular level of training or that he be admitted to the bar of the jurisdiction in which he is sitting. The case of Shadwick v. City of Tampa, 407 U.S. 345 (1972) is in point in this regard. There, the Supreme Court held that it was within the bounds of due process for the City of Tampa to authorize municipal court clerks who were neither lawyers or judges to issue warrants, stating that the requirement of being neutral and detached could be met by a layman. The defendant in Shadwick argued that a lay clerk was incapable of understanding and applying the principles embodied in the Fourth Amendment. To this, the court answered:

It is less than clear, however, as to who could qualify as a 'judicial officer' under appellant's theory. There is some suggestion in appellant's brief that a judicial officer must be a lawyer or the municipal court judge himself . . . But it has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or the type of warrant involved. In Jones v. United States, 362 U.S. 257, 270-271 (1960), the Court implied that United States Commissioners, many of whom were not lawyers or judges, were nonetheless 'independent judicial officers.' Id. at 347-48.

The court then went on to state that the test for the qualifications of a magistrate in the present case was whether he was detached and capable of determining probable cause and held that non-lawyer magistrates were capable of meeting the test.

Appellant likewise has failed to demonstrate that these clerks lack capacity to determine probable cause. Our legal system has long entrusted non-lawyers to evaluate more complex and significant factual data than that in the case at hand . . . The significance and responsibility of these lay judgments betray any belief that the Tampa clerks could not determine probable cause for arrest. What we . . . reject today is any per se invalidation of a state of local warrant system on the ground that the issuing magistrate is not a lawyer or a judge.

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Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers. Id. at 352 (Emphasis added).

While Shadwick case decided only that non-lawyer, non-judicial clerks were constitutionally capable of deciding probable cause, it is relevant to the present case. The issue presently before the court is whether non-lawyer justices of the peace are per se unqualified to declare the law and determine the facts in application of the law in limited misdemeanor situations. The Shadwick court would reject such a blanket disqualification. The court in Shadwick placed great stock in the fact that the non-lawyer clerks who were deciding probable cause had limited jurisdiction and were closely supervised by judicial officers. Similarly, under the Utah system, justices of the peace benefit from required legal training, close higher court supervision and have only limited jurisdiction.

Utah law requires close supervision and training of all justices of the peace, thus assuring that the system comport with reasonable fairness and due process. Utah Code Annotated, § 78-5-27, passed in 1971, sets up a mandatory system of continuing education for justices of the peace:

All justices of the peace shall attend one of two annual institutes to be supervised by the Utah Supreme Court. Any justice not attending one institute during the year shall vacate his office unless he has obtained a written excuse for good cause from the chief justice of the state Supreme Court.

In other cases involving the loss of individual liberty, the Supreme Court has not been willing to require the extension of a full

panoply of constitutional rights. In Morrissey v. Brewer, 408 U.S. 471 (1972) the Supreme Court required certain due process standards be met prior to the revocation of a prisoner's parole. The court did not require as a sin qua non to the revocation of parole that the accused be afforded a lawyer. A preliminary probable cause type hearing followed by a more formal evidentiary hearing was all that was required. The court ruled with reference to the standard of professionalism of the persons making the determination to revoke parole that they need not be judges or lawyers. The court observed, id. at 489:

. . . (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; . . .

Parole revocation may very well result in a longer period of incarceration than that that could be imposed by a lay justice of the peace in the State of Utah. The Supreme Court, however, was unwilling to say that due process required a lawyer for the parolee or that the adjudicating body be made up of judges or lawyers.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the court was faced with a contention that in a revocation of probation that counsel should be required at all hearings. The court rejected such a rigid rule saying that it "would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel." The court ruled only that a probationer was entitled to the preliminary and final revocation hearing under the conditions specified in Morrissey. The court's observation is applicable to the issue raised in this case.

In Wolff v. McDonnell, 418 U.S. 539 (1974), the court was faced with

the question as to what procedural rights a prisoner confined in an institution was entitled to before being subjected to disciplinary action. The court concluded that the Morrissey and Scarpelli standards need not be met even though a prisoner would face serious loss of liberty. The court recognized the difference between prison disciplinary proceedings and court processes. A written statement of the charges and the hearing were the primary benefits that the court felt the prisoner entitled to. It denied the contention that a prisoner should be entitled to counsel and further said, "We decline to rule that the adjustment committee which conducts the required hearings at the Nebraska prison complex and determines whether to revoke good time is not sufficiently impartial to satisfy due process." The adjudication committee consisted of prison officials with no indication that there was lawyer participation. It is submitted, therefore, that the Supreme Court's apparent unwillingness to require lawyer trained personnel in situations similar to those at issue in this case does not make the requirement of a lawyer judge fundamental to due process. As was noted by the Arizona Supreme Court in Crouch v. Tl Justice of the Peace Court of the Sixth Precinct, 7 Ariz. App. 460, 440 P.2d 1,000 (1968):

The fact that a Justice of the Peace is not an attorney does not mean that he is per se unqualified to declare the law in the limited type of situations over which he has jurisdiction. The fact that a judicial error may be made in a proceeding does not necessarily imply a denial of due process of law. The 14th Amendment does not assure immunity from judicial error.

See also, State v. Lynch, 197 Ariz. 463, 489 P.2d 697 (1971); State v. Dziggel, 16 Ariz. App. 289, 492 P.2d 1227 (1972). The Illinois Supreme Court has also reached a similar result in City of Decatur v. Kushmer,

43 Ill. 2d 334, 253 N.E.2d 425 (1969). Cases from other jurisdictions have also reached the same general conclusion in a variety of contexts. Mississippi County v. Green, 200 Ark. 204, 138 S.W. 2d 377 (1940); State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914); State ex rel. Sellars v. Parker, 87 Fla. 181, 100 So. 260 (1924); Ditty v. Hampton, 490 S.W. 2d 772 (Ky. 1973) appeal dismissed 414 U.S. 885 (1973); Attorney General ex rel. Cook v. O'Neill, 280 Mich. 649, 274 N.W. 445 (1937); Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913); In re Hudson County, 106 N.J. 62, 144 Atl. 169 (1928); State ex rel. Swann v. Freshour, 219 Tenn. 482, 410 S.W. 2d 885 (1967).

Utah's Two Tier System Providing for Trial De Novo on Appeal Adequately Satisfies Due Process Standards

The Utah Constitution, Article VIII, Section 9, provides that appeal are available from the final judgment of a justice of the peace in criminal cases to the district courts on both questions of law and fact with such limitations and restrictions as may be provided by law. The legislature has provided for a right of trial de novo in an appeal from a justice court. § 77-57-43 Utah Code Annotated, 1953. A defendant may bypass the justice court altogether by pleading guilty and obtaining a trial de novo without prejudice before the district court. Weaver v. Kimball, 59 Utah 72, 202 Pac. 9 (1921); § 77-57-38 Utah Code Annotated, 1953. Utah law provides for a two-tier system. An accused who is tried before a justice of the peace who is not a lawyer has an absolute right to have his case heard anew before the district court where he would have a lawyer judge. The United States Supreme Court has never required that a state provide the right to appeal to a defendant in a criminal case. Griffin v. Illinois 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

Therefore, Utah goes beyond what current federal constitutional

requirement of due process of law in providing an appellate process. In addition, the appellate process meets the very complaint raised by respondents in the instant case. By extending the right to appeal to a trial de novo the accused obtains a complete review of both the adjudication and sentencing portions of his case and since this process is extended to him as a matter of right, he has every opportunity to have the due process respondent contends is constitutionally mandated.

The Utah system is substantially different than that which was before the California Supreme Court in Gordon v. The Justice Court, 12 Cal. 3d 326, 525 P.2d 72 (1974) where the California Supreme Court held that the use of non-attorney justices to try misdemeanors where there was a possibility of imprisonment was a violation of due process of law. Under California law, however, the accused does not have a right to a trial de novo, but must appeal his case, Cal. Penal Code § 1466 (West 1970). It is a matter of discretion whether the defendant is granted a trial de novo in California. Cal. Penal Code § 1469 (West 1970). Added to this problem in California is the fact that Justice Courts are not courts of record (Cal. Const., Art. VI, § 1), thus making the appeal procedure more inadequate since any appeal would be based solely "upon a statement of the case settled or prepared by the non-attorney judge himself." 115 Cal. Rptr. at 638. Thus, it is obvious that the California system is not as protective of the accused's rights as is Utah's where the defendant has an absolute right to a trial de novo. The due process considerations in determining the constitutional validity of the California system are different than in a jurisdiction where a trial de novo is the defendant's right.

In Ross v. Moffit, 417 U.S. 600 (1974), the Supreme Court held that

an accused was not entitled to counsel as a matter of due process on his discretionary appeal to the Supreme Court of North Carolina where he otherwise had counsel at the time of his first appeal. The inverse of that situation is present in the instant case, and the same conclusion should hold true if a lawyer judge on appeal satisfies due process requirements. In other contexts, this would render moot the argument being advanced by the respondents but for their efforts at obtaining extraordinary relief. Cf. Costarelli v. Massachusetts, 43 L.W. 4510 (USSC 1975).

The two-tier system for adjudicating less serious criminal cases was held in Colten v. Kentucky, 407 U.S. 104 (1972) to satisfy due process, even though the judge in the de novo case could impose a higher penalty. The court acknowledged that many states do not require justice court judges to be attorneys and that the mere fact that a defendant had to endure a trial in an inferior court with less adequate protections did not deny due process where trial de novo was available. The court stated:

(M)any . . . systems . . . lack some of the safeguards provided in more serious criminal cases . . . Some, including Kentucky, do not record proceedings and the judges may not be trained for their positions either by experience or schooling.

. . .

We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available.
407 U.S. at 113, 118.

. . .

Proceedings in the inferior courts are simple and speedy . . . Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. 407 U.S. at 119 (Emphasis added).

The trial court rejected the contention that the two-tier system adequately affords due process. (See, page 6 Memorandum Opinion). The trial court concluded that the respondents were entitled to a fair trial in the first instance citing Ward v. Village of Monroeville, 409 U.S. 57 (1972). It is submitted that the analogy to the Ward case and its predecessor, Toomey v. Ohio, 273 U.S. 510 (1927), is inapplicable in the instant situation. In both cases, the Supreme Court held that where a mayor before whom the defendant was tried on traffic offenses had a substantial financial interest in the outcome that trial before such an individual was a denial of due process. The court indicated that trial was required before a disinterested or impartial judicial officer. The issue in the instant case in no way involves the question of whether a judge has such an immediate interest in the outcome of the case as to disqualify him. A lay judge may be totally impartial where a lawyer judge does not necessarily guarantee any greater degree of impartiality.

It cannot be said that per se a trial before a non-lawyer judge is the equivalent of a trial before a judge that has a financial interest in the outcome. In both the Ward and Toomey cases although not mentioned in the opinion, it would appear that trial was held before an executive official who was not necessarily a lawyer and this was not a factor in the court's opinions.

It is submitted that Utah's two-tier system effectively answers the respondents' contentions that trial in the first instance before a lay justice of the peace denies due process of law if imprisonment may be imposed or is imposed.

Based on all the above considerations, it is submitted that the due process clause of the Fourteenth Amendment of the United States Constitution does not require a lawyer judge where a sentence of incarceration can or is in fact imposed.

POINT III

THE UTAH JUSTICE OF THE PEACE SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE FOURTEENTH AMENDMENT.

A. Proper Classification

The respondents in their complaint raised a contention that there was a denial of equal protection under the Fourteenth Amendment to the Constitution of the United States because persons tried for the same offense before a city judge in Salt Lake County could receive a trial before a lawyer whereas for the most part persons tried before a justice of the peace in the same county would be tried by non-lawyers. Respondent therefore, claimed the appropriate classification to be that of Salt Lake County for determining whether a denial of equal protection had occurred. The trial court's decision does not appear to be predicated upon a denial of equal protection. However, the Memorandum Opinion is not altogether

clear as to the exact basis upon which the trial court relied. Therefore, the equal protection issue should be considered by this court.

It is submitted that in determining what is an appropriate classification for applying equal protection standards that Salt Lake County is not the proper classification standard. In establishing the office of justice of the peace, the Utah Constitution purports to operate statewide. The legislative implementation of the constitutional office of justice of the peace is not limited to Salt Lake County but is applicable throughout the State of Utah. Consequently, the appropriate category for classification is the State of Utah not just Salt Lake County. When the classification is examined on a statewide basis, it appears that there is no merit to a claim of a denial of equal protection.

B. Rational Basis Standard

The United States Supreme Court has formulated two standards for assessing whether a legislative classification violates the equal protection standards of the Fourteenth Amendment. See, Gunther, The Supreme Court 1971 Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Where a category for legislative action is based upon political or racial criteria, it is a "suspect classification." Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). In those instances, there must be ample evidence to justify the classification. In other instances, where such a classification basis is absent, the legislative classification will stand if there is any rational basis on which to justify the differentiation. Most recently, in Stanton v. Stanton, 95 S.Ct. 1373 (1975) the Supreme Court indicated that it need not determine whether a classification difference based on sex was a suspect category. The court

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held that the matter could be decided on the more fundamental rational basis test.

In the area of criminal law, the application of the equal protection clause has been most readily identified with assuring that the benefits of a fair trial have been extended to defendants irrespective of their wealth. Griffin v. Illinois, 351 U.S. 12 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963). In the instant case, there is no question concerning different treatment of individuals of varying economic position. The situation here is one of geographical location as to the place of the commission of the offense and the education of the judge. It is submitted that if any rational basis can be found justifying lay justices of the peace that such classification can withstand constitutional scrutiny. A similar argument on equal protection grounds was raised in Ditty v. Hampton, 490 S.W. 2d 772 (Ky. 1973) where the Kentucky Court of Appeals observed:

There has been no showing in this case that non-lawyer police judges, proportionately, convict more defendants, impose higher sentences, or are reversed more on appeal, than lawyer judges. There is no basis for any finding that they are less fair and impartial in cases in which the defendant, as he is entitled, is represented by counsel, or that their ignorance of the law harms the accused more than the government. There is no support for the assertion that the non-lawyer judge, generally, will accept the prosecutor's version of the law rather than that of defense counsel.

We conclude that the bases for the classification reasonably justify the classification in the balance of the bases against possible detriment factors.
490 S.W. 2d 777.

It is submitted that when the State of Utah is considered as the unit of classification that given its history, geography and demography that the differentiation that the legislature has made is not only reasonable but

essential. The United States Supreme Court has recognized that a state need only have some justifiable basis in enacting legislation treating persons differently in order to sustain the legislation. Thus, the court has ruled that there is no denial of equal protection because students in one school district receive greater financial support than students in another school district because of a different tax base. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). Thus, all school districts are not required to provide the same educational advantages. Not all judicial forums need provide a judge of the same degree of sophistication.

In McGinnis v. Royster, 410 U.S. 263 (1973), the court held that a New York statute denying certain state prisoners good time credit for parole eligibility for the period of their pre-sentence incarceration and granting good time credit to those released on bail did not deny equal protection since the state was able to articulate a rehabilitative goal in such a differentiation.

In Ortwein v. Schwab, 410 U.S. 656 (1973), the court said that a rational justification was the standard to be applied in determining whether Oregon law requiring an appellate filing fee for indigents seeking to appeal adverse welfare decisions was unconstitutional. The court upheld the requirement in the face of an equal protection argument finding that the categorization of requiring a fee for welfare appeals and not in criminal cases involving loss of liberty and civil cases involving termination of parental rights was not such an arbitrary classification as to deny equal protection.

In view of the fact that large segments of Utah must rely upon lay judges as a part of the system of courts and do not have access to lawyers allowing lay judges to serve as justices of the peace is not irrational. City judges serve mostly in metropolitan areas and frequently in areas where attorneys are most prevalent. Justices of the peace often have jurisdiction in remote areas and lawyers are often unavailable to act as judges if they must reside in the precinct. Hence, it cannot be said that the failure to require justices of the peace to be lawyers is irrational.

Salt Lake County

Even assuming that the respondents' equal protection unit of classification of Salt Lake County is the proper classification for considering whether the current justice of the peace system violates equal protection, it is submitted that the rational basis test would still be satisfied. In Salzberg v. Maryland, 346 U.S. 545 (1954), the United States Supreme Court upheld legislation in the State of Maryland that treated certain defendants in criminal cases differently in one county over another as against a claim of denial of equal protection. The court found the justification based on the different problems within the particular county. Most recently, in In re Trader, 16 Cr.L.Rep. 2072 (Md. Ct. of App. 1974), the Maryland Court, referring to the Salzberg case, upheld different treatment of juveniles within the same county finding that the circumstances within the county justified the differentiation. In the instant case, there is no evidence to show why a classification requiring city judges in Salt Lake City to be lawyers and allowing justices of the peace in Salt Lake County encompassing a more rural area is not a legitimate classification. Since the burden is on the respondents to show the irrationality of the classification and there is

a presumption that the classification is constitutional, it is submitted that respondents did not establish their contention of a violation of equal protection of the laws.

POINT IV

THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IS NOT VIOLATED BY ALLOWING A DEFENDANT IN A MISDEMEANOR CRIMINAL CASE TO BE TRIED AND SENTENCED TO A TERM OF IMPRISONMENT BY A NON-LAWYER JUDGE.

The trial court concluded that if an accused was entitled to legal counsel in a misdemeanor case where there was a possibility of imprisonment, Argersinger v. Hamlin, 407 U.S. 25 (1972), that due process likewise mandated a lawyer judge to "comprehend and utilize counsel's legal arguments." The trial court then concluded that only a lawyer judge could impose a sentence of imprisonment. The California Supreme Court in Gordon v. The Justice Court, supra, ruled that permitting non-lawyer judges to preside over a criminal trial in which the offense is punishable by jail sentence violated the due process clause of the Fourteenth Amendment. The California court concluded that a fair trial was not otherwise possible. The due process argument has heretofore been treated and the only question is whether the Sixth Amendment requires a lawyer judge in order to make the right to counsel effective.

It is submitted that there is no constitutional requirement for a lawyer judge in cases where imprisonment is imposed or may be imposed as a matter of effectuating the Sixth Amendment. The Sixth Amendment to the Constitution flatly states that the accused shall enjoy the right "to have the assistance of counsel for his defense." At the time of the adoption of the Sixth Amendment, lay judges were quite common. Counsel could provide an accused with guidance through the labyrinth of legal procedures as well as being an articulate spokesman in promoting an

accused's defense. The position that seemed to be taken by the trial court in the instant case is that only a lawyer can understand a lawyer. If such is the case, the legal profession instead of becoming more adept in the articulation of a client's cause would appear to have become so mute that only a narrow class of persons can comprehend what is being said. Such simply is not the case. A lawyer can still be an effective advocate for his client before a non-lawyer judge. He can marshal the facts in a way to make them more comprehensible to the trier of fact. The lawyer performs this function when the case is submitted to a lay jury. He can articulate the legal principles involved to a lay judge in the same fashion that he often must articulate such principles when presenting the case for decision to a lay jury. He can still raise in an intelligent and persuasive fashion all that reasonable advocacy would expect. Essentially, the assistance of counsel is for "the right to be heard." Powell v. Alabama, 287 U.S. 45 (1932). The same reasons that compel the right to counsel do not necessarily mandate a lawyer trained judge. Laymen in many contexts are required to apply and appreciate legal principles. Income tax, commercial law, corporate law are all areas where laymen often effectively handle legal matters. In the field of criminal law, laymen most frequently apply the law, these being policemen, charged with interpreting the law as well as making a determination as to whether the process of government should be directed against a person's activities. The logical extension of the contention that the Sixth Amendment is not meaningful unless there is a lawyer listening to counsel's presentation would require lawyer juries and maybe lawyer officials in the pre-judicial enforcement of the criminal law. Such an extension would be impossible to meet and most unnecessary.

In In re Gault, 387 U.S. 1 (1967), the United States Supreme Court adopted a standard for required procedures in juvenile cases similar in some respects to that later required in misdemeanor cases in Argersinger v. Hamlin, supra. Thus, the court required that a juvenile have the right to counsel where the child may be subjected to the loss of his liberty. In the same opinion, however, the court noted that in the juvenile justice system as it existed at the time of Gault according to the National Crime Report "indicates that half of these judges have no undergraduate degree, a fifth have no college education at all, a fifth are not members of the bar, and three-quarters devote less than one-fourth of their time to juvenile matters." It also noted that the George Washington University Center for Behavioral Sciences of 1965 did a detailed statistical study of juvenile court judges and found that "about a quarter of these judges have no law school training at all." Even with those observations, the court did not impose any requirement that a juvenile be brought before a judge who is a member of the bar or who has any particular standard of training. The court laid out numerous rights that a juvenile may have including the right to counsel but apparently at the time of Gault the court believed the right to counsel to be sufficient to protect a juvenile accused without additional requiring that the judge be a member of the bar. It is submitted therefore that there is no Sixth Amendment right to a lawyer judge and that the analogy adopted by the trial court and by the California Supreme Court to Argersinger v. Hamlin, supra, is not one that is mandated by the Federal Constitution.

CONCLUSION

It is respectfully submitted that the trial court in the instant case erred in concluding that an accused has a constitutional right to a lawyer judge before a sentence to imprisonment can be imposed. An examination of the due process, equal protection and right to counsel arguments reveals that the Constitution of the United States does not require that an accused be tried by a lawyer judge before a sentence of imprisonment can be imposed. Nothing in the Constitution of the United States says anything about the qualifications of the federal judiciary. It has been suggested from time to time that a non-lawyer should be appointed to the Supreme Court. In some jurisdictions, the juries actually fix the sentence of imprisonment. To mandate the requirement of lawyer judges would not only distort the historical meaning of the Constitution of the United States but would place an immense burden on the present judicial system. The impact of upholding the trial court's decision would be difficult to calculate. This court should reverse the trial court and conclude that lawyer judges are not required before a sentence of imprisonment can be imposed or a case adjudicated where imprisonment may be a possibility.

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