

1975

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

Utah Supreme Court

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R. Paul Van Dam; Salt Lake County Attorney; Donald Sawaya; Chief Civil Deputy County Attorney; Ronald N. Boyce; Deputy Count Attorney; Robert D. Moore; Rawlings, Roberts, and Black; Earl F. Dorius; attorneys for appellants.

Stephen R. McCaughey; attorney for respondents. J. Thomas Greene; attorney for intervenor. Lionel Frankel; attorney for Amicus Curiae.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LARRY SHELMIDINE, et. al.,
Plaintiff-Respondents

SEP 16 1976

CHARLENE POLLY COOK
Intervenor

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14152

-vs-

CHARLES A. JONES, et. al.,
Defendants-Appellants

BRIEF OF RESPONDENTS - CROSS 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.

R. PAUL VAN DAM
Salt Lake County Attorney
Metropolitan Hall of Justice C-220
Salt Lake City, Utah 84111

STEPHEN R. MC CAUGHEY
343 South 6th East
Salt Lake City, Utah 84102
Attorney for Respondents

DONALD SAWAYA
Chief Civil Deputy County Attorney
Metropolitan Hall of Justice C-220
Salt Lake City, Utah 84111

J. THOMAS GREENE
800 Kennecott Building
Salt Lake City, Utah 84133
Attorney for Intervenor

RONALD N. BOYCE
Deputy County Attorney
Metropolitan Hall of Justice
Salt Lake City, Utah 84111
Attorneys for Appellants

LIONEL FRANKEL
University of Utah College of Law
Salt Lake City, Utah
Attorney for Amicus Curiae
Utah Civil Liberties Union

ROBERT D. MOORE
Rawlings, Roberts & Black
400 Ten Broadway Building
Salt Lake City, Utah 84101

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EARL F. DORIUS
Assistant Attorney General
236 State Capitol

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY J. SHELMIDINE, et. al.	:	
	:	
Plaintiffs-Respondents	:	
	:	
CHARLENE POLLY COOK,	:	
	:	
Intervenor	:	
	:	
vs.	:	
	:	
CHARLES A. JONES, et. al.,	:	Case No. 14152
	:	
Defendants -Appellants.	:	

BRIEF OF RESPONDENTS - CROSS 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 charged with criminal offenses, an extraordinary writ in the nature of prohibition precluding the appellants as non-lawyer justices of the peace from imposing imprisonment or jail sentences on conviction of a criminal offense otherwise within their jurisdiction.

DISPOSITION IN THE LOWER COURT

The respondents filed a petition for an extraordinary writ in the nature of prohibition in the District Court, Third Judicial District, Salt Lake County, State of Utah, against the appellants. 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 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. The action was originally filed as a class action and application was made to have the matter certified as a class action. 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. A motion to intervene on behalf of Charlene Polly Cook was subsequently filed and granted. 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.

RELIEF SOUGHT ON APPEAL AND CROSS APPEAL

Appellants seek reversal of the District Court's order granting a writ in the nature of prohibition and remand of the case for further proceedings on the charges filed against respondents. Respondents pursuant to their duly filed cross appeal under Rules 74 and 75 d of the Utah Rules of Civil Procedure seek an order directing that the writ in the nature of

prohibition be entered as originally prayed for in respondent's original complaint. Specifically on cross-appeal respondents requests a writ in the nature of prohibition preventing appellant lay-justices from hearing any criminal cases involving charges in which a jail sentence may be the ultimate result.

Alternatively respondent's ask for an order affirming the District Court's memorandum decision and an order granting a writ in the nature of prohibition which prevents the appellant lay justices from imposing imprisonment or a jail sentence upon a conviction of an offense over which they otherwise have jurisdiction.

STATEMENT OF FACTS

Respondents stand charged with the crime of driving under the influence of intoxicating liquor, Section 41-6-44 Utah Code Annotated (1953 as amended). Respondent Larry J. Shelmidine's case was set for trial before appellant Charles A. Jones on January 16, 1975. Respondent John R. Reeves' case was set for trial before Lynn D. Bernard on March 25, 1975. Respondent Charlene P. Cook's case was set for trial before Charles A. Jones on April 10, 1975. The penalty involved if respondents are found guilty is imprisonment for not less than thirty days nor more that six months, or by a fine of not less than \$100 nor more than \$299, or by both such fine and imprisonment. Section 41-6-44 Utah Code Annotated (1953). Trials for all respondents were stayed pending the outcome of this case.

Respondents sought a petition for an extraordinary writ in the nature of prohibition forbidding appellants from hearing criminal cases where imposition of imprisonment or a jail sentence was possible.

At the time of the hearing on motion for summary judgement, it was stipulated that none of the appellants were a member of the Bar of the State of Utah.

ARGUMENT

In this case as originally filed in the District Court, respondent's sought extraordinary relief in the nature of prohibition permanently prohibiting the appellant lay justices from presiding over any criminal case where a jail sentence may be imposed absent the requisite waiver. The District Court modified the relief sought by respondents ruling only that appellants could not impose any imprisonment or jail sentence, but could in effect continue to hear criminal cases where a jail sentence might result as long as appellant's did not in fact impose such a sentence. Respondents respectfully submit, pursuant to the cross appeal heretofore taken under Rules 74 and 75 of the Utah Rules of Civil Procedure, that the District Court's order should be modified to allow for the relief originally prayed and that this Court should prohibit the appellant lay justices from hearing any criminal case where a jail sentence might result. Such a ruling would bring the decision within the meaning of Argersinger v. Hamlin, 407 U.S. 25 (1972) thus granting respondents original prayer for relief.

Alternatively respondent's ask affirmance of the District Court's ruling and order granting the writ in the nature of prohibition.

POINT I

DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A JUDGE IN A CRIMINAL CASE IN WHICH A JAIL SENTENCE MAY BE IMPOSED BE A LAWYER.

Respondent's submit that the practice of allowing the appellants to preside over criminal cases wherein a jail sentence may be imposed is a denial of a criminal defendant's right to a fair trial and thus, is in violation of Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

The right to a fair trial is protected by the due process clause of the Fourteenth Amendment. The Lay Justice of the Peace system in Salt Lake County is fraught with arbitrary justice resulting in a denial of due process. Lay judges in Salt Lake County have jurisdiction over many complex matters that directly affect the liberty of the accused, and their jurisdiction results in a denial of due process of law that cannot be remedied by according the accused the right to appeal.

The U. S. Supreme Court has held that all defendants are entitled to a fair trial, Adamson vs. California, 332 U. S. 46, reh. den. 332 U. S. 784 (1947); Tumey v. Ohio, 273 U. S. 510 (1927). While the Fourteenth Amendment

is not a guarantee that a trial shall be devoid of error, if the error is gross and obvious, coming close to the boundary of arbitrary action, there is a violation of due process, Roberts v. New York City, 295 U.S. 264 (1934). Due process further requires that different criminal procedure in the several states nevertheless should be subject to the overriding requirements of fundamental fairness implicit in the concept of ordered liberty. Mapp v. Ohio, 367 U.S. 643, 655 (1961). No matter how well-meaning a lay judge may be, there are compelling reasons why he should not be permitted to perform judicial functions in proceedings which affect the liberty of the accused.

The Supreme Court of California has recently held, in the case of Gordon v. Justice Court, 115 Cal. Rptr. 632, 12 Cal. 2d 323, 525 P. 2d 72 (1974), cert. den. 43 L. Ed. 2d 415 (Feb. 18, 1975) that the use of non-lawyer judges in criminal cases where a jail sentence may result is a patent denial of due process of law.

The court in that case held:

. . . we conclude that, under today's advanced standards, due process demands that henceforth a defendant charged with an offense carrying a possible jail sentence must be provided with an attorney judge to preside over the proceedings, unless he elects to waive such right. (525 P. 2d at 79)

Gordon and Arguijo, the defendants in that case, were brought before different non-attorney justice court judges to stand trial for misdemeanors, punishable with a possible jail sentence. Gordon was

charged with disturbing the peace and failure to disperse and Arguijo with driving under the influence of alcohol. The California Supreme Court, in bank, unanimously held that due to the lack of legal training "a reasonable likelihood exists that a non-attorney judge will be unable to afford a defendant a fair trial." (525 P.2d at 79).

An analysis of the California Court's opinion in Gordon demands a determination that the use of lay judges in the justice of the peace courts of Salt Lake County suffers the same constitutional infirmities as the California system.

Justices of the Peace in Utah have criminal jurisdiction over several specified misdemeanors and all misdemeanors punishable by up to a Three Hundred Dollar (\$300.00) fine or six (6) months in prison or both, Section 78-5-4 Utah Code Annotated (1953). The jurisdiction of the California justice courts, struck down Gordon, was very similar (See 525 P.2d at 74). At the outset of that case the California Court stated that no distinction of constitutional dimension could be made solely on the fact that the justice court's deal exclusively with misdemeanor cases. In this regard it was noted that the constitutional and legal issues involved in a misdemeanor case:

. . . may be as complex as those involved in a trial of a more serious offense. (See Argersinger v. Hamlin, 407 U.S. 25, 33, 92 S. Ct. 2006, 32 L. Ed. 2d 530). There is little guarantee that the background of a non-attorney judge will have prepared him to recognize these issues and resolve them according to established legal principles. (525 P.2d at 76).

While noting the the breadth of the recent development of constitutionally mandated criminal procedure, the court further opined that such functions as charging the jury, taking guilty pleas, making difficult sentencing decisions, and ruling on difficult constitutional and evidentiary issues demands highly developed legal skill and training and may not be performed by one not trained in the law (525 P. 2d at 72). Interestingly the court noted that ruling on the complex evidentiary issues surrounding the administering of various blood alcohol tests in driving under the influence cases is one instance where the non-attorney judge is not going to be able to perform satisfactorily. The respondents in the instant case, all charged with driving under the influence, thus face the same quandry as that which the California Court found so telling in making their decision.

The California Court found support for its landmark ruling in the dynamic quality of the concept of Due Process of law. Quoting at length from Mr. Justice Frankfurter's opinion in Wolf v. Colorado, 338 U. S. 25, 27, (1949) Justice Burke speaking for the unanimous court went on to say:

Whatever the justification for permitting laymen to preside over criminal trials in the 1800's, it is well recognized that even long-standing practices must meet the advancing standards of due process. (525 P. 2d at 75).

The court then noted that the United States Supreme Court's landmark right to counsel decisions of Gideon v. Wainwright, 372 U. S. 335, (1963) and Argersinger v. Hamlin, 407 U. S. 25, (1972), recognized that the complexities involved in defending oneself in a criminal trial are

beyond the capabilities of the average layman untrained in the laws regardless of the severity of the penalty. Taking the next step the California court said:

. . . it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process. (525 P. 2d at 78).

Thus, the decision by the California Supreme Court sets forth a definitive ruling that the due process of law embodied in the Fourteenth Amendment to the United States Constitution finds the use of non-lawyer judges in criminal trials where jail-time may result, constitutionally impermissible. Those few other cases which have dealt with this specific issue are not so definitive and are readily distinguishable, as was noted by the California Court. (525 P. 2d at 78).

Three of these cases, City of Decatur v. Kushner, 43 Ill. 2d 334, 253, N. E. 2d 425 (1969); Crouch v. Justice Court, 7 Ariz. App. 460, 440 P. 2d 1000 (1969) and Melkean v. Avent, 300 F. Supp 516 (D. C. N. D. Miss. 1969) are pre-Argersinger v. Hamlin decisions. The precedential value of these cases is therefore of limited validity considering the California Court's and Judge Hanson's heavy reliance on the Argersinger rationale for their decisions. Furthermore, in none of these cases is the issue extant in the instant case really thoroughly discussed. In City of Decatur v. Kushner the issue seems to have been raised by counsel as an afterthought and for the first time on appeal. The Supreme Court of

Illinois casually dismissed the constitutional issue with citations only to Am. Jr., C.J.S. and state statutory and constitutional provisions.

In Crouch v. Justice Court the intermediate appellate court in Arizona dealt solely with the issue of whether allowing a justice of the peace to instruct the jury as to the law in a criminal misdemeanor case is a denial of due process. The court in Crouch similarly did not reach the precise issue at the bar today.

Melkian v. Avent, 300 F. Supp. 516 (D. C. N. D. Miss. 1969) is even less in point. This pre-Argersinger decision embodied an action in Federal Court to have the entire Mississippi Justice of the Peace Court System declared unconstitutional. Importantly, however, the action in the justice court upon which the plaintiff asked for injunctive relief in Federal Court was a civil suit sounding in contract, and not a criminal action. The issue as to whether a non-lawyer judge may constitutionally preside over a criminal trial where a jail sentence may result was not even discussed peripherally.

The other authority asserted in the briefs of appellants is likewise of little relevance being pre-Argersinger. Moreover, like State ex rel Swann v. Freshour, 219 Tenn 482, 410 S. W. 2d 885 (1967) none of the cases deal with the issue of the use of lay judges in the context of a criminal trial where a jail sentence may result or has been imposed. That is the issue in the instant case, contrary to the assertions of appellants this not an attempt on

the part of respondents to overthrow the entire justice of the peace system in Utah or ring the death knell of that system.

Appellant's rely heavily on the case of Shadwick v. City of Tampa, 407 U. S. 345 (1972) for the proposition that a lay judge is per se qualified to preside at a criminal trial where jail time may result. Shadwick, however, as is noted in the brief's submitted by the appellants (Brief of Salt Lake County Attorney at 12 and Brief of Appellants -Utah Attorney General at 9) decided only that a non-lawyer, non-judicial clerk was capable of determining probable cause for the issuance of an arrest warrant. The issue before the Court in the instant case is not even alluded to, and was not before the United States Supreme Court in Shadwick.

Respondents have no quarrel with the limited rule announced in that case. Shadwick only reaffirms the long standing use of layman, particularly police officers, to make a probable cause determination for arrest. See for example Section 77-13-3 Utah Code Annotated (1953). Moreover, the Court in Shadwick expressly noted that the lay-clerk issuing such warrants would be under the close scrutiny of a judicial officer and furthermore limited the holding to the issuance of arrest warrants. The Court was not willing to go the next step and decide whether a lay-clerk could issue search warrants where the intrusion into the sanctity of home and office might be great and the concomitant legal issues more complex.

The only real authority which may be found in opposition to the California Court's decision in Gordon and Judge Hanson's decision below is a series of decisions from the Kentucky Court of Appeals. Ditty v. Hampton

Ky., 490 S. W. 2d 772 (1972) app. dism. 414 U.S. 885 (1973); and North v. Russell, Ky., 516 S. W. 2d 103 (1974) vac. and rem. 95 S. Ct. 673 (1974)¹. Ditty v. Hampton is the benchmark in Kentucky and the Court therein ruled, post-Argersinger, that due process does not require that the court in a criminal case be presided over by a lawyer judge. The conclusion of that court is best embodied in the following statement:

. . . we think it is clear, accepting due process as a living principle, that advancing standards or changing conditions have not yet made the lawyer judge a condition of fundamental fairness. (490 S. W. 2d at 772). (Emphasis Supplied).

The California Court, specifically citing Ditty v. Hampton, unequivocally disagreed:

The people point out that the courts of several states have concluded that the use of non-attorney judges is consistent with the demands of due process . . . [citing Ditty v. Hampton, Crouch v. Justice of the Peace Court and City of Decatur v. Kushner,] . . . yet, none of these cases convincingly resolved the inherent inconsistency in guaranteeing a defendant an attorney to represent him without providing for an attorney judge to preside at the proceedings. As we have seen a defendant's right to a fair trial may be substantially abridged by the use of a non-attorney judge. Gordon v. Justice Court, supra, 525 P.2d at 78.

1. The United States Supreme Court has again recently decided to hear the case of North v. Russell, 17 Cr. L. 4093 (6-23-75) having noted probable jurisdiction for appeal once again, and having accepted Briefs on the following issue:

Are Kentucky statutes that subject defendant to trial and potential imprisonment in court presided over by a non lawyer judge invalid under the Fifth, Sixth and Fourteenth Amendments?

Furthermore, Ditty v. Hampton dealt with the issue of whether a non attorney police judge could constitutionally preside over "any criminal trial" or exercise "any jurisdiction in any criminal proceedings." (490 S. W. 2d at 773). Thus, the specific issue in the instant case of non-attorney judges exercising jurisdiction over criminal cases where a jail sentence might result was dealt with only collaterally, if at all.²

In the instant case the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, has followed the rationale of the California Court in Gordon in ruling on the constitutionality of the Utah's Justice of the Peace System.

Respondents submit, that the California Court in Gordon, and the District Court speaking through Judge Hanson below state the better reasoned rule and that Due Process of Law requires an attorney judge to preside over any criminal case where a jail sentence may be the result of a conviction.

The legislative trend in the United States also supports this point. An increasing number of jurisdictions are abandoning lay judge systems. At the present time, the laws of 15 jurisdictions exclude lay judges from hearing cases in which the defendant is charged with a crime punishable by imprisonment: Connecticut, the District of Columbia, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New Jersey, Oklahoma, Rhode Island, Tennessee, Texas, Vermont and Wyoming. Of these 15

2. It might be noted parenthetically that the Circuit Court Judge in Kentucky found the use of non-attorney police court judges in criminal cases a denial

jurisdictions, moreover, ll have also precluded lay judges from presiding over preliminary hearings and issuing search and arrest warrants. These facts indicate a significant trend toward the abolition of lay judge jurisdiction over criminal matters in the various states.

A model for the states was provided by the Federal Magistrates Act, 28 U.S.C. Section 631 (l)(b)(l) (1968). That Act replaced Title 28, Chapter 43 of the United States Code which had provided for United States Commissioners who were not required to have legal training. The new law requires all full-time federal magistrates to be members of the bar. It was also the consensus of the 1971 National Conference on the Judiciary that, "judges should be full-time officials, professionally trained in the law and aware of its traditional values." (Consensus Statement of the National Conference on the Judiciary", 55 J. Amer. Jud. Soc. 29, at 30 (1971).

More recently, the House of Delegates of the American Bar Association in February, 1974. adopted the report of the American Bar Association's Project on Standards for Court Organization entitled, "Court Organization". On Page 39, the Report observed that.

"The quality of a court system is determined chiefly by the quality of its judges".

At Section 1.21(a), Page 40, it is recommended:

"(a) Personal and professional qualifications. All persons selected as judges should be of good moral character, emotionally stable and mature, in good physical health, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reasoned judgment. They should have a broad general and legal education and should have been admitted to the bar. They should have had substantial experience in the practice,

administration, or teaching of law for a term of years commensurate with the judicial office to which they are appointed. (Emphasis Supplied).³

The most recent legislative limitation on the use of non-lawyer judges is found in the recent revision of the statute found constitutionally wanting by Judge Hanson below. In response to the Utah District Court's decision in that case a Special Session of the Utah Legislature recently passed legislation which gives a defendant in a criminal case the right to be tried and sentenced by a judge who is a member of the Utah State Bar Association. This statute, which takes effect on September 2, 1975, clearly shows that the often alleged problems of travel, transportation, and lack of an adequate number of lawyers can be overcome, while providing lawyer judges for all criminally accused. It is often argued that in states such as Utah and Kentucky where there are few lawyers in many of the rural counties and long distances to travel to the various county seats where the District Courts sit, that requiring law trained judges for the criminally accused in all misdemeanor cases becomes an impossible task. House Bill No. 1 which amends Section 78-5-4, Utah Code Annotated (1953) shows however that such arguments have little substance. This legislation provides that District Court Judges, who must be lawyers in Utah, may

3. In accord with this recommendation see the report of the President's Commission on Law Enforcement and Administration of Justice where it is stated that "All justices should be required to be fully trained in the law and their duties and their line of competence should be maintained by continuing training." (Emphasis Supplied) The Challenge of Crime in a Free Society, United States Government Printing Office (1967), Chapter 5 at 130. cf. A. B. A. Standards Relating to the Administration of a Criminal Justice, Standards Relating to the Function of the Trial Judge, Introduction;

hear the cases as Justices of the Peace Pro Tempore or appoint a member of the Utah Bar to sit as a Justice of the Peace Pro Tempore in order to accord the criminally accused his right to a competent tribunal. This simple solution to the problem in Utah overcomes those commonly voiced objections to the alleged problems in mandating lawyer judges in our inferior courts. This simple but effective response by the Utah Legislature gives effect to the wisdom inherent in Judge Hanson's statement that:

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. (Memorandum Decision at 3)

And this is true even though, as Judge Hanson noted, of the 29 Counties in Utah there are still eight counties with two or less resident attorneys and five counties with no resident attorney.

POINT I

A

THE DENIAL OF DUE PROCESS BY REQUIRING TRIAL BEFORE A NON-LAWYER JUDGE IS NOT REMEDIED BY A TRIAL DE NOVO APPEAL

Article VIII, Section 9 of the Utah Constitution and Section 78-3-5 Utah Code Annotated (1953) provide for de novo appeals from justice of the peace courts in Utah, as does Section 78-4-17 Utah Code Annotated (1953).

The provisions of Utah law granting trial de novo on appeal are not an adequate substitute or remedy for a trial in the first instance before a law trained judge competent to rule on legal issues. In Ward v. Village of Monroeville, 409 U.S. 57, (1972), the Court ruled that petitioner

convicted of two traffic offenses and sentenced to a \$50 fine on each offense was denied his right to be tried by a disinterested and impartial judge as guaranteed by Fourteenth Amendment due process where the trial took place before a village mayor empowered by Ohio statute to sit as Judge. The Court based its conclusion on the fact that the fines and forfeitures imposed by the mayor as judge went to the village treasury and constituted a major portion of village funds. The respondent argued that any error in the trial before the mayor was cured by the availability of trial de novo on appeal. The Court specifically rejected this contention.

Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This 'procedural safeguard' does not guarantee a fair trial in the mayor's court . . . Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance. 409 U.S. at 61-62. (Emphasis Supplied).

The appellant's rely on Colten v. Kentucky, 407 U.S. 104 (1972) for the proposition that this right to a trial de novo in the District Court somehow clears up any constitutional infirmities in the use of non-attorney justices of the peace. Appellants read Colten for more than it is worth. Colten was basically concerned with whether or not on a trial de novo appeal from a justice court to a superior court of general jurisdiction, the superior court could enhance the punishment given the defendant in the justice court. Specifically, the issue was whether the rule of North Carolina v. Pearce, 395 U.S. 711 (1969) was applicable to de novo appeals. The issue in the instant case, whether or not a non-attorney judge can preside over

a criminal case where a jail sentence might result, was not at issue. In point of fact, Colten's appeal was from the imposition of a fine of \$10.00 and not a jail sentence. And, the court specifically noted that the trial judge in that Kentucky justice court was a lawyer. (407 U.S. at 114 n. 11). The holding of the Court was expressly tied to the North Carolina v. Pearce issue:

We cannot say that the Kentucky trial de novo system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in North Carolina v. Pearce, . . . (407 U.S. at 119). (Cf. Marshall, J. in dissent 407 U.S. at 122-127).

Interestingly, the Court in Colten conceded that the justice courts, in Kentucky at least, are incapable of according an accused his constitutional rights:

. . . the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience to provide speedy and inexpensive means of disposition of charges of minor offenses. (407 U.S. at 117).⁴

Colten's worth as precedent on the issue in the instant case must be limited to its facts, for as was noted in that case:

4. One commentator has noted the inherent inconsistency of the self-serving argument that lay justice courts really exist to the advantage of the accused in that he gets a preview of the state's case and is afforded a speedier trial. See Note, Increased Penalty Upon Trial de Novo, 75 West Va. L. Rev. 372 (1972-1973) where the author notes that a justice of the peace system should be envisioned not merely as a mechanism of convenience and speedy conviction or acquittal, but as a court of law where justice is a foreseeable product.

Proceedings in the inferior courts are simple and speedy; and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. (407 U.S. at 118).

Respondents agree that to the extent a fine and not a jail sentence is imposed, then trial de novo review may cure any defect in the "simple and speedy" justice of a justice courts of convenience.⁵ However, where the threat of imprisonment exists, then the defendant must be accorded a trial before an attorney-judge as a matter of right, since at that point the potential harm to the accused outweighs any "convenience" factor.

Moreover, as indicated above, Ward v. Village of Monroeville firmly states the principle that trial de novo review is no talisman before which the constitutional infirmities recognized by the Court in Colten in the inferior courts somehow vanish. The Constitution of the United States does demand a fair trial in the "first instance." Or as stated by the United States Supreme Court speaking through Mr. Justice Clark in Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

. . . we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. . .

In conclusion, the dynamic concept of Due Process of Law as employed in Gordon and reiterated by Judge Hanson below requires that the

5. In Colten the Court noted that, following the trial in the Kentucky Circuit Court on appeal de novo, defendant had further appeals "in the same manner as a person tried initially in the general criminal court," 407 U.S. at 113. In Utah there is no appeal to the Utah Supreme Court from the district court decision except where the case involves the validity or constitutionality of a statute. Section 78-4-17 Utah Code Annotated (1953)

present system of allowing non-attorney judges to preside over criminal cases where a jail sentence may result be declared unconstitutional as violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

POINT II

THE PRACTICE OF HAVING NON -LAWYER JUDGES IN ALL PARTS OF SALT LAKE COUNTY AND LAWYER JUDGES IN SALT LAKE CITY ONLY, DEPRIVES RESPONDENTS WHO MUST BE TRIED BEFORE NON-LAWYER JUDGES, OF EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Respondents claim that the practice of having non-lawyer judges in Salt Lake County with the exception of Salt Lake City where lawyer judges preside, deprives Respondents who must be tried before non-lawyer judges, the Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the United States Constitution.

The Constitution of the State of Utah vests the judicial power of this state in the Senate sitting as a court of impeachment, and in a Supreme Court, district courts and in justices of the peace as well as any other inferior courts established by law. Art. VIII, Section 1. The State Constitution also requires that all judges of District Courts as well as all Supreme Court Justices be members of the bar in good standing and "learned in the law." Art. VIII, Sections 5 and 2. It is silent as to qualifications of the judges of the justice of the peace courts, and the legislature has never required justices of the peace to be members of the

bar or learned in the law. Section 78-5-1 et. seq. Utah Code Annotated (1953). Nor is this required by Section 17-16-5 Utah Code Annotated (1953) which establishes the election qualifications for justices of the peace. Unlike justices of the peace, however, in all first, second, third class cities or county seat cities which have a city judge pursuant to Section 78-4-1 Utah Code Annotated (1953), that city judge must be a member of the bar in good standing and admitted to the practice of law. Sections 78-4-4 and 78-4-8 Utah Code Annotated (1953). The criminal jurisdiction of city court judges where those offices exist, is the same as that of the justices of the peace under Section 78-4-16 Utah Code Annotated (1953).⁶

The only remote legal qualification required of justices of the peace is that they attend at least one of two institutes supervised by the Utah Supreme Court each year. Any justice of the peace who fails to so attend without the written excuse of the Chief-Justice of the Utah Supreme Court is required by statute to vacate his office. Section 78-5-27 Utah Code Annotated (1953). As a result of the lack of legal training required of justices of the peace, of the eleven Justices of the Peace in Salt Lake County only one, who was not a party-defendant to the action below, is an attorney-judge.

6. See 78-5-4 Utah Code Annotated (1953) as to criminal jurisdiction of justices of the peace.

This system results in a denial of equal protection to criminal defendants who, due to an accident of geography, happen to be charged with a crime in an outlying area of Salt Lake County as opposed to being charged within the confines of the jurisdiction of Salt Lake City Court which pursuant to Sections 78-4-4, and 78-4-8 Utah Code Annotated (1953) has lawyer-judges, or within the jurisdiction of the one attorney-judge in the Salt Lake County Justice of the Peace System.

Although respondents herein distinguish between the classes of attorney and non-attorney judges, the real distinction is between one class of judges who have experienced three years of law school and then law practice, and the class of appellant judges who have not. The difference can accurately be characterized as that between trained and untrained persons, needless to say the difference between the two classes is graphic.

The difference between the legal training and skill which must be demonstrated to obtain admission to the bar and the legal training and skill which must be demonstrated to qualify for the office of judge of the justice court is so substantial as to be beyond dispute. Qualifications and requirements for the admission to the practice of law in the State of Utah are stringent. Besides certain age and citizenship requirements, the bar applicant has the burden of showing his good moral character. Furthermore, admission to take the bar examination now requires "a preliminary education other than legal" and the regular and attentive study of law for a period of three years. Successful graduation, however, is not enough for

admission to practice. In addition, a candidate for bar admission must pass an intensive three-day written examination designed to test an applicant's ability to function under pressure as well as his substantive knowledge and analytical skill. With regard to criminal matters an applicant must demonstrate a basic understanding of the substantive criminal law and the procedural protections embodied in the due process and equal protection clauses of the U.S. Constitution. See Section 78-51-10 Utah Code Annotated (1953).

In contrast, no prior legal training, formal education, or prior business or professional experience of any kind is required for the office of Justice of the Peace. Persons who have never graduated from high school, much less law school, may be elected to that position. The sole requirement other than election, is participation in at least one supervised institute per year. Section 78-5-27 Utah Code Annotated (1953).

To suggest that the presence or absence of training in a judge makes no difference in the quality of justice would be patently absurd. To do so would imply that legal training and knowledge of the law is irrelevant to the process of legal decision making and to the exercise of judicial functions.

The distinction involved in this action - except for one attorney justice of the peace in Salt Lake County who has actually studied law - is not one of subtle gradation along a continuum of legal learning. The distinction is between trained and untrained judges - between rule by law and rule by fiat. Dean Pound observed the importance of rule by law:

Administration of Justice According to Law has six advantages:

(1) Law makes it possible to predict the course which the administration of justice will take; (2) Law secures against errors of individual judgment; (3) Law secures against improper motives on the part of those who administer justice; (4) Law provides the magistrate with standards in which the ethical ideas of the community are formulated; (5) Law gives the magistrate the benefit of all the experience of his predecessors; (6) Law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty immediate interests. Pound, "Justice According to Law, Essays on Jurisprudence from the Columbia Law Review, 230 (1963) (Emphasis in Original)

Dean Pound also observed the harmful consequences of rule by fiat:

With no training in the law, no training in the process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a [lay judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him, the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the system] . . . Such justice is not justice at all. It is unequal, uncertain, and capricious. Smith, The Justice of the Peace System, 15 Cal. L. Rev. 118, 127-128 (1927) quoting from Pound, Outlines of Lectures on Jurisprudence, 75 (3rd Ed)

The verdict of other legal commentators on the institution of untrained judges is equally severe. With the metamorphosis of criminal

law and procedure into a complex, sophisticated system governed increasingly by a myriad of statute and case law, the overwhelming weight of learned authority calls either for a drastic curtailment of lay judge jurisdiction or for abolition of the system outright.⁷

The Supreme Court of the United States has recognized the distinction between attorney judges and lay magistrates having no legal training, and has noted that "unbridled discretion, however benevolently motivated is frequently a poor substitute for principle and procedure." In Re Gault, 387 U.S. 1, 18 (1967). The Court in Gault went out of its way to note the absence of judicial qualifications in many juvenile proceedings, including the non-attorney status of many juvenile judges. The court quoted with approval the observation that "good will, compassion and similar virtues are . . . admirably prevalent throughout the system," but that "expertise, the keystone of the whole venture, is lacking." 387 U.S. at 14 n.14.

7. Vanlandingham, Decline of the Justice of the Peace, 12 Kan. L. Rev. 389 (1964); Smith, The Justice of the Peace System, 12 Cal. L. Rev. 118 (1927); Jacowitz, Education and Training of Justices of the Peace, 35 N. Y. S.B.J. 61 (1963); Lee, The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace, 20 Fed. B.J. 111 (1960); McDonald, An Arbitrary Note on the Connecticut Justice of the Peace, 35 Conn. B.J. 411 (1961); Nordberg, Farewell to Illinois Justices of the Peace, 44 Chi. B. Rec. 469 (1963); Banyon, Justice Court on Trial, 37 Mich. S.B.J. 35 (1958); Vanderbilt, The Municipal Court in New Jersey, 10 Rut. L. Rev. 647 (1956); Karringer, The Court of the Justice of the Peace, 60 Dick. L. Rev. 55 (1955); Zimmerman, Justice of the Peace Courts, 21 Ore. L. Rev. 380 (1942).

In determining whether specified state action violates the Equal Protection Clause of the Fourteenth Amendment, an initial determination must be made as to which standard of review is appropriate. In recent years, the United States Supreme Court has articulated two basic tests to be applied to equal protection cases. Under the traditional standard of review, a statute does not deny equal protection if any facts may be reasonably conceived to justify it. See Dandridge v. Williams, 397 U. S. 471 (1970). Under this standard, the state action or classification would be upheld if a rational relationship can be shown for the classification, or difference in treatment accorded classes of individuals standing in the same or similar relationship to the state.

The second and stricter standard of review, comes into use when there is a violation or penalization of a fundamental constitutionally protected right. See Dunn v. Blumstein, 405 U. S. 330 (1972). Under this standard the state must show a substantial and compelling reason for its classification or distinction between two classes standing in the same or similar relationship to the state.

Whether or not respondents have a constitutional right to a lawyer judge as a matter of due process, the quality of justice which may be reasonably expected from a lay judge is sufficiently inferior to that expected from a lawyer judge and the interest involved sufficiently fundamental as to require justification by a compelling governmental interest to meet the requirement of the Equal Protection Clause of the Fourteenth Amendment.

In Re Murchison, 349 U. S. 133 (1955): This issue was not decided in Gordon v. Justice Court, the court finding the due process claim dispositive of the case (525 P. 2d at 74 fn. 4).

The classification under challenge goes directly to the right of a person to a fair trial. This right is so fundamental and so primary as to invoke the compelling state interest test to any statutory classification affecting it. The United States Supreme Court has frequently affirmed that a fair trial is "the most fundamental of all freedoms" Estes v. Texas, 381 U. S. 532, 540 (1965), and that "a fair trial in a fair tribunal is a basic requirement of due process." In Re Murchison, supra. If, as past judicial decisions make clear, the government must prove a compelling interest for its classifications affecting such things as the right to procreation, Skinner v. Oklahoma 316 U. S. 535, 541 (1942), state apportionment, Reynolds v. Simms, 377 U. S. 533 (1964), voting eligibility Carrington v. Rash, 380 U. S. 89 (1965), freedom of association, Williams v. Rhodes 393 U. S. 23 (1968) free exercise of religion, Sherbert v. Verner, 374 U. S. 398, 406 (1963), public housing eligibility Cole v. Housing Authority of City of Newport, 312 F. Supp. 692 (D. C. R. I. 1970), hiring examinations, Arrington v. Massachusetts Bay Transportation Authority, 306 F. Supp. 1355, 1358 (D. C. Mass. 1969), and public education, Serrano v. Priest, 96 Cal. Rptr. 487 P. 2d 1241 (1971), it hardly remains to be argued that the same strict scrutiny must apply to the classification affecting the right to a fair and impartial trial by a competent judge.

Those cases which examine the rights of a criminally accused under the equal protection clause rather than the due process clause speak of 'unreasoned distinctions' among classes of accused persons which the state may justify only by showing a strong countervailing interest. Note, for example, Rinaldi v. Yeager, 384 U.S. 305 (1966) which invalidated a New Jersey statute which denied a free transcript on appeal only to persons confined in state penal institutions; Mayer v. City of Chicago, 404 U.S. 189 (1971) which invalidated a court rule permitting free trial transcripts in felony but not misdemeanor cases; and Groppi v. Wisconsin, 400 U.S. 505, 507-508 (1971) which invalidated a state statute which categorically prevented a change of venue in a criminal jury trial in misdemeanor cases, the apparent alternative basis of this holding is the impropriety of a distinction drawn between felony and misdemeanor trials. See also, Mayer v. City of Chicago, *supra* at 415.

Just as Groppi struck down a state law "that categorically prevents a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant, on the sole ground that the charge against the defendant is labeled a misdemeanor, (400 U.S. at 508), so the scheme under scrutiny here is invalid to the extent that it categorically prevents a trial before an attorney-judge regardless of the complexity of defenses or the admitted unfamiliarity of the lay-judge with the issues before him solely on the ground that the charge against the accused is labeled a

misdemeanor and, moreover, lies in a particular geographical location of

Salt Lake County.

Furthermore, the felony-misdemeanor distinction does not permit a state to create differences in trial of the two classes of offenses. For example, the distinction does not permit infringement of the right to counsel. Argersinger v. Hamlin, supra; or of state rules providing for copies of a transcript on appeal, Mayer v. City of Chicago, supra. Indeed, the decisions do not permit any dilution of an accused's trial rights depending on the severity of the charge, when a jail sentence is a possible result of the charge.

Geographical variations in the basic competence of a trial judge similarly cannot withstand constitutional scrutiny. The interest of a person charged with a misdemeanor in obtaining a fair trial clearly is a "fundamental" interest. Estes v. Texas, 381 U.S. 532 (1965). This interest is invaded by a system which provides two classes of judges. The classification is executed solely according to an arbitrary geographic formula and by an impermissible felony-misdemeanor distinction. The State therefore must demonstrate a compelling interest in maintaining such a classification in order to uphold it. The State of Utah cannot do so in the instant case.

What exists in Salt Lake County is a system which is sanctified by history alone but fails to meet the close scrutiny now required under the equal protection clause. That the history of the lay judge institution is itself a justification, and that it must pass constitutional muster by virtue of its tradition is no justification at all. It worked in the 18th Century, the

argument goes, and therefore it must work today. The sanctity of history, however, can no more shield Justices of the Peace from modern judicial requirements than it can shield a person who was authorized to practice surgery 100 years ago from the rigorous standards of modern medical practice. In fact, the genesis of the lay judge system as a matter of need in a bygone era compels even greater scrutiny according to modern standards, and must be found constitutionally impermissible under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

POINT III

THE PRACTICE OF HAVING NON-LAWYER JUDGES PRESIDE OVER CRIMINAL CASES IN WHICH A JAIL SENTENCE MAY RESULT PRESENTS A DEFACTO DEPRIVATION OF A CRIMINALLY ACCUSED'S RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The practice of having non-lawyer judges preside over criminal cases in which a jail sentence may be imposed, is a violation of a criminally accused's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution in that non-lawyer judges cannot be assumed to have the ability to understand complex legal arguments.

The practice of allowing lay judges to preside over criminal trials renders the Sixth Amendment right to counsel nugatory and constitutes a violation of due process of law. In Gideon v. Wainwright, 372 U.S. 342 (1963), and its companion case Douglas v. California, 372 U.S. 353 (1963)

the United States Supreme Court held the Sixth Amendment right to the assistance of counsel applicable to the states by incorporation into the Fourteenth Amendment.

Lay justices of the peace in Utah exercise criminal jurisdiction over various and sundry criminal offenses. Jurisdiction of lay justices in Utah extends over such misdemeanors as petty theft, assault and battery, breach of the peace and all misdemeanors involving up to a \$300 fine or six (6) months imprisonment or both. Section 78-5-4- Utah Code Annotated (1953).

The United States Supreme Court has held that the right to counsel at trial extends to all indigent criminally accused facing a jail sentence. Argersinger v. Hamlin. The fundamental character of this right was reiterated by giving the Argersinger decision full retroactive effect in Berry v. City of Cincinnati, 414 U.S. 29 (1973). However, the right to counsel is rendered illusory where counsel must argue before a judge who is not adequately trained in the law. If a judge is not able to rely on his own knowledge of the legal merit of counsel's argument, he is apt to trust the counsel of the lawyer that he is most familiar with, as he lacks an independent standard by which to judge. This becomes the "rule by fiat" denounced by Dean Pound.

A notable example of who the non-lawyer judge will turn to when a problem arises finds startling effect in Utah. The means provided by the State of Utah to shield the justices from legal error resulting from their lack of learning in the law is a Manual for Justices of the Peace in the State of Utah prepared by Brigitte M. Bodenheimer in 1956. This manual is today hopelessly outdated and affirmatively misleading.⁸ 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 a 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 manual notes:

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 Supplied).

8. This manual, we are told, is in the process of being revised and brought up to date.

At page 71, The Justice of the Peace is given 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 Supplied).

The effect of this advice in the official Manual is to invite the "neutral" judge to defer, when in doubt, to the decision of one of the litigant's counsel. The right to a 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 becomes his right to be heard by opposing counsel.

A judge who has been a lawyer is in the habit of reading the advance sheets containing state appellate and United States Supreme Court cases as well as law review articles. A layman is not likely to be learned in such complex matters as the rules of evidence. The difficulty of the subject matter of a criminal case is nowhere better exemplified than in the Utah Rules of Evidence where the Hearsay Rule, Rule 63, for example, takes up some 21 pages embodying the Rule itself and the numerous exceptions to the Rule. Other examples become obvious from an even cursory perusal of Volume Eight of the Utah Code Annotated which contains the criminal code and code

of criminal procedure.⁹

The proper resolution of complex legal problems is often crucial to the outcome of cases within the justice's jurisdiction. Since the decision in Mapp v. Ohio, 367 U.S. 643 (1966), extending the Fourth Amendment's exclusionary rule to the states, the United States Supreme Court alone has decided literally hundreds of cases affecting the criminal trial process. These cases affect such interests, to name only a few, as: the right to be free from unreasonable search and seizures,¹⁰ the prohibition against double jeopardy;¹¹ the prohibition against self-

9. Exemplifying this point in the cases of the respondent's are several recent decisions of this Court involving the offense of driving under the influence which presented difficult evidentiary issues and problems of statutory construction. Section 41-6-44 Utah Code Annotated (1953). See eg. Gibb v. Dorius, Utah, 533 P.2d 299 (1975) (holding that only one acting under the direction and or supervision of a licensed physician may withdraw blood from one suspected of driving while under the influence); Wells v. City Court of Logan City, Utah, 535 P.2d 683 (1975) (person arrested for drunk driving shall be immediately taken to a magistrate who is nearest to the place where the arrest is made). Greaves v. State, Utah 528 P. 2d 805 (1974) (upholding Sections 41-6-12, 41-6-44.2 Utah Code Annotated (1953) making it unlawful for anyone with blood alcohol content of .10 per cent or greater to drive or be in actual control of any vehicle against void for vagueness claim); and McCall v. Dorius, Utah; 527 P.2d 647 (1974) (Construing implied consent statute and propriety of revocation of driving license). Cf. State v. Cruz, 21 U.2d 406, 446 P.2d 307 (1968) (Discussing implied consent law in Utah).

10. Chimel v. California, 395 U.S. 752 (1969) (limitations on "search incident to arrest"); Coolidge v. New Hampshire, 403 U.S. 443 (1971) ("the plain view theory"); Wong Sun v. United States, 371 U.S. 471 (1963) (the "fruit of the poisonous tree" doctrine); Spine Uli v. United States, 393 U.S. 410 (1968) (search warrant affidavits). Schmerber v. California, 384 U.S. 757 (1966) (seizure of person's blood for purposes of blood alcohol test) c

11. Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel doctrine).

It is safe to predict that changes in the criminal law will continue to be a source of increasing complexity and controversy in the criminal process. Moreover, resolution of cases within the jurisdiction of inferior courts requires not only ability to understand a highly complex, controversial and changing body of law, but also the ability to disregard the truthfulness and probative value of illegally obtained evidence which has been heard in its full and potentially incriminating detail. Because of the inability of the lay person to segregate the issue of truthfulness from the issue of admissibility and the issues of admissibility from the issue of guilt, the responsibility for making these determinations cannot constitutionally be delegated to a jury.²⁰

Thus, the presence of defense counsel in court, his presentation of evidence, and his argument about the legal standards and matters of evidence is apt to fall upon deaf ears where the judge lacks an independent standard to apply. Since arguments based upon recent cases decided by the United States Supreme Court and this Court in areas of constitutional law, as well as simple evidentiary matters, may not be comprehended by the lay judge, the constitutional guarantee of due process cannot be accorded the

20. Jackson v. Denno 378 U. S. 368 (1964) (procedure that leaves the factual determination of the voluntariness of a confession to the jury held to be invalid in view of the confession either in determining admissibility or in determining guilt) and Bruton v. United States, 391 U. S. 123 (1968) (co-defendant's confession inculcating the defendant cannot be used in a joint trial even if jury specifically instructed that confession was admissible only against the declarant).

defendant.²¹ Due process of law requires not only that a person exercising a judicial function be fair and impartial but also that he be competent. The wisdom of the words of Justice Sutherland speaking for the Court in Powell v. Alabama, 287 U.S. 45, 69 (1932) decided over forty years ago are apposite in the instant case:

Even the intelligent and educated layman has small and sometimes no skill in the science of the 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 other wise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much, more true is it of the ignorant and illiterate, or those of feeble intellect.

The right to counsel at trial is equally as important to the preservation of justice in misdemeanors as in felony proceedings. Argersinger v. Hamlin supra. As Chief Justice Burger observed, concurring in Argersinger:

[A]ny deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman, especially when he is opposed by a law-trained prosecutor. There is little ground,

21. Alexander Hamilton noted this problem long ago, in a different context, stating that "Laws are a dead letter, without courts to expound and define their meaning and operation." Federalist Papers No. 15 as quoted in Hart and Wechsler's, The Federal Courts and the Federal System (2d ed. 1973) at 24.

therefore, to assume that a defendant unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges. Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record. (407 U. S. at 41).

It is clear, therefore, that justice of the peace courts cannot find justification from the fact that lay judges in justice courts are limited to trials of misdemeanors carrying a maximum penalty of six months imprisonment as is the case in Utah. The distinction between so-called "petty" and "serious" offenses has been expressly limited to the right to jury trial (by reason of the unique legal history of the jury) and has been notably rejected as inapplicable to other due process rights in misdemeanor cases.²²

For the same reasons a lay person can no longer be considered competent to preside over the criminal trials where a jail sentence may result within the jurisdiction of the justice of the peace courts of Utah. The right to counsel in these cases necessarily includes the right to a competent law trained tribunal to hear counsel. To conclude otherwise is to continue a system which requires that indigent criminal defendants must be provided with counsel who are attorneys but not that they must be provided with judges who are attorneys. This conclusion posits that the

22. In re Oliver, 333 U. S. 257 (1948) (right to public trial); Pointer v. Texas, 380 U. S. 400 (1965) (right to confrontation); Washington v. Texas, 388 U. S. 14 (1967) (right to compulsory process to secure attendance of witnesses); District of Columbia v. Clawans, 300 U. S. 617 (1937) (right to cross-examine).

role of the judge who must decide or preside over a criminal case is less crucial and less constitutionally significant than the role of the counsel who must argue it. Respondents submit that this cannot be so.

The California Court's, obvious reliance on Argersinger in Gordon v. Justice Court, lends credence to this assertion, and it is respectfully submitted that the Sixth Amendment Right to Counsel as applied to the States through the Fourteenth Amendment demands not only counsel at the side of the accused, but an attorney-judge presiding over the trial who is able to adequately respond to counsel when imprisonment may result from the charge.

CONCLUSION

The practice of allowing lay judges to try cases that affect the liberty of the accused violates the constitutional rights of those against whom, by an accident of geography, a complaint is filed in areas where a lay judge is sitting. The unfamiliarity of lay judges with constitutional law and criminal law and procedure necessarily results in such a lack of adherence to the legal precedents which are applied in other courts that the accused are deprived due process of law and equal protection as required by the Fourteenth Amendment to the United States Constitution. In addition, the barrier to defense counsel's communication with an untrained judge as to the rules and legal nuances governing the defendant's rights, results in a de facto deprivation of the Sixth Amendment right to counsel as made applicable to the States by incorporation into the Fourteenth Amendment.

Although large numbers of persons each year receive their first impressions of the American System of Criminal Justice in courts where non-lawyer judges

preside, these courts, by and large, fail to meet professional standards of criminal law and procedure. Finally, the development of modern means of transportation and communication and availability of sufficient numbers of professionally trained personnel, coupled with the current trend away from lay judge courts, should result in the discarding as a violation of due process of law such an antiquated system which was utilized as an expedient to meet Eighteenth Century, not Twentieth Century, conditions.

Respectfully submitted,

STEPHEN R. McCAUGHEY

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