

2008

Hyde Park City v. Jerald Rio Davis : Brief of Appellant

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

HYDE PARK CITY
Plaintiff / Appellee,

vs

JERALD RIO DAVIS
Defendant /Appellant.

BRIEF OF APPELLANT

Priority No. 2

Case No.20080055-CA

BRIEF OF APPELLANT

Appeal from an Order of the Honorable Clint S. Judkins
Judge of the First Judicial District Court
Cache County, State of Utah

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UTAH APPELLATE COURTS
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THE UTAH COURT OF APPEALS

HYDE PARK CITY
Plaintiff / Appellee,

vs

JERALD RIO DAVIS
Defendant /Appellant.

BRIEF OF APPELLANT

Priority No. 2

Case No.20080055-CA

JURISDICTIONAL STATEMENT

1. Defendant/Appellant was charged in the Justice Court for Hyde Park City before a Justice court judge sitting in that court with some legal training but which justice was neither a law school graduate nor a member of any state or federal bar. The Defendant/Appellant, prior to trial in the Justice Court, filed Motions to Dismiss (See Appendix A) thereby challenging the constitutionality and sufficiency of the city ordinances under which Defendant/Appellant was charged and sentenced as well as the legislative enactments enabling the creation and operation of the Justice court system.

2. The Defendant/Appellant suffered an adverse ruling by the sitting Justice and was thereafter tried, convicted and sentenced by said Justice Court Judge (See Appendix B). Defendant/Appellant appealed the conviction and Sentence to the First District court for Cache County (See Appendix C) and particularly specifying therein that

an illegal sentence had been imposed in light of Utah Law in addition to the other matters addressed in the Motions presented at the Justice Court level.

3. The case was heard denovo in the District Court for Cache County and Defendant/Appellant suffered adverse rulings on all motions to dismiss filed therewith (See Appendix D), each filed anew in connection with the denovo proceeding (practically identical to those filed in the Justice Court). Each Motion addressed Constitutional issues and in fact challenged the constitutionality of one or more statutes or ordinances.

4. Defendant/Appellant was convicted by the District Court after a Bench Trial on the 19th day of September, 2007 and at that time Judgment and Sentence were orally imposed by the Trial Court. (See Transcript as Appendix E). The Minutes, Sentence, Judgment, Commitment and Notice was signed and filed by the Court on the 28th day of September, 2007 (See Appendix F). A Notice of Appeal was filed by the Defendant/Appellant on the 15th day of October, 2007 (See Appendix G). This Appeal is taken from a criminal judgment pursuant to the provisions of Rule 26 of the Utah Rules of Criminal Procedure and Utah Code Ann. § 77-18a-1, (1953 as Amended). Jurisdiction of this Court is established pursuant to provisions of Utah Code Ann. § 78-2a-3(e), (1953 as Amended).

5. The clerk of the Trial Court refrained from transmitting the file to the Court of Appeals, which Appeal Defendant had filed on 15 October 2007, even after the

Designation of Record was filed on November 30, 2007 (See Appendix H). On the 16th day of January, 2008 the file was belatedly transmitted to the Utah Court of Appeals after two evidentiary hearings addressing a disputed contempt citation had transpired. The Trial Court, at each hearing, had granted Defendant/Appellant additional time to complete an ordered cleanup; the last review on the ordered clean up was scheduled for the 1st day of July, 2008 and was heard on that date, no further hearings are now scheduled.

STANDARD OF REVIEW

6. The Standard of Review on Appeal concerning the challenge to the Trial Court's interpretation as to the constitutionality of the questioned ordinance, the legality of the sentence, and the constitutionality of the Statutes creating Justice courts is as to the correctness of the trial courts ruling without deference to the trial Judges findings.

STATEMENT OF ISSUES

- I. Are the Plaintiff/Appellee City's nuisance ordinances repugnant to and in conflict with the laws of the State of Utah and not in accord with the doctrine announced in ALLGOOD v. LARSON (Supra).**
- II Are the nuisance Ordinances of Plaintiff/ Appellee and the various Statutes of the State of Utah addressing nuisance constitutional or should said statutes be declared void-for-vagueness because the statutes do not adequately define what is a nuisance nor do they provide adequate guidelines for the enforcement of said statutes.**
- III. Is the penalty ordinance No. 10-359 of the Plaintiff/ Appellee enforceable on its face as imposed upon Defendant/ Appellant?**
- IV. The Statutory scheme for Justice Courts interferes with Judicial**

independence by providing monetary incentives to convict criminal defendants and by authorizing the administrative arm of municipal government to hire and fire judges and to control court operations.

V. Did the Trial Court both at the Justice Court level and at the District level abuse their respective discretions and exceed the Maximum sentence as allowed by State Law thereby denying Due Process as guaranteed by the Utah Constitution and by the United States Constitution.

VI. Did the District Court rule by its ruling appropriately dispose of the issues as to constitutionality of a statute or ordinance when it denied the Defendant/Appellant's motion to dismiss and the motion to quash the justice court conviction.

PRESERVATION OF ISSUES FOR APPEAL

7. The issues presented in the de novo prosecution were adequately preserved at the Justice Court level and subsequently in the District Court by Motion to Dismiss supported by a Memorandum of Points and Authorities dated 12th April, 2007 filed addressing the violation of the Defendant's right to due process of law, equal protection under the laws and right to uniform operation of the law, in that the Statute UCA 10-8-60 defining what constitutes a Nuisance is relegated to each city and town and violates the Doctrine of Separation of powers as mandated by Article VIII Section 4 of the Utah Constitution and other constitutional provisions and that the very existence of the Justice Court constitutes a violation of Article VIII Section 4 of the Utah Constitution and thereby may not presume jurisdiction to decide criminal cases or controversies and by Objection to the Order entered on Motion to Dismiss And To Quash Conviction as filed on the 21st August, 2007 (See Appendix J) and on the Objection to Oral Verdict,

Judgement and Sentence filed on the 9th October, 2007 (See Appendix K).

CONSTITUTIONAL AND STATUTORY PROVISIONS
CASES CITED AND LEARNED WORKS AND OTHER AUTHORITIES CITED

United States Constitution, 14th Amendment

Utah Constitution Article I, Section 1

Utah Constitution Article I, Section 24

Utah Constitution Article V, Section 1

Utah Constitution Article VIII, Section 1

Utah Constitution Article VIII Section 4

Utah Constitution Article XI Section 5

Tennessee Constitution Article II, Section 2

Tennessee Constitution Article IV, Section 4

Tennessee Constitution Article VI, Section 1

Utah Code Annotated § 10-3-703

Utah Code Annotated § 10-8-6

Utah Code Annotated § 10-8-60

Utah Code Annotated § 10-8-84

Utah Code Annotated § 76-1-103 (1)

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Utah Code Annotated § 76-3-301

Utah Code Annotated § 76-10-801(1)

Utah Code Annotated § 76-10-801 (2)

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Utah Code Annotated § 77-18a-1 (1953 as Amended)

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Utah Code Annotated § 78-5-101

Utah Code Annotated § 78-5-101.5

Utah Code Annotated § 78-5-104(1)

Utah Code Annotated § 78-5-108

Utah Code Annotated § 78-5-110

Utah Code Annotated § 78-5-111

Utah Code Annotated § 78-5-116 (1)

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Utah Code Annotated § 78-5-134 (2)

Utah Code Annotated § 78-5-134 (5)

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Utah Code Annotated § 78-38-9

Utah Rules of Criminal Procedure, Rule 26

Utah Rules of Judicial Conduct Canon 2

Hyde Park City Ordinance 10-332

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Blankenship v. Minton Chevrolet, Inc., 266 S.Ed 902, 903 (W.V. 1979)

Blanton v. City of Las Vegas 489 U.S. 538, 542 (1989)

Bradley vs. Fisher 80 U.S. 335, 349 n. 16 (1871)

Calligy v. Mayor and Council of the City of Hoboken 665 A.2d 408, 409 (N.J. Super. 1995)

Cannon v. Neuberger 1 Utah 2d 396, 268 P.2d 425

Citizens Club v. Welling 27 P.3d 23, 26 (Utah 1933)

City of Columbus v. Molt 36 Ohio ST. 2d 94, 304 N.E.2d 245

Colautti v. Franklin 439 U.S. 379, 394-401, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979)

Dahl v. Utah Oil Refining Co. 71 Utah 1, 262 P.269

Grayned v. City of Rockford 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972)

Greenwood v. City of North Salt Lake 817 P.2d 816 (Utah 1991)

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Provo City v. Whatcott 200 UT, (Ut App. 1986)

Richfield City V. Walker 790 P.2d 87, 90-91 (Utah App. 1990)

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Sims v. Tax Commission 841 P.2d 6 (Utah 1992)

Solar Salt Co. vs. Southern Pacific Transp. Co. 555 P.2d 286, 289 (Utah 1976)

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690 P.2d 562, 564-565 (Utah 1984)

Tite v. State Tax Commission 57 P.2d 734, 737 (Utah 1963)

Turnbaugh v. Anderson 793 P.2d 939 (Utah App. 1990)

United States v. Reese 92 U.S. 214, 221, 25 L.Ed. 563 (1876)

Winters v. New York 333 U.S. 507, 515, 92 L.Ed 840, 68 S.Ct. 665 (1948)

Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579, 594 (1952)

Institute for Law and Policy Planning, Salt Lake County Criminal Justice Assessment 6.11 (2004)

Sam Newton, Justice Court Appeal: The Good, the Bad, and the Unintended, 18 Utah Bar J. No. 1 at 25 (January/February 2005)

Blacks Law Dictionary 7th Edition, West Group 1999

NATURE OF PROCEEDINGS

8. This action was originally filed in the Justice Court of Hyde Park City and was, after proceedings in that court, appealed to the District Court for Cache County. This Appeal is taken from a final Judgment and Sentence entered in the First District Court for Cache County, State of Utah on the 19 day of September, 2007 and signed by the District Judge on the 28 day of September, 2007 convicting Defendant of a purported violation of Hyde Park City Ordinance 10-332 thereby adjudging Defendant guilty of 1 Count of Maintaining a Nuisance, an infraction.

STATEMENT OF FACTS

9. Ira B. (Friday) Davis, the father of Defendant Jerald Rio Davis was a long time resident of Hyde Park City, owning lands located at 187 East 200 North in that city consisting of 1.07 acres upon which stood a home and shop which housed the business which was licensed pursuant to the laws of said municipality and operated as Ira B. Davis Body and Fender, apparently a de facto Proprietorship.

10. During the lifetime of Ira B. Davis, the minutes of the Hyde Park City Council (examined from 1970 to present), no discussion concerning said lands is noted other than one instance regarding placement of a "Trailer House" which had been moved onto the property, there was a brief discussion but no formal action was taken at that time and no further discussion regarding this topic or of any other issue was addressed until the end of 1979. (A mobile home is still situated on the property and is rented to tenants which tenants change from time to time.)

11. Hyde Park City purported to enact Chapter 10-300 through 10-343 which agglomeration of ordinances is hereinafter referred to as the "nuisance ordinance." This ordinance appears to have been enacted on the 10th day of January, 1979 and is said to have been revised or amended on the 1st day of February, 1979.

12. The "nuisance ordinance", as adopted by the Plaintiff City, differs significantly from the nuisance statutes which have been and are presently enacted by the Utah Legislature during all relevant times including the time coextensive with this litigation and at the time of the alleged violation.

13. On August 11, 1998 a letter from Mayor Mark E. Daines to Ira Davis advised that the City had received complaints about the "appearance of your property" (See Appendix L).

14. In a letter dated November 9, 1998 from Mayor Mark E. Daines, it is observed that,

"...We have noticed the removal of some vehicles and very much appreciate your willingness to comply with the ordinance and at the same time not jeopardize your repair business."

15. Ira Davis died on May 18, 2001 and his estate ultimately passed to his son, Rio Davis, the Defendant/Appellant who, having previously been employed in the business by his father, continued to operate the business under license issued upon application of Rio Davis (See Appendix M). No significant alterations to the general condition of the subject lands have been made since the demise of Ira Davis except as noted hereinbelow.

16. After taking possession of the property at 187 East 200 North, Hyde Park, Utah, Defendant/Appellant commenced a clean up, discarding and/or destroying items considered not to be relevant to the continued operation of the business, and has indeed removed a considerable amount of personal property from the East side of the tract, which portion was then fenced and now serves as an enclosure for horses, apparently a permitted use under applicable zoning ordinances. Personal property remains stored in the open area behind the shop which houses the Davis repair business as it is now operated. Likewise, a barn on the premises is employed as housing for animals as well as for storage of machinery and auto parts.

17. On March 21, 2003 Defendant/Appellant received a letter from Reed A. Elder, purporting to represent Hyde Park City (See Appendix N). The letter discusses a visit and alluded to goals which were to be accomplished by Defendant/Appellant in

order to bring the property into compliance with the existing City ordinances as follows:

"1. Removal of or storage in an onsite garage, ...all non-licensed vehicles and boats.

2. All miscellaneous materials that you [emphasis mine] have no useful purpose for and all debris must be removed from the property. This includes, but is not limited to automotive motor parts, brick and masonry materials, lumber or other wood items, metal barrels and all other items of furniture, machinery and building materials.

3. All material and machinery which you [emphasis mine] want to keep and store on the property must be stored inside a closed structure or within an additional fenced area inside the property which creates a visual barrier to the other properties surrounding your property. The materials to be used and the location of placement of such a fence would need to be approved by the City.

4. The property on which there is presently a trailer home located (northeast corner) must be separated from the balance of your property to establish its own lot and utilities. This will need to follow existing ordinances which the City will help you with.

5. This all must be accomplished within 120 days of this letter or the City may have to take actions to have the work done, which will result in a charge to you for the cost."

The letter goes on to request a signature from Defendant/Appellant which signature was never provided.

18. On or about the 3rd day of November, 2005 Defendant/Appellant was charged with the crime of "Maintaining a Nuisance" in violation of Hyde Park Revised Ordinance No. 10-332 with regard to the tract located at 187 East 200 North, Hyde Park, Utah and litigation ensued. (See Appendix P).

19. After denial of written Motions challenging the constitutionality of the court and of the ordinance a trial was had on the 28th day of June, 2006 in the Hyde Park City Court, whereupon the Defendant was found Guilty and was Sentenced on the 1st day of November, 2006 as follows: "Defendant is fined \$50.00 (fifty dollars) each day after

11/30/06 not in compliance with ordinance." (See paragraph 2 above.)

20. The Judgment of Conviction and sentence entered by the Justice court was Appealed to the First District Court in Cache County. After renewed Motions asserting constitutional grounds were filed and denied by the District court a trial was had on the 19th day of September, 2007 whereupon the Defendant was adjudged Guilty of an infraction and was Sentenced on the 28th day of September, 2007 as specified hereinabove. The sentence required that Defendant pay a \$50.00 fine and clean up the property to the satisfaction of city officials under pain of contempt.

SUMMARY OF ARGUMENT

21. The Defendant/ Appellant is charged with violation of Hyde Park City Revised Ordinance 10-332 "Maintaining a Nuisance". The statute, as written, is repugnant to and in conflict with the laws of the State of Utah and not in accord with the doctrine announced in Allgood v. Larson 545 P.2d 530, 531 (Utah 1976)(See Appendix Q) and as such the nuisance statutes of both Hyde Park City/Appellee and the State of Utah are unconstitutional and should be declared void-for-vagueness because they do not adequately define what is a nuisance nor do they provide adequate guidelines for enforcement and each Ordinance should be struck down as unenforceable on its face and as it has been applied to this particular Defendant.

22. The Defendant/ Appellant contends that Part 10-331 of the Plaintiff/ Appellant's nuisance ordinance and U.C.A. § 76-10-801(1) defining nuisance and

U.C.A. § 76-10-803 defining a public nuisance are unconstitutionally vague in violation of Article I, § 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution.

23. Ordinances, such as the Plaintiff/Appellee has adopted here, are regulated by the State laws and by the courts, the city cannot impose a greater sentence than that provided by state law. See *Allgood v. Larson* (supra). It is to be noted that 10-8-84, by its express terms, limits the grant of power to municipalities to pass ordinances, to those "not repugnant to law." It should be further noted that the penalty provisions in the city ordinance exceeds the mandates of 10-8-60 by pre-classifying the offense as a Class C Misdemeanor which defeats the "fine only" grant under the limitation on the grant of power regarding nuisance charges bestowed on the city by that statute.

24. The Utah legislature's scheme for establishing and operating justice courts violates the separation of powers doctrine's prohibition proscribing acts of one branch of government which interfere with performance of core functions by another branch. Judges must be free to exercise exclusive power to decide cases independently and without influence exerted by the executive and legislative branches. Under Utah's statutory scheme, municipal governments have been afforded broad authority to control and direct justice courts, including the power to whimsically appoint and dismiss judges. In addition, municipalities may and are directed to control justice court budgets, personnel, and resources. Because Utah law requires that municipalities must fund their

own justice courts, local governments will tend to establish local courts only if the courts are able to fund their own operations. In practice, some justice courts have become so profitable that they serve as a significant source of revenue upon which the municipalities they serve rely when planning their annual budgets. This legislative scheme presents enormous, if subtle, incentives for justice court judges to generate revenue by convicting and fining criminal defendants. These incentives and others interfere with the core judicial function of independently and fairly adjudicating criminal cases in violation of the separation of powers doctrine.

25. The sentence imposed by the Justice Court as well as by the District Court was clearly at odds with the powers extended to cities and towns (and importantly to the District Court as well) and was surely "repugnant to law." *Allgood vs. Larsen* (decided) see also *State vs. Hemmert* (supra) in the Supreme Court of the State of Utah No. 15725 (an unpublished opinion) Crockett, Hall and Ellet concurring.) If the singular and unlawful sentence imposed by the Justice Court and, to some extent, perpetuated by the District Court had it not found its basis in an unconstitutional ordinance, this Defendant would have been deprived of any power to seek an effective review of the draconian pronouncements that plagued this case as found its way through the lower Courts.

26. Defendant/Appellee filed a Motion and Memorandum of Points and Authorities In Support of a Motion To Dismiss in the District Court on or about the 12th day of April, 2007. A Motion to Quash the Justice Court conviction was also filed. Said

Motions specifically addressed constitutional issues as related to the validity of Plaintiff/Appellant's ordinances and the validity of certain statutes of State of Utah regarding nuisance as well as the constitutionality of the sentences imposed.

27. The District Court did not adequately address its basis for denying Defendant/Appellant's Motion to Dismiss and Motion to Quash and in fact relied on a presumption as if it were an item of evidence which tended to negate evidence in argument presented by Defendant/Appellant.

ARGUMENT

I. Are the Plaintiff/Appellee City's nuisance ordinances repugnant to and in conflict with the laws of the State of Utah and not in accord with the doctrine announced in ALLGOOD v. LARSON (Supra).

28. The powers conferred on cities and towns within Utah, such as Plaintiff/Appellee town are regulated by Title 10 of the Utah Code, U.C.A. § 10-8-60 significantly provides that:

" They [cities and town] may declare what shall be a nuisance, and abate the same, and impose fines upon persons who may create, continue or suffer nuisances to exist."

This section does not seem to address criminal sanctions and certainly limits the cities power to that of imposing fines. Defendant/Appellant suggests that fines can be of either a civil or criminal nature. Blacks Law Dictionary, 7th Edition West Group 1999 defines a fine as, "a pecuniary criminal punishment or civil penalty payable to the public treasury."

29. While this section seems to give considerable flexibility to the city/town to

fashion its own standards of criminality, this section (even if it authorizes criminal sanctions) must be considered in light of other provisions of law and in connection with the "Allgood Doctrine" interestingly, Utah Code Annotated 10-8-60 does not seem to allow the city to by their ordinances, to impose imprisonment as a punishment.

30. As a limitation imposed on the Grant found in the above cited statute, U.C.A. § 10-8-84 provides that cities and town such as Plaintiff/Appellee may:

" (1) ... pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants , and for the protection of property in the city."

and

"(2)... may enforce obedience to ordinances with fines or penalties in accordance with Section 10-3-703."

This provision provides an interesting paradox because it may, by use of the term

"penalties" allow imprisonment for maintaining a nuisance despite the limitation found in

10-8-60 (supra) Utah Code Annotated Section 10-3-703 provides:

" (1) The governing body of each municipality may impose a minimum criminal penalty for the violation of any municipal ordinance by a fine not to exceed the maximum class B misdemeanor fine under Section 76-3-301 or by a term of imprisonment up to six months, or by both the fine and term of imprisonment.

(2)(a) Except as provided in Subsection (2)(b), the governing body may prescribe a minimum civil penalty for the violation of any municipal ordinance by a fine not to exceed the maximum class B misdemeanor fine under Section 76-3-301."

The city by limiting the fine to fifty dollars/day seems to be at odds with the minimum mandatory requirement found in 10-3-703.

31. The Utah Supreme Court in ALLGOOD v. LARSON(Supra) , held that the provisions of Article XI, Section 5 of the Utah Constitution are "not only a delegation of power by the people to a municipality, but is also a limitation" of such powers. The "constitutional provision, in conferring police power upon municipalities, limits the grant to an area "not in conflict with the general law." The Allgood Court placed a construction on the provision found in UCA 10-8-84 "not repugnant to law" as being coextensive with the mandate emphasized above.

32. In determining whether an ordinance is in conflict with general laws, the test is whether the questioned ordinance permits or licenses that which the statute forbids and prohibits, and likewise whether that same ordinance might eschew conduct permitted by the "General Law." RICHFIELD CITY v. WALKER, 790 P.2d 87, 90-91 (Utah App. 1990) citing SALT LAKE CITY v. KUSSE, 97 Utah 113, 93 P.2d 671 (1938).(See Appendix R) Based on this test it is apparent that the Plaintiff/ Appellee's nuisance ordinances are in conflict with the "general laws" of the State of Utah as the elements of each cannot be reconciled one with the other.

Part 10-331 of the Plaintiff/ Appellee's nuisance ordinance defines a nuisance as follows:

"For the purpose of this part the term "nuisance" is defined "to mean any condition of use or premises or of building exteriors which are deleterious or injurious, noxious or unsightly which includes, but is not limited to keeping or depositing on, or scattering over the premises any of the following:

- A. Lumber, junk, trash, or debris.
- B. Abandoned, discarded, or unused objects or equipment such as furniture, stoves, refrigerators, freezers, cans or containers."¹

Where in the Utah Nuisance Statutes do prohibitions such as these appear?

33. All prohibitions in the Utah Code eschew "such terms as "noxious" or "unsightly" and invoke the requirement that any proscribed condition must be dangerous to "human life or health" or create an "impure or unwholesome" condition. [Defendant suggests that the latter standard "impure or unwholesome" is unenforceable (infra)].

34. The Utah Supreme Court has held that the test as to whether the use of the property constitutes a "nuisance" is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case. CANNON v. NEUBERGER, 1 Utah 2d 396, 268 P.2d 425 (See Appendix S); DAHL v. UTAH OIL REFINING CO., 71 Utah 1, 262 P.269. (See Appendix T) The question is not whether a reasonable person in the Plaintiff/ Appellee's or Defendant/ Appellant's position would regard the condition as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.

¹ In the Information and in the Amended Information it is provided that, "Nuisance" is also defined to mean: (2) unsheltered storage or old, unused, stripped and junked machinery, implements, equipment or personal property of any kind which is no longer safely usable for the purposes for which it was manufactured, for a period of 30 days or more". This is inconsistent with the existing Plaintiff/Appellant Ordinance as acknowledged by a Fax submitted by a city employee, Diane, who acknowledges that the ordinance has not been modified since 1978. The verbiage herein is also inconsistent with Utah Code 76-10-801, defining "Nuisance".

Should Defendant/Appellant's use offend the "Danger to human health" standard, the inquiry must nevertheless shift to the reasonableness of the use in the location. (Perhaps this is the basis of the three or more persons requirement which basis is problematic in that the standard is suspect, invidious and arbitrary).

35. The Courts have uniformly held that the use of property analogous to Defendant/ Appellant's use of the subject property or even for such purposes as public garages or for the business of wrecking automobiles and salvaging parts are not nuisances per se. HATCH v. HATCH CO., 3 Utah 2d 295, 283 P.2d 217 (Utah 1955) citing GEORGE v. GOODVICH, 288 Pa. 48, 135 A. 719, 50 A.L.R. 107 (See Appendix U); PARKERSBURG BUILDERS MATERIAL CO. v. BARRACK, 118 W.Va. 608, 191 S.E. 368, 110 A.L.R. 1461.(See Appendix V)

Utah Code Annotated, § 76-10-801, (1973 as Amended) defines "nuisance" as follows:

"(1) A nuisance is any item, thing, manner, condition whatsoever that is dangerous to human life or health or renders soil, air, water, or food impure or unwholesome."

No such limitation appears in the Plaintiff/Appellee's Ordinance The Utah State statute above goes on to provide:

"(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues or retains a nuisance, is guilty of a class B misdemeanor."

36. The Utah Court of Appeals in TURNBAUGH v. ANDERSON, 793 P.2d

939 (Utah App. 1990) (See Appendix W) held that Section 76-10-801 encompasses two types of nuisance developed under the common law: public and private nuisance. See e.g., HELMKAMP v. CLARK READY MIX CO., 214 N.W.2d 126, 129 (Iowa 1974) (See Appendix X) (state statutory enumerations do not modify the common-law doctrine of nuisance); see also Restatement (Second) of Torts 821A (1979) (See Appendix Y). The definition of nuisance in Section 76-10-801 includes acts or conditions that are commonly classed as public or private nuisances.

37. A public nuisance is defined under the provisions of U.C.A. § 76-10-803, (1992 Amendment) as follows:

"(1) A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing any act or omitting to perform any duty, which act or omission:

(a) annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;²

(b) offends public decency³:

(c) unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway;

(d) is a nuisance as defined in Section 78-38-9;,(for application of which section Plaintiffs do not contend) or

(e) in any way renders three or more persons insecure in life

²Which three (3) people? (See Solar Salt) (infra)

³ As is noted on page 8, Defendant contends that (a) and (b) are unenforceable as vague and imprecise.

or the use of property.

(2) An act which affects three or more persons in any of the ways specified in this section is still a nuisance regardless of the extent of annoyance or damage inflicted on individuals is unequal."

38. The Utah Supreme Court had defined a public nuisance as affecting "an interest common to the general public, rather than peculiar to one individual, or several."

SOLAR SALT CO. vs. SOUTHERN PACIFIC TRANSP. CO., 555 P.2d 286, 289

(Utah 1976) (quoting W. Prosser, Law of Torts 606). *cf* 76-10-803 SUPRA.

(See Appendix Z)

39. It is more than clear that the nuisance ordinances of the Plaintiff City are repugnant to and in conflict with the general laws of the State of Utah in violation of the doctrine of ALLGOOD v. LARSON, *supra*. The Plaintiff City's nuisance ordinances forbid what the "general laws" of the State of Utah permit.

40. The Plaintiff/ Appellee's nuisance ordinances should therefore be declared null and void as being violative of Article XI, § 5 of the Utah Constitution and parallel provisions of the Constitution of the United States.

II. Are the nuisance Ordinances of Plaintiff/ Appellee and the various Statutes of the State of Utah addressing nuisance constitutional or should said statutes be declared void-for-vagueness because the statutes do not adequately define what is a nuisance nor do they provide adequate guidelines for the enforcement of said statutes.

41. There should be no question that the nature of even civil proceedings may be, to some extent, quasi- criminal in character. SIMS v. TAX COMMISSION, 841 P.2d

6 (Utah 1992). (See Appendix AA) U.C.A. § 76-10-801(2), (1973 as Amended)

provides as follows:

"(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues, or retains a nuisance, is guilty of a class B misdemeanor."

42. The Defendant/ Appellant contends that Part 10-331 of the Plaintiff/ Appellant's nuisance ordinance and U.C.A. § 76-10-801(1) defining nuisance and U.C.A. § 76-10-803 defining a public nuisance are unconstitutionally vague in violation of Article I, § 7 of the Utah and the Fourteenth Amendment to the United States Constitution.

43. The void-for-vagueness doctrine requires that a statute or ordinance define an offense with sufficient definiteness that "ordinary people" can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *KOLENDER v. LAWSON*, 461 U.S. 352, 357, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855 (1983). (See Appendix BB) More important than actual notice is the requirement that a legislature establish minimal guidelines to govern law enforcement. *KOLENDER*, quoting *SMITH v. GOGUEN*, 415 U.S. 566, 574, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974). It is a basic principle of due process that an enactment is void for vagueness if its prohibition is not clearly defined. *GRAYNED v. CITY OF ROCKFORD*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972). (See Appendix CC).

44. A constitutional vagueness challenge can proceed either as a facial challenge or upon its application, based upon the facts of the case. *GREENWOOD v. CITY OF NORTH SALT LAKE*, 817 P.2d 816 (Utah 1991).(See Appendix DD) A facial challenge is permitted when a statute or ordinance has no practical application in any case or the law reaches a substantial amount of constitutionally protected conduct. *HOFFMAN ESTATES v. FLIPSIDE, HOFFMAN ESTATES, INC.*, 455 U.S. 489, 494, 71 L.Ed.2d 362, 102 S.Ct. 1186 (1982). (See Appendix EE) Where a statute or ordinance imposes criminal penalties, the standard of certainty is higher. *WINTERS v. NEW YORK*, 333 U.S. 507, 515, 92 L.Ed. 840, 68 S.Ct. 665 (1948).(See Appendix FF) This concern has led the United States Supreme Court to invalidate a criminal statute on its face even when it could conceivably have had some valid application. *COLAUTTI v. FRANKLIN*, 439 U.S. 379, 394-401, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979)⁴ .(See Appendix GG).

45. The challenged ordinances and statutes in the instant case reaches a substantial amount of constitutionally protected conduct.

Article I, § 1 of the Utah Constitution provides as follows:

"All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship

4

Utah cases such as *Logan City v. Huber* 786 P.2d 1372 (Ut App. 1990) (See Appendix HH) and *Provo City v. Whatcott* 200 UT, (Ut. App 1986) would seem to rely on this holding. (See Appendix JJ) For ordinances and statutes which sweep too broadly.

according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress or grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

46. As a preliminary matter, the Plaintiff/ Appellee must establish and prove in connection with an appropriate ordinance that Defendant/ Appellant's use of the subject property is a public nuisance as defined under § 76-10-803 and such use has a detrimental effect on public comfort, repose, health or safety, or which offends public decency.

47. The Utah Supreme Court has held that municipal ordinances which are similar to U.C.A. § 76-10-801 and § 76-10-803, even when only the civil remedy is pursued, are unconstitutionally vague. The Court in *JONES v. LOGAN CITY CORP.*, 19 Utah 2d 169, 428 P.2d 160 (1967) (See Appendix KK) observed as follows:

"While the statute above mentioned grants to cities the power to declare what shall be a nuisance, the ordinance before us does not in fact define what a nuisance is. Ordinance No. 120 above referred to, which grants to the Board of Condemnation the right to determine whether any building constitutes a menace to public health or public safety, does not provide standards on which the board can base its findings as to what is or what is not a menace to public health or public safety. It would appear that the ordinance imposes upon the Board of Condemnation quasi-judicial functions without standards or guidelines to govern the Board in its determination."

48. U.C.A. § 76-10-801 and § 76-10-803 do not provide sufficient standards or guidelines upon which the Court can base its findings as to what is or what is not detrimental to public comfort, repose, health or safety and what is or what is not a public

nuisance or even what public comfort or repose are.

49. The United States Supreme Court observed in *KOLENDER v. LAWSON*, (supra, n. 7) "societies concern for minimal guidelines finds its roots as far back as the decision in *UNITED STATES v. REESE*, 92 U.S. 214, 221, 25 L.Ed. 563 (1876)" (See Appendix LL)

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

50. U.C.A. § 76-10-801 and § 76-10-803 are unconstitutionally vague on their face because the statutes encourage arbitrary enforcement by failing to describe with sufficiency what conduct is proscribed by the statutes and also because those statutes reach a substantial amount of constitutionally protected conduct. It is also evident that the statutes are unconstitutionally vague in the application of their provisions to the facts of this case. Assuming that the Plaintiff/ Appellee's nuisance ordinances are applicable in this case, those questioned ordinances are likewise unconstitutionally vague.

51. Part 10-331 of Plaintiff/ Appellee's nuisance ordinance is susceptible of many different meanings and consequently is unconstitutionally vague. For example, the ordinance prohibits lumber from being deposited or scattered on any premises. This ordinance could incidentally preclude a commercial lumber yard from maintaining stock on the premises and/or selling lumber. The ordinance might also prohibit the

construction of buildings from lumber. Junk, as defined in the ordinance, is also susceptible of many different meanings as opposed to a common definition such as might be found in a dictionary.⁵

52. The questioned ordinance is susceptible of many different meanings and encourages arbitrary and discriminatory enforcement and should therefore be declared unconstitutionally vague.

III. Is the penalty ordinance No. 10-359 of the Plaintiff/ Appellee enforceable on its face as imposed upon Defendant/ Appellant?

53. Plaintiff/Appellee's Ordinance No. 10-359 PENALTY FOR FAILURE TO COMPLY is as follows:

"A. Any owner, occupant or person having an interest in the property subject to this chapter who shall fail to comply with the notice or order given pursuant to this chapter shall be guilty of a class C misdemeanor for each offense and further sum of \$50.00 for each and every day such failure to comply continues beyond the date fixed for compliance.

B. Compliance by any owner, occupant or person to whom a notice has been given as provided in this chapter shall not be admissible in any criminal proceeding brought pursuant to this section."

54. For purposes of this argument, we shall dwell only on part A. With regard to that portion which reads, "...further sum of \$50.00 for each and every day such failure to comply continues beyond the date fixed for compliance."

⁵ Old iron, glass, paper, or other waste that may be used again in some form (2): secondhand, worn, or discarded articles (3): clutter 1b b : something of poor quality : trash c: something of little meaning, worth, or significance. (Webster's Dictionary)

55. The Utah legislature in 1973 created classes of offenses and in 76-1-103 (1), the following language appears:

"The provisions of this code shall govern the construction of, the punishment for,...any offense defined in this code.... any offense defined outside this code ... " 76-1-104 provides that the code shall be constructed in accordance with these general purposes; and Subsection (3), dealing with penalties, states; ' Prescribe penalties which are proportionate to the seriousness of offenses..."

The language was cited in Allgood vs. Larsen (supra).

56. Ordinances, such as the Plaintiff/Appellee has adopted here, are regulated by the State laws and by the courts, the city cannot impose a greater sentence than that provided by state law. See Algood v. Larson (supra). It is to be noted that 10-8-84, by its express terms, limits the grant of power to municipalities to pass ordinances, to those "not repugnant to law." It should be further noted that the penalty provisions in the city ordinance exceeds the mandates of 10-8-60 by pre-classifying the offense as a Class C Misdemeanor which defeats the fine only limitation imposed by 10-8-84..

57. If the ordinance penalty conflicts with that of the "general law" of the state addressing the same subject, the ordinance penalty is void. The penalty prescribed by the city ordinance cannot exceed that set by the state law. [Allgood v. Larson(supra)]

58. The test as to whether an ordinance is repugnant to or in conflict with state law is not necessarily as to whether it deals with the same subject matter in a different manner by providing a different penalty, but it is whether the ordinance permits or licenses something which the state statute forbids or prohibits, or vice versa. See Algood

v. Larson quoting Salt Lake city v. Kusse, supra; and see, e.g. City of Columbus v. Molt, 36 Ohio St. 2d 94, 304 N.E.2d 245 (supra).

59. Any violation of the Plaintiff/ Appellee's Nuisance Ordinance shall be designated as a single crime, a misdemeanor.⁶ The Ordinance exceeds the statutory limits by providing that a fine of \$50.00 shall be assessed "...for each and every day such failure to comply continues beyond the date fixed for compliance." There can only be one violation and as such there can be only one fine assessed. If the penalty is valid, it can only find application to the point that \$50.00 represents the maximum which may be assessed and then, only once. See State of Utah v. Hemmert, No 15725 1978. (supra) (Unpublished opinion) (See Appendix MM).

IV. The Statutory scheme for Justice Courts interferes with Judicial independence by providing monetary incentives to convict criminal defendants and by authorizing the administrative arm of municipal government to hire and fire judges and to control court operations.

60. The Utah legislature's scheme for establishing and operating justice courts violates the separation of powers doctrine's prohibition proscribing acts of one branch of government which interfere with performance of core functions by another branch. Judges must be free to exercise exclusive power to decide cases independently and without influence exerted by the executive and legislative branches. Under Utah's statutory scheme, municipal governments have been afforded broad authority to control

⁶ In this case, the crime was charged as an infraction, presumably to avoid the necessity of impaneling a Jury as demanded by the Defendant.

and direct justice courts, including the power to whimsically appoint and dismiss judges. In addition, municipalities may and are directed to control justice court budgets, personnel, and resources. Because Utah law requires that municipalities must fund their own justice courts, local governments will tend to establish local courts only if the courts are able to fund their own operations. In practice, some justice courts have become so profitable that they serve as a significant source of revenue upon which the municipalities they serve rely when planning their annual budgets. This legislative scheme presents enormous, if subtle, incentives for justice court judges to generate revenue by convicting and fining criminal defendants. These incentives, in turn, interfere with the core judicial function of independently and fairly adjudicating criminal cases in violation of the separation of powers doctrine.

A. The Utah Constitution Grants Judges the Exclusive Power to Impartially Decide Criminal Cases, Independent of any Compulsion Wielded by Executive and/or Legislative Branches.

61. Under the Utah Constitution's separation of powers clause, one branch of government may not interfere with the core function of another branch. Although this doctrine does not require complete independence between any or all of the three branches, it does require that each branch respect the inherent roles of the other two branches. The main function of the judicial branch, as an undeniable fact, is to impartially interpret the law and fairly decide cases and controversies.

62. The separation of powers doctrine serves as the very foundation of the

American concept of liberty. Article V, section one of the Utah Constitution defines this doctrine as follows:

"The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise functions appertaining to either of the others, except in the cases herein expressly directed or permitted.
Utah Const. Art. V, § 1."

63. As the Utah Court has observed, the separation of the three branches is essential to preserve liberty and individual rights:

"Montesquieu's writings warn us that there can be no liberty if the powers of the three branches of government do not remain separate. Madison recognized the principle as more sacred than any other in a free constitution, and that no one branch should possess, directly or indirectly, an overruling influence over the others in the administration of its powers. Justice Marshall adhered to the principle in *Marbury vs. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed, 60.... (See Appendix NN). The fundament of the doctrine remained unassailable when the United States Supreme Court through Justice Frankfurter reminded the President that his action of seizing the nation's steel mills to prevent a national catastrophe threatened to be an "accretion of dangerous power" which comes from the "unchecked disregard" of the checks and balances that doctrine was created to provide. *Youngstown Sheet & Tube Co. Vs. Sawyer*, 343 U.S. 579, 594 (1952) (See Appendix PP). Whether implied, as in our federal constitution and in those of fourteen states, or whether expressly stated, as in our own state's constitution, the doctrine of separation of powers is the control gate harnessing the reservoir of powers of a government which functions at the will of the people. *Timpanogos Planning & Water Management Agency vs. Central Utah Water Conservancy Dist.* 690 P.2d 562, 564-565 (Utah 1984)."

64. Notwithstanding the imperative of the above quoted language, the modern separation of powers doctrine does not require absolute independence between the branches. "[A]lthough the threefold division of powers is the basis for the American

Constitution, there are many cases in which the duties of one department are, to a certain extent, devolved upon and shared by the other." In re Young, 1999 UT 6, ¶13, 976 P.2d 581 (quoting Tite vs. State Tax Commission, 57, P.2d 734, 737 (Utah 1963)) (See Exhibit QQ). One branch only violates the separation of powers doctrine when it exercises the power that is "exclusive to one department..." Id. at ¶14. Utah Courts have characterized exclusive powers as those which are "primary," "core," or "essential," to one branch. Id. (quoting Salt Lake City vs. Ohms, 881 P.2d 844, 849 (Utah 1994) (Appendix RR); Timpanogas, (Supra) at 567; State vs. Gallion, 572 P.2d 683, 688 (Utah 1977)) (Appendix SS). Stated differently, exclusive means "inherent in the very concept of one of the three branches of a constitutional government." Id. at ¶ 26.

65. The judicial branch's "primary function" includes the duty to fairly and independently "hear and determine controversies between adverse parties and questions in litigation." Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy Dist., 690 P.2d at 569, 571 (Utah 1984) (quoting Citizens Club vs. Welling, 27 P.3d 23, 26 (Utah 1933)) (See Exhibit TT). Judges have the exclusive power "to interpret and adjudicate with dispassionate impartiality questions of law between adverse parties..." Id. it follows that the separation of powers doctrine bars executive or legislative actions that threaten "the fundamental integrity of the judicial branch..." Ohms, (supra) (quoting In re Criminal Investigation, 754 P.2d 633, 642 (Utah 1988)). "It is essential in all courts that the judges who are appointed to administer the

law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear." In re Hammermaster 985 P.2d 924, 936 (Wash. 1999) (quoting Bradley vs Fisher, 80 U.S. 335, 349 n. 16 (1871) (See Appendix UU).

B. Utah's Legislative Scheme Governing Justice Courts Creates Substantial Economic Incentives for Municipalities to Use Justice Courts to Generate Revenue for Their General Fund.

66. The statutes governing justice courts violate principles of Constitutional dimension in that justice courts are revenue-driven entities that, by definition, cannot independently and impartially adjudicate disputes. Under Utah's legislative scheme, state funded district courts have jurisdiction over misdemeanor offenses unless a local municipality acts to fund its own justice court. Because municipalities retain half of the revenue created by justice courts, municipalities, as a practical matter, will only create such courts when the elective system can generate sufficient revenue to fund a profitable operation. This revenue-producing scheme creates enormous incentives for municipal governments and consequently justice court judges to overlook fundamental constitutional principles in order to achieve and maximize that profit.

67. In Utah's courts system, local municipalities may, at their option, elect to enforce class B and C misdemeanors either through the state district courts or by creating their own justice courts. Article VIII, section 1 of the Utah Constitution authorizes the legislature to create "courts not of record..." The legislature has done so in chapter five

of Title 78 of the Utah Code. That chapter authorizes municipalities to create and fund justice courts with "jurisdiction over class B and C misdemeanors, violation of ordinances, and infractions committed within their territorial jurisdiction, except those offenses over which the juvenile court has exclusive jurisdiction." Utah Code Ann. § 78-5-104(1) (2002); see also Utah Code Ann. § 78-5-101, 78-5-101.5 (2002) (providing for the creation of justice courts). In the absence of a justice court, state funded district courts have jurisdiction over these criminal offenses. Utah Code Ann. § 78-3-4(8) (Supp. 2004)⁷.

68. Despite this legislative authority to create justice courts, as a practical matter, local governments only do so when justice courts exhibit the apparent ability to generate sufficient revenue to pay for their own expenses. By statute, the states must fund the district courts to enforce class B and C misdemeanors, local ordinances, and infractions. Utah Code Ann. §78-3-13.4 (2002). Under this model, the state receives half of all fines and forfeitures while the prosecuting agency, usually meaning the county, receive the other half. Id. § 78-3-14.5 (2) (Supp. 2004). Local municipalities receive no portion of this revenue because they provide no funding to the district courts.

69. When municipalities purport to create justice courts to supplant the state funded court operations, Utah Code Ann. § 78-5-110 (Supp. 2004), 78-5-111 (2002);

⁷ The Justice Court, by some mechanism, retains the entire fee generated by Plea in Abeyance Agreements.

they must, as a preliminary requirement and in order to receive favorable action on an application to create a justice court, demonstrate a "need" for a local court, including demonstration of the ability to fund the proposed court. Id. § 78-5-101.5 (2002). As previously noted, in a justice-court system, municipalities retain half of all fines and forfeitures; the other half goes to the state. Id. § 78-5-116 (1) (Supp. 2004).

70. Given these fiscal realities, municipalities only create justice courts when doing so makes economic sense. Because the state has a statutory obligation to enforce class B and C misdemeanors, local ordinances, and infractions without charge visited on local governments, municipalities would have no incentive to establish local justice courts unless such courts generate adequate revenue to retire the operational cost.. A recent study of justice courts in Salt Lake County established that all justice courts, "produce revenues in excess of expenditures in varying degrees." Institute for Law and Policy Planning, Salt Lake County Criminal Justice Assessment 6.11 (2004) (hereinafter referred to as "County Justice Court Assessment") (See Appendix VV).

71. Many justice courts show a profit and thereby generate revenue for cities. The previously referenced County Justice Court Assessment discloses that justice court "[j]udges and administrators freely admit that they believe the justice courts are a source of significant revenue for their cities." Id. In fact, municipalities "view the [justice] courts as a prime source worthy of protection and expansion." Id.

72. Municipalities have further capitalized on the justice court system by

refusing to reimburse the host county for incarcerating justice court offenders. Id. at 3.9. Although some county sheriffs bill municipalities for housing offenders, most cities maintain that they already contribute to the County's general fund, and that such contributions should provide compensation for operating the jail. Id. at 3.10 . As a result, in Salt Lake County, "municipalities generated nearly \$17 million dollars in court fees [gross revenue] during 2000, yet paid nothing towards the approximately \$7 million in jail billings".

73. In addition to confinement at no cost to the involved city , municipalities are the recipient of additional services from counties. "Justice Courts have unfettered access to the larger system through the jail, the county probation department, the legal defender, etc. with little or no financial obligation. Id. at 3.9. For these very reasons, justice courts have, not surprisingly, proliferated in recent years. Id. at 6.5 . In Cache County, courts have even been established in minor villages such as Trenton & Clarkston.

C. The Legislative Scheme Coupled With Municipalities' Lack of Financial Accountability For Incarcerated Offenders Undermines Justice Court Independence and Creates Unconstitutional Pecuniary Incentives to do Other Than Justice as well as to Dispense with Fairness and impartiality.

74. The legislature's funding mechanism coupled with the political reality that municipalities use justice courts to generate revenue for the general fund directly undermine justice court judges' independence. Justice court judges must produce sufficient revenue to maintain the very existence of their courts, and thereby incentive

exists to meet a municipalities' revenue projections. The County Justice Court Assessment study substantiates this proposition of "the fear that cities will become dependent on the money generated through enforcement, thus increasing the likelihood that police and judges will be overly aggressive as a way to meet financial expectations and demands." Id. at 3.8.

75. The conclusion quoted above directly conflicts with certain official assumptions that monetary demands on justice court judges are "unlikely" and "speculative." Indeed, the revenue-generating impetus for establishing justice courts is obvious. As the editorial staff of the Salt Lake Tribune observed, "the justification for creating justice courts explicitly includes being a revenue source for the wider city government..." Editorial, Justice Peeks, Salt Lake Tribune, July 20, 2005. The County Justice Court Assessment concluded that "the importance of revenue generation to municipalities is apparent from the fact that municipal judges are directly responsible to the executive branch, unlike county judges who must stand for retention by the electorate." County Justice Court Assessment at 6.5.

76. The separation of powers doctrine bars judges from being subject to financial blandishments when deciding cases. Statutes "granting a pecuniary interest" to judges are clearly unconstitutional. *Blankenship vs. Minton Chevrolet, Inc.*, 266 S.E.2d 902, 903 (W.V. 1979) (See Appendix WW). The Utah Courts have similarly held that judges must have "no favors to grant, no patronage to dispose of, and no friends to

reward." Timpanogo, 690 P.2d at 568 (quoting In re O'Sullivan, 158 P.2d 306, 309 (Mont. 1945)). In the Timpanogos case, the Supreme Court held that the legislature violated the separation of powers doctrine when it empowered district court judges to appoint board members of a water conservancy district. Id. at 570. Citing the possibility that the same judges who appointed board members might later review board decisions, this Court concluded that the district court judges might "feel constrained in passing upon board action." Id. at 570.

77. Financial incentives need not be explicit in order to violate the separation of powers doctrine. In defining governmental branch powers, the Utah Court observed that there is a natural tendency of all persons, even judges, to unconsciously protect their interest:

Due to the manner in which our system was created and has developed, the judiciary has the awesome prerogative and responsibility of judging the scope of powers of the executive, legislative, and of its own. For this reason it is essential that the judiciary be especially circumspect in maintaining an awareness of the natural propensity of human nature: that when anyone has the power to decide wherein his own interests are involved, there is danger of consciously or subconsciously leaning toward the protection, and perhaps the magnification, of his own self-interest. Jones, 550 P.2d at 210 (footnote omitted) (See Appendix XX).

Knowing that justice courts will only survive if they produce adequate revenue, a justice court judge might well have an incentive to convict and fine persons without due regard to their core function to fairly adjudicate cases. Timpanogos, 660 P.2d at 571..

78. Municipalities' refusal to reimburse jails for costs associated with

confinement compounds justice court judges' incentives to generate revenue. This stance allows justice court judges to use county jails "with little restriction and complete financial impunity." County Justice Court Assessment at 3.9. A direct consequence of un-reimbursed jail services is the common practice in justice courts of ordering criminal defendants to "pay or serve" their sentences. Id. 6.5. This device allows justice court judges to threaten to and/or to incarcerate offenders who fail to pay fines in a timely manner. Id.. The absence of any financial obligation to municipalities for jail services has resulted in justice court judges employing incarceration to excess in order to collect revenue. Id. at 3.9.

79. The "pay or serve" practice is particularly offensive because it tends to foment an unwarranted deprivation of a persons liberty. In defining separation of powers violations, the Utah Court has held that it will tolerate shared powers "when it is essential to the discharge of a primary function, when it is not an assumption of the whole power of another department, and when the exercise of the other power does not jeopardize individual liberty." Timpanogos, 690 P.2d at 567 (quoting C. Sand, Sutherland Statutory Construction § 3.06). The absence of any financial obligation resulting from the incarceration of offenders who fail to pay fines, Defendant/Appellant suggests, violates this test.

D. Municipalities' Statutory Control Over Justice Courts Further Frustrates the Fair Adjudication of Criminal Cases.

80. Even if financial incentives did not interfere with judicial independence,

Utah's legislative scheme governing justice courts also violates separation of powers principles because it foments exertion of inordinate control over administration of justice courts. Municipalities have statutory authority to hire and fire judges, to fund court operations, and to supervise court personnel. These powers, coupled with the use of justice courts as sources of general revenue, create a legislative scheme that invades the core function of the judicial branch to fairly and independently deciding cases.

81. Of greatest concern, the legislature has authorized the executive, without meaningful guidelines, to hire and fire justice courts judges. Utah Code Annotated section 78-5-134 (2)(2002) designates the municipal leader, whether a mayor, council chair, or city manager, generically called the "appointing authority," to "appoint " justice court judges. The entity's legislative body must then confirm the appointment by a majority vote. Id § 78-5-134(2). Justice Court judges serve four-year terms. Id. § 78-5-132 (1). Upon completion of the term, Utah law mandates that justice court judges "shall be reappointed absent a showing of good cause." Id. § 78-5-134(5). In determining whether "good cause" exists, municipalities "shall consider" (1) whether the state Judicial Council has certified the judge; and, (2) "any other factors considered relevant by the appointing authority." Id. § 78-5-134(5)(d). (Emphasis mine)

82. Although this scheme purports to model the appointment of justice court judges after the traditional appointment process for Federal judges, it allows for expansive executive and legislative influence over judges. Because appointing

authorities may "consider any other factor" in deciding whether to reappoint a judge, justice court judges essentially serve at the whim of the executive. *Id.* § 78-5-134(5)(d). Given this broad discretion as to whether to reappoint, the economic realities surrounding justice courts and the pressure to generate revenue might directly influence how judges handle cases. At its most extreme, such influence is manifested if a judge fails to meet a municipality's revenue projections⁸ whereupon the appointing authority might employ the grant of power as a means of expressing frustration or displeasure. In a plausible scenario, the justice court judge might indeed, sense pressure, whether "consciously or subconsciously" to maximize collections and, thus, preserve his or her "own self-interest." *Jones*, 550 p.2d at 210. Pressure to collect revenue might not necessarily be overt, unspoken or unrealized expectations of "favours," "patronage," or "reward" but might well be enough to violate separation of powers principles. *Timpanogos*, 690 P.2d at 568 (quoting *In re O'Sullivan*, 158 P.2d at 309).

83. At the very least, the appointment and reappointment process tend to create an appearance of impropriety. Canon 2 of the Utah Code of Judicial Conduct charges judges to avoid even "the appearance of impropriety" to ensure "public confidence" in the judiciary. The County Justice Court Assessment pointed to such an appearance of patronage when it concluded that justice court judges are "directly responsible to the executive branch" for their very existence. County Justice Court Assessment at 6.5.

⁸ Surely a significant "factor"

Although the assessment did not observe anything "sinister or improper" the stated concern was that the "appointive power of the mayors presents an interesting if not conflicted situation in that the Executive branch literally creates the judicial branch via appointment." Id. at 6.10. The editorial staff of the Salt Lake Tribune eliminated any doubt about the appearance of impropriety when it recently observed that "because the justification for creating justice courts explicitly includes being a revenue source for the wider city government, judicial impartiality is seriously compromised." Editorial, Justice Peeks, Slat Lake Tribune, July 20, 2005.

84. Given the sheer numbers of persons who appear before justice courts, appearance of impartiality is essential to maintenance of public confidence in those courts. The Utah State court website points out that in fiscal year 2004 justice courts presided of over 450,000 traffic cases. In addition, the justice courts disposed of an additional 85,000 misdemeanor cases during that same year. By comparison, the district courts disposed of only about 100,000 misdemeanors during fiscal year 2004. See http://www.utcourts.gov/stats/FY04/dist/fy2004_9.htm. A person, citizen or otherwise, is most likely to experience the Utah justice system through justice courts. These numbers present a compelling case to ensure "public confidence" in the justice courts. Hammermaster, 985 P.2d at 936.

85. Moreover, an appearance of impropriety undermines the independence of justice courts because public perception affects judicial decision-making. Utah Courts

have held that appearances erode public confidence and alter judges' decisions

discussing the point as follows:

"A judge cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the definite record upon which his action is based...But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitable impairs his value as a judge and the appropriate influence of his office." Timponogos, 690 P.2d at 572 (quoting a letter from former U.S. Supreme Court Justice Harlan Fiske Stone to Franklin D. Roosevelt, July 20, 1942, in Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193, 203-204 (1953).

86. In addition to the appointment process, the legislature has granted municipalities control over justice court personnel and resources. Utah law entrusts municipalities with funding physical facilities, hiring and supervising court staff, and administering personnel policies. Utah Code Annotated § 78-5-108 (Supp. 2004), 78-5-110 (Supp. 2004), 78-5-111 (2002). Utah law thereby empowers local executives to control every aspect of justice court operations and to determine, and thereby fix, each budgetary item. The executive branch also appoints the administrative staff who serve "at will" or are hired via the merit system as any other city employees" in the executive department. County Justice Court Assessment at 6.10.

87. These extensive powers emphasize the appearance of impropriety and tend to reinforce the actual conflicts discussed above. Executive control over justice courts' budgets, staff, and resources presents "the perception (if not the reality) of dominance that elected officials exercise over the judiciary they created." *Id.* Executive action

violates the separation of powers doctrine "when there is an attempt by one branch to dominate another in that other's proper sphere of influence." Young, 1999 UT 6, ¶23, 976 P.2d 581. Because the legislative scheme allows local executives to "effectively control " the justice courts, that scheme unconstitutionally invades the province of the judiciary. Id.⁹

E. No Valid Reasons Support Or Justify Municipalities' Revenue-Motivated Control Over Justice Courts.

88. Although one might present several unpersuasive rebuttals to the suggestion that municipalities are revenue-driven to creation of justice courts; none of those arguments change the legislative landscape that fosters executive and legislative interference with justice courts based on budgetary considerations. Neither judicial oversight, nor case law, nor the theoretical advantages and efficiencies presented by use of the justice court system sanitizes the separation of powers obstacles presented by Utah's legislative scheme. Such argument as has been presented in proceedings to date fail to resolve the main question presented by this motion which question requires an answer as to whether the legislative scheme governing justice courts jeopardizes the "dispassionate" adjudication of criminal cases. Timponogos, 690 P.2d at 571. Although one might reason that no particular Defendant can provide a showing that revenue

⁹ Most attorneys who have significant experience with criminal defense can tell horror stories of jury trials held on folding chairs in a bay of the local fire departments or amongst the garden tools in the justice court Judge's garage (so much for public confidence).

concerns actually motivated any particular justice court judges' decisions the discussion above demonstrates the superficiality of such an argument given the reality that justice courts are essentially revenue-driven. See County Justice Court Assessment at 3.9, 3.9, 6.11.¹⁰ Additionally, proper application of the separation of powers doctrine does not require such a showing in that the Utah Supreme Courts opinion in Timponogos establishes that no actual bias need occur when one branch is provided authority to influence another's core function. In that case, the Utah Court struck down district court judges' authority to appoint water conservancy board members even though the parties neither alleged nor proved actual favoritism. Timponogos, 690, P.2d at 570-72. This appointment system violated the separation of powers doctrine on the reasoning that judges might "feel constrained" and "would avoid confrontations" while adjudicating disputes involving water boards. Id. at 570-71.

89. Any position taken to the effect that no other jurisdictions have struck down similar justice court systems based on separation of powers considerations is manifestly without foundation. State by and through the Town of South Carthage vs. Barrett, 840 S.W.2d 895 (Tenn. 1992) (See Appendix YY), the Tennessee Supreme Court held that a legislatively-established justice court system violated separation of powers principles without a showing of any actual harm to any defendant. The

¹⁰ There is some tacit recognition of the "revenue driven" nature of the courts origination and operation by the promulgation of a bail schedule.

Tennessee Constitution contains provisions similar to Utah's as they require the separation of the three branches and as they allow for the legislature to create justice courts. *Id.* at 897 (citing Tenn. Const. Art. II, § 2, Art. VI, § 1). Like Utah, the Tennessee legislature empowered municipalities to appoint justice courts judges to "serve at the pleasure" of the mayor and local legislative leaders. *Id.* at 896.

90. The Tennessee Supreme Court held that this system violated the mandate of the separation of powers doctrine because of the potential for city leaders to influence justice court judges "to increase city revenue...and to impose harsher sentences" on DUI offenders. *Id.* at 897 (quoting *Summers vs. Thompson*, 764 S.W.2d 182, 183 (Tenn. 1988)) (See Appendix ZZ). Although that court relied on a prior decision in which city leaders had actually attempted to influence a justice court judge, no similar allegations arose with respect to the case under review. *Carthage*, 840 S.W.2d at 897. The court held without necessity of reference to the previous case that the mere potential for influence violated justice court judges' ability to fairly adjudicate cases:

The instant scenario demonstrates the danger posed to an independent judiciary and to the impartial administration of justice through the exercise of arbitrary power by a separate branch of government motivated by policy and political concerns inimical to an independent system of justice. Judicial independence by all respected political thought indispensably is essential to the effective operation of constitutional government. *Id.* at 899.

91. To ensure a judiciary independent from the political caprice and whims of other government branches, the Tennessee Supreme Court required justice court judges to be elected rather than to be appointed and supervised by local municipalities. *Id.* The

Tennessee Constitution employs popular elections to preserve judicial independence from the other branches of government. *Id.* at 896 (citing Tenn. Const. Art. IV, § 4). Although Utah does not rely on popular elections, the "danger" attendant to influence of justice court judges as enunciated in *Carthage* would seem to apply equally under Utah's justice court system.

92. Similarly, in *Calligy vs. Mayor and Council of the City of Hoboken*, 665 A.2d 408, 409 (N.J. Super. 1995) (See Appendix AAA), a taxpayer claimed that an ordinance placing a municipal court in a city's department of administration violated separation of powers principles. That opinion invalidated the justice court because the "authority conferred by the ordinance is inconsistent with both the fact and appearance of judicial independence required by law." *Id.* at 412. The Court reached this conclusion despite the absence of any allegation that city officials had ever interfered with the court. *Id.* at 411. Instead, the court held that placing the justice court in the executive branch was "inconsistent with that court's independence." *Id.*

93. This instant case is analogous. Although Defendant/Appellant does not and cannot allege that the justice court judge is actually influenced by the fact that he is beholden to the City's leaders¹¹ under Utah's legislative scheme, the fact remains that local executive officials "literally create[] the judicial branch via appointment." County

¹¹ Other than the inferences that might be drawn from Judicial adherence to the singular and unlawful fine schedule imposed by the legislative act of the Hyde Park City council.

Justice Court Assessment at 6.10. Thus, justice court judges are "directly responsible to the executive branch..." County justice Court Assessment at 6.5. This situation allows municipalities to "dominate" justice courts in violation of the separation of powers doctrine. Young, 1999 UT 6, ¶ 23, 976 P.2d 581.

94. Even more to the point, in the State of Washington that State's experience points to the very dangers that the reality of revenue-generating justice courts suggest might happen in Utah. In *In re Hammermaster*, 985 P.2d 924 (Wash. 1999), the Washington Supreme Court sanctioned a justice court for violating numerous ethical duties and abusing his authority. The court reprimanded the judge for threatening to incarcerate offenders up to a "life" term for failing to pay court-ordered fines. *Id.* at 935-36. In doing so, the court held that "[a] judge's primary function is the administration of justice, not the collection of fines." *Id.* at 936.

95. One justice fully concurred in the court's judgment and provided specific examples of justice court judges who were motivated by financial considerations in adjudicating criminal cases and observed:

Our opinion today conveys a very strong message to the judiciary and local governments in Washington that the Supreme Court will not tolerate short cuts in due process. While many municipalities have established municipal courts because they want to administer justice locally, it is also true many jurisdictions establish municipal court for purely avaricious reasons— as revenue agencies to be operated if they "make money" and be dispensed with if they become inconvenient to administer or generate insufficient revenues. Some local jurisdictions have even attempted to control performance of duties by municipal court judges through devices such as performance audits, the provision of substandard court facilities, or nonjudicial

control of court personnel. Occasionally, in some jurisdictions, when the judge has been too independent and has refused to generate sufficient revenue for the municipality, the city's legislative or executive authorities have forced the ouster of the judge. *Id.* at 249 (Talmadge, J. Concurring)(cites omitted).

96. Arguments that "section 8 judges" exercise "meaningful oversight" of justice courts are advanced with misplaced confidence. There is no dispute but that other courts, the Judicial Conduct Commission and the state Judicial Council oversee justice courts. The fact that supervision is available fails to address the multitude of problems inherent in Utah's justice court system. Even given the supervision available, the legislative scheme does, nonetheless, provide justice courts with strong incentives to generate revenue contrary to the impartial administration of justice. Any such argument similarly fails to address a municipalities' power and influence with respect to appointment and reappointment of judges, to push for increased collections, and to manipulate budgets, personnel, and resources whether it be explicitly or implicitly. In any event, actual municipal pressure need not invite the Utah court's attention or violate the Canons of Judicial Conduct in order to influence justice court judges' decision-making. As detailed above, this Court has recognized that subtle pressures can be as effective to subvert the system as can overt influence. *Timponogos*, 690 P.2d at 571; *Jones*, 550 P.2d at 210.

97. Any argument that the Utah legislature has authorized justice courts for over 100 years without problem does no more than beg the point. Aside from the obvious response that the law as well as jurisprudence evolves over time, Utah's present

legislative scheme directly defeats the purposes behind establishing local courts. "Justice Courts 'are designed, in the interest of both the defendant and the state, to provide speedier and less costly adjudications than may be possible in criminal courts of general jurisdiction.'" *Bernat vs. Allphin*, 2005 UT 1, ¶ 32.106 P.3d 707 (quoting *Colten vs. Kentucky*, 407 U.S. 104, 114 (1972)) (See Appendix BBB). But, the separation of powers doctrine bars government from sacrificing "liberty" for the sake of efficiency. *Timponogos*, 690 P.2d at 567. In *Timponogos*, denial of the power to appoint water conservancy board members because such a "centralization and consolidation of power would seem to us tantamount to loss of democracy in the name of efficiency, an untenable proposition under our system of jurisprudence." *Id.* at 571. points up the basic flaw in any such argument.

98. Like judges' power to appoint officers whom appear before those same judges, municipal control and influence over justice court judges who may generate revenue to that municipality undermines "essential" constitutional liberties. *Id.* at 567. Indeed, the framers of the federal constitution founded the justice system on judicial independence in criminal matters. *Hammermaster*, 985 P.2d at 935-36. An independent judiciary, free from fiscal constraints, "is an essential tool in guarding the constitution and the rights of individuals." *Id.* at 936.

99. Finally, any contention that the right to appeal to the district court and request a trial de novo "sanitizes" any problems with justice courts is without basis in

theory or as practiced. Any such argument grossly underrates the impact justice courts have on criminal defendants. Even though justice courts handle only class B and C misdemeanors, local ordinance violations and infractions, with intermediate punishment authority, conviction of even the least of these crimes can devastate lives. Incarceration visits destruction on the most routine daily activities and deprives persons of the fundamental right to liberty. As the United States Supreme Court has observed, even "[p]enalties such as probation or a fine may engender 'a significant infringement of personal freedom,' but they cannot approximate in severity the loss of liberty that a prison term entails." *Blanton vs. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Frank vs. United States*, 395 U.S. 147, 151 (1969)) (See Appendix CCC). Beyond the possibility of a jail sentence, fine, or probation, numerous collateral consequences disrupt the lives of persons who are convicted in justice courts. These disruptions include the loss of employment, driving privileges, government benefits, and even student loans. Sam Newton, *Justice Court Appeal: The Good, the Bad, and the Unintended*, 18 Utah Bar J. No. 1 at 25 (January/February 2005) (See Appendix DDD).

100. The appellate process as contemplated by the legislature and as it is employed with respect to Justice court cases is flawed. By statutory mandate, an ordinance imperfection is dealt with differently than an imperfect constitutional ruling by a judge, albeit the appointment of that Justice Court Judge might have been for all the wrong reasons. The fact of this legislative distinction violates the right of a Defendant to

due process and equal protection under the law, particularly in view of the fact that a singular protection is thereby extended to a flawed system.¹²

V. Did the Trial Court both at the Justice Court level and at the District level abuse their respective discretions and exceed the Maximum sentence as allowed by State Law thereby denying Due Process as guaranteed by the Utah Constitution and by the United States Constitution.

101. The Court sentenced the Defendant orally from the bench on the 19th day of September, 2007 as follows:

"The Court finds you guilty of the offense....It will be the order of the Court that the Defendant pay a fine in the amount of \$50 for maintaining that nuisance. The Court will place the Defendant on probation and will review this matter on the 26th of November at 10:00 a.m. At that point in time I'll expect Mr. Grunig in his capacity to come back and report to the Court, and the Defendant is to be present at that time as well with his counsel, and represent to me that the property has been cleaned up satisfactory to the norms of society. If not, the Defendant will be placed in contempt and then the Court will impose a jail sentence at that point in time." (See Transcript No. 1 pg. 46 and 47)

This sentence was clearly at odds with the powers extended to cities and towns (and more importantly to the District Court) and was surely "repugnant to law." Allgood vs. Larsen (supra) see also State vs. Hemmert (supra) in the Supreme Court of the State of Utah No. 15725 (an unpublished opinion) Crockett Hall and Ellet concurring. If the singular and unlawful sentence imposed by the Justice Court and perpetuates by the District Court had not found its basis in an unconstitutional ordinance, this Defendant would have been deprived of any power to seek an effective review of this draconian

¹² The Defendant/Appellant is particularly grateful for the assistance provided in connection with the text and argument used in connection with presentation of this issue.

pronouncement.

VI. Did the District Court rule by its ruling appropriately dispose of the issues as to constitutionality of a statute or ordinance when it denied the Defendant/Appellant's motion to dismiss and the motion to quash the justice court conviction.

102. Defendant/Appellee filed a Motion and Memorandum of Points and Authorities In Support of Motion To Dismiss in the District Court on or about the 12th day of April, 2007. A Motion to Quash the Justice Court conviction was also filed. Said Motions specifically addressed constitutional issues as related to the validity of Plaintiff/Appellant's ordinances and the validity of certain statutes of State of Utah regarding nuisance.

2. The District Judge in a Hearing held on the 30th day of July, 2007 ruled on the issues in said Motion To Dismiss in the Court's Minutes regarding that Ruling recites:

"The Court denies both of defendant's motions." (See Appendix EEE)

The actual transcript of that hearing is found in Transcript #1, Page 3 and reads as follows:

"In regards to Defendant's Motion to Dismiss, the Court finds that the Defendant has not overcome the long-standing presumptions regarding constitutionality. The court finds that Plaintiff's ordinance is not unconstitutionally vague and therefore defendant's motion is denied. "

103. The Plaintiff/Appellee was charged with preparing the Order On Motion to Dismiss And To Quash Conviction and the proposed order recited as follows:

"Based upon the pleadings and other arguments made in this matter, the

Court finds that Defendant has failed to overcome the burden necessary to show that the Hyde Park City nuisance ordinance is unconstitutional; that the Hyde Park City nuisance ordinance is in conflict with state statutes; and that the ordinance is unconstitutionally vague or over broad."

The Defendant/Appellant filed timely objections to the Oral Order of the Court and to the Judgement of conviction (Appendix FFF).

CONCLUSION

In keeping with prior points regarding sensitivity to the revenue potential inherent in operation of Justice Courts one need only look at the sentencing process employed in this case. In the Justice Court the mandate of municipalities legislative arm insured a steady flow to city coffers at the rate of fifty dollars per day, not just from the date of conviction but from the date of Notice. When appealed to the District Court an even less subtle approach was employed in order to circumvent the above unconstitutionality by invoking the tool of civil contempt, a punishment without end so to speak, all without the safeguards afforded by the right to appeal provided by a system created without deference to the concept of separation of powers.

The general purpose of all laws and regulations, is that of allowing an owner the highest possible degree of freedom of use of his property so long as it is not an infringement upon recognition of similar rights of others or inconsistent with the general welfare while not infringing upon the safety and health of others. Notwithstanding those laudable goals, a well ordered State must insure that the functions inherent in justice and punishment be insulated from local prejudices or proclivities that might erupt in certain

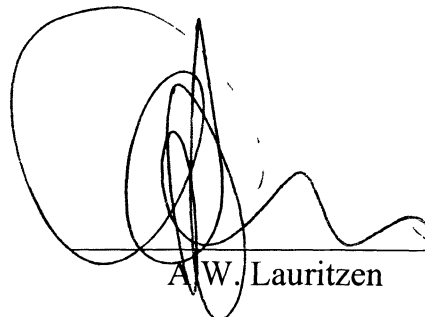
areas within the general sovereignty.

Utah's legislative scheme governing justice courts invades the judges' core function to "adjudicate with dispassionate impartiality." Instead of administering justice, justice courts risk being relegated to "collection agencies" for "government officials intent on revenue" generation. The separation of powers doctrine demands "[j]udicial independence...without intrusion from or intruding upon the other branches of government."

Upon the reasoning supporting the above conclusions this court should reverse the ruling of the District Court for want of jurisdiction and thereby invalidate Utah's legislative scheme creating and maintaining justice courts.

Alternatively, should this Court conclude that the Justice Court have jurisdiction to try criminal cases the conviction of Defendant should be reversed in that the ordinance of Hyde Park City is flawed in that the elements of that ordinance, if proved, forbids conduct which a state statute protects and metes out punishment which the Utah Constitution and the acts of the State legislature forbid.

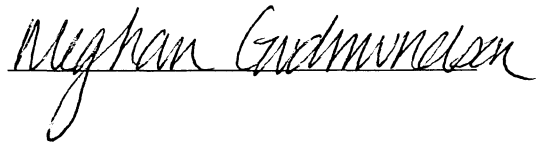
Respectfully Submitted,



A.W. Lauritzen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Foregoing document(s),
BRIEF OF APPELLANT, was delivered on the following in the manner indicated
on the 16th day of July, 2008. [] U.S. mail [X] Hand delivery [] Fax



Jonathan Jenkins
108 North Main
Logan, UT 84321

Addendum
(none required)

APPENDIX A

Motions to Dismiss

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IN THE JUSTICE COURT FOR HYDE PARK CITY
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY,
Plaintiff,

vs.

RIO DAVIS
Defendant.

DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S INFORMATION

Case No. HP05-05
Judge David C. Marx

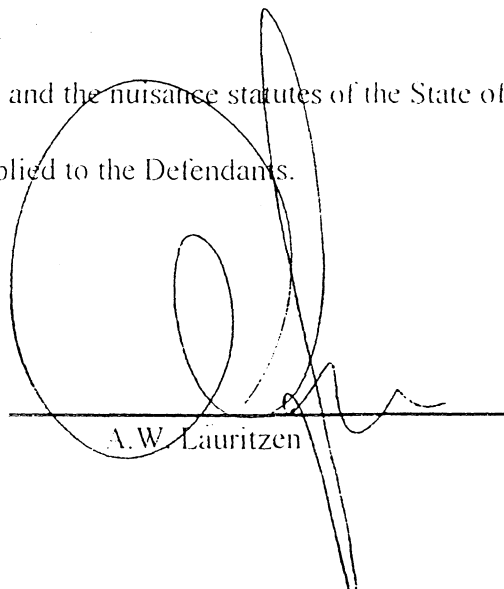
Oral Arguments Requested

COMES NOW the Defendant's and hereby respectfully moves this Honorable Court for
an Order to Dismiss the Plaintiff's Complaint.

The prosecution must be dismissed on the following reasoning and grounds:

1. The nuisance ordinance of the Plaintiff's City has not been properly enacted,
published, posted or adopted in accordance with the statutes and laws of the State of Utah.
2. The Plaintiff City's nuisance ordinances are repugnant to and in conflict with the
general laws of the State of Utah.
3. The Plaintiff's City's nuisance ordinances and the nuisance statutes of the State of Utah
are unconstitutionally vague both facially and as applied to the Defendants.

Dated this 24th day of February, 2006.



A. W. Lauritzen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of a Foregoing documents, DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S INFORMATION and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS was served on the following in the manner indicated on the 2nd day of March, 2006. ☒ U.S. mail ☐ Hand delivery ☐ Fax

Angie G. Slaght

Scott Wyatt
113 East Center
Hyde Park, Utah 84318

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IN THE JUSTICE COURT FOR HYDE PARK CITY
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY.
Plaintiff.

vs.

RIO DAVIS
Defendant.

MOTION TO DISMISS
PENDING ACTION

Oral Arguments Requested

Case No. HP05-05
Judge: David C. Marx

COMES NOW Rio Davis and moves this court to Dismiss the action pending on the grounds previously argued and upon the further ground that the trial/appeal process as promulgated by the Utah Legislature and as practiced in the Justice Court and in the District Court are flawed and deny this Defendant due process of law follows:

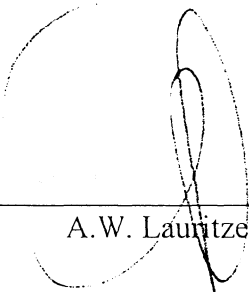
1. The Statute UCA 10-8-60 in prescribing that determination of evidence employed regarding what constitutes a Nuisance be relegated to each city and town constitutes violation of Defendant's right to due process and violated the Doctrine of Separation of powers as mandated by Article VIII Section 4 of the Utah Constitution and as construed by authorities.

2. This court by its very existence and as governed pursuant to State Law constitutes a violation of Article VIII Section 4 of the Utah Constitution and thereby possesses no jurisdiction to decide cases or controversies.

3. A Memorandum of Points and Authorities are provided herewith

Wherefore this action should be dismissed.

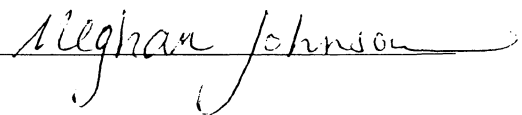
Dated this the 26th day of October, 2006.



A.W. Launitzen

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the
Foregoing document(s), MOTION TO DISMISS PENDING ACTION, was
served on the following in the manner indicated on the 26th day
of October, 2006. [☒] U.S. mail [☐] Hand delivery [☐] Fax.


Meghan Johnson

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IN THE JUSTICE COURT IN AND FOR HYDE PARK CITY
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY,
Plaintiff,

vs.

JERALD RIO DAVIS,
Defendant,

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AND QUASH
CONVICTION

Case No. HP05-0503

FACTS

1. Relying on a Hyde Park Ordinance, § 10-332, said ordinance widely divergent from State Statute both as to punishment and elements proof of which is required to support a conviction Defendant stands convicted of the town ordinance and now awaits sentencing before a town justice who is as to this case, not legally trained.

ISSUES

POINT I. The Statutory scheme for Justice Courts interferes with Judicial independence by providing monetary incentives to convict criminal defendant's and authorizing municipal government to hire and fire judges and to control court operations.

SUMMARY OF ARGUMENTS

ARGUMENT

THE STATUTORY SCHEME PROMULGATED FOR THE PURPOSE OF CREATING AND REGULATING JUSTICE COURTS INTERFERES WITH JUDICIAL INDEPENDENCE BY PROVIDING MONETARY INCENTIVES TO CONVICT AND/OR SANCTION CRIMINAL DEFENDANTS AND BY AUTHORIZING MUNICIPAL GOVERNMENTS TO HIRE AND FIRE JUDGES AND BY GRANTING CONTROL OF COURT OPERATIONS.

3. The Utah legislature's scheme for establishing and operating justice courts violates the separation of powers doctrine's prohibition proscribing acts of one branch of government which interfere with performance of core functions by another branch. Judges must be free to exercise exclusive power to decide cases independently and without influence exerted by the executive and legislative branches. Under Utah's statutory scheme, municipal governments have obtained broad authority to control and direct justice courts, including the power to whimsically appoint and dismiss judges. In addition, municipalities may and are directed to control justice court budgets, personnel, and resources. Because Utah law requires that municipalities must fund their own justice courts, local governments will tend to establish local courts only if the courts are able to fund their own operations. In practice, some justice courts have become so profitable that they serve as a significant source of revenue upon which the municipalities they serve rely when planning their annual budgets. This legislative scheme presents enormous, if subtle, incentives for justice court judges to generate revenue by convicting and fining criminal defendants. These incentives, in turn, interfere with the core judicial function of independently and fairly

adjudicating criminal cases in violation of the separation of powers doctrine.

A. The Utah Constitution Grants Judges the Exclusive Power to Impartially Decide

Criminal Cases, Independent of any Compulsion Wielded by Executive and Legislative Branches.

4. Under the Utah Constitution's separation of powers clause, one branch of government may not interfere with the core function of another branch. Although this doctrine does not require complete independence among the three branches, it does require each branch to respect the inherent roles of the other two branches. The main function of the judicial branch, as an undeniable fact, is to impartially interpret the law and fairly decide cases and controversies.

5. The separation of powers doctrine serves as the very foundation for the American concept of liberty. Article V, section one of the Utah Constitution defines this doctrine as follows:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise functions appertaining to either of the others, except in the cases herein expressly directed or permitted.
Utah Const. Art. V, § 1.

6. As the Utah Court has observed, the separation of the three branches is essential to preserve liberty and individual rights:

Montesquieu's writings warn us that there can be no liberty if the powers of the three branches of government do not remain separate. Madison recognized the principle as more sacred than any other in a free constitution, and that no one branch should possess, directly or indirectly, an overruling influence over the others in the administration of its powers. Justice Marshall adhered to the principle in **Marbury vs. Madison**, 5 U.S. 137, 1 Cranch 137, 2 L. Ed, 60....The fundament of the doctrine remained unassailable when the United States Supreme Court through Justice Frankfurter reminded the President that

his action of seizing the nation's steel mills to prevent a national catastrophe threatened to be an "accretion of dangerous power" which comes from the "unchecked disregard" of the checks and balances that doctrine was created to provide. Youngstown Sheet & Tube Co. Vs. Sawyer, 343 U.S. 579, 594 (1952). Whether implied, as in our federal constitution and in those of fourteen states, or whether expressly stated, as in our own state's constitution, the doctrine of separation of powers is the control gate harnessing the reservoir of powers of a government which functions at the will of the people. Timpanogos Planning & Water Management Agency vs. Central Utah Water Conservancy Dist. 690 P.2d 562, 564-565 (Utah 1984).

7. Notwithstanding the imperative of the above quoted language, the modern separation of powers doctrine does not require absolute independence between the branches. "[A]lthough the threefold division of powers is the basis for the American Constitution, there are many cases in which the duties of one department are to a certain extent devolved upon and shared by the other." In re Young, 1999 UT 6, ¶13, 976 P.2d 581 (quoting Tite vs. State Tax Commission, 57, P.2d 734, 737 (Utah 1963)). One branch only violates the separation of powers doctrine when it exercises the power that is "exclusive to one department..." Id. at ¶14. Utah Courts have characterized exclusive powers as those which are "primary," "core," or "essential," to one branch. Id. (quoting Salt Lake City vs. Ohms, 881 P.2d 844, 849 (Utah 1994); Timpanogos, 690 P.2d at 567; State vs. Gallion, 572 P.2d 683, 688 (Utah 1977)). Stated differently, exclusive means "inherent in the very concept of one of the three branches of a constitutional government." Id. at ¶ 26.

8. The judicial branch's "primary function" includes the duty to fairly and independently "hear and determine controversies between adverse parties and questions in litigation." Timpanogos, 690 P.2d at 569, 571 (quoting Citizens Club vs. Welling, 27 P.3d 23, 26 (Utah 1933)). Judges have the exclusive power "to interpret and adjudicate with dispassionate impartiality questions of law between adverse parties..." Id. it follows that the separation of

powers doctrine bars executive or legislative actions that threaten “the fundamental integrity fo the judicial branch...” Ohms, 881 P.2d at 849 (quoting In re Criminal Investigation, 754 P.2d 633, 642 (Utah 1988)). “It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favor and without fear.” In re Hammermaster 985 P.2d 924, 936 (Wash. 1999) (quoting Bradley vs Fisher, 80 U.S. 335, 349 n. 16 (1871)).

B. Utah’s Legislative Scheme Governing Justice Courts Creates Substantial Economic Incentives for Municipalities to Use Justice Courts to Generate Revenue for Their General Fund.

9. The statutes governing justice courts violate principles of Constitutional dimension in that justice courts are revenue-driven entities that, by definition, cannot independently and impartially adjudicate disputes. Under Utah’s legislative scheme, state funded district courts have jurisdiction over misdemeanor offenses unless a local municipality acts to fund its own justice court. Because municipalities retain half of the revenue created by justice courts, municipalities, as a practical matter, will only create such courts when the elective system can generate sufficient revenue to fund a profitable operation. Consequently, this revenue-producing scheme creates enormous incentives for municipal governments and justice court judges to overlook fundamental constitutional principles in order to achieve and maximize that profit.

10. In Utah’s courts system, local municipalities may, at their option, elect to enforce class B and C misdemeanors either through the state district courts or by creating their own justice courts. Article VIII, section one of the Utah Constitution authorizes the legislature to create “courts not of record...” The legislature has done so in chapter five of Title 78 of the Utah

Code. That chapter authorizes municipalities to create and fund justice courts with “jurisdiction over class B and C misdemeanors, violation of ordinances, and infractions committed within their territorial jurisdiction, except those offenses over which the juvenile court has exclusive jurisdiction.” **Utah Code Ann. § 78-5-104(1) (2002); see also Utah Code Ann. §§ 78-5-101, 78-5-101.5 (2002) (providing for the creation of justice courts).** In the absence of a justice court, state funded district courts have jurisdiction over these criminal offenses. **Utah Code Ann. § 78-3-4(8) (Supp. 2004).**

11. Despite this legislative authority to create justice courts, as a practical matter, local governments only do so when justice courts can generate sufficient revenue to pay for their own expenses. By statute, the states must fund the district courts to enforce class B and C misdemeanors, local ordinances, and infractions. **Utah Code Ann. §78-3-13.4 (2002).** Under this model, the state receives half of all fines and forfeitures while the prosecuting agency, usually meaning the county, receive the other half. **Id. § 78-3-14.5 (2) (Supp. 2004).** Local municipalities receive no portion of this revenue because they provide no funding to the district courts.

12. When municipalities purport to create justice courts, to supplant the state fund court operations, **Utah Code Ann. § 78-5-110 (Supp. 2004), 78-5-111 (2002);** they must, as a preliminary requirement and in order to receive favorable action on an application to create a justice court, demonstrate a “need” for a local court, including demonstration of the ability to fund the proposed court. **Id. § 78-5-101.5 (2002).** As previously noted, in a justice-court system, municipalities retain half of all fines and forfeitures; the other half goes to the state. **Id. § 78-5-116 (1) (Supp. 2004).**

13. Given these fiscal realities, municipalities only create justice courts when doing so makes economic sense. Because the state has a statutory obligation to enforce class B and C misdemeanors, local ordinances, and infractions without charge visited on local governments, municipalities would have no incentive to establish local justice courts unless such courts generate adequate revenue to retire the operational cost.. A recent study of justice courts in Salt Lake County established that all justice courts, “produce revenues in excess of expenditures in varying degrees.” **Institute for Law and Policy Planning, Salt Lake County Criminal Justice Assessment 6.11 (2004) (hereinafter referred to as “County Justice Court Assessment”)(relevant portions are attached hereto).**

14. Many justice courts show a profit and thereby generate revenue for cities. The previously referenced County Justice Court Assessment discloses that justice court “[j]udges and administrators freely admit that they believe the justice courts are a source of significant revenue for their cities.” **Id.** In fact, municipalities “view the [justice] courts as a prime source worthy of protection and expansion.” **Id.**

15. Municipalities have further capitalized on the justice court system by refusing to reimburse the host county for incarcerating justice court offenders. **Id. at 3.9.** Although some county sheriffs bill municipalities for housing offenders, most cities maintain that they already contribute to the County’s general fund, and that such contributions should provide compensation for operating the jail. **Id. at 3.10.** As a result, in Salt Lake County “municipalities generated nearly \$17 million dollars in court fees [gross revenue] during 2000, yet paid nothing towards the approximately \$7 million in jail billings”. **Id.**

16. In addition to confinement at no cost to the involved city , municipalities are the

recipient of additional services from counties. “Justice Courts have unfettered access to the larger system through the jail, the county probation department, the legal defender, and so forth with little or no financial obligation. **Id. at 3.9.** For these very reasons, justice courts have, unsurprisingly, proliferated in recent years. **Id. at 6.5.** Courts have even been established in minor villages such as Trenton & Clarkston.

C. The Legislative Scheme Coupled With Municipalities’ Lack of Financial Accountability For Incarcerated Offenders Undermines Justice Court Independence and Creates Unconstitutional Pecuniary Incentives do Other Than Justice to Dispense with Fairness and impartiality.

17. The legislature’s funding mechanism coupled with the political reality that municipalities use justice courts to generate revenue for the general fund directly undermine justice court judges’ independence. Justice court judges must produce sufficient revenue to maintain the very existence of their courts, and thereby incentive exists to meet a municipalities’ revenue projections. The County Justice Court Assessment study substantiates this proposition of “the fear that cities will become dependent on the money generated through enforcement, thus increasing the likelihood that police and judges will be overly aggressive as a way to meet financial expectations and demands.” **Id. at 3.8.**

18. The conclusion quoted above directly conflicts with certain official assumptions that monetary demands on justice court judges are “unlikely” and “speculative.” Indeed, the revenue-generating impetus for establishing justice courts is obvious. As the editorial staff of the Salt Lake Tribune recently observed, “the justification for creating justice courts explicitly includes being a revenue source for the wider city government...” **Editorial, Justice Peeks, Salt Lake**

Tribune, July 20, 2005. The County Justice Court Assessment concluded that “the importance of revenue generation to municipalities is apparent from the fact that municipal judges are directly responsible to the executive branch, unlike county judges who must stand for retention by the electorate.” **County Justice Court Assessment at 6.5**

19. The separation of powers doctrine bars judges from being subject to financial blandishments when deciding cases. Statutes “granting a pecuniary interest” to judges are clearly unconstitutional. **Blankenship vs. Minton Chevrolet, Inc., 266 S.E.2d 902, 903 (W.V. 1979).** The Utah Courts have similarly held that judges must have “no favors to grant, no patronage to dispose of, and no friends to reward.” **Timpanogo, 690 P.2d at 568 (quoting In re O’Sullivan, 158 P.2d 306, 309 (Mont. 1945).** In the Timpanogos case, the Supreme Court held that the legislature violated the separation of powers doctrine when it empowered district court judges to appoint board members of a water conservancy district. **Id. at 570.** Because the same judges who appointed board members would later review board decisions, this Court concluded that the district court judges might “feel constrained in passing upon board action.” **Id. at 570.**

20. Financial incentives need not be explicit in order to violate the separation of powers doctrine. In defining governmental branch powers, the Utah Court observed that there is a natural tendency of all persons, even judges, to unconsciously protect their interest:

Due to the manner in which our system was created and has developed, the judiciary has the awesome prerogative and responsibility of judging the scope of powers of the executive, legislative, and of its own. For this reason it is essential that the judiciary be especially circumspect in maintaining an awareness for the natural propensity for human nature: that when anyone has the power to decide wherein his own interests are involved, there is danger of consciously or subconsciously leaning toward the protection, and perhaps the magnification, of his own self-interest. **Jones, 550 P.2d at 210 (footnote omitted).**

Knowing that justice courts will only survive if they produce adequate revenue, a justice court judge might well have an incentive to convict and fine persons without due regard to their core function to fairly adjudicate cases. Timpanogos, 660 P.2d at 571.

21. Municipalities' refusal to reimburse jails compounds justice court judges' incentives to generate revenue. This stance allows justice court judges to use county jails "with little restriction and complete financial impunity." **County Justice Court Assessment at 3.9.** A direct consequence of un-reimbursed jail services is the common practice in justice courts of ordering criminal defendants to "pay or serve" their sentences. **Id. 6.5.** This device allows justice court judges to threaten to and/or to incarcerate offenders who fail to pay fines in a timely manner. *Id.* The absence of any financial obligation to municipalities for jail services has resulted in justice court judges employing incarceration to excess in collecting revenue. **Id. at 3.9.**

22. The "pay or serve" practice is especially offensive because it tends to foment an unwarranted deprivation of a persons liberty. In defining separation of powers violations, the Utah Court has held that it will tolerate shared powers "when it is essential to the discharge of a primary function, when it is not an assumption of the whole power of another department, and when the exercise of the other power does not jeopardize individual liberty." Timpanogos, 690 P.2d at 567 (quoting C. Sand, Sutherland Statutory Construction § 3.06). The absence of any financial obligation resulting from the incarceration of offenders who fail to pay fines, Defendant suggests, violates this test.

D. Municipalities' Statutory Control Over Justice Courts Further Frustrates the Fair Adjudication of Criminal Cases.

23. Even if this financial incentive did not interfere with judicial independence, Utah's legislative scheme governing justice courts also violates separation of powers principles because it foments exertion of inordinate control over administration of justice courts. Municipalities have statutory authority to hire and fire judges, to fund court operations, and to supervise court personnel. These powers, coupled with the use of justice courts as revenue boosters create a legislative scheme that invades the core function of the judicial branch to fairly and independently deciding cases.

24. Of greatest concern, the legislature has authorized the executive, without meaningful guidelines, to hire and fire justice courts judges. **Utah Code Annotated section 78-5-134()**, **(2)(2002)** designates the municipal leader, whether a mayor, council chair, or city manager, generically called the "appointing authority," to "appoint " justice court judges. The entity's legislative body must then confirm the appointment by a majority vote. **Id § 78-5-134(2)**. Justice Court judges serve four-year terms. **Id. § 78-5-132 (1)**. Upon completion of the term, Utah law mandates that justice court judges "shall be reappointed absent a showing of good cause." **Id. § 78-5-134(5)**. In determining whether "good cause" exists, municipalities "shall consider" (1) whether the state Judicial Council has certified the judge; and, (2) "any other factors considered relevant by the appointing authority." **Id. § 78-5-134(5)(d)**. (Emphasis mine)

25. Although this scheme purports to model the appointment of justice court judges after the traditional appointment process of Federal judges, it allows for expansive executive and legislative influence over judges. Because appointing authorities may "consider any other factor" in deciding whether to reappoint a judge, justice court judges essentially serve at the whim of the executive. **Id. § 78-5-134(5)(d)**. Given this broad discretion as to whether to

reappoint, the economic realities surrounding justice courts and the pressure to generate revenue directly influence how judges handle cases. At its most extreme, such influence is manifested if a judge fails to meet a municipality's revenue projections¹ and the appointing authority uses the grant of power as a means of expressing displeasure. In a plausible scenario, the justice court judge might indeed, sense pressure, whether "consciously or subconsciously" to maximize collections and, thus, preserve his or her "own self-interest." **Jones, 550 p.2d at 210.** Pressure to collect revenue might not necessarily be overt, unspoken or unrealized expectations of "favors," "patronage," or "reward" might well be enough to violate separation of powers principles. **Timpanogos, 690 P.2d at 568 (quoting In re O'Sullivan, 158 P.2d at 309).**

26. At the very least, the appointment and reappointment process tend to create an appearance of impropriety. Canon 2 of the Utah Code of Judicial Conduct charges judges to avoid even "the appearance of impropriety" to ensure "public confidence" in the judiciary. The County Justice Court Assessment pointed to such an appearance of patronage when it concluded that justice court judges are "directly responsible to the executive branch" for their very existence. **County Justice Court Assessment at 6.5.** Although the assessment did not observe anything "sinister or improper" the stated concern was that the "appointive power of the mayors presents an interesting if not conflicting situation in that the Executive branch literally creates the judicial branch via appointment." **Id. at 6.10.** The editorial staff of the Salt Lake Tribune eliminated any doubt about the appearance of impropriety when it recently observed that "because the justification for creating justice courts explicitly includes being a revenue source for the wider city government, judicial impartiality is seriously compromised." **Editorial, Justice**

¹Surely a significant "factor"

Peeks, Slat Lake Tribune, July 20, 2005.

27. Given the sheer numbers of persons who appear before justice courts, appearance of impartiality is essential to maintain public confidence in those courts. The Utah State court website points out that in fiscal year 2004 justice courts presided of over 450,000 traffic cases. **See http://www.utcourts.gov/stats/FY04/justice/fy2004_statewide.htm.** In addition, the justice courts disposed of an additional 85,000 misdemeanor cases during the same year. By comparison, the district courts disposed of only about 100,000 misdemeanors during fiscal year 2004. **See http://www.utcourts.gov/stats/FY04/dist/fy2004_9.htm.** A person, citizen or otherwise, is most likely to experience the Utah justice system through justice courts. These numbers present a compelling case to ensure “public confidence” in the justice courts.

Hammermaster, 985 P.2d at 936.

28. Moreover, an appearance of impropriety undermines the independence of justice courts because public perception affects judicial decision-making. Utah Courts have held that appearances erode public confidence and alter judges’ decisions discussing the point as follows:

“A judge cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the define record upon which his action is based...But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitable impairs his value as a judge and the appropriate influence of his office.” **Timponogos, 690 P.2d at 572 (quoting a letter from former U.S. Supreme Court Justice Harlan Fiske Stone to Franklin D. Roosevelt, July 20, 1942, in Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193, 203-204 (1953)).**

29. In addition to the appointment process, the legislature has granted municipalities control over justice court personnel and resources. Utah law entrusts municipalities with funding

physical facilities, hiring⁵ and supervising court staff, and administering personnel policies. **Utah Code Annotated §§ 78-5-108 (Supp. 2004), 78-5-110 (Supp. 2004), 78-5-111 (2002).** Utah law thereby empowers local executives to control every aspect of justice court operations and to determine and thereby fix, each budgetary item. The executive branch also appoints the *administrative staff who serve “at will” or are hired via the merit system as any other city employees*” in the executive department. **County Justice Court Assessment at 6.10.**

30. These extensive powers emphasize the appearance of impropriety and tend to reinforce the actual conflicts discussed above. Executive control over justice courts’ budgets, staff, and resources presents “the perception (if not the reality) of dominance that elected officials exercise over the judiciary they created.” **Id.** Executive action violates the separation of powers doctrine “when there is an attempt by one branch to dominate another in that other’s proper sphere of influence.” **Young, 1999 UT 6, ¶23, 976 P.2d 581.** Because the legislative scheme allows local executives to “effectively control ” the justice courts, that scheme unconstitutionally invades the province of the judiciary. **Id.**

E. No Valid Reasons Support Or Justify Municipalities’ Revenue-Motivated Control Over Justice Courts.

31. Although one might present several unpersuasive rebuttals to the suggestion that municipalities are revenue-driven to creation of justice courts; none of those arguments change the legislative landscape that fosters executive and legislative interference with justice courts based on budgetary considerations. Neither judicial oversight, case law, nor the theoretical advantages present through the justice court system sanitizes the separation of powers obstacles presented by Utah’s legislative scheme. Such argument as has been presented in proceedings to

date fail to resolve the main question presented by this motion: whether the legislative scheme governing justice courts jeopardizes the “dispassionate” adjudication of criminal cases.

Timponogos, 690 P.2d at 571. Although one might reason that no particular Defendant can provide a showing that revenue concerns actually motivated any particular justice court judges’ decisions the discussion above demonstrates the superficiality of such an argument given the reality that justice courts are essentially revenue-driven. **See County Justice Court Assessment at 3.9, 3.9, 6.11.**² Additionally, proper application of the separation of powers doctrine does not require such a showing in that the Utah Supreme Courts opinion in **Timponogos** establishes that no actual bias need occur when one branch is provided authority to influence another’s core function. In that case, the Utah Court struck down district court judges’ authority to appoint water conservancy board members even though the parties neither alleged nor proved actual favoritism. **Timponogos, 690, P.2d at 570-72.** This appointment system violated the separation of powers doctrine on the reasoning that judges might “feel constrained” and “would avoid confrontations” in adjudicating disputes involving water boards. **Id. at 570-71.**

32. Any position taken to the effect that no other jurisdictions have struck down similar justice court systems based on separation of powers considerations is manifestly without foundation. . **State vs. Town of South Carthage, 840 S.W.2d 895 (Tenn. 1992)**, the Tennessee Supreme Court held that a legislatively-established justice court system violated separation of powers principles without a showing of any actual harm to the defendant. The Tennessee Constitution contains provisions similar to Utah’s as they require the separation of

²There is some tacit recognition of the “revenue driven’ nature of the courts origination and operation by the promulgation of a bail schedule.

the three branches and as they allow for the legislature to create justice courts. **Id at 897 (citing Tenn. Const. Art. II, § 2, Art. VI, § 1).** Like Utah, the Tennessee legislature empowered municipalities to appoint justice court judges to “serve at the pleasure” of the mayor and local legislative leaders. **Id at 896.**

33. The Tennessee Supreme Court held that this system violated the mandate of the separation of powers doctrine because of the potential for city leaders to influence justice court judges “to increase city revenue...and to impose harsher sentences” on DUI offenders. **Id. at 897 (quoting Summers vs. Thompson, 764 S.W.2d 182, 183 (Tenn. 1988)).** Although that court relied on a prior decision in which city leaders had actually attempted to influence a justice court judge, no similar allegations arose with respect to the case under review. **Carthage, 840 S.W.2d at 897.** The court held without necessity of reference to the previous case that the mere potential for influence violated justice court judges’ ability to fairly adjudicate cases:

The instant scenario demonstrates the danger posed to an independent judiciary and to the impartial administration of justice through the exercise of arbitrary power by a separate branch of government motivated by policy and political concerns inimical to an independent system of justice. Judicial independence by all respected political thought indispensably is essential to the effective operation of constitutional government. **Id. at 899.**

34. To ensure an judiciary independent from the political caprice and whims of other government branches, the Tennessee Supreme Court required justice court judges to be elected rather than to be appointed and supervised by local municipalities. **Id.** The Tennessee Constitution employs popular elections to preserve judicial independence from the other branches of government. **Id. at 896 (citing Tenn. Const. Art. IV, § 4).** Although Utah does not rely on popular elections, the “danger” attendant to influence of justice court judges as

enunciated in Carthage would seem to apply equally under Utah's justice court system.

35. Similarly, in Calligy vs. Mayor and Council fo the City of Hoboken, 665 A.2d 408, 409 (N.J. Super. 1995), a taxpayer claimed that an ordinance placing a municipal court in a city's department of administration violated separation of powers principles. That opinion invalidated the justice court because the "authority conferred by the ordinance is inconsistent with both the fact and appearance of judicial independence required by law." **Id. at 412.** The Court reached this conclusion despite the absence of any allegation that city officials had ever interfered with the court. **Id. at 411.** Instead, the court held that placing the justice court in the executive branch was "inconsistent with that court's independence." **Id.**

36. This instant case is analogous. Although Defendant does not and cannot allege that the justice court judge is actually influenced by the fact that he is beholden to the City's leaders under Utah's legislative scheme, the fact remains that local executive officials "literally create[] the judicial branch via appointment." **County Justice Court Assessment at 6.10.** Thus, justice court judges are "directly responsible to the executive branch..." **County justice Court Assessment at 6.5.** This situation allows municipalities to "dominate" justice courts in violation of the separation of powers doctrine. Young, 1999 UT 6, ¶ 23, 976 P.2d 581.

37. Even more to the point, in the State of Washington that states experience points to the very dangers that the reality of revenue-generating justice courts suggest might happen in Utah. In In re Hammermaster, 985 P.2d 924 (Wash. 1999), the Washington Supreme Court sanctioned a justice court for violating numerous ethical duties and abusing his authority. The court reprimanded the judge for threatening to incarcerate offenders up to a "life" term for failing to pay court-ordered fines. **Id. at 935-36.** In doing so, the court held that "[a] judge's primary

function is the administration of justice, not the collection of fines.” **Id. at 936.**

38. One justice fully concurred in the court’s judgment and provided specific examples of justice court judges who were motivated by financial considerations in adjudicating criminal cases and observed:

Our opinion today conveys a very strong message to the judiciary and local governments in Washington that the Supreme Court will not tolerate short cuts in due process. While many municipalities have established municipal courts because they want to administer justice locally, it is also true many jurisdictions establish municipal court for purely avaricious reasons—as revenue agencies to be operated if they “make money” and be dispensed with if they become inconvenient to administer or generate insufficient revenues. Some local jurisdictions have even attempted to control performance of duties by municipal court judges through devices such as performance audits, the provision of substandard court facilities, or nonjudicial control of court personnel. Occasionally, in some jurisdictions, when the judge has been too independent and has refused to generate sufficient revenue for the municipality, the city’s legislative or executive authorities have forced the ouster of the judge. **Id. at 249 (Talmadge, J. Concurring)(cites omitted).**

39. Arguments that “section 8 judges” exercise “meaningful oversight” of justice courts. Are advanced with misplaced confidence. There is no dispute that other courts, the Judicial Conduct Commission and the state Judicial Council oversee justice courts. The fact that supervision is available fails to address the multitude of problems inherent in Utah’s justice court system. Even given the supervision available, the legislative scheme does, nonetheless, provide justice courts with strong incentives to generate revenue contrary to the impartial administration of justice. Any such argument similarly fails to address a municipalities’ power and influence with respect to appointment and reappointment of judges, to push for increased collections, and to manipulate budgets, personnel, and resources whether it be explicitly or implicitly. In any event, actual municipal pressure need not invite the Utah court’s attention or violate the Canons

of Judicial Conduct in order to influence justice court judges' decision-making. As detailed above, this Court has recognized that subtle pressures can be as effective, to subvert the system as can overt influence. **Timponogos, 690 P.2d at 571; Jones, 550 P.2d at 210.**

40. Any argument that the Utah legislature has authorized justice courts for over 100 years without problem does no more than beg the point. Aside from the obvious response that the law as well as jurisprudence evolves over time, Utah's present legislative scheme directly defeats the purposes behind establishing local courts. "Justice Courts 'are designed, in the interest of both the defendant and the state, to provide speedier and less costly adjudications than may be possible in criminal courts of general jurisdiction.'" **Bernat vs. Allphin, 2005 UT 1, ¶ 32.106 P.3d 707 (quoting Colten vs. Kentucky, 407 U.S. 104, 114 (1972)).** But, the separation of powers doctrine bars government from sacrificing "liberty" for the sake of efficiency.

Timponogos, 690 P.2d at 567. In **Timponogos**, denial of the power to appoint water conservancy board members because such a "centralization and consolidation of power would seem to us tantamount to loss of democracy in the name of efficiency, an untenable proposition under our system of jurisprudence." **Id. at 571.** points up the basic flaw in such an argument.

41. Like judges' power to appoint officers whom appear before those same judges, municipal control and influence over justice court judges to generate revenue undermines "essential" constitutional liberties. **Id. at 567.** Indeed, the framers of the federal constitution founded the justice system on judicial independence in criminal matters. **Hammermaster, 985 P.2d at 935-36.** An independent judiciary, free from fiscal constraints, "is an essential tool in guarding the constitution and the rights of individuals." **Id. at 936.**

42. Finally, any contention that the right to appeal to the district court and request a trial

de novo “sanitizes ” any problems with justice courts is without basis in theory or as practiced. Any such argument grossly underrates the impact justice courts have on criminal defendants. Even though justice courts only handle class B and C misdemeanors, local ordinance violations, with intermediate punishment schedules, and infractions, conviction of these crimes can devastate lives. Incarceration visits destruction on the most routine daily activities and deprives persons of the fundamental right to liberty. As the United States Supreme Court has observed, even “[p]enalties such as probation or a fine may engender ‘a significant infringement of personal freedom,’ but they cannot approximate in severity the loss of liberty that a prison term entails.” **Blanton vs. City of North Las Vegas**, 489 U.S. 538, 542 (1989) (quoting **Frank vs. United States**, 395 U.S. 147, 151 (1969)). Beyond the possibility of a jail sentence, fine, or probation, numerous collateral consequences disrupt the lives of persons who are convicted in justice courts. These disruptions include the loss of employment, driving privileges, government benefits, and even student loans. **Sam Newton, Justice Court Appeal: The Good, the Bad, and the Unintended**, 18 Utah Bar J. No. 1 at 25 (January/February 2005).

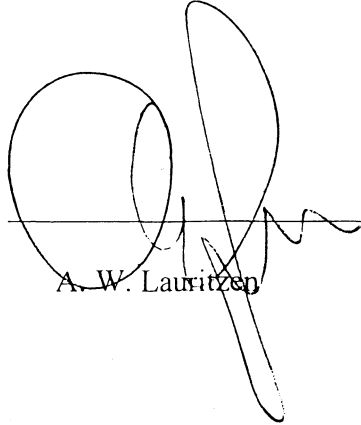
43. The appellate process as contemplated by the legislature and as it is employed with respect to Justice court cases is flawed. By statutory mandate, an ordinance imperfection is dealt with differently than an imperfect constitutional ruling by a judge, albeit his appointment might be for all the wrong reasons. The fact of this legislative distinction violates the right of a Defendant to due process and equal protection under the law.

CONCLUSION

In summary, Utah's legislative scheme governing justice courts invades the judges' core function to "adjudicate with dispassionate impartiality." **Timponogos, 690 P.2d at 571**. Instead of administering justice, justice courts risk being relegated to "collection agencies" for "government officials intent on revenue" generation. **Hammermaster, 985 P.2d at 943 (Talmage, J. Concurring)**. The separation of powers doctrine demands "[j]udicial independence...without intrusion from or intruding upon the other branches of government." **Id. at 936 (majority opinion)**.

Upon the reasoning supporting the above conclusions this Defendant requests this Court Dismiss this pending action for want of jurisdiction and thereby invalidate Utah's legislative scheme for creating and maintaining justice courts.

Respectfully submitted this th~~30~~ day of OCT, 2006.



A. W. Lauritzen

APPENDIX B

Sentence & Judgement

Hyde Park Municipal Justice Court

Cache County, State of Utah
113 East Center Street, Hyde Park City, Utah 84318 (435)563-6923

STATE OF UTAH/ Hyde Park
Plaintiff,

JUDGMENT

___ As Modified at Sentence Review

Ronald Rio Davis

DOB: 11-11-58

Case: HP05-0503

Defendant

Defendant either having been adjudged or entered a plea of GUILTY/NO CONTEST to the charge of:

Count No. 1 Maintaining a Nuisance.....Hyde Park Ordinance 10-332.....Infraction

Defendant is a misdemeanor, and no legal reason having been shown why judgment should not be pronounced, and Defendant being present with or without waiving Counsel. It is the judgment and sentence of the Court (___ Judgment and sentence is modified) as follows:

Count No. 1 Defendant is fined \$ _____ and sentenced to _____ days in the Cache County Jail; and _____ * days in the Cache County Jail and \$ _____ are suspended upon satisfactory completion of _____ months probation to: ___ Formal Court probation requiring Defendant to appear personally before the Court on the _____ Wednesday of each month between 2:00 & 5:00 p.m. beginning ____; OR ___ Informal Court probation to submit a written report to the Court prior to the first Wednesday of each month. Terms of probation are as follows:

- ___ a. Payment of total fine(s) \$ _____ or _____ hours community service as follows: \$ _____ per month beginning _____ and by the same day of each month thereafter until paid in full. \$20 late fee for all delinquent payments.
- ___ b. No violation of federal, state, or local law. Keep Court informed of current address and phone number at all times. Submit to search of person, premises, or property and seizure of any evidence without a search warrant, any time of day or night, upon reasonable suspicion as ascertained by probation officer or police officer to verify compliance with probation terms.
- ___ c. \$ _____ restitution to _____. Restitution is to be paid before Court fines.
- ___ d. Do not possess or consume any alcoholic beverages, and do not frequent any place where alcohol is the main item on the menu; in particular: liquor stores, bars, and parties. Submit to urinalysis and/or blood tests at request of alcohol counselor, police officer, or Court.
- ___ e. Contact ___ Bear River Alcohol and Drug OR ___ Court approved agency _____ by _____ for evaluation and complete recommended treatment, pay directly to provider the cost for treatment and sign a release of information to the Court.
- ___ f. Provide all new receipts for proof of payment of all counseling upon each appearance before the Court. No credit given without receipts.
- ___ g. No association with anyone wanted by the law or performing illegal activity.
- ___ h. Maintain full time employment or educational program.
- ___ i. Contact Private Probation Services Incorporated by _____ to arrange for supervised probation. OR ___ Participate in the PPSI House Arrest Program and pay the costs of the same.
- ___ j. Complete and pay for: ___ SA course ___ Victim Impact Panel course ___ Values course ___ high school diploma/GED certificate by _____.
- ___ k. Written report about _____ by _____.
- ___ l. Attend ___ Alcoholics Anonymous (AA) ___ Narcotics Anonymous (NA) or ___ other Court pre-approved rehabilitation group _____ times _____ within _____ days _____ every week and provide proof of attendance to Court at time of probation appearance on the next required appearance or each month, whichever is applicable. Must complete a written summary on each meeting attended.
- ___ m. Contact assigned agency for community service hours on or before _____ and schedule _____ work _____ hours _____ days which are to be completed by _____.
- ___ n. Pay restitution for any jail time required to serve at the then current State approved rate.
- ☒ o. DEFENDANT IS FINED \$50.00 (FIFTY DOLLARS) EACH DAY AFTER 11/30/2006. NOT IN COMPLIANCE WITH ORDINANCE.

Count No. 2 Defendant is fined \$ _____

\$ _____

less the following suspended \$ _____

TOTAL TO BE PAID \$ _____ and

or be imprisoned for _____ * days in the Cache County Jail with _____ days to be suspended on payment of fine and successful completion of probation.

Count No. 3 Defendant is fined \$ _____

\$ _____

less the following suspended \$ _____

TOTAL TO BE PAID \$ _____ and

or be imprisoned for _____ * days in the Cache County Jail with _____ days to be suspended on payment of fine and successful completion of probation.

Defendant may appeal this judgment within thirty (30) days to Cache County First District Court by notifying this Court's clerk.

Date of Judgment NUNC PRO TUNC 11/01/2006

Copy delivered/mailed to Defendant on 1-18-07 by Sharon D. Jensen, Clerk

APPENDIX C

Notice of Appeal

A. W. Lauritzen (1906)
Attorney at Law/ Attorney for Defendant
P.O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391

LC

Sent 11-22-06

IN THE JUSTICE COURT IN AND FOR HYDE PARK CITY
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY
Plaintiff.

vs

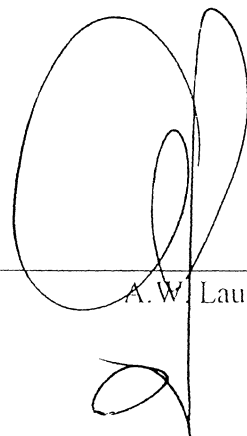
JERALD RIO DAVIS
Defendant

NOTICE OF APPEAL

Case No. HP05-0503
Judge: David C. Marx

You will please take notice that the Defendant appeals the decision of the Hyde Park City Justice Court for Cache County, State of Utah, made and entered on the 1st day of November, 2006 to the District Court for Cache County, State of Utah; said decision amounting to a Judgment of conviction and sentence in the above entitled action.

Dated the 22nd day of November, 2006.

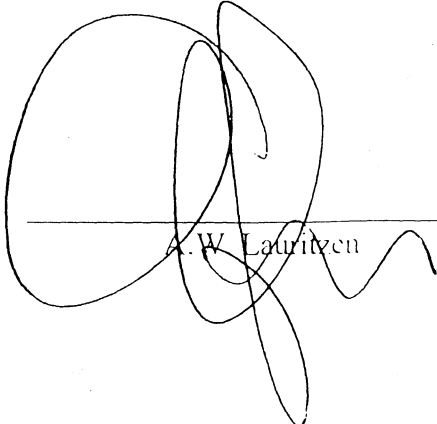

A. W. Lauritzen

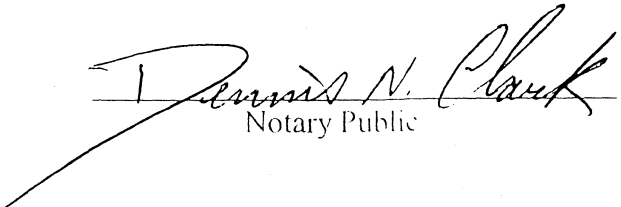
CERTIFICATE OF COUNSEL

COUNTY OF CACHE

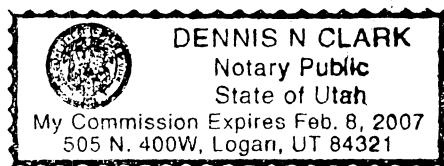
STATE OF UTAH

A.W. Lauritzen being first duly sworn does depose and say that I hereby certify that there are valid grounds for the taking of appeal in the above entitled matter and that the appeal is not taken for the hindrance or delay ro to obstruct justice.


A.W. Lauritzen


Notary Public

Seal:



CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, NOTICE OF APPEAL, postage prepaid, to the following listed below on the ____ day of November, 2006.

Scott Wyatt, Esq.
108 North Main
Logan, UT 84321

APPENDIX D

Motions to Dismiss



A. W. Lauritzen (1906)
Attorney at Law
610 North Main
P.O. Box 171
Logan, Utah 84321
Telephone: (801) 753-3391

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY,
Plaintiff,

vs.

RIO DAVIS
Defendant.

MOTION TO DISMISS
PENDING ACTION

Oral Arguments Requested

Case No. 071100143
Judge: Judkins

COMES NOW Rio Davis and moves this court to Dismiss the action pending on the grounds previously argued in Justice Court upon the ground that the trial and appeal process as promulgated by the Utah Legislature and as practiced in the Justice Court and in the District Court are flawed and deny this Defendant due process of law follows:

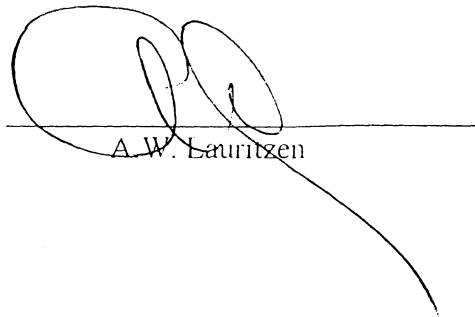
1. The Statute UCA 10-8-60 in prescribing the nature and quality of evidence employed regarding what constitutes a Nuisance be relegated to each city and town constitutes a violation of Defendant's right to due process and violates the Doctrine of Separation of powers as mandated by Article VIII Section 4 of the Utah Constitution and as construed by authorities such as *Burns v. Boyden* 133 P3d. 370 (Utah 2006).

2. The Justice Court by its very existence and as governed pursuant to State Law, constitutes a violation of Article VIII Section 4 of the Utah Constitution and thereby may assert no jurisdiction to decide criminal cases or controversies.

3. A Memorandum of Points and Authorities is provided herewith.

Wherefore this action should be dismissed.

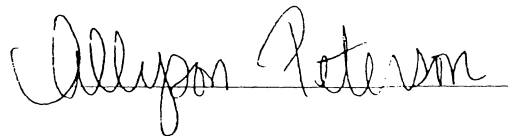
Dated this the 12~~th~~ day of April, 2007.



A.W. Lauritzen

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document(s) ACTION TO
DISMISS PENDING ACTION, was served on the following in the manner indicated on the
12 day of April, 2007. ☒ U.S. mail ☐ Hand delivery ☐ Fax.



Scott Wyatt
108 North Main, # 200
Logan, Utah 84321

A. W. Lauritzen (1906)
Attorney at Law/ Attorney for Defendant
P.O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391

IN THE FIRST DISTRICT COURT IN
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY)	MEMORANDUM OF POINTS AND
Plaintiff,)	AUTHORITIES IN SUPPORT OF
)	MOTION TO DISMISS
vs)	
)	
JERALD RIO DAVIS)	Case No.071003
Defendant)	Judge: Judkins
)	
)	Oral Arguments Requested

STATEMENT OF FACTS

1. Ira B. (Friday) Davis, the father of Defendant Jerald Rio Davis was a long time resident of Hyde Park City, owning lands located at 187 East 200 North consisting of 1.07 acres upon which stood a home and shop which housed the business licensed and operated as Ira B. Davis Body and Fender.

2. During the lifetime of Ira B. Davis the minutes of the Hyde Park City Counsel (examined during the period of 1970 onward) no discussion concerning said lands is noted except that respecting a Trailer House which was moved onto the property, there was a brief discussion but no action was taken at that time and no further discussion regarding this topic or any other was addressed until the end of 1979.

3. For the purposes of this argument and for no other purpose, it is conceded by the

Defendant that Hyde Park City has purported to have enacted Chapter 10-300 through 10-343 which, from time to time, will be referred to as the “nuisance ordinance.” This ordinance appears to have been enacted on the 10th day of January, 1979 and is said to have been revised on the 1st day of February, 1979.

4. The nuisance ordinance, as adopted by the Plaintiff City, differs significantly from the nuisance statutes which have been and are in effect in Utah during the time coextensive with this litigation.

5. On August 11, 1998 a letter from Mayor Mark E. Daines to Ira Davis advised that the City has received complaints about the “appearance of your property.”

6. In a letter dated November 9, 1998 from Mayor Mark E. Daines, observes that,
“... We have noticed the removal of some vehicles and very much appreciate your willingness to comply with the ordinance and at the same time not jeopardize your repair business.”

7. Ira Davis died on May 18, 2001 and his estate ultimately passed to Rio Davis who continued to operate the business under a license issued by the executive branch of the Municipal Government.

8. After taking possession of the property at 187 East 200 North, Rio Davis commenced a clean up, discarding items considered not to be relevant to continued operation, and has indeed removed a considerable amount of property from the East side of the tract which portion has now been fenced and is occupied by horses. Now operated, Personal property remains behind the shop which houses the Davis repair business as it is now situated.

9. On March 21, 2003 Defendant received a letter from Reed A. Elder, purporting to represent Hyde Park City. The letter discusses a visit in which suggested goals were to be

accomplished by Defendant to bring the property into compliance with the existing City ordinances as follows:

1. Removal of or storage in an onsite garage, “ ...all non-licensed vehicles and boats”
2. “All miscellaneous materials that you [emphasis mine] have no useful purpose for and all debris must be removed from the property. This includes, but is not limited to automotive motor parts, brick and masonry materials, lumber or other wood items, metal barrels and all other items of furniture, machinery and building materials.”
3. “All material and machinery which you want to keep and store on the property must be stored inside a closed structure or within an additional fenced area inside the property which creates a visual barrier to the other properties surrounding your property. The materials to be used and the location of placement of such a fence would need to be approved by the City.”
4. “The property on which there is presently a trailer home located (northeast corner) must be separated from the balance of your property to establish its own lot and utilities. This will need to follow existing ordinances which the City will help you with.”
5. “This all must be accomplished within 120 days of this letter or the City may have to take actions to have the work done, which will result in a charge to your for the cost.”

The letter requests a signature from Defendant which was never accomplished.

10. Defendant was charged with the crime of Maintaining a Nuisance in violation of Hyde Park Revised Ordinances of 10-332 with regard to the property at 187 East 200 North, Hyde Park, Utah alleging the occurrence on or about the 3rd day of November, 2005.

11. Defendant was tried and convicted of an infraction by a non-lawyer Judge and sentenced to pay a fine of \$50.00/ day from the date of sentencing to a date to be thereafter determined by the Executive Department of the Municipal Government; this appeal follows.

ISSUES

I. Whether or not the Plaintiff City’s nuisance ordinances are repugnant to and in conflict with the laws of the State of Utah and not in accord with the doctrine announced in ALLGOOD v. LARSON (infra).

II. Whether or not the nuisance statutes of Hyde Park City and the State of

Utah are constitutional or whether said statutes should be declared void-for-vagueness because the statutes do not adequately define what is a nuisance nor do they provide adequate guidelines for the enforcement of said statutes.

III. Whether or not the penalty ordinance No. 10-359 of the Plaintiff City is enforceable on its face as imposed upon Defendant.

DISCUSSION

I. The nuisance ordinances of the Plaintiff City are repugnant to and in conflict with the laws of the State of Utah and in violation of the doctrine of ALLGOOD v. LARSON(supra).

12. The powers of cities and towns such as Plaintiff town are regulated by Title 10 of the Utah Code, U.C.A. § 10-8-60 which provides that:

cities and town may declare what shall be a nuisance and abate the same and impose fines upon persons who may create, continue or suffer nuisances to exist.

13. While this section seems to give considerable flexibility to the city to fashion its own standards of criminality, this section must be considered in light of other provisions of law and the "Allgood Doctrine." cf Logan City v. Thatcher ____ P2d ____ (19__ UT).

14. As a limitation imposed on the Grant found in the above cited statute, U.C.A. § 10-8-84 provides that cities and town such as Plaintiff may:

pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants , and for the protection of property in the city and may enforce obedience to ordinances with fines or penalties as they may deem proper, but the punishment in any event shall be by fine not to exceed the maximum class B misdemeanor fine under Section

76-3-301 or by imprisonment not to exceed six months or both fine and imprisonment.

15. The Utah Supreme Court in ALLGOOD v. LARSON, 545 P.2d 530, 531 (Utah 1976) held that the provisions of Article XI, § 5 of the Utah Constitution are "not only a delegation of power by the people to a municipality, but is also a limitation" of such powers. The "constitutional provision, in conferring police power upon municipalities, limits the grant to an area "not in conflict with the general law."" The Allgood Court placed a construction on the provision found in 10-8-84 "not repugnant to law" as being coextensive with the mandate emphasized above.

16. In determining whether an ordinance is in conflict with general laws, the test is whether the questioned ordinance permits or licenses that which the statute forbids and prohibits, and likewise whether that same ordinance might eschew conduct permitted by the "General Law." RICHFIELD CITY v. WALKER, 790 P.2d 87, 90-91 (Utah App. 1990) citing SALT LAKE CITY v. KUSSE, 97 Utah 113, 93 P.2d 671 (1938). Based on this test it is apparent that the Plaintiff City's nuisance ordinances are in conflict with the general laws of the State of Utah as the elements of each cannot be reconciled in several respects.

Part 10-331 of the Plaintiff City's nuisance ordinance defines a nuisance as follows:

For the purpose of this part the term "nuisance" is defined "to mean any condition of use or premises or of building exteriors which are deleterious or injurious, noxious or unsightly which includes, but is not limited to keeping or disposing on, or scattering over the premises any of the following:

A. Lumber, junk, trash, or debris.

B. Abandoned, discarded, or unused objects or equipment such as furniture,

stoves, refrigerators, freezers, cans or containers.

17. Where in the Utah Nuisance Statutes do prohibitions such as these appear? All prohibitions in the Utah Code eschew "such terms as "noxious" or "unsightly" and invoke the requirement that any proscribed condition must be dangerous to "human life or health" or create an "impure or unwholesome" condition. [Defendant proposes that the latter standard "impure or unwholesome" is unenforceable (infra)].

18. The Utah Supreme Court has held that the test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case. CANNON v. NEUBERGER, 1 Utah 2d 396, 268 P.2d 425; DAHL v. UTAH OIL REFINING CO., 71 Utah 1, 262 P.269. The question is not whether a reasonable person in the Plaintiff's or Defendant's position would regard the condition as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable; thus should Defendant's use offend the "Danger to human health" standard, the inquiry must nevertheless shift to the reasonableness of the use in the location. (Perhaps this is the basis of the three or more persons requirement which basis is problematic as to whether the standard is suspect, invidious and arbitrary).

19. The Courts have uniformly held that the use of property analogous to Defendants' use of the subject property or even for such purposes as public garages or for the business of wrecking automobiles and salvaging parts are not nuisances per se. HATCH v. HATCH CO., 3 Utah 2d 295, 283 P.2d 217 (Utah 1955) citing GEORGE v. GOODVICH, 288 Pa. 48, 135 A. 719, 50 A.L.R. 107; PARKERSBURG BUILDERS MATERIAL CO. v. BARRACK, 118 W.Va.

608, 191 S.E. 368, 110 A.L.R. 1461.

Utah Code Annotated, § 76-10-801, (1973 Amendment) defines "nuisance" as follows:

(1) A nuisance is any item, thing, manner, condition whatsoever that is dangerous to human life or health or renders soil, air, water, or food impure or unwholesome.

No such limitation appears in the Hyde Park Ordinance and the State statute goes on to provide:

(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues or retains a nuisance, is guilty of a class B misdemeanor.

20. The Utah Court of Appeals in TURNBAUGH v. ANDERSON, 793 P.2d 939 (Utah App. 1990) held that Section 76-10-801 encompasses two types of nuisance developed under the common law: public and private nuisance. See e.g., HELMKAMP v. CLARK READY MIX CO., 214 N.W.2d 126, 129 (Iowa 1974) (state statutory enumerations do not modify the common-law doctrine of nuisance); see also Restatement (Second) of Torts 821A (1979). The definition of nuisance in Section 76-10-801 includes acts or conditions that are commonly classed as public or private nuisances.

21. A public nuisance is defined under the provisions of U.C.A. § 76-10-803, (1992 Amendment) as follows:

(1) A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing any act or omitting to perform any duty, which act or omission:

(a) annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;¹

¹Which three (3) people. (See Solars Salt)

(b) offends public decency²:

(c) unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway;

(d) is a nuisance as defined in Section 78-38-9, (for application of which section Plaintiffs do not contend) or

(e) in any way renders three or more persons insecure in life or the use of property.

(2) An act which affects three or more persons in any of the ways specified in this section is still a nuisance regardless of the extent of annoyance or damage inflicted on individuals is unequal.

22. The Utah Supreme Court had defined a public nuisance as affecting "an interest common to the general public, rather than peculiar to one individual, or several." SOLAR SALT CO. vs. SOUTHERN PACIFIC TRANSP. CO., 555 P.2d 286, 289 (Utah 1976) (quoting W. Prosser, Law of Torts 606). *cf* 76-10-803 SUPRA.

23. It is more than clear that the nuisance ordinances of the Plaintiff City are repugnant to and in conflict with the general laws of the State of Utah in violation of the doctrine of ALLGOOD v. LARSON, *supra*. The Plaintiff City's nuisance ordinances forbid what the general laws of the State of Utah permit.

24. The Plaintiff City's nuisance ordinances should therefore be declared null and void as being violative of Article XI, § 5 of the Utah Constitution and parallel provisions of the Constitution of the United States.

II. The Plaintiff City's nuisance ordinances and the nuisance statutes are

²As is noted on page 8, Defendant contends that (a) and (b) are unenforceable as vague and imprecise.

unconstitutionally vague.

25. There should be no question that the nature of even civil proceedings are quasi-criminal in character. SIMS v. TAX COMMISSION, 841 P.2d 6 (Utah 1992).

U.C.A. § 76-10-801(2), (1973 Amendment) provides as follows:

(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues, or retains a nuisance, is guilty of a class B misdemeanor.

26. The Defendants contend that Part 10-331 of the Plaintiff City's nuisance ordinance and U.C.A. § 76-10-801(1) defining nuisance and U.C.A. § 76-10-803 defining a public nuisance are unconstitutionally vague in violation of Article I, § 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution.

27. The void-for-vagueness doctrine requires that a statute or ordinance define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. KOLENDER v. LAWSON, 461 U.S. 352, 357, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855 (1983). More important than actual notice is the requirement that a legislature establish minimal guidelines to govern law enforcement. KOLENDER, quoting SMITH v. GOGUEN, 415 U.S. 566, 574, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974). It is a basic principle of due process that an enactment is void for vagueness if its prohibition is not clearly defined. GRAYNED v. CITY OF ROCKFORD, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972).

28. A constitutional vagueness challenge can proceed either as a facial challenge or upon its application, based upon the facts of the case. GREENWOOD v. CITY OF NORTH SALT LAKE, 817 P.2d 816 (Utah 1991). A facial challenge is permitted when a statute or

ordinance has no practical application in any case or the law reaches a substantial amount of constitutionally protected conduct. HOFFMAN ESTATES v. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489, 494, 71 L.Ed.2d 362, 102 S.Ct. 1186 (1982). Where a statute or ordinance imposes criminal penalties, the standard of certainty is higher. WINTERS v. NEW YORK, 333 U.S. 507, 515, 92 L.Ed. 840, 68 S.Ct. 665 (1948). This concern has led the United States Supreme Court to invalidate a criminal statute on its face even when it could conceivably have had some valid application. COLAUTTI v. FRANKLIN, 439 U.S. 379, 394-401, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979)³.

29. The challenged ordinances and statutes in the instant case reaches a substantial amount of constitutionally protected conduct.

Article I, § 1 of the Utah Constitution provides as follows:

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress or grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

30. The Plaintiff City must establish and prove in this case that Defendants' use of the subject property is a public nuisance as defined under § 76-10-803 and such use has a detrimental effect on public comfort, repose, health or safety, or which offends public decency.

31. The Utah Supreme Court has held that municipal ordinances which are similar to U.C.A. § 76-10-801 and § 76-10-803 even when only the civil remedy is pursued, to be unconstitutionally vague. The Court in JONES v. LOGAN CITY CORP., 19 Utah 2d 169, 428

3

Utah cases such as Logan City v. Huber 786 P.2d 1372 (Ut App. 1990) and Provo City v. Whatcott 200 UT, (Ut. App 1986) discuss ordinances and statutes which sweep too broadly.

P.2d 160 (1967) observed as follows:

While the statute above mentioned grants to cities the power to declare what shall be a nuisance, the ordinance before us does not in fact define what a nuisance is. Ordinance No. 120 above referred to, which grants to the Board of Condemnation the right to determine whether any building constitutes a menace to public health or public safety, does not provide standards on which the board can base its findings as to what is or what is not a menace to public health or public safety. It would appear that the ordinance imposes upon the Board of Condemnation quasi-judicial functions without standards or guidelines to govern the Board in its determination.

32. U.C.A. § 76-10-801 and § 76-10-803 do not provide sufficient standards or guidelines upon which the Court can base its findings as to what is or what is not detrimental to public comfort, repose, health or safety and what is or what is not a public nuisance or even what public comfort or repose are.

33. The United States Supreme Court stated in KOLENDER v. LAWSON, supra, n. 7: societies concern for minimal guidelines finds its roots as far back as the decision in UNITED STATES v. REESE, 92 U.S. 214, 221, 25 L.Ed. 563 (1876):

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

34. U.C.A. § 76-10-801 and § 76-10-803 are unconstitutionally vague on their face because the statutes encourage arbitrary enforcement by failing to describe with sufficiency what conduct is proscribed by the statutes and also those statutes reach a substantial amount of constitutionally protected conduct. Furthermore, the statutes are unconstitutionally vague in the application of the statutes to the facts of this case. Assuming, the Plaintiff City's nuisance ordinances are applicable in this case, the ordinances are also unconstitutionally vague.

35. Part 10-331 of Plaintiff City's nuisance ordinance is susceptible of many different meanings and consequently is unconstitutionally vague. For example, the ordinance prohibits lumber from being deposited or scattered on any premises. This ordinance could preclude a commercial lumber yard from maintaining stock on the premises and selling lumber. The ordinance could also prohibit the construction of buildings from lumber. Junk as defined in the ordinance is also susceptible of many different meanings as defined in Webster's Dictionary.

36. The ordinance is susceptible of many different meanings and encourages arbitrary and discriminatory enforcement and should therefore be declared unconstitutionally vague.

III. Whether or not the penalty ordinance No. 10-359 of the Plaintiff City, as written is enforceable upon Defendant.

37. Hyde Park City Ordinance No. 10-359 PENALTY FOR FAILURE TO COMPLY is as follows:

A. Any owner, occupant or person having an interest in the property subject to this chapter who shall fail to comply with the notice or order given pursuant to this chapter shall be guilty of a class C misdemeanor for each offense and further sum of \$50.00 for each and every day such failure to comply continues beyond the date fixed for compliance.

B. Compliance by any owner, occupant or person to whom a notice has been given as provided in this chapter shall not be admissible in any criminal proceeding brought pursuant to this section.

38. For purposes of this argument, we shall dwell only on part A. With regard to that portion which reads, "...further sum of \$50.00 for each and every day such failure to comply continues beyond the date fixed for compliance."

39. The legislature created on July 1, 1973 classes of offenses and stated in 76-1-103 (1) the following as found in *Algood v. Larson* (supra):

"The provisions of this code shall govern the construction of, the punishment for,...any offense defined in this code.... any offense defined outside this code ... " 76-1-104 provides that the code shall be constructed in accordance with these general purposes; and Subsection (3), dealing with penalties, states; ' Prescribe penalties which are proportionate to the seriousness of offenses..."

40. The cities which adopt ordinances, such as the Plaintiff City has accomplished here, are regulated by the State laws and by the courts, the city cannot impose a greater sentence than that provided by state law. See *Algood v. Larson* (supra). It is to be noted that 10-8-84, by its express terms, limits the grant of power to municipalities to pass ordinances, to those "not repugnant to law."

41. If the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void. The penalty prescribed by the city ordinance cannot exceed that set by the state law. [*Allgood v. Larson*(supra)]

42. The test as to whether an ordinance is repugnant to or in conflict with state law is not whether it deals with the same subject matter in a different manner by providing a different penalty, but it is whether the ordinance permits or licenses something which the state statute forbids or prohibits, or vice versa. See *Algood v. Larson* quoting *Salt Lake city v. Kusse*, supra; and see, e.g. *city of Columbus v. Molt*, 36 Ohio St. 2d 94, 304 N.E.2d 245.

43. Any violation of the Plaintiff City's Nuisance Ordinance shall be designated as a single crime, a misdemeanor. The Ordinance exceeds the statutory limits by providing that a fine of \$50.00 shall be assessed "...for each and every day such failure to comply continues beyond the date fixed for compliance." There can only be one violation and as such there can be only one fine assessed. If the penalty is valid, the probable application is only to the point that \$50.00

APPENDIX E

Transcript

totally decimated by that sort of situation. I don't think you thought about that. That truck back there may be something that you have a future use for, but right now you don't have a use for it.

The court is going to order that the -- well, I guess, Mr. Lauritzen, your client has the right to come back in not less than two nor more than 45 days unless you want to waive that time frame and proceed with sentencing today?

MR. LAURITZEN: I'll waive it.

THE COURT: Very well. It will be the order of the court that the defendant pay a fine in the amount of \$50 for maintaining that nuisance. The court will place the defendant on probation and will review this matter on the 5th of November at 10:00. At that point in time I'll expect Mr. Grunig in his capacity to come back and report to the court, and the defendant is to be present at that time as well with his counsel, and represent to me that the property has been cleaned up satisfactory to the norms of society. If not, the defendant will be placed in contempt and then the court will impose a jail sentence at that point in time. Mr. Davis, I think you understand the court's position.

It will be ordered that the exhibits be returned to Mr. Jenkins. We'll be in recess.

(Trial concluded.)

APPENDIX F

Minutes, Sentence, Judgment, Commitment and Notice

First Judicial District, State of Utah, County of Cache

FEB 08 2003

STATE OF UTAH

Plaintiff,

vs.

Gerald Leo Davis
Defendant

JUDGMENT & COMMITMENT

Case No. 071100143

Plaintiff's Attorney Jonathan Jenkins

Defendant's Attorney Arden Houtzen

Defendant (having been adjudged) ~~entered a plea of~~ (GUILTY / NO CONTEST) to the charge of

Count No. 1 Public Nuisance a Class 1st Misdemeanor

Count No. 2 _____ a Class _____ Misdemeanor

Count No. 3 _____ a Class _____ Misdemeanor

And Defendant having agreed to proceed with sentencing and no other legal reason having been shown why judgment should not be pronounced, and Defendant being presented (with) (having waived) Counsel, it is the judgment and sentence of the Court as follows:

Count No. 1	Defendant is fined \$ <u>50</u> plus surcharge of _____
	less the following suspended \$ _____
	TOTAL TO BE PAID \$ <u>50</u>
and to be imprisoned for _____ days in the County Jail with _____ days to be suspended on payment of fine/probation	
Count No. 2	Defendant is fined \$ _____ plus surcharge of _____
	less the following suspended \$ _____
	TOTAL TO BE PAID \$ _____
and to be imprisoned for _____ days in the County Jail with _____ days to be suspended on payment of fine/probation	
Count No. 3	Defendant is fined \$ _____ plus surcharge of _____
	less the following suspended \$ _____
	TOTAL TO BE PAID \$ _____
and to be imprisoned for _____ days in the County Jail with _____ days to be suspended on payment of fine/probation	

REPORT TO JAIL _____ to serve _____ days. Community Service _____ hrs by _____.

Fine to be paid in installments of \$ _____ per _____ beginning _____ FINE DUE by _____

Probation with ☐ PPS ☐ AP&P ☒ Court ☐ No association with known criminals, drug dealers or drug users.

☐ Complete alcohol counseling, pay fees, file completion notice, ☐ Possess/consume no alcohol or be where it is served/sold.

☐ Receive credit of _____ towards cost of counseling. ☐ Keep Court Informed Of Current Address.

☐ Submit to search and seizure and random testing upon request of law enforcement. ☐ Violate no laws. ☐ Obtain UA.

☐ Obtain and maintain full-time employment or schooling. ☐ Obtain GED _____

Defendant to clean up property
Review set for Nov 26, 2007 at 10:00

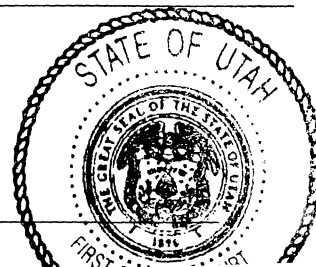
Defendant may appeal this judgment within (30) days to Court of Appeals in Salt Lake City, Utah.

Dated

9/28/07

Clerk

Judge



APPENDIX G

Notice of Appeal

10-11-07

A.W. Lauritzen (1906)^s
15 East 600 North #1
P.O. Box 171
Logan, UT 84321
435-753-3391

IN THE FIRST DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

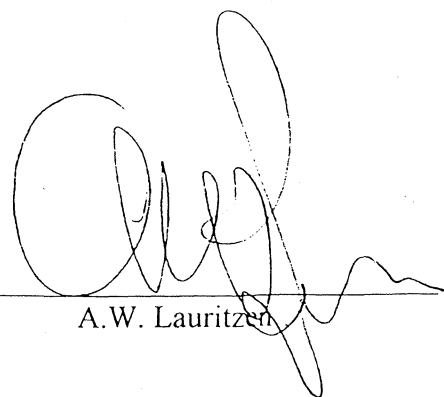
JERALD RIO DAVIS,
Defendant.

NOTICE OF APPEAL

Case No. 071100143 MO
Judge Clint S. Judkins

You will please take notice that the Defendant appeals the Judgment of Conviction and sentence entered in the First District Court for Cache County, State of Utah, on the 28th of September, 2007 to the Supreme Court of the State of Utah; said Entry amounting to a final judgment of conviction and sentence in the above entitled action.

DATED this 11th day of OCTOBER, 2007



A.W. Lauritzen

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, NOTICE OF APPEAL, postage prepaid, to the following listed below on the 11th day of ~~September~~^{October}, 2007.

Meghan Gudmundson

Jonathan E. Jenkins, Esq.
108 North Main
Logan, UT 84321

EXHIBIT J

14-08
COPY

A.W. Lauritzen (1906)
Attorney at Law/Attorney for Defendant
135 North Main Ste. # 104
P.O. Box 171
Logan, UT 84321
435-753-3391

IN THE FIRST DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY
Plaintiff,

vs.

JERALD RIO DAVIS,
Defendant.

AMENDED
NOTICE OF APPEAL

Case No. 071100143 MO
Judge Clint S. Judkins

You will please take notice that pursuant to an Order of the District Court, made on January 16, 2008 (see Exhibit A), the Defendant files herewith an Amended Notice of Appeal taken from the Judgment of Conviction and Sentence entered in the First District Court for Cache County, State of Utah, on the 28th of September, 2007; said Entry amounting to a final judgment of conviction and sentence in the above entitled action.

This notice is being submitted specifically designating the constitutional issues from which Defendant hereby appeals to the Utah Court of Appeals as follows:

1. Whether the Ordinance of the Plaintiff City herein # 10-332 et seq. is Unconstitutionally vague and violative of the protections afforded by the Due Process Clause of the U.S. Constitution as well as the guarantees of equal protection of the laws.
2. Whether the Ordinances of the Plaintiff's are repugnant to and in conflict with the laws of the State of Utah and do not thereby afford Defendant due process and/or equal

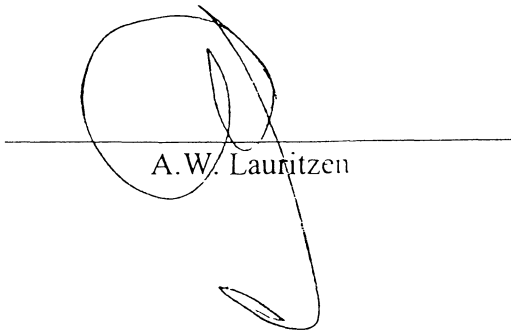
laws of the State of Utah and do not thereby afford Defendant due process and/or equal protection of the laws in violation of constitutional mandates.

3. Whether the creation and regulation of Justice Courts interferes with Judicial independence and thereby violates the separation of powers concept of the Utah Constitution by providing monetary incentives to convict and/or sanction criminal Defendants and by authorizing the administrative branch of municipal governments to hire and fire judges and affording inordinate municipal control of court operations.

4. Whether the Sentences as imposed by the Justice Court and by the District court were lawful under State Law and did thereby afford Defendant due process of law.

This Appeal is taken to the Appellate Courts of the State of Utah pursuant to Applicable Law.

DATED this 14 day of March, 2008.



A.W. Lauritzen

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, AMENDED
NOTICE OF APPEAL, postage prepaid, to the following listed below on the 14th day of
March, 2008.

A handwritten signature in cursive script, appearing to read "Jonathan E. Jenkins", is written over a horizontal line.

Jonathan E. Jenkins, Esq.
108 North Main
Logan, UT 84321

APPENDIX H

Designation of Record on Appeal

A.W. Lauritzen (1906)
Attorney at Law
15 East 600 North #1
P.O. Box 171
Logan, UT 84321
Phone: 435-753-3391
Fax: 435-753-8331

LOGAN DISTRICT
07 NOV 14 PM 4:55

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee, vs. JERALD RIO DAVIS, Defendant/Appellant.	DESIGNATION OF RECORD ON APPEAL Case No. 071100143 MO Judge Judkins
---	--

TO THE HONORABLE JUDGE OF SAID COURT:

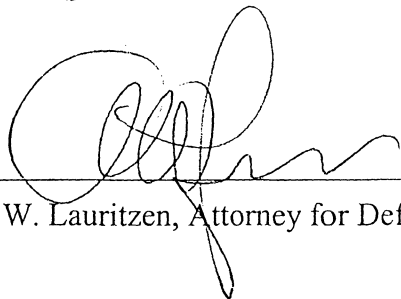
COMES NOW the Defendant/Appellant, Jerald Rio Davis, and submits this Designation of Record on Appeal, and requests that the following items be submitted as part of the Record with respect to this Appeal.

1. Any and all transcripts of Hearings and Court proceedings appertaining to the above entitled matter be supplied to Defendant/Appellant to aid in this Appeal insofar as they are now in the possession of the Clerk of the Trial Court..
2. The entire contents of the file as it now exists in the records of the First District Court.
3. All Exhibits that may have been offered and/or admitted in the course of proceedings had at the trial level.

4. Transcript of the proceedings and Oral pronouncement of Sentence had on the 19th day of September, 2007.

WHEREFORE, the Defendant/Appellant respectfully requires that these matters be contained within the Record of this Appeal and transmitted as required by law.

Dated the 9th day of NOVEMBER, 2007.



A.W. Lauritzen, Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, DESIGNATION
OF RECORD ON APPEAL, postage prepaid, to the following listed below on the 9th day of
November, 2007.

Sarah Lewis

Jonathan E. Jenkins, Esq.
108 North Main
Logan, UT 84321

A. W. Lauritzen (1906)
Attorney at Law
P.O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391

8/22/07
COPY

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY,

Plaintiff,
vs.

JERALD RIO DAVIS

Defendant.

OBJECTION TO PLAINTIFF'S
ORDER ON MOTION TO DISMISS
AND TO QUASH CONVICTION

Case No. 071100143

Judge: Clint S. Judkins

COMES NOW A.W. LAURITZEN, Attorney for the Defendant, with this his
Objection to Plaintiff's Order on Motion to Dismiss and to Quash Conviction and alleges:

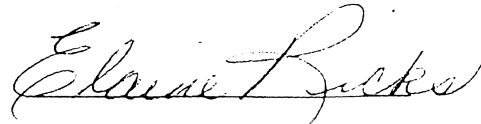
1. Defendant objects to the Court's Order in that the penalty prescribed by the ordinances exceeds the legislative grant; the sentence imposed by the convicting Court is thereto as immaterial. The ordinance, in its entirety, should be declared void in view of the express holding in *Algood v. Larson* 545 P.2d 530 (Utah 1976).

DATED this 21st day of August, 2007.


A. W. Lauritzen

CERTIFICATE OF SERVICE

I hereby certify that I faxed and mailed a true and correct copy of the foregoing,
OBJECTION TO PLAINTIFF'S ORDER ON MOTION TO DISMISS AND TO QUASH
CONVICTION, Postage prepaid, to the following listed below on this 22 Day of August,
2007.

A handwritten signature in cursive script, appearing to read "Elaine Ricks".

Jonathan Jenkins, Esq.
108 North Main
Logan, UT 84321

APPENDIX J

Objection to the Order on Motion to Dismiss and to Quash Conviction

APPENDIX K

Objection to Oral Verdict, Judgment and Sentence

A.W. Lauritzen (1906)
15 East 600 North #1
P.O. Box 171
Logan, UT 84321
435-753-3391

10-9-07
COPY

IN THE FIRST DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

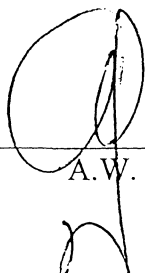
JERALD RIO DAVIS,
Defendant.

OBJECTION TO ORAL VERDICT,
JUDGEMENT AND SENTENCE

Case No. 071100143 MO
Judge Clint S. Judkins

COMES NOW the Defendant, by and through is Attorney of record, with this his
Objection to the ruling from the bench, Judgment and Sentence as entered on the 19th day of
September, 2007 in that the Judge's Order imposed the maximum sentence and in that, the
Defendant was convicted of an infraction with the ordinance prescribing the maximum fine of
Fifty Dollars (\$50.00). No jail time may be imposed upon conviction of the infraction under
either municipal or state law and in that Defendant has suffered the maximum penalty, no
probation or further sanction may be imposed should the fine be paid as required by the Court in
its written Judgement.

Dated the 8th day of October, 2007.



A.W. Lauritzen

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, OBJECTION TO ORAL VERDICT, JUDGEMENT AND SENTENCE, postage prepaid, to the following listed below on the 9th day of ~~September~~ ^{October}, 2007.

Meghan Gudmundson

Jonathan E. Jenkins, Esq.
108 North Main
Logan, UT 84321

APPENDIX L

Letter from Mark E. Daines

Hyde Park City
113 East Hyde Park Lane, P.O. Box 489
Hyde Park, Utah 84318
563-6507

November 9, 1998

Mr. Ira B. Davis
187 East 200 North
Hyde Park, Utah 84318

Dear Ira:

I will try to respond to your written request for information concerning the business at your home. It has taken some time to locate and research the old ordinances and Council minutes.

A. Regarding the date of your first business license, we will accept your date of late 50's or early 60's. We have no records dating back that far for business licenses, and can find no record in the Council minutes.

B. We have reviewed the earliest zoning ordinances that we can locate of the City and are enclosing a copy of the portion that relates to you and your business. Your business has always been a non-conforming use in a residential zone. It was grandfathered in and today would not be allowed. Even in the earliest ordinances there is provision that such a non-conforming use may NOT be expanded. This, of course, is a serious concern for the City. It appears that you have added many, many vehicles and other materials to your property.

C. The original right that you have is a non-conforming use in a residential zone, grandfathered in by the existence of your business prior to zoning regulations in the City.

D. Enclosed is a copy of the minutes of September 8, 1998 as requested.

We hope to work amicably with you to allow you to keep your repair business, but to remove all articles added onto your property which did not exist at the time you got your business license in the late 50's or early 60's.

We have noticed the removal of some vehicles and very much appreciate your willingness to comply with the ordinance and at the same time not jeopardize your repair business.

Sincerely,

Mark E. Daines
Mark E. Daines
Mayor

MED/jyh

APPENDIX M

Business License

Hyde Park, Utah

License

The Ordinance in force has been complied with and the amount of \$ 15.00 has been paid to the CITY TREASURE, for the term of twelve months, commencing July 1, 2000 to June 30, 2001 to conduct the business of Davis Repair

Signed:

Name Ira Davis
Mayor

Address 187 East 200 North
Attest:

Hyde Park, Utah... 84318...
Recorder

License is not transferable

040486

APPENDIX N

Letter from Reed A. Elder

March 21, 2003

Rio Davis
808 East Canyon Rd.
Hyde Park, UT 84318

Re: Property clean up at 187 East 200 North

Dear Rio:

This letter is a follow-up on my visit with you on Thursday the 20th of March 2003, where we discussed the clean-up of your property at 187 East 200 North in Hyde Park City. The following is a list of items we agreed needed to be done to bring your property into compliance with City ordinances:

1. All non-licensed vehicles and boats must be removed from the property or stored in a garage on site.
2. All miscellaneous materials that you have no useful purpose for and all debris must be removed from the property. This includes, but is not limited to automotive motor parts, brick and masonry materials, lumber or other wood items, metal barrels and all other items of furniture, machinery and building materials.
3. All material and machinery which you want to keep and store on the property must be stored inside a closed structure or within an additional fenced area inside the property which creates a visual barrier to the other properties surrounding your property. The materials to be used and the location of placement of such a fence would need to be approved by the City.
4. The property on which there is presently a trailer home located (northeast corner) must be separated from the balance of your property to establish its own lot and utilities. This will need to follow existing ordinances which the City will help you with.
5. This all must be accomplished within 120 days of this letter or the City may have to take actions to have the work done, which will result in a charge to you for the cost.

Rio, we are very interested in helping you accomplish this task. Let us work together to get this done. Please sign the enclosed letters as your agreement to perform. Return one in the self-addressed stamped envelope and keep the other as your copy.

Sincerely,

Rio Davis

Reed A. Elder
Hyde Park City

cc: David Kooyman, Mayor
Hyde Park City Council

APPENDIX P

Information

Scott L Wyatt # 5829
HYDE PARK CITY ATTORNEY
108 North Main
Logan, Utah 84321
(435) 753-4000

COPY

IN THE JUSTICE COURT IN AND FOR HYDE PARK CITY
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY,

Plaintiff,

v.

JERALD RIO DAVIS,
808 Canyon Road
Hyde Park, Utah 84318
DOB 11/11/58

Defendant.

INFORMATION

Case No. HP05- 0503

Judge: David C. Marx

The City of Hyde Park, upon information and belief, charges the above-named defendant with the commission of the following crime:

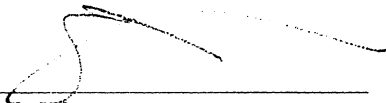
COUNT 1:	Maintaining a Nuisance
IN VIOLATION OF:	Revised Ordinances of Hyde Park §10-332
CLASSIFICATION:	A Class "B" Misdemeanor
LOCATION:	187 East 200 North, Hyde Park, Utah
ON OR ABOUT:	November 3, 2005

The acts of the defendant constituting the crime are: That the defendant, owning, leasing, occupying or having charge of the premises located at 187 East 200 North, Hyde Park, Utah, did maintain or keep any nuisance thereon. "Nuisance" is defined to mean: (1) any condition of use of premises or of building exteriors which are deleterious or injurious, noxious or unsightly which includes, but not limited to keeping or depositing on, or scattering over the premises any of the following: (a) Lumber, junk, trash, or debris; or (b) abandoned, discarded or unused objects or equipment such as furniture, stoves, refrigerators, freezers, cans or containers. "Nuisance" is also defined to mean: (2) unsheltered storage or old, unused, stripped and junked machinery, implements, equipment or personal property of any kind which is no longer safely usable for the

purposes for which it was manufactured, for a period of 30 days or more

This information is based on evidence obtained from the following witness: R. Karren,
M. Grunig.

DATED November 3, 2005



Scott L Wyatt
Hyde Park City Attorney

Scott L Wyatt # 5829
HYDE PARK CITY ATTORNEY
108 North Main
Logan, Utah 84321
(435) 753-4000

COPY

IN THE JUSTICE COURT IN AND FOR HYDE PARK CITY
COUNTY OF CACHE, STATE OF UTAH

HYDE PARK CITY,

Plaintiff,

v.

CHRISTINE H. DAVIS,
808 Canyon Road
Hyde Park, Utah 84318
DOB 11/11/58

Defendant.

AMENDED
INFORMATION

Case No. HP05-0504

Judge: David C. Marx

The City of Hyde Park, upon information and belief, charges the above-named defendant with the commission of the following offense:

COUNT 1:	Maintaining a Nuisance
IN VIOLATION OF:	Revised Ordinances of Hyde Park §10-332
CLASSIFICATION:	An Infraction
LOCATION:	808 East Canyon Road, Hyde Park, Utah
ON OR ABOUT:	November 3, 2005

The acts of the defendant constituting the offense are: That the defendant, owning, leasing, occupying or having charge of the premises located at 808 East Canyon Road, Hyde Park, Utah, did maintain or keep any nuisance thereon. "Nuisance" is defined to mean: (1) any condition of use of premises or of building exteriors which are deleterious or injurious, noxious or unsightly which includes, but not limited to keeping or depositing on, or scattering over the premises any of the following: (a) Lumber, junk, trash, or debris; or (b) abandoned, discarded or unused objects or equipment such as furniture, stoves, refrigerators, freezers, cans or containers. "Nuisance" is also defined to mean: (2) unsheltered storage or old, unused, stripped and junked machinery, implements, equipment or personal property of any kind which is no longer safely usable for the

purposes for which it was manufactured, for a period of 30 days or more

This information is based on evidence obtained from the following witness: R. Karren,
M. Grunig.

DATED March 23, 2006

A handwritten signature in black ink, appearing to be 'Scott L. Wyatt', with a long horizontal stroke extending to the right.

Scott L Wyatt
Hyde Park City Attorney

APPENDIX Q

Allgood vs. Larson 545 P.2d 530, 531 (Utah 1976)

01/12/76 VIVIAN ALLGOOD v. DELMAR LARSON

- [1] SUPREME COURT OF UTAH
- [2] No. 14094
- [3] 1976.UT.4 <<http://www.versuslaw.com>>, 545 P.2d 530
- [4] January 12, 1976
- [5] **VIVIAN ALLGOOD, PLAINTIFF AND RESPONDENT,**
v.
DELMAR LARSON, SHERIFF OF SALT LAKE COUNTY, UTAH, AND SALT LAKE CITY, UTAH, DEFENDANTS AND APPELLANTS
- [6] Roger F. Cutler, Salt Lake City Atty., Paul G. Maughan, Deputy Salt Lake City Atty., Salt Lake City, for defendants and appellant.
- [7] Stephen R. McCaughey of Salt Lake Legal Defenders Assn., Salt Lake City, for plaintiff and respondent.
- [8] Maughan, Justice, wrote the opinion.
- [9] Tuckett, J., concurs.
- [10] Henriod, C.j., concurs in the result.
- [11] Crockett, Justice (dissenting).
- [12] Ellett, J., concurs in the views expressed in the Dissenting opinion of Crockett, J.
- [13] The opinion of the court was delivered by: Maughan
- [14] MAUGHAN, Justice:
- [15] Plaintiff was arrested, charged, and convicted of trespassing; under a Salt Lake City

APPENDIX R

Richfield City vs. Walker 790 P.2d 87, 90-91 (Utah App. 1990)

03/26/90 RICHFIELD CITY v. JAMES M. WALKER

[1] COURT OF APPEALS OF UTAH

[2] No. 890156-CA

[3] 1990.UT.73 <<http://www.versuslaw.com>>, 790 P.2d 87, 131 Utah Adv. Rep. 37

[4] March 26, 1990

[5] **RICHFIELD CITY, PLAINTIFF AND RESPONDENT,**
v.
JAMES M. WALKER, DEFENDANT AND APPELLANT

[6] Sixth Circuit, Sevier County, The Honorable David L. Mower.

[7] Sheldon R. Carter, Provo, for Appellant.

[8] Richard K. Chamberlain, Richfield, for Respondent.

[9] Regnal W. Garff, Judge, Russell W. Bench, Judge, John Farr Larson, *fn1 Judge, concur.

[10] The opinion of the court was delivered by: Garff

[11] **FACTS.** - Walker was found drunk in his truck, engine off, headlights on, and keys in the ignition. He was asleep, lying with his head toward the passenger door.

[12] **PROCEEDINGS.** - Walker was convicted of being in actual physical control of the vehicle and appealed.

[13] **RESULT.** - Affirmed. Per Garff; Bench & Larson concur.

[14] **HELD.** - The Richfield ordinance was not inconsistent with the controlling statute. Walker was in actual physical control of the vehicle under the circumstances.

[15] **REGNAL W. GARFF, Judge:**

APPENDIX S

Cannon v. Neuberger, 1 Utah 2d 396, 268 P.2d 425

03/22/54 CANNON v. NEUBERGER ET UX.

- [1] SUPREME COURT OF UTAH
- [2] No. 8083
- [3] 1954.UT.31 <<http://www.versuslaw.com>>, 268 P.2d 425, 1 Utah 2d 396
- [4] March 22, 1954
- [5] **CANNON**
v.
NEUBERGER ET UX.
- [6] George C. Heinrich, Logan, for appellant.
- [7] George D. Preston, Logan, for respondents.
- [8] McDONOUGH, Crockett, Henriod, and Wade, JJ., concur.
- [9] Wolfe, C. J., being disqualified does not participate herein.
- [10] The opinion of the court was delivered by: Dunford
- [11] DUNFORD, District Judge. Plaintiff brought this action to abate a claimed nuisance in the form of three Carolina Poplar trees and two Siberian Elm trees which defendants have upon their property. The trial court ordered the Carolina Poplar trees 'topped' by cutting twenty feet from the tops thereof, ordered removed the dead wood and sufficient of the branches to overcome a danger of the trees being blown over onto plaintiff's property. Plaintiff appealed claiming under three assignments of error, that the court should have ordered defendants to remove the offending trees from their property or require them to so control their growth as to keep their branches from overspreading, or the roots from permeating, or the leaves, twigs and branches from falling or being blown upon plaintiff's lot and buildings. We affirm the judgment of the lower court with costs to the respondents.
- [12] This action being in equity, the court will review the evidence and determine its weight. However, much consideration must be given to the trial court's findings, inasmuch as the presiding Judge saw and heard the witnesses, had a better opportunity to determine their knowledge of the facts testified to, to observe their demeanor indicating interest, prejudice,

APPENDIX T

Dahl v. Utah Oil Refining Co. 71 Utah 1, 262 P.2 69

APPENDIX U

Hatch v. Hatch Co., 3 Utah 2d 295, 283 P.2d 217 (Utah 1955)

05/05/55 GLEN A. HATCH AND EDITH E. HATCH v. W. S.

- [1] SUPREME COURT OF UTAH
- [2] No. 8215
- [3] 1955.UT.42 <<http://www.versuslaw.com>>, 283 P.2d 217, 3 Utah 2d 295
- [4] May 5, 1955
- [5] **GLEN A. HATCH AND EDITH E. HATCH, PLAINTIFFS AND APPELLANTS,**
v.
W. S. HATCH COMPANY, A CORPORATION, AND WILLARD S. HATCH,
DEFENDANTS AND RESPONDENTS
- [6] Oscar W. Moyle, Jr., Moyle & Moyle, Salt Lake City, for appellants.
- [7] Marr, Wilkins & Cannon, Mark K. Boyle, Salt Lake City, for respondents.
- [8] Crockett, Wade and Worthen, JJ., and Lewis, District Judge, concurred.
- [9] Henriod, J., having disqualified himself did not participate herein.
- [10] The opinion of the court was delivered by: McDonough
- [11] McDONOUGH, Chief Justice. Plaintiffs appeal from a dismissal of their cause after a trial on the merits by the court sitting without a jury, contending that the trial court erred in finding that no actionable nuisance is maintained by the defendants on property adjoining plaintiffs' residential property.
- [12] Plaintiff Glen A. Hatch and defendant W. S. Hatch are brothers, who inherited contiguous pieces of property, with a house on each lot, situated in Woods Cross, Davis County, Utah. Plaintiffs moved into their home in 1917, but did not obtain title until 1935, doing substantial remodelling in 1935 and again in 1951; they occupy the property primarily as a residence, doing some farming thereon and maintaining a filling pump and storage garage in the rear of their house for trucks belonging to Hatch Brothers Company, a livestock corporation in which both brothers hold stock. Defendant moved into his residence, immediately north of plaintiff's property, about 1935 and utilized the area behind the house to establish a business of transporting road tars and oils. The company, here also made

APPENDIX V

**Parkersburg Builders Material Co. v. Barrack, 118 W.Va. 608, 191 S.E. 368, 110
A.L.R. 1461**

APPENDIX W

Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

[1] COURT OF APPEALS OF UTAH

[2] No. 880501-CA

[3] 1990.UT.133 <<http://www.versuslaw.com>>, 793 P.2d 939, 135 Utah Adv. Rep. 72

[4] May 31, 1990

[5] **SHIRLEY TURNBAUGH, AS PERSONAL REPRESENTATIVE OF THE ESTATE
OF LE ROY TURNBAUGH, FOR THE BENEFIT OF THE HEIRS OF LE ROY
TURNBAUGH, PLAINTIFF AND APPELLANT,
v.
EVAN ANDERSON AND RED DOME, INC., A UTAH CORPORATION,
DEFENDANTS AND APPELLEES**

[6] Fourth District, Millard County, The Honorable Ray M. Harding.

[7] D.m. Amoss (Argued), Roger T. Nuttall, Attorneys at Law, Salt Lake City, Utah.

[8] Dexter L. Anderson (Argued), Attorney, Fillmore, Utah.

[9] Pamela T. Greenwood, Judge. Norman H. Jackson, Judge, Gregory K. Orme, Judge, concur.

[10] The opinion of the court was delivered by: Greenwood

[11] **FACTS.** - Turnbaugh was killed when the heavy equipment he was operating ran out of fuel, thereby lost power, brakes, and steering, and overturned into an open pit mine owned by Red Dome. Anderson owned the heavy equipment.

[12] **PROCEEDINGS.** - Turnbaugh's personal representative sued Anderson and Red Dome for wrongful death. From a judgment for the defendants, Turnbaugh appeals.

[13] **RESULT.** - Affirmed. Per Greenwood; Jackson & Orme concur.

[14] **HELD.** - Lacking a showing of unreasonable interference with a right common to the

APPENDIX X

Helmkamp v. Clark Ready Mix Co, 214 N.W.2d 126, 129 (Iowa 1974)

HELMKAMP v. CLARK READY MIX COMPANY, 214 N.W.2d 126 (Iowa 01/16/1974)

- [1] Supreme Court of Iowa.
- [2] No. 56112
- [3] 214 N.W.2d 126, 1974.IA.0042344< <http://www.versuslaw.com>>
- [4] January 16, 1974
- [5] **CLARK HELMKAMP ET AL., APPELLANTS,
V.
CLARK READY MIX COMPANY, APPELLEE.**
- [6] APPEAL FROM CARROLL DISTRICT COURT, PAUL E. HELLWEGE, J. [214 NW2d Page 127]
- [7] Edward S. White, Carroll, for appellants.
- [8] Minnich & Neu, Carroll, for appellee.
- [9] Heard before Moore, C.J., and Mason, Rees, Uhlenhopp and Harris, JJ.
- [10] The opinion of the court was delivered by: Uhlenhopp, Justice.
- [11] The question in this appeal is whether we should enjoin as a nuisance the operation of the cement ready-mix plant of defendant Clark Ready Mix Company in Carroll County, Iowa. We hear [214 NW2d Page 128]
- [12] the appeal de novo. We give weight to the trial court's fact findings but are not bound by them. Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 109 N.W.2d 695.
- [13] United States Highway 71, which carries substantial traffic, runs north and south along the west side of Carroll, Iowa. In 1959, owners of land in the northwest part of Carroll platted Thomas Addition on the east side of the highway. Residential restrictions apply in the addition, except for two lots adjoining the highway which are zoned commercial. At time of trial in October 1972, the respective plaintiffs had owned and lived in homes in the addition for periods ranging from three to nine years. The homes vary in value for tax purposes from

APPENDIX Y

Restatement (Second) of Torts 821A (1979)

APPENDIX Z

Solar Salt Co. vs. Southern Pacific Transp. Co., 555 P.2d 286, 289 (Utah 1976)

09/10/76 SOLAR SALT COMPANY v. SOUTHERN PACIFIC

- [1] SUPREME COURT OF UTAH
- [2] No. 14427
- [3] 1976.UT.187 <<http://www.versuslaw.com>>, 555 P.2d 286
- [4] September 10, 1976
- [5] **SOLAR SALT COMPANY, PLAINTIFF AND APPELLANT,**
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, A CORPORATION,
DEFENDANT AND RESPONDENT
- [6] Frank J. Allen, of Clyde & Pratt, Salt Lake City, for plaintiff and appellant.
- [7] Haldor T. Benson and James R. Amschler, of VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, for defendant and respondent.
- [8] Ellett, Justice, wrote the opinion.
- [9] Henriod, C.j., concurs.
- [10] Crockett, Justice (concurring).
- [11] Maughan, Justice (dissenting).
- [12] Tuckett, J., concurs in the views expressed in the Dissenting opinion of Mr. Justice Maughan.
- [13] The opinion of the court was delivered by: Ellett
- [14] ELLETT, Justice:
- [15] The plaintiff has a lease from the State of Utah on land bordering the shore of the Great Salt

APPENDIX AA

Sims v. Tax Commission, 841 P.2d 6 (Utah 1992)

[1] SUPREME COURT OF UTAH

[2] No. 900324

[3] 1992.UT.218 <<http://www.versuslaw.com>>, 841 P.2d 6, 198 Utah Adv. Rep. 5

[4] October 22, 1992

[5] **LOUIE E. SIMS, PETITIONER,**
v.
COLLECTION DIVISION OF THE UTAH STATE TAX COMMISSION,
RESPONDENT

[6] Original Proceeding in this Court

[7] R. Paul Van Dam, Leon A. Dever, John C. McCarrey, Salt Lake City, for Tax Commission.

[8] G. Fred Metos, Salt Lake City, for Sims.

[9] Durham, Zimmerman, Stewart, Howe, Hall

[10] The opinion of the court was delivered by: Durham

[11] DURHAM, Justice:

[12] Petitioner Louie E. Sims seeks review of a formal order of the Utah State Tax Commission ("the Commission") affirming a tax and penalty assessment under the Illegal Drug Stamp Tax Act ("the Act"). Utah Code Ann. §§ 59-19-101 to -107. We reverse the decision of the Commission and vacate the tax and penalty assessed.

[13] On July 27, 1988, the Utah Highway Patrol and the Juab County Sheriff's Department set up a roadblock on Interstate Highway 15 approximately two miles outside of Nephi, Utah. When Sims' car was stopped at the roadblock, the officers observed an open container of alcohol in the back seat area. Sims was asked to exit the car, at which time he consented to a search of the interior. There, the officers discovered the remnants of one or two marijuana cigarettes. Sims then consented to a search of the trunk. When the latter search revealed two

APPENDIX BB

Kolender v. Lawson, 461 U.S. 352, 357, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855 (1983)

- [1] SUPREME COURT OF THE UNITED STATES
- [2] No. 81-1320
- [3] 103 S. Ct. 1855, 461 U.S. 352, 75 L. Ed. 2d 903, 51 U.S.L.W. 4532, 1983.SCT.41818
<<http://www.versuslaw.com>>
- [4] decided: May 2, 1983.
- [5] **KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL**
v.
LAWSON
- [6] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.
- [7] A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, and Jay M. Bloom, Deputy Attorney General.
- [8] Mark D. Rosenbaum, by invitation of the Court, 459 U.S. 964, argued the cause as amicus curiae in support of the judgment below. With him on the brief were Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn, and Charles S. Sims.^{*fn*}
- [9] O'connor, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Marshall, Blackmun, Powell, and Stevens, JJ., joined. Brennan, J., filed a concurring opinion, post, p. 362. White, J., filed a dissenting opinion, in which Rehnquist, J., joined, post, p. 369.
- [10] Author: O'connor
- [461 U.S. Page 353]
- [11] JUSTICE O'CONNOR delivered the opinion of the Court.

APPENDIX CC

Grayned v. City of Rockford, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972)

- [1] SUPREME COURT OF THE UNITED STATES
- [2] No. 70-5106
- [3] 92 S. Ct. 2294, 408 U.S. 104, 33 L. Ed. 2d 222, 1972.SCT.42411
<<http://www.versuslaw.com>>
- [4] decided: June 26, 1972.
- [5] **GRAYNED**
v.
CITY OF ROCKFORD
- [6] APPEAL FROM THE SUPREME COURT OF ILLINOIS.
- [7] Sophia H. Hall argued the cause for appellant. With her on the briefs were William R. Ming, Jr., and Aldus S. Mitchell.
- [8] William E. Collins argued the cause for appellee. With him on the brief were A. Curtis Washburn and Charles F. Thomas.
- [9] Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Powell, and Rehnquist, JJ., joined. Blackmun, J., filed a statement joining in the judgment and in Part I of the Court's opinion and concurring in the result as to Part II of the opinion, post, p. 121. Douglas, J., filed an opinion dissenting in part and joining in Part I of the Court's opinion, post, p. 121.
- [10] Author: Marshall
- [408 U.S. Page 105]
- [11] MR. JUSTICE MARSHALL delivered the opinion of the Court.
- [12] Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial

APPENDIX DD

Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah 1991)

09/10/91 KATE GREENWOOD AND ANDREW GREENWOOD v.

[1] SUPREME COURT OF UTAH

[2] No. 890355

[3] 1991.UT.216 <<http://www.versuslaw.com>>, 817 P.2d 816, 169 Utah Adv. Rep. 6

[4] September 10, 1991

[5] **KATE GREENWOOD AND ANDREW GREENWOOD, PERSONALLY, AND
RALPH GREENWOOD, BOTH PERSONALLY AND AS PRESIDENT AND
MEMBERS OF AMERICAN DOG BREEDERS' ASSOCIATION, INC.,
PLAINTIFFS AND APPELLANTS,
v.
CITY OF NORTH SALT LAKE, AN INCORPORATED MUNICIPALITY,
DEFENDANT AND APPELLEE**

[6] Second District, Davis County; The Honorable Rodney S. Page.

[7] David Paul White, Salt Lake City, for appellants.

[8] Kent Christiansen, Salt Lake City, for appellee.

[9] Stewart, Justice. Gordon R. Hall, Chief Justice, Richard C. Howe, Associate Chief Justice, Christine M. Durham, Justice, Michael D. Zimmerman, Justice, concur.

[10] The opinion of the court was delivered by: Stewart

[11] **FACTS.** - North Salt Lake enacted an ordinance regulating dogs classified as "fierce, dangerous, or vicious," including pit bulls. Greenwoods own and breed pit bulls.

[12] **PROCEEDINGS.** - Greenwoods sued to challenge the constitutionality of the ordinance. The district court upheld the ordinance for the most part, and Greenwoods appealed.

[13] **RESULT.** - Affirmed. Per Stewart; all concur.

APPENDIX EE

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 71 L.Ed.2d 362, 102 S.Ct. 1186 (1982)

ILLAGE HOFFMAN ESTATES ET AL. v. FLIP-SIDE, 102 S. Ct. 1186, 455 U.S. 489 (U.S. 3/03/1982)

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 80-1681

[3] 102 S. Ct. 1186, 455 U.S. 489, 71 L. Ed. 2d 362, 50 U.S.L.W. 4267, 1982.SCT.40974
<<http://www.versuslaw.com>>

[4] decided: March 3, 1982.

[5] **VILLAGE OF HOFFMAN ESTATES ET AL**
v.
THE FLIP-SIDE, HOFFMAN ESTATES, INC.

[6] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

[7] Richard N. Williams argued the cause and filed briefs for appellants.

[8] Michael L. Pritzker argued the cause and filed a brief for appellee.^{*fn*}

[9] Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Blackmun, Powell, Rehnquist, and O'Connor, JJ., joined. White, J., filed an opinion concurring in the judgment, post, p. 507. Stevens, J., took no part in the consideration or decision of the case.

[10] Author: Marshall

[455 U.S. Page 491]

[11] JUSTICE MARSHALL delivered the opinion of the Court.

[12] This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed

APPENDIX FF

Winters v. New York, 333 U.S. 507, 515, 92 L.Ed 840, 68 S.Ct. 665 (1948)

WINTERS v. NEW YORK, 68 S. Ct. 665, 333 U.S. 507 (U.S. 03/29/1948)

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 3

[3] 68 S. Ct. 665, 333 U.S. 507, 92 L. Ed. 840, 1948.SCT.40361
<<http://www.versuslaw.com>>

[4] decided: March 29, 1948.

[5] **WINTERS**
v.
NEW YORK

[6] APPEAL FROM THE COURT OF SPECIAL SESSIONS OF NEW YORK CITY.

[7] Arthur N. Seiff argued the cause and filed the briefs for appellant. With him on the original argument and the first reargument was Emanuel Redfield.

[8] Whitman Knapp argued the cause for appellee. With him on the briefs was Frank S. Hogan.

[9] Briefs of amici curiae urging reversal were filed by Sidney R. Fleisher for the Authors' League of America, Inc.; and Emanuel Redfield, Osmond K. Fraenkel and Morris L. Ernst for the American Civil Liberties Union.

[10] Vinson, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton

[11] Author: Reed

[333 U.S. Page 508]

[12] MR. JUSTICE REED delivered the opinion of the Court.

[13] Appellant is a New York City bookdealer, convicted, on information,^{*fn1} of a

APPENDIX GG

Colautti v. Franklin, 439 U.S. 379, 394-401, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979)

COLAUTTI v. FRANKLIN ET AL., 99 S. Ct. 675, 439 U.S. 379 (U.S. 01/09/1979)

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 77-891

[3] 99 S. Ct. 675, 439 U.S. 379, 58 L. Ed. 2d 596, 1979.SCT.40246
<<http://www.versuslaw.com>>

[4] decided: January 9, 1979.

[5] **COLAUTTI, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL**
v.
FRANKLIN ET AL.

[6] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA.

[7] Carol Los Mansmann, Special Assistant Attorney General of Pennsylvania, argued the
cause for appellants. With her on the brief was J. Jerome Mansmann, Special Assistant
Attorney General.

[8] Roland Morris argued the cause and filed a brief for appellees.^{*fn*}

[9] Blackmun, J., delivered the opinion of the Court, in which Brennan, Stewart, Marshall,
Powell, and Stevens, JJ., joined. White, J., filed a dissenting opinion, in which Burger, C.
J., and Rehnquist, J., joined, post, p. 401.

[10] Author: Blackmun

[439 U.S. Page 380]

[11] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

[12] At issue here is the constitutionality of subsection (a) of ? 5^{*fn1} of the Pennsylvania
Abortion Control Act, 1974 Pa. Laws,

APPENDIX HH

Logan City v. Huber 786 P.2d 1372 (Ut App. 1990)

[1] COURT OF APPEALS OF UTAH

[2] No. 890093-CA

[3] 1990.UT.15 <<http://www.versuslaw.com>>, 786 P.2d 1372, 126 Utah Adv. Rep. 6

[4] January 17, 1990

[5] **LOGAN CITY, PLAINTIFF AND RESPONDENT,**
v.
RALPH LOWELL HUBER, DEFENDANT AND APPELLANT

[6] First Circuit, Cache County, The Honorable Burton H. Harris.

[7] A.w. Lauritzen, Attorney for Appellant, Logan, Utah.

[8] Cheryl A. Russell, Logan City Attorney, Logan, Utah.

[9] Norman H. Jackson, Judge, Richard C. Davidson, Judge, Regnal W. Garff, Judge, concur.

[10] The opinion of the court was delivered by: Jackson

[11] FACTS. - Huber had an angry verbal interchange with police and was arrested.

[12] NORMAN H. JACKSON, Judge:

[13] Ralph Lowell Huber was convicted by a jury of disorderly conduct, a misdemeanor, in violation of a Logan City ordinance. On appeal, he challenges the constitutionality of the ordinance on its face and as applied. We reverse.

[14] In the early morning hours of December 11, 1988, Officers Russell Roper and Greg Monroe were on alcohol enforcement detail. They were parked off the road in their unmarked patrol car when they heard and saw a small car approaching them. The car made a wide turn at the corner and started to slide on the pea gravel in the road. The car accelerated and went past the police vehicle, at a speed estimated by the officers at 35-38 m.p.h. in a 25 m.p.h. zone,

APPENDIX JJ

Provo City v. Whatcott 200 UT, (Utah App. 1986)

IN THE UTAH COURT OF APPEALS

Provo City,
Plaintiff and Appellee,

v.

Scott A. Whatcott,
Defendant and Appellant.

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OPINION

(For Official Publication)

Case No. 981642-C.

FILED

(March 23, 2000)

2000 UT App 86

Fourth District, Provo Department

The Honorable Gary D. Stott

Attorneys: Margaret P. Lindsay and Thomas H. Means, Provo, for
Appellant

Vernon F. Romney, Provo, for Appellee

Before Judges Jackson, Billings, and Orme.

JACKSON, Associate Presiding Judge:

¶1 Scott A. Whatcott challenges his conviction for telephone harassment, a Class B misdemeanor in violation of Utah Code Ann. § 76-9-201 (1999). Because subsections (a) and (d) of the telephone harassment statute are unconstitutionally overbroad, we reverse Whatcott's conviction.

BACKGROUND

¶2 "When reviewing a jury verdict, we examine the evidence and all reasonable inferences in a light most favorable to the verdict, reciting the facts accordingly. We present conflicting evidence only when necessary to understand issues raised on appeal." State v. Heaps, 2000 UT 5, ¶2, 386 Utah Adv. Rep. 31 (citations omitted).

¶3 Whatcott admitted to placing a telephone call to the home of Anne Nielson and her roommate, Kathryn Convey. Nielson and Whatcott were friends, and Convey was acquainted with Whatcott. Whatcott left the following message on their answering machine:

I've got this boil on my testicle that just keeps oozing consistently and constantly and it's painful and it's red. It's either that or a third testicle. And I was wondering if like Kathy or Ann[e], if one of you could help me out here, if either one of you could like grab my crotch and just like fondle that third testicle of mine. It's just oozing all over the place, to get their hands kind of greasy. If you have any advice, please, give me a call. You know the number. Thanks. Bye.

¶4 At trial, Whatcott testified that Convey had often talked about her infected, oozing toenail, a boil on her breast, and other health problems. He said that his intent in making the call was to "play a prank" on Convey and to "parody" what he had heard her saying about her physical ailments. He described the phone call as a "sick kind of joke." Convey testified that the message shocked and offended her, and she referred to the message as obscene, lewd, and lascivious. Whatcott was convicted by a jury of one count of telephone harassment in violation of Utah Code Ann. § 76-9-201 (1999), as incorporated by Provo, Utah Code Ch. 9.40.010 (1999).

ISSUES AND STANDARD OF REVIEW

¶5 Whatcott argues there was insufficient evidence to show that the telephone message was lewd, lascivious, or profane. Further, he contends the telephone harassment statute is unconstitutionally overbroad, both on its face and as applied, and is void for vagueness. A challenge to the constitutionality of a statute presents a question of law, which we review for correctness, according no deference to the trial court's ruling. See Provo City Corp. v. Willden, 768 P.2d 455, 456 (Utah 1989).

¶6 Because we conclude the telephone harassment statute is unconstitutionally overbroad, we need not reach Whatcott's challenge to the sufficiency of the evidence or his vagueness argument.

ANALYSIS

¶7 Whatcott argues that section 76-9-201 is unconstitutionally overbroad, both on its face and as applied to him, and that it is void for vagueness. 1 We first consider Whatcott's overbreadth challenge. We need consider his vagueness challenge only if we conclude the statute is not unconstitutionally overbroad. See Logan City v. Huber, 786 P.2d 1372, 1375 (Utah Ct. App. 1990).

¶8 A statute will be invalidated for overbreadth only if it "'does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or the press.'" Logan City, 786 P.2d at 1375 (citation omitted). "[P]articularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well" Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2918 (1973); see State v. Haig, 578 P.2d 837, 841 (Utah 1978). Further, a "statute should not be deemed facially invalid unless it is not readily subject to a narrowing

construction.'" Haig, 578 P.2d at 841 (Maughan, J., concurring in result) (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S. Ct. 2268, 2276 (1975)). As an overarching principle, we will construe a statute as constitutional whenever possible. See State v. Mohi, 901 P.2d 991, 1009 (Utah 1995).

¶9 The telephone harassment statute, section 76-9-201, provides:

(1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number or recklessly creating a risk thereof, the person:

(a) makes a telephone call, whether or not a conversation ensues;

(b) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;

(c) makes a telephone call and insults, taunts, or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response;

(d) makes a telephone call and uses any lewd or profane language or suggests any lewd or lascivious act; or

(e) makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person.

(2) Telephone harassment is a class B misdemeanor.

Utah Code Ann. § 76-9-201 (1999). 2

¶10 We acknowledge at the outset that the state has a legitimate interest in protecting the public from certain unreasonable telephone calls. Presumably, the Legislature intended to prohibit threatening and menacing calls, and calls that would provoke a breach of the peace. This is certainly within the Legislature's power, and does not offend the First Amendment.

¶11 But section 76-9-201 sweeps even more broadly. Under subsection (a), the statute prohibits any "telephone call, whether or not a conversation ensues," where the caller has "recklessly creat[ed] a risk" of "annoy[ing], alarm[ing] . . . , intimidat[ing], offend[ing], abus[ing], threaten[ing], harass[ing], or frighten[ing]" the recipient. *Id.* Read thus, the statute would prohibit a potentially huge universe of otherwise legitimate telephone calls.

¶12 For example, unwanted telephone solicitations made to a private home during the dinner hour would be prohibited, as those calls surely risk annoying, offending, or harassing the recipients. Or, imagine a young adult who has recently moved out of the family home. To his exasperation (frequently and vocally expressed), his mother calls often to make sure he is alright. Under this statute, the worried mother's telephone calls--whether or not she actually conversed with or in fact annoyed him--could subject her to prosecution. Her conscious disregard of the substantial likelihood that the call would annoy her son would bring the call within the statute's ambit.

¶13 Subsection (d) is also problematic. For example, one could call a friend in a spirit of good fun, intending to play a joke on the friend. ³ At the very same time, one could also have the specific intent to annoy or offend the friend by using "lewd or profane language" or even by "suggest[ing] a[] lewd or lascivious act." *Id.* § 76-9-201(d). This lewd language, in fact, could be part and parcel of the joke. The specific intent to annoy or offend while telling a joke would bring the telephone call under the statute. One could also call a friend, intending to tell a lewd joke and assuming that the friend would not be offended--but nonetheless violate the statute because telling the joke created the reckless risk that the friend would take offense.

¶14 The potential overbreadth of the statute is not, of course, limited to the scenarios posed above. Other legitimate telephone calls, made with a specific intent to annoy or offend the recipient, could include "a consumer calling the seller or producer of a product to express dissatisfaction of product performance, a businessman calling another to protest failure to perform a contractual obligation, a constituent calling his legislator to protest the legislator's stand on an issue, etc." *State v. Dronso*, 279 N.W.2d 710, 714 (Wis. Ct. App. 1979). These few examples show that the overbreadth of subsections (a) and (d) is real and substantial, as they ""sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech."" *Logan City*, 786 P.2d at 1375 (quoting *Waters v. McGuriman*, 656 F. Supp. 923, 925 (E.D. Pa. 1987) (citation omitted)). Thus, we hold that subsections (a) and (d) of section 76-9-201 are unconstitutionally overbroad. See *State v. Lopes*, 1999 UT 24, ¶¶18, 20, 980 P.2d 191 (stating "if a portion of [a] statute might be saved by severing the part that is unconstitutional, such should be done[,] " so long as severance does not "destroy the purpose of the statute").

¶15 Our holding here should "not suggest that the first amendment gives one the unlimited right to annoy another, by speech or otherwise." *People v. Klick*, 362 N.E.2d 329, 331 (Ill. 1977). However, the First Amendment does not prohibit the kind of essentially harmless communications described above. Simply put, "[t]he First Amendment is made of sterner stuff." *Bolles v. People*, 541 P.2d 80-83 (Colo. 1975)

CONCLUSION

¶16 Subsections (a) and (d) of the telephone harassment statute, section 76-9-201 of the Utah Code, are unconstitutionally overbroad both facially and as applied. We thus reverse Whatcott's conviction. Because of our disposition, we do not reach Whatcott's arguments that insufficient evidence supported his conviction and that the statute is also unconstitutionally vague.

¶17 Reversed.

Norman H. Jackson,

Associate Presiding Judge

¶18 WE CONCUR:

Judith M. Billings, Judge

Gregory K. Orme, Judge

FOOTNOTES

1 "[W]e assume, arguendo, the applicability of federal first amendment standing principles in Utah courts." Logan City v. Huber, 786 P.2d 1372, 1375 n.10 (Utah Ct. App. 1990). Because Whatcott is mounting a First Amendment challenge to the telephone harassment statute, he has standing to challenge it "on behalf of others not before the court even if the law could be constitutionally applied to" him, Salt Lake City v. Lopez, 935 P.2d 1259, 1263 n.2 (Utah Ct. App. 1997), unless we are able to construe the statute in a manner that "will apply only to unprotected activity." Provo City Corp. v. Willden, 768 P.2d 455, 458 (Utah 1989). Because we cannot impose a limiting construction in this case, Whatcott has standing to challenge the statute both on its face and as applied to him.

2 The information charging Whatcott did not indicate under which subsection Whatcott was charged. Similarly, the jury was instructed to evaluate whether Whatcott's conduct satisfied any of the subsections, without specifying a particular one. Both Whatcott and the City contend that Whatcott's actions could fall only under subsections (a) or (d). We agree that the call would most logically fall under one of these subsections. Thus, we interpret Whatcott's appeal as a challenge to subsections (a) and (d) only, and we do not address the constitutionality of subsections (b), (c), or (e).

3 In fact, Whatcott's defense in this case is that he intended only to "play a prank, to have fun, give a joke." Puerile and offensive as the call may have been, it is nonetheless protected expression under the First Amendment.

APPENDIX KK

Jones v. Logan City Corp., 19 Utah 2d 169, 428 P.2d 160 (1967)

[1] SUPREME COURT OF UTAH

[2] No. 10622

[3] 1967.UT.74 <<http://www.versuslaw.com>>, 428 P.2d 160, 19 Utah 2d 169

[4] May 24, 1967

[5] **EVAN P. JONES, PLAINTIFF AND APPELLANT,**
v.
LOGAN CITY CORPORATION, DEFENDANT AND RESPONDENT

[6] Theodore S. Perry, Logan, for appellant.

[7] H. Preston Thomas, Logan, for respondent.

[8] Tuckett, Justice, wrote the opinion.

[9] Henriod, J., concurs.

[10] Callister, Justice (concurring in result).

[11] Ellett, Justice (concurring and Dissenting).

[12] Crockett, Chief Justice (dissenting).

[13] The opinion of the court was delivered by: Tuckett

[14] TUCKETT, Justice:

[15] This is an action brought by the plaintiff wherein he seeks to restrain Logan City from destroying a home owned by him. The City's Board of Condemnation, after a hearing and inspection of the building in question, made findings that the building owned by the plaintiff constituted a menace to public safety and further found that the building should be

APPENDIX LL

United States v. Reese, 92 U.S. 214, 221, 25 L.Ed. 563 (1876)

U.S. Supreme Court

United States v. Reese, 92 U.S. 214 (1875)

United States v. Reese

92 U.S. 214

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF KENTUCKY

Syllabus

1. Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of that protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, and may be varied to meet the necessities of a particular right.

2. The Fifteenth Amendment to the Constitution does not confer the right of suffrage, but it invests citizens of the United States with the right of

Page 92 U. S. 215

exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers Congress to enforce that right by "appropriate legislation."

3. The power of Congress to legislate at all upon the subject of voting at state elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude.

4. The third and fourth sections of the Act of May 31, 1870, 16 Stat. 140, not being confined in their operation to unlawful discrimination on account of race, color, or previous condition of servitude, are beyond the limit of the Fifteenth Amendment and unauthorized.

5. As these sections are in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, and cannot be limited by judicial construction so as to make them operate only on that which Congress may rightfully prohibit and punish, *held* that Congress has not provided by "appropriate legislation" for the punishment of an inspector of a municipal election for refusing to receive and count at such election the vote of a citizen of the United States of African descent.

6. Since the passage of the act which gives the presiding judge the casting vote in cases of division and authorizes a judgment in accordance with his opinion, Rev.Stat., sec. 650, this Court, if it finds that the judgment as rendered is correct, need do no more than affirm it. If, however, that judgment is reversed, all questions certified, which are considered in the final determination of the case here, should be answered.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

This case comes here by reason of a division of opinion between the judges of the Circuit Court in the District of

Kentucky. It presents an indictment containing four counts, under secs. 3 and 4 of the Act of May 31, 1870, 16 Stat. 140, against two of the inspectors of a municipal election in the State of Kentucky for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

APPENDIX MM

State of Utah v. Hemmert, No 15725 1978

Municipal Code Penalty
IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Respondent,

v.

Earl Hemmert,
Defendant and Appellant.

No. 15725

FILED
December 13, 1978

Geoffrey J. Butler
Geoffrey J. Butler, Clerk

MAUGHAN, Justice:

Defendant was charged in a justices court, with a violation of a Salt Lake County zoning ordinance. Specifically, defendant was accused of maintaining a dwelling with an attached carport on his property with less than the requisite side yard. The side yard ordinance is not in issue here. The defense stipulated as to the facts, and defendant was found guilty. Defendant appealed to the district court, before whom the case was submitted based on stipulated facts. We declare the sentencing ordinance invalid, but sustain the judgment of the court.

Before the district court defendant urged there was discriminatory enforcement of the zoning ordinance. To sustain his claim defendant cited nine violations of zoning ordinances in another subdivision, approximately three miles from his residence, which the county had not prosecuted.

The trial court ruled intentional discriminatory enforcement would be in violation of the equal protection guaranteed by the Constitution of the United States and the State of Utah. In contrast, mere laxity of enforcement, even though it may result in unequal application of the law to those entitled to be treated alike, does not constitute a denial of equal protection.¹ The trial court found there was no evidence of intentional discrimination; and, therefore, found defendant was guilty as charged.

The county has urged the decision of the district court is final.

Article VIII, Section 9, Constitution of Utah, provides two exceptions to the finality of the decision of the district court on appeals from a justice of the peace, they are "in cases involving the validity or constitutionality of a statute."

At the time of sentencing defense counsel moved the sentence not be imposed and the conviction vacated on the grounds the ordinance setting forth the penalty was both unconstitutional and invalid by reason that the County Commission exceeded its statutory authority. Specifically, defendant urged the ordinance was discriminatory and denied equal protection of the law since by failure to prosecute a violator for a 1. *People v. Utica Daws Drug Company, Inc.*, 16 Ap. Div. 2d 12, 225 N.Y.S. 2d 128, 4 A.L.R. 3d 393 (1962).

period of five years, the violation becomes a nonconforming use. Secondly, the County Commission exceeded its statutory authority by conferring on the Planning Commission the power to establish a nonconforming use, which in effect, permits the latter to amend the zoning ordinance. Thirdly, defendant asserted the ordinance was applied in a discriminatory manner by reason that long term violators were not prosecuted although they had failed to follow the procedure set forth in the ordinance to establish the nonconforming use as provided therein.

The challenged ordinance, Section 22-1-11, provides:

22-1-11. Penalties. Any person, firm or corporation, whether as principal, agent employee or otherwise, violating or causing or permitting the violation of the provision of this Title shall be guilty of a misdemeanor and punishable as provided by law. Such person, firm or corporation who intentionally violates this Title shall be deemed to be guilty of a separate offense for each and every day during which any violation of this Title is committed, continued; or permitted by such person, or corporation and shall be punishable as herein stated, provided, however, that when any structure or use is in continuous violation of this Ordinance for a period exceeding five (5) years, and upon proper affidavits being submitted to the Salt Lake County Planning Commission to the effect that no action has been instigated or complaint received during said period with respect to the violation, and when said Commission finds that in the interest of justice and the general public good and welfare such structure or use should be allowed to continue, then and in that event said Commission may declare such structure or use non-conforming. However, the period of limitation of five (5) years prescribed herein shall not commence to run until the effective date of this Ordinance and in no way shall be interpreted to permit the continuation of any violation which exists on the effective date hereof.

It clearly exceeds powers detailed in four legislative enactments. The power conferred on the boards of county commissioners to provide for zoning and plans are set forth in Chapter 27, Title 17, U.C.A. 1953.

Section 17-27-18 provides statutory regulation for a nonconforming use. Its express terms a nonconforming use is, in effect, defined as an existing and lawful use at the time of adoption of a zoning resolution or its amendment. Such a nonconforming use may be continued, except as provided in the statute. All the provisions in the statute concerning nonconforming uses require the terms and conditions to be set forth in a zoning resolution.

17-27-15 confers on the Board of County Commissioners power to authorize the board of adjustment (by zoning resolution), to make special exceptions, when such will be in harmony with the general purpose and intent of the regulations. The power to make exceptions is "subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the zoning regulation."

17-27-23 provides that any person violating any regulation or any provision of a zoning resolution shall be guilty of a misdemeanor.

The effect of the ordinance is to establish a conditional five year statute of limitations for violation of a zoning ordinance. The ordinance further violates the statutory standard which establishes a nonconforming use as an existing and lawful use at the time of the adoption of a zoning resolution or amendment. The ordinance attempts to establish a procedure to convert an existing, unlawful use into a nonconforming use in contravention of the statute. Furthermore, there is no statutory provision conferring on the Board of County Commissioners the authority to delegate to the Planning Commission the power to grant a nonconforming use status, on a case by case basis. The established statutory procedure to create an exception to a zoning resolution is set forth in Section 17-27-15. Finally the ordinance exceeds the power granted the Board of County Commissioners by creating a five year limitation period, and providing each day of violation constitutes a separate offense.

17-27-23 provides:

It shall be unlawful to erect . . . any . . . structure . . . in violation of . . . any zoning resolution, or any amendment thereof, enacted or adopted by any board of county commissioners under the authority of the act. Any person . . . violating . . . any zoning resolution, or any amendment of this act, shall be guilty of a misdemeanor . . . [Emphasis supplied.]

This statute designates a violation of a zoning resolution as a single crime, viz., a misdemeanor. The ordinance exceeds the statutory limits by providing each day of violation constitutes a separate offense. The five year limitation period contravenes Section 76-1-302(b), which provides a prosecution for a misdemeanor must be commenced within two years after it is committed.

The provisions of the challenged ordinance are clearly invalid by reason of the Board of Commissioners exceeding the statutory authority conferred upon them under Chapter 27, Title 17. The invalidity of the ordinance does not preclude the imposition of sentence on defendant, since the statute, Section 17-27-23, provides the penalty. However, in view of the state statute's provision for one offense rather than a series of offenses, the trial court may want to modify this sentence.

CROCKETT, Justice: (Concurring, with reservation)

I concur in affirming the conviction and the imposition of sentence. But inasmuch as that is done, I see neither reason nor necessity for criticizing the ordinance referred to, nor for declaring that it exceeds the powers granted to the

County Commissioners.¹ It impresses me as within the zoning and planning authority conferred upon the Commission by the statutes referred to, and that is well designed to accomplish its proper objectives. This includes the provision that when any structure has existed continuously for a period of five years, with no complaint and no action thereon, the Commission then has discretion to determine whether "in the interest of justice and the general public good and welfare such structure or use should be allowed to continue."

That provision is in harmony with what should be the general purpose of all laws and regulations, that of allowing an owner the highest possible degree of freedom of use of his property so long as it is not an infringement upon recognition of similar rights in others inconsistent with the general welfare. The fact that a structure has existed for a period of five years with no one making any complaint about it seems at least a prima facie basis for assuming that it is not bothering or adversely affecting other individuals or the public welfare. Allowing the Commission to then make such a determination, and granting or denying what is sometimes also referred to as "a variance," recognizes that there may be marginal situations and/or circumstances of practical exigency which justify the Commission in using some judgment and discretion in carrying out its zoning and planning responsibilities.

Ellett, Chief Justice, concurs in the views expressed in the concurring opinion of Mr. Justice Crockett.

1. That the court should avoid intruding into the legislative prerogative unless necessary to resolve a controversy before it, see 3 Am. Jur. 383 and cases therein cited; cited in *Heathman v. Giles*, 13 Utah 2d 368, 374 P.2d 839; and that a legislative enactment should be presumed valid and not declared otherwise unless it appears so beyond a reasonable doubt, see *Newcomb v. Ogden City, etc.*, 121 Utah 503, 243 P.2d 941.

HALL, Justice: (Concurring, with reservation)

I concur in affirming the judgment of the trial court. However, there is no necessity to discuss the constitutional merits of the ordinance which supports the conviction as that matter was not raised below and hence is not before us on this appeal.¹

Wilkins, Justice, does not participate herein.

1. Article VIII, Section 9, Constitution of Utah.

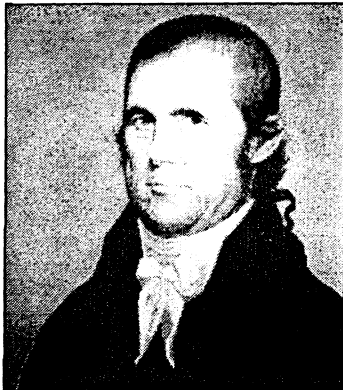
APPENDIX NN

Marbury vs. Madison, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60

WILLIAM MARBURY v. JAMES MADISON, SECRETARY OF STATE OF THE UNITED STATES.
SUPREME COURT OF THE UNITED STATES
5 U.S. 137
FEBRUARY, 1803 Term

Is Marbury entitled to his commission?	Does Section 13 of the Judiciary Act authorize the Court to issue a writ of mandamus?	Is Section 13 of the Judiciary Act constitutional?	If Section 13 of the Judiciary Act is unconstitutional, does the Supreme Court have the power to declare it void?
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Chief Justice Marshall delivered the opinion of the court.



In the order in which the court has viewed this subject, the following questions have been considered and decided:

- 1st. Has the applicant a right to the commission he demands?
- 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
- 3dly. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of enquiry is: Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the district of Columbia. This law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years."

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution, declares, that "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for." The third section declares, that "he shall commission all the officers of the United States." An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any

commission before the same shall have been signed by the President of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

- 1st, The nomination. This is the sole act of the President, and is completely voluntary.
- 2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
- 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."

This is an appointment by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself.... The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberations has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

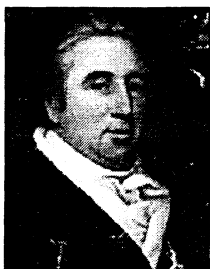
The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It asserts, by an act supposed to be of public notoriety, the verity of the Presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this regard, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose....

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.



Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry; which is, 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of

the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This office, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court: 1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for

which the laws of his country afford him a remedy.

It remains to be enquired whether, 3dly. He is entitled to the remedy for which he applies. This depends on, 1st. The nature of the writ applied for, and, 2dly. The power of this court.

1st. The nature of the writ.

If one of the heads of departments commits any illegal act, under the color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission which has received all the legal solemnities, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department....

It was at first doubted whether the action of detinue was not a specified legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired, Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or

restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial powers, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those

departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written constitution -- would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey? There are many other parts of the constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law. The constitution declares that "no bill of attainder or ex post facto law shall be passed." If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Note: Top image: Chief Justice John Marshall; bottom image: William Marbury

Judicial Review Page

Exploring Constitutional Conflicts

APPENDIX PP

Youngstown Sheet & TubeCo. Vs. Sawyer, 343 U.S. 579, 594 (1952)

YOUNGSTOWN SHEET & TUBE CO. ET AL. v. SAWYER, 72 S. Ct. 863, 343 U.S. 579 (U.S. 06/02/1952)

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 744

[3] 72 S. Ct. 863, 343 U.S. 579, 96 L. Ed. 1153, 1952.SCT.40707
<<http://www.versuslaw.com>>

[4] decided: June 2, 1952.

[5] **YOUNGSTOWN SHEET & TUBE CO. ET AL**
v.
SAWYER

[6] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT.^{*fn*}

[7] John W. Davis argued the cause for petitioners in No. 744 and respondents in No. 745. On the brief were Mr. Davis, Nathan L. Miller, John Lord O'Brian, Roger M. Blough, Theodore Kiendl, Porter R. Chandler and Howard C. Westwood for the United States Steel Co.; Bruce Bromley, E. Fontaine Broun and John H. Pickering for the Bethlehem Steel Co.; Luther Day, T. F. Patton, Edmund L. Jones, Howard Boyd and John C. Gall for the Republic Steel Corp.; John C. Bane, Jr., H. Parker Sharp and Sturgis Warner for the Jones & Laughlin Steel Corp.; Mr. Gall, John J. Wilson and J. E. Bennett for the Youngstown Sheet & Tube Co. et al.; Charles H. Tuttle, Winfred K. Petigrue and Joseph P. Tumulty, Jr. (who also filed an additional brief) for the Armco Steel Corp. et al.; and Randolph W. Childs, Edgar S. McKaig and James Craig Peacock (who also filed an additional brief) for E. J. Lavino & Co., petitioners in No. 744 and respondents in No. 745.

[8] Solicitor General Perlman argued the cause for respondent in No. 744 and petitioner in No. 745. With him on the brief were Assistant Attorney General Baldridge, James L. Morrisson, Samuel D. Slade, Oscar H. Davis, Robert W. Ginnane, Marvin E. Frankel, Benjamin Forman and Herman Marcuse.

[9] By special leave of Court, Clifford D. O'Brien and Harold C. Heiss argued the cause for the Brotherhood of Locomotive Engineers et al., as amici curiae, supporting petitioners in No. 744 and respondents in No. 745. With them on the brief were Ruth Weyand and V. C. Shuttleworth.

APPENDIX QQ

In Re Young, 1999 UT 6, ¶13, 976 P.2d 581

In re Young
1999 UT 6
976 P.2d 581
Case Number: 970032
Decided: 01/22/1999
Utah Supreme Court

Cite as 1999 UT 6, 976 P 2d 581

In re Inquiry Concerning a Judge, the Honorable David S. Young, District Judge
From the Judicial Conduct Commission

Attorneys:

Steven H. Stewart, Francis M. Wikstrom, Salt Lake City, for Judicial Conduct Commission
Daniel L. Berman, Peggy A. Tomsic, D. Frank Wilkins, Salt Lake City, for Judge Young
Brent M. Johnson, Richard H. Schwermer, Margaret K. Gentles, Salt Lake City, for amici Utah
Judicial Council and Administrative Office of the Courts
M. Gay Taylor, Robert H. Rees, Salt Lake City, for amici legislative members of Judicial Conduct
Commission
Jan Graham, Att'y Gen., Annina M. Mitchell, Asst. Att'y Gen., Salt Lake City, for amici Governor
Leavitt and Attorney General Graham

On Petition for Rehearing

ZIMMERMAN, Justice

¶1 This matter is before us on a petition for rehearing. The original decision in this case was handed down on July 10, 1998, and was published as *In re Young*, 961 P.2d 918 (Utah 1998) (hereinafter referred to as original opinion).¹ In that decision, we held that sections 78-7-27(1)(a) and (b) of the Code were violative of article V, section 1 of the Utah Constitution. Those Code subsections provide that two members of the Senate, appointed by the President, and two members of the House, appointed by the Speaker, shall serve on the ten-member Judicial Conduct Commission. As a consequence, we held void proceedings of the commission that led it to recommend that this court enter a public sanction against Judge David S. Young.

¶2 The Judicial Conduct Commission moved for permission to file a petition for rehearing. This court granted the motion, as well as the motions of various parties for permission to file briefs as amici curiae in support of the petition for rehearing.² The respondent, Judge Young, filed an opposition to the petition for rehearing. Oral argument was held on December 21, 1998. We now grant the petition and issue this opinion on rehearing.

¶3 The petition for rehearing and the briefs of the various amici have raised several issues of substantial import. First and foremost, the amicus brief of the legislative members of the Judicial Conduct Commission has brought to our attention much new material about the origins of the present judicial article of the Utah Constitution, article VIII, which was rewritten in its entirety and passed by the voters in 1984. Section 13 of that article elevated the Judicial Conduct Commission to constitutional status. The legislative amici contend that this new material demonstrates that the drafters of the amended article, the judges who participated in the hearings preceding its being finalized, the legislators who then passed the proposed amendment and put it on the ballot, and the voters who approved it at a general election all understood that the amended article contemplated legislative participation on the Judicial Conduct Commission. Therefore, they argue, our original decision holding such participation unconstitutional was in error.

¶4 The objective importance of this historical material cannot be overstated. The petition of the Judicial Conduct Commission for rehearing had narrowly asked only that we declare whether the commission can continue to function without the legislative members. But at oral argument, the chair of the commission, who previously had been unaware of the historical materials provided us by the amici, apologized for failing to bring this critical material to our attention in the original proceeding. He also announced in open court that he was now convinced that our original decision was wrong and should be reversed.

APPENDIX RR

Salt Lake City vs. Ohms, 881 P.2d 844, 849 (Utah 1994)

08/05/94 SALT LAKE CITY v. MASON A. OHMS

[1] SUPREME COURT OF UTAH

[2] No. 930580

[3] 1994.UT.16295 <<http://www.versuslaw.com>>, 881 P.2d 844, 245 Utah Adv. Rep. 22

[4] August 5, 1994

[5] **SALT LAKE CITY, PLAINTIFF AND APPELLEE,**
v.
MASON A. OHMS, DEFENDANT AND APPELLANT

[6] Third Circuit, Salt Lake County. Commissioner Sandra N. Peuler

[7] Cheryl D. Luke, Salt Lake City, for Salt Lake City.

[8] David L. Sanders, Salt Lake City, for Ohms.

[9] Russon, Stewart, Howe, Durham, Zimmerman

[10] The opinion of the court was delivered by: Russon

[11] AMENDED OPINION

[12] RUSSON, Justice:

[13] Mason A. Ohms appeals his conviction of giving false or misleading information to a police officer, a class C misdemeanor, in violation of Salt Lake City Ordinance § 11.04.100. We reverse and remand.

[14] I. FACTS

[15] At approximately 9:30 p.m. on August 25, 1992, a disturbance involving the distribution of beer erupted in the third-level plaza area of the Delta Center. Sergeant Foster Mayo of the

APPENDIX SS

State vs. Gallion, 572 P.2d 683, 688 (Utah 1977)

[1] SUPREME COURT OF UTAH

[2] No. 14966

[3] 1977.UT.262 <<http://www.versuslaw.com>>, 572 P.2d 683

[4] November 17, 1977

[5] **STATE OF UTAH, PLAINTIFF AND APPELLANT,**
v.
DEBRA KAY GALLION, DEFENDANT AND RESPONDENT.

[6] Robert B. Hansen, William W. Barrett, Noall T. Wootton for plaintiff and appellant.

[7] Michael D. Esplin for defendant and respondent.

[8] Maughan, Justice, wrote the opinion. WE Concur: D. Frank Wilkins, Justice, Gordon R. Hall, Justice. Crockett, Justice: [Concurring Separately]. Ellett, Chief Justice: .

[9] The opinion of the court was delivered by: Maughan

[10] MAUGHAN, Justice The state appeals from an order of the district court quashing an information filed against defendant. Defendant was charged with a violation of Section 58-37-8(4) D (a)(iii), U.C.A. 1953, as enacted in 1972, that she altered a forged prescription for a Schedule II controlled substance, demerol. Conviction under this section provides the penalty for a felony in the third degree. We affirm.

[11] In Section 58-37-4(3)(b), the substances which were determined by the legislature to be included in Schedule II were set forth. The substance, demerol, does not appear therein. The state asserted in a memorandum to the trial court that the attorney general had added demerol to Schedule II in accordance with the Utah Controlled Substances Act, Title 58, Chapter 37. Specifically the state claimed:

[12] ... Since the adoption of the Controlled Substance Act, Demerol has been added to the controlled substance list, a true list being in the possession of Dr. Wesley Parish, a chemist, located at 815 West Columbia Lane, Provo, Utah. *fn1

APPENDIX TT

**Timpanogos Planning and Water Management Agency v. Central Utah Water
Conservancy Dist. 690 P.2d 562, 564-565 (Utah 1984)**

10/10/84 TIMPANOGOS PLANNING AND WATER MANAGEMENT

- [1] SUPREME COURT OF UTAH
- [2] No. 19482
- [3] 1984.UT.198 <<http://www.versuslaw.com>>, 690 P.2d 562
- [4] October 10, 1984
- [5] **TIMPANOGOS PLANNING AND WATER MANAGEMENT AGENCY, A UTAH
INTERLOCAL CO-OPERATION ACT ENTITY, ET AL., PLAINTIFFS AND
APPELLANTS,
v.
CENTRAL UTAH WATER CONSERVANCY DISTRICT, A UTAH WATER
DISTRICT, ET AL., DEFENDANTS AND RESPONDENTS.**
- [6] James S. Jardine, Salt Lake City; Kent H. Murdock, Salt Lake City; John A. Adams, Salt Lake City, for Plaintiff.
- [7] Edward W. Clyde, Salt Lake City; Merlin K. Jensen (Weber Basin), Ogden; Douglas A. Taggart (Weber Basin), Ogden; Hugh W. Colton (Uintah), Vernal; Therold N. Jensen (Carbon), Price, for Defendant.
- [8] Howe, Justice, wrote the opinion. WE Concur: Gordon R. Hall, Chief Justice, Christine M. Durham, Justice, J. Dennis Frederick, District Judge. Stewart, Justice, does not participate herein; Frederick, District Judge, sat. Zimmerman, Justice, does not participate herein.
- [9] The opinion of the court was delivered by: Howe
- [10] HOWE, Justice: Plaintiff Timpanogos Planning and Water Management Agency and others brought this suit to have U.C.A., 1953, § 73-9-9, as constituted prior to its amendment in 1983, declared unconstitutional on the ground that it violated the separation of powers mandated by Utah Constitution article V, section 1. The statute provided for the appointment of boards of directors of water conservancy districts to be made by the district court. By its 1983 amendment, L. 1983, ch. 350, § 1, the legislature provided for the appointment to be made by the board of county commissioners of a single county district and by the Governor with the advice and consent of the Senate in multi-county districts.
- [11] Inasmuch as six of the court-appointed directors of defendant Central Utah Water

APPENDIX UU

In re Hammermaster 985 P.2d 924, 936 (Wash. 1999)

In re Hammermaster, 139 Wash.2d 211, 985 P.2d 924 (Wash. 10/07/1999)

[1] Washington Supreme Court

[2] No. JD #15

[3] 139 Wash.2d 211, 985 P.2d 924, 1999.WA.0043634 <<http://www.versuslaw.com>>

[4] October 07, 1999

[5] **IN RE HONORABLE A. EUGENE HAMMERMASTER, RESPONDENT JUDGE.**

[6] The opinion of the court was delivered by: Madsen, J.

[7] EN BANC

[8] Municipal Court Judge A. Eugene Hammermaster appeals a determination by the Commission on Judicial Conduct (the Commission) ordering censure, and recommending suspension for 30 days without pay. The Commission found that Judge Hammermaster violated the Code of Judicial Conduct (CJC) Canons 2(A), 3(A)(1) and 3(A)(3) by making improper threats of life imprisonment and indefinite jail sentences, improperly accepting guilty pleas, holding trials in absentia, and engaging in a pattern of undignified and disrespectful conduct toward defendants. Judge Hammermaster admits that he engaged in the alleged conduct, but maintains that his conduct was a reasonable exercise of judicial independence which did not violate the Canons. We affirm the Commission's findings of misconduct, but also find that Judge Hammermaster's practice of ordering defendants to leave the country constitutes a violation of Canon 3(A)(3). We substantially agree with the Commission's order of censure but find that a six-month suspension without pay is more appropriate than the sanction recommended by the Commission.

[9] Facts

[10] Judge Hammermaster is an appointed part-time municipal court Judge for the Sumner, Orting, and South Prairie courts of Pierce County, Washington. He has been a Judge for one or more of these courts for 30 years. Report of Commission Proceedings (RP) at 322. On June 25, 1996, the Commission on Judicial Conduct received a letter of complaint about Judge Hammermaster from an inmate at the Sumner City Jail who was serving jail time because he had not paid a fine imposed by the Judge. In the letter the inmate stated that "Judge Hammermaster has told me before that if I didn't pay my 300\$(sic) fine he would throw me in jail for life. I've sat out the time in jail to pay off the fine but thats (sic) not exaptbl (sic) to him." CJC, Finding of Probable Cause (May 13, 1998). The letter goes on to

APPENDIX VV

**Institute for Law and Policy Planning, Salt Lake County Criminal Justice
Assessment 6.11 (2004)**

SALT LAKE COUNTY COUNCIL

Committee of the Whole

~ MINUTES ~

Tuesday, May 4, 2004

12:35 p.m.

COMMITTEE MEMBERS

PRESENT:

Randy Horiuchi
Jim Bradley
Joe Hatch
Michael Jensen
David Wilde
Russell Skousen
Cortlund Ashton
Marvin Hendrickson
Steve Harmsen, Chair

Criminal Justice System Assessment Report

The Institute of Law & Policy Planning was engaged by Mayor Workman on behalf of the Criminal Justice Advisory Council to conduct a comprehensive Criminal Justice System assessment. The impetus for the study was crowding at the Adult Detention Center, a facility that opened in January 2000 and shortly thereafter reached near capacity. Crowding occurred despite a decrease in the overall crime rate and the existence of various jail population control mechanisms. The system assessment's goals were: 1) find ways to reduce current and future jail population, 2) provide recommendations for alternatives to incarceration, and 3) provide a planned process for implementation of the study's recommendations.

Mr. Alan Kalmanoff, The Institute for Law & Policy Planning (ILPP), presented a summary of the final report. He stated ILPP performed two major statistical analyses to determine the primary causes of the growing inmate population: an inmate tracking analysis to look for delays in the case flow and a profile analysis to analyze the seriousness of the current inmate population. The analyses clearly showed that the growth in jail population was due to a dramatic increase in the average length of stay for inmates, not due to increase in crime or population. Since 1977, the average length of stay has more than doubled to 29 days. Doubling the average length of stay and then multiplying it by the thousands of offenders that enter the jail has led to a rapid increase in the jail population.

He reviewed "leverage points" in the justice system that are attributable to deficiencies in the justice system, such as: no uniform arrest policy; pretrial release options are not broad; municipalities and their Justice Courts overly rely on the jail; Justice Courts' sentences to

jail vary considerably from jurisdiction to jurisdiction; the Sheriff's Office's authority is circumvented; continuances and delays in the District Court; two-tiered court system is problematic (district court and justice courts) because it is neither coordinated nor managed as a cohesive system; case priorities are not set; drug courts have inappropriate participants; waiting lists for substance abuse treatment are too long; the County has not developed a plan for reduced resources; and the Criminal Justice Advisory Council has developed into a briefing forum rather than a management forum that can provide leadership.

He stated that the analysis yielded over 60 recommendations to enhance the efficiency and effectiveness of the criminal justice system. He reviewed the primary recommendations to help alleviate congestion and jail overcrowding:

1. Adopt a countywide field citation release policy that includes circumstances and offenses suitable for citation releases and supervisory review requirements on discretionary arrests.

2. Create a pre-processing intake center at the Jail.

3. Develop sentencing guidelines and a continuum of sanctions at the Justice Court level that favor community-based sanctions rather than incarceration at the jail.

4. Discontinue accepting Class B misdemeanants at the Jail with the exception of certain offenses such as DUI and violation of protection from abuse orders.

5. Establish through legislation that pre-trial and sentenced inmates for all courts are ultimately in the "custody of the Sheriff," whereby the Sheriff can move offenders between the jail and various alternative programs based on custody factors and behavior.

6. Assist the municipalities in developing a strategic plan for a minimum-security detention facility that can be implemented if other avenues of controlling the jail population do not prevail.

7. Encourage appeals of justice court convictions that result in excessive or disproportionate sentences, especially when the sentence is in lieu of payment of a fine, so long as the interest of the individual client in each case is served.

8. Create a new case management system at the District Court that supports

cases time standards.

9. Develop consolidated or regional mental health and drug courts at the Justice Court level.

10. Institute municipal-level community service programs that provide a method for defendants to work off fines and costs.

11. Develop a 48-hour DUI intervention program (in lieu of jail).

12. Expand the community custody program to include additional lower risk inmates especially those who have been incarcerated for failure to pay fines/costs.

13. Work toward the goal of conducting a substance abuse assessment prior to placing offenders in programs to ensure that treatment resources are appropriately utilized.

14. Restructure the Criminal Justice Advisory Council (CJAC) so that it becomes an engine of coordination, collaboration, and change.

15. Hire a criminal justice coordinator to facilitate CJAC and implement recommendations of this report and previous studies.

In conclusion, Mr. Kalmanoff emphasized the need for CJAC to take the lead in implementing the recommendations and becoming the management group of the criminal justice system. This will require some restructuring of CJAC. Presently, CJAC consists of over 25 members representing all of the criminal justice players, such as treatment organizations, the legal community, the business community, and government agencies. There are so many people representing so many stakes, CJAC has become quite cumbersome. Its size needs to be reduced to an executive group of no more than 10 people, who can grab the reins and make things happen. This executive group should include the Mayor, District Attorney, Sheriff, a key judge, and a few others. Other people can be assigned to task forces to work on issues such as pre-trial release, a county wide jail policy, court delays, etc. He felt it would also be helpful to have an outside coordinator or facilitator for CJAC to help push things along.

Council Member Jensen stated he would be helpful for CJAC to look at the study recommendations and suggest what the Council can do to help implement some of the recommendations.

Mr. Gary Dalton, Director, Criminal Justice Services Division and a member of CJAC, stated CJAC will hold an executive meeting on May 13, 2004, to lift some of the issues out of the report and discuss them. He would appreciate the Council making a gesture of support, in concert with the Mayor, to direct CJAC to analyze and prioritize the recommendations in the assessment report.

Council Member Horiuchi, seconded by Council Member Jensen, moved to support the assessment report and to join with the Mayor in directing CJAC to analyze and prioritize the recommendations in the report. The motion passed unanimously.

— — — — —
Discussion Regarding Contract with Contract Cities for Sheriff's Law Enforcement Services

On April 23, 2004, Council Member Ashton, Jensen, and Hatch met with the cities that contract with the Sheriff's Office for law enforcement services, Sheriff's Office representatives, Auditor's Office representatives, and Attorney's Office representatives regarding the law enforcement contract for the upcoming year.

Council Member Harmsen stated that there is a misconception circulating that the County does not have a firm contract price and the price could exceed the 5 percent cap. (Under the term of the three-year contract, it is anticipated that the cost per deputy as well as the aggregate cost of pooled services will increase from the base level price by 5 percent each year for the three-year period.)

Council Member Jensen stated it was also discussed at the meeting that there is a potential for unforeseen, nondiscretionary increases that could raise the contract price by more than 5 percent. This could happen if the price of gasoline rose to \$4 per gallon, or the State increased retirement fund contributions. An agreement was reached that if an outside external force necessitated a price increase, everyone would pay the increase, but before a greater expenditure is allowed that would exceed the budget, the County must inform the cities and give them an opportunity to provide input. The cities discussed making lists of nondiscretionary and discretionary expenditures, but the decision whether or not to create such lists was left in the hands of the cities.

Mr. Darrin Casper, Fiscal Analyst, Council Office, stated the plan was for the contract prices to increase by 5 percent each year for three years, and hold the expenditure growth to 3.6 percent per year for three years to catch the revenues up with the expenditures. It was discussed at the meeting that unavoidable increases could go beyond the 3.6 percent growth expenditure cap and whether or not the budget could be amended for discretionary versus nondiscretionary reasons. If the 3.6 percent expenditure growth per year is circumvented, even due to circumstances beyond the County's control, it will manifest itself in a liability that is created at the end of the year.

Council Member Russ Wall, Taylorsville City, stated the biggest issue is that the budget cap seems to be a moving target. Last year the cities were hit with a \$1.5 million error, which the cities had to pick up; then they were hit with the liability issue; and then they were hit with the reconciliation issue. Taylorsville City has a \$13-million budget and law enforcement is one-third of that budget. Taylorsville City cannot afford any more surprises. Eventually, they have to set a price cap and say that is as far as they will go.

Council Member Hatch stated the figures the County gave the cities for the coming

Committee of the Whole
May 4, 2004

contract should be totally in line with the 5 percent per year cap.

Council Member Jensen stated John Brems, the attorney for the contract Cities, and Dick Nixon, Deputy District Attorney, are negotiating the contract. A draft should be completed within one to two weeks.

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Gifts to Clark Planetarium

Mr. Alan Dayton, Deputy Mayor, explained the following gifts were auctioned at the Clark Planetarium VIP fund raising gala on April 15, 2004, to benefit the planetarium. Formal acceptance of the gifts has been placed on the Council agenda.

<i>Larry H. Miller</i>	Gateway Basket	\$ 600
	Girl Scout Cookies	400
	Clark Star Party	10,000
	Kennedy Space Center	8,500
	Flight with Winston Scott	10,500
<i>Mike & Mary Beth Clark</i>	Clark Star Party	\$ 6,500
	Flight with Sen. Jake Garn	5,000
<i>Terry Diehl</i>	Car Detailing	\$ 300
	Jazz Basketball	1,000
<i>Mark Hansen</i>	Autographed AK-47 Shoes	\$ 600
<i>Mayor Nancy Workman</i>	Autographed Arroyo Shoes	\$ 500
<i>Charles Brown</i>	Flight with Terry Fregly	\$ 6,200
<i>Richard James</i>	Fishing with Sterling Poulson	\$ 2,600

Council Member Jensen, seconded by Council Member Horiuchi, moved to forward acceptance of the gifts to the 4:00 p.m. Council meeting. The motion passed unanimously.

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Resolution Regarding Reconstruction and Realignment of 11400 South

At the April 20, 2004, Committee of the Whole meeting, the Utah Department of Transportation reviewed the 11400 South Environmental Impact Statement listing five alternatives for the reconstruction and

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realignment of 11400 South. The Council instructed the District Attorney's Office to draft a resolution supporting Alternative 4.

Mr. Karl Hendrickson, Deputy District Attorney, stated a resolution has been drafted endorsing Alternative 4 of the Utah Department of Transportation's Environmental Impact Study regarding the reconstruction and realignment of 11400 South. The resolution has been placed on the Council agenda for final approval and execution.

Council Member Jensen, seconded by Council Member Horiuchi, moved to forward the resolution to the 4:00 p.m Council meeting for formal consideration. The motion passed unanimously.

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Resolution and Interlocal Agreement

Mr. Alan Dayton, Deputy Mayor, explained the following interlocal agreement. The resolution authorizing the execution of this agreement has been placed on the Council agenda for final approval and execution:

1) Utah Department of Public Safety regarding campaign to increase safety restraint use.

Council Member Jensen, seconded by Council Member Horiuchi, moved to forward the agreement to the 4:00 p.m. Council meeting for formal consideration. The motion passed unanimously.

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Review of Property Tax Committee Recommendations

Ms. JodiAnn Martin, Chair, Property Tax Committee, reviewed the recommendations of the Property Tax Committee regarding requests of taxpayers for consideration of tax-related matters. These recommendations have been placed on the Council agenda for final approval.

Council Member Jensen, seconded by Council Member Horiuchi, moved to forward the recommendations to the 4:00 p.m. Council agenda for formal consideration. The motion passed unanimously.

— — — —

Mr. Alan Dayton, Deputy Mayor, explained that the Zoo, Arts & Parks Tier I Advisory Board has recommended that the following organizations receive funding under the Tier I Zoo, Arts & Parks Program for 2004. The recommendations have been placed on the Council agenda for final approval. (The agreements with these organizations will be signed and executed by the Mayor):

*Ballet West
Children's Dance Theater
Friends of Tracy Aviary
Gina Bachauer
Grand Theater
Red Butte Garden
Ririe-Woodbury Dance
Salt Lake Acting Company
Salt Lake Art Center
Salt Lake City Arts Council
Sundance Institute
Tree Utah
Utah Humanities Council
Utah Museum of Fine Arts
Utah Museum of Nat His
Utah Symphony & Opera*

The Advisory Board has also recommended that the following organizations receive funding under the Tier I Zoo, Arts & Parks Program for 2004, subject to a financial health plan being submitted and accepted by the staff and Advisory Board.

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*Children's Museum of Utah
First Night
Hale Center Theater*

*Pioneer Theater
Repertory Dance Theater
This is the Place Foundation
Utah Arts Festival
Odyssey Dance
Utah Heritage Foundation*

Council Member Jensen, seconded by Council Member Horiuchi, moved to forward the recommendations to the 4:00 p.m. Council meeting for formal consideration. The motion passed unanimously.

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Other Business

Acceptance of Minutes

Council Member Jensen, seconded by Council Member Horiuchi, moved to accept the April 20, 2004, minutes. The motion passed unanimously.

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The meeting was adjourned at 2:30 p.m.

Chair, Committee of the Whole

Deputy Clerk

— — — —
— — — —
— — — —

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APPENDIX WW

Blankenship vs. Minton Chevrolet, Inc., 266 S.E.2d 902, 903 (W.V. 1979)

11/06/79 MERRILL BLANKENSHIP v. MINTON CHEVROLET

[1] SUPREME COURT OF APPEALS OF WEST VIRGINIA

[2] Nos. 14559, 14435, 14394

[3] 1979.WV.33 <<http://www.versuslaw.com>>, 266 S.E.2d 902, 164 W.Va. 446

[4] November 6, 1979

[5] **MERRILL BLANKENSHIP**

v.

MINTON CHEVROLET, INC., ET AL.; THOMAS L. ANDERSON, AND JAMES A. LIOTTA, ADM'R., ETC V. M. C. MORAN; DONALD SHAFFER, ETC. V. J. O. MARKO, ETC., ET AL. AND RICHARD S. STEPHENSON

[6] Appeals from decisions of the Circuit Court, Logan County, Harvey Oakley, Judge, the Circuit Court, Marion County, Fred L. Fox, II, Judge, and a writ of error from Circuit Court, Monongalia County, Frank J. DePond, Judge, were consolidated for decision.

[7] Charles R. Garten, Jr., Daniel F. Hedges, for Blankenship.

[8] Eric H. O'Briant, Valentine, Wilson & Partain, for Minton Chevrolet, et al.

[9] J. Scott Tharp, James A. Liotta, for Anderson, et al.

[10] Rose, Southern & Padden, Herschel Rose, Duane Southern, Philip C. Petty, for Moran.

[11] Richard S. Stephenson, pro se.

[12] No appearance by Shaffer.

[13] Neely, Justice.

[14] The opinion of the court was delivered by: Neely

APPENDIX XX

Jones, 550 P.2d at 210

APPENDIX YY

Town of South Carthage vs. Barrett, 840 S.W.2d 895 (Tenn. 1992)

09/28/92 STATE TENNESSEE v. CHESTER BARRETT

[1] SUPREME COURT OF TENNESSEE, AT NASHVILLE

[2] No. 01-S-01-9003-CV-00025

[3] 1992.TN.1728 <<http://www.versuslaw.com>>, 840 S.W.2d 895

[4] September 28, 1992

[5] **STATE OF TENNESSEE, BY AND THROUGH THE TOWN OF SOUTH
CARTHAGE, TENNESSEE, PLAINTIFF/APPELLANT,
v.
CHESTER BARRETT, DEFENDANT/APPELLEE.**

[6] CIRCUIT COURT. SMITH COUNTY. HON. BOBBY CAPERS, JUDGE.

[7] For Appellant: David Bass, Bass And Bass, Carthage, Tennessee.

[8] For Appellee: Jacky O. Bellar, Carthage, Tennessee.

[9] Anderson, Reid, Drowota, O'Brien, Daughtrey.

[10] The opinion of the court was delivered by: Anderson

[11] ANDERSON, J.

[12] The sole issue raised in this direct appeal is whether municipal or "corporation" courts may constitutionally exercise concurrent jurisdiction over state criminal offenses committed within the municipality's boundaries. The Smith County Circuit Court held that the legislation (Tenn. Code Ann. § 6-2-403) granting such concurrent jurisdiction to the Municipal Court of the Town of South Carthage violates the separation of powers provisions of the Tennessee Constitution. We agree and affirm.

[13] BACKGROUND

[14] The parties have stipulated the following factual and procedural background:

APPENDIX ZZ

Summers vs. Thompson, 764 S.W.2d 182, 183 (Tenn. 1988)

05/23/88 JERRY H. SUMMERS v. MAYOR ROBERT L.

- [1] SUPREME COURT OF TENNESSEE
- [2] No. 229
- [3] 1988.TN.772 <<http://www.versuslaw.com>>, 764 S.W.2d 182
- [4] May 23, 1988
- [5] **JERRY H. SUMMERS, PETITIONER-APPELLEE,**
v.
MAYOR ROBERT L. THOMPSON, ET AL., RESPONDENTS-APPELLANTS
- [6] HAMILTON CHANCERY, Hon. R. Vann Owens, Chancellor.
- [7] Petition for Rehearing Overruled July 18, 1988
- [8] Jacqueline E. Schulten, Soddy-Daisy City Attorney, Chattanooga, Tennessee, W. J. Michael Cody, Attorney General and Reporter, Kevin Steiling, Assistant Attorney General, Nashville, Tennessee for Appellants.
- [9] Jerry H. Summers, Chattanooga, Tennessee, Jack R. Brown, Chattanooga, Tennessee for Appellee.
- [10] Deborah S. Swettenam, Tennessee Association of Criminal Defense Lawyers, Dickson, Tennessee, J. Anthony Farmer, Tennessee Trial Lawyers' Association, Knoxville, Tennessee for Amicus Curiae.
- [11] Frank F. Drowota, III, Justice, Harbison, C.j., Fones, Cooper and O'Brien, JJ., Concur.
- [12] The opinion of the court was delivered by: Drowota
- [13] FRANK F. DROWOTA, III, Justice.
- [14] This direct appeal raises a significant issue of Tennessee constitutional law, that is, whether certain statutes permitting a municipal Judge to be terminated at will are valid. The

APPENDIX AAA

**Calligy vs. Mayor and Council of the City of Hoboken, 665 A.2d 408, 409 (N.J.
Super. 1995)**

Calligy v. Mayor and Council of City of Hoboken, 284 N.J.Super. 365, 665 A.2d 408(N.J.Super.Law Div. 06/23/1995)

- [1] New Jersey Superior Court, Law Division
- [2] DOCKET NO. HUD-L-2005-95
- [3] 284 N.J.Super. 365, 665 A.2d 408, 1995.NJ.4 <<http://www.versuslaw.com>>
- [4] June 23, 1995
- [5] **THOMAS P. CALLIGY, PLAINTIFF,**
v.
THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, DEFENDANT.
- [6] Thomas P. Calligy, Attorney, Pro Se.
- [7] David F. Corrigan for defendant (Murray, Murray & Corrigan, attorneys).
- [8] D'italia, A.j.s.c.
- [9] The opinion of the court was delivered by: D'italia
- [10] D'ITALIA, A.J.S.C.
- [11] This is a taxpayer action challenging an ordinance of the City of Hoboken that creates the offices of municipal court Judge and additional municipal court Judge "in the Department of Administration" of City government. Plaintiff argues that the assignment of the municipal court to a department of municipal government, a practice which has existed in Hoboken under various ordinances since at least 1959, violates the separation of powers doctrine. This matter is before the court on cross-motions for summary judgment.
- [12] The amended sections of the Hoboken Code about which complaint is made provide in pertinent part: *fn1
- [13] Sec.4-22. Municipal Court Judge.

APPENDIX BBB

Bernat vs. Allphin, 2005 UT 1, ¶32.106 P.3d 707

Bernat v. Allphin, 106 P.3d 707, 2005 UT 1 (Utah 01/07/2005)

- [1] IN THE SUPREME COURT OF THE STATE OF UTAH
- [2] No. 20030567
- [3] 106 P.3d 707, 2005 UT 1, 516 Utah Adv. Rep. 18, 2005.UT.0000009<
<http://www.versuslaw.com>>
- [4] January 7, 2005
- [5] **SEAN BERNAT, LESA BEUCHERT, JEREMY KEE, BRANDON KVENVOLD, DONALD LANG, DARRIN MANN, MATTHEW PHILLIPS, JOSEPH SCOVELL, DYLAN T. SERRE, MARK WAHLSTROM, AND HENRY T. ZAHKARIAN, PLAINTIFFS AND PETITIONERS,**
v.
THE HONORABLE MICHAEL G. ALLPHIN, THE HONORABLE ANN BOYDEN, THE HONORABLE MICHAEL K. BURTON, THE HONORABLE GLEN R. DAWSON, THE HONORABLE DONALD J. EYRE, THE HONORABLE DENISE P. LINDBERG, THE HONORABLE BRUCE C. LUBECK, DEFENDANTS AND RESPONDENTS.
- [6] Attorneys:
- [7] Benjamin A. Hamilton, Salt Lake City, for petitioners.
- [8] Brent M. Johnson, Salt Lake City, for respondents.
- [9] The opinion of the court was delivered by: Durrant, Justice
- [10] Original Proceeding in the Utah Court of Appeals
- [11] On Certiorari to the Utah Court of Appeals
- [12] ¶1 Petitioners challenge the constitutionality of Utah's two-tier justice court system, arguing that this system violates the prohibition against double jeopardy and denies defendants due process and equal protection under the law. They assert that, in light of these alleged violations, the court of appeals abused its discretion when it refused to issue writs of mandamus directing various district courts to dismiss the charges against Petitioners. We

APPENDIX CCC

Blanton vs. City of North Las Vegas, 489 U.S. 538, 542 (1989)

BLANTON ET AL. v. CITY NORTH LAS VEGAS, 109 S. Ct. 1289, 489 U.S. 538 (U.S. 03/06/1989)

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 87-1437

[3] 109 S. Ct. 1289, 489 U.S. 538, 103 L. Ed. 2d 550, 57 U.S.L.W. 4314, 1989.SCT.41329
<<http://www.versuslaw.com>>

[4] decided: March 6, 1989.

[5] **BLANTON ET AL**
v.
CITY OF NORTH LAS VEGAS, NEVADA

[6] CERTIORARI TO THE SUPREME COURT OF NEVADA.

[7] John J. Graves, Jr., argued the cause for petitioners. With him on the briefs was John G. Watkins.

[8] Mark L. Zalaoras argued the cause for respondent. With him on the brief was Roy A. Woofter.^{*fn*}

[9] Marshall, J., delivered the opinion for a unanimous Court.

[10] Author: Marshall

[489 U.S. Page 539]

[11] JUSTICE MARSHALL delivered the opinion of the Court.

[12] The issue in this case is whether there is a constitutional right to a trial by jury for persons charged under Nevada law with driving under the influence of alcohol (DUI). Nev. Rev. Stat. ? 484.379(1) (1987). We hold that there is not.

[13] DUI is punishable by a minimum term of two days' imprisonment and a maximum term of

APPENDIX DDD

**Sam Newton, Justice Court Appeal: The Good, the Bad, and the Unintended, 18
Utah Bar J. No. 1 at 25 (January/February 2005)**



Utah Bar Journal

Articles of the Utah Bar Journal

«« Improving our Profession, and Theirs, Too, I Guess | Main | Justice Court - the People's Court »»»

May 03, 2005

Justice Court Appeals: The Good, the Bad, and the Unintended

by Sam Newton

Your client has been charged with a criminal misdemeanor which is being heard in a justice court. What a lucky draw, right? The client gets two bites at the apple. He can run motions, and then he can try the case. If he wins, then he is done. But if he loses, then he has the option to appeal the case to District Court, wipe the slate clean, and start everything from scratch. What could be better? The Utah Court of Appeals agrees. In *Lucero v. Kennard*, 2004 UT App 94, the defendant wanted review of a justice court decision, and he did it by filing an extraordinary writ.¹ The Court of Appeals disagreed with defendant's decision to pursue a writ: "A trial de novo would have remedied any constitutional violations Petitioner may have suffered in the Justice Court." *Lucero*, 2004 UT App 94, ¶13. But is this statement true? Is the trial de novo the complete "fix-all"? Is it possible that pursuing a trial de novo may actually create problems for a defendant?

Everything is Not So Rosy

In Shakespeare's *Measure for Measure* one character laments: "O, what may man within him hide, Though angel on the outward side!"² The trial de novo process seems to be a perfect fix to most any problems which would occur in justice court. What could be better than a fresh start? But we may not consider (or realize) that pursuing a trial de novo may be unintentionally complicated or may bring unintended consequences.

I. No or Limited Review of Justice Court Judges' Legal Rulings

Supreme Court Justice William Brennan once said, "there are few, if any situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property"³ Because de novo review results in a case simply starting over as though it was never heard, the justice court judges are almost completely insulated from true appellate review. They have the power to make legal conclusions and to impose criminal sanctions

which impact defendants' most fundamental constitutional rights. Yet the trial de novo remains the only procedure in place in Utah law to remedy any justice court problem. While the trial de novo gives our clients a fresh start, the justice court judge's legal rulings or sentence remain unchecked.

Outside of the United States Supreme Court, the justice courts are the only other body in this jurisdiction to have virtually no appellate review. Of course the trial de novo most often fixes or eliminates a poor justice court decision. But what is alarming is that in a system which thrives on the ability of higher courts to check the abuses of lower courts, the decisions of justice court judges cannot be checked or called into question. Sure, justice court sentences and convictions no longer stand when one successfully pursues a trial de novo, but the higher court is not able to tell a lower court that a particular process or practice is unconstitutional. The procedure lacks a mechanism to review a judicial officer's exercise of discretion. This essentially gives justice court judges free rein - they know that their specific rulings cannot be reviewed or their abuses of discretion called into question.

Interestingly, the Utah Code gives the prosecution an opportunity to have the district court review a justice court decision. If the justice court dismisses a case, invalidates a statute or ordinance, excludes evidence, or grants a motion to withdraw a guilty plea, then the prosecution is entitled to a hearing de novo in district court on that issue.⁴ No such provision exists for the defendant. This is arguably because she has a better right: she can start the whole proceeding over and run all of her motions or arguments again in the district court. But the problem remains: a defendant lacks a procedural mechanism to ask a higher court to review a justice court decision.

Let's assume the worst. What if a justice court decided to illegally detain a defendant? Or what if that court refused to afford people their constitutional trial rights? What are defendants' remedies? They must plead guilty and appeal. Or they must go to trial and then appeal. Neither of these options fixes the problem that occurred below, and neither option slaps the justice court on the wrist. That court may engage in repetitively unconstitutional practices, yet Utah law lacks a mechanism which tells that court that it is in the wrong.

Some may assume that the extraordinary writ may keep a justice court in check. The writ may be used when a court "has exceeded its jurisdiction or abused its discretion."⁵ Yet before one may pursue the extraordinary writ there must be "no other plain, speedy and adequate remedy" available.⁶ But in the current state of the law, it appears that the availability of the writ may be questionable. The Court of Appeals in *Lucero v. Kennard*, 2004 UT App 94, held that a defendant who pursued an extraordinary writ should have pursued the trial de novo, even though that defendant was not represented by counsel in the justice court.

The problem is fundamental. The extraordinary writ may be the only way a defendant has to check a justice court judge's abuse of discretion. And while the appellate courts have reviewed justice court writs in the past,⁷ *Lucero* illustrates that the appellate courts have become more reticent about using the writ as a method of review. They seem to prefer use of the trial de novo. The writ still seems to be an option that is out there, but there are no guarantees that the appellate courts will accept one.

Interestingly, the vast majority of persons encounter the criminal justice system through the justice

courts. People think that because the justice courts only handle class B and C misdemeanors, they can only do limited damage to peoples' liberties. But recently the justice court sentencing practices have been coming under fire. That is, even though the justice courts lack the ability to punish severely, they make up for it in their more-frequent use of punitive measures.⁸ This issue has become increasingly political with the release of a study commissioned by the Criminal Justice Advisory Counsel (CJAC) this last May. Because of massive overcrowding at the Salt Lake County Jail, the CJAC study made some rather drastic recommendations regarding the justice courts. Among others, the study recommended that the jail should discontinue accepting class B and C misdemeanants, that justice court judges should be given a limited number of beds at the jail based on their jurisdiction's population, and that defense attorneys should "adopt a policy of routinely appealing all justice court convictions that result in excessive or disproportionate sentences, especially when the sentence is in lieu of payment of a fine . . ." ⁹ Alan Kalmanoff, of the Institute for Law and Policy Planning, and the consultant on the study, said that justice courts have been overusing jail as a sanction: they have been incarcerating "those we're angry at," rather than "those we're scared of." ¹⁰

Of course the majority of justice court judges act within their discretion and act to protect defendants. But it is not necessarily the justice court judges as a whole who are the problem. The problem is created by a system which allows judges to overstep the bounds of propriety. The concern is not that these judges should lack the authority to incarcerate defendants. The concern is that the current state of the law lacks a mechanism to check a justice court judge's abuse of that power.

If our clients plan on pursuing a trial de novo, and if we wish to allege some sort of unconstitutional error or practice in the justice court, we must realize that it may be extremely difficult to even get the appellate courts to take a look at the issue.

II. Custody Status Pending Appeal

Not only does a defendant lack the means to get a justice court decision reviewed, but he may suffer other collateral consequences by entering a plea or going to trial and then asking for a trial de novo.

Let's say that a person is arrested for simple assault on Friday. Under the law, he must be arraigned, his bail must be set, and he must be given a court date within a few days. Now let's take an identical defendant, but this time he enters a plea to simple assault in the justice court on Friday - and let's say that he is taken into custody. He files his appeal that day. This same defendant may not get his case heard in the district court, nor may he get his bail set for periods of up to twenty days or more. How can this defendant make sure that the justice court sentence is stayed or that the district court hears his case within a reasonably prompt period of time?

According to Rule 38 of the Rules of Criminal Procedure, once a defendant has filed a notice of appeal *and* the justice court has issued a certificate of probable cause, the judgment of the justice court is stayed.¹¹ Yet interestingly, the rule states that once a defendant has filed a notice, then the district court must issue all further orders governing the case (with the exception of the certificate of probable cause) and must "conduct anew the proceedings."¹² But what happens with these defendants who are either in custody, or who are taken into custody, when the justice court enters its

sentence? Are they instantly released from jail upon counsel's filing for the trial de novo? Is the justice court sentence automatically stayed?

These are unanswered questions.¹³ According to Rule 38, in order to obtain a stay of the justice court sentence, two requirements must be met: 1) the defendant must file a notice of appeal, and 2) the justice court judge must issue a certificate of probable cause.¹⁴ This matter starts to get complicated when one looks at the standard for obtaining a certificate of probable cause, which is found in Rule 27. According to Rule 27, in order to obtain the certificate, the judge must make two findings: 1) the appeal is not taken for purpose of delay; and 2) the appeal "raises substantial issues of law or fact reasonably likely to result in reversal . . ." ¹⁵ Add one more rule to the sticky pot: if the defendant is in custody or sentenced to jail, the judge must determine by clear and convincing evidence that the defendant is not likely to flee and that he does not pose a danger to the community if he were to be released.¹⁶

Now here's where it really gets messy. Utah Code Ann. § 78-5-120 contains the trial de novo standard, and is completely clear: "In a criminal case, a defendant is *entitled* to a trial de novo in the district court" when a notice of appeal is filed within thirty days of either 1) sentencing after a trial or a plea of guilty, or 2) after a plea held in abeyance.¹⁷ Here is the problem: a defendant has an automatic right to a trial de novo. She doesn't have to make a showing. She doesn't have a burden. She files her notice on time and the statute automatically gives her a new trial.

But what is the justice court judge supposed to do with the issuance of the certificate of probable cause? The rules clearly require one to issue. Additionally, they require the justice court judge to make findings regarding whether the defendant raises a good question of law or whether the appeal is just a delay tactic. But she gets her new trial automatically, so arguably, the certificate should also issue as a matter of course.

Not all justice court judges agree. Some will automatically stay a sentence once a notice of appeal is received. Others want to go through the formalities of the certificate of probable cause - and it is not uncommon for a justice court judge to deny a stay based on some of the prongs traditionally required for issuing a certificate.¹⁸

The Court of Appeals seems to have agreed with justice courts who have automatically issued the stay. In a series of memorandum decisions, the Court held that defendants would not have to show a likelihood that they will prevail on appeal: "A defendant appealing a justice court judgment is entitled to a trial de novo without any demonstration of error in the justice court. In this context, we agree it appears unnecessary to require a defendant to demonstrate that the 'appeal . . . raises substantial issues of law or fact reasonably likely to result in a reversal . . .'" ¹⁹

Despite this pronouncement from the Court of Appeals, the rules still appear to be contradictory - and it appears that these questions remain unresolved in the minds of many district and justice court judges. When a defendant appeals, is her justice court sentence automatically stayed? Or does the justice court retain the power to hold the defendant? At what point may the district court step in and order a defendant's release or set an appropriate bail? As one can see, the questions are not answered by the rules and as a result, some defendants may get caught in the middle.

Counsel must realize that if a client is sentenced to jail in the justice court and is taken into custody (or the client is already in custody) that he or she may not get out of jail, nor may the justice court sentence be stayed, until counsel can get a district court judge to act on the matter.

The problem is further complicated because the district courts may not generate a file until they have received the file from the justice courts. In the event that the defendant is only being held on the justice court sentence, it may leave counsel with the only option of filing an extraordinary writ in order to have the district court hear the issue in the meantime. Some justice court judges think that because the Rule gives them twenty days to transfer the file to the district court,²⁰ that they can hold a defendant in custody for the full twenty days before transferring the file. This attitude only prolongs the amount of time our clients may sit in custody while we attempt to secure their release.

Securing our clients' release may be further complicated because different district court judges have different procedural approaches. Some will sign an order which stays the justice court sentence as a matter of course. Others want defense counsel to file a motion. Others want to wait until the district court clerks have generated a file. Some want stipulations from both counsel. Some want a formal denial from the justice court and an appeal of that denial. Others want counsel to use the extraordinary writ. But what if the justice court sentences a defendant to twenty days jail and waits the full twenty to transfer the file? Or what if that court refuses to transfer the file at all? Then defense counsel must spend time at the district court to try to get a judge to act. We, as counsel, should not judge-shop. In the Third District Court in downtown Salt Lake City, there has been an attempt to solve this problem. The District Court will generate a file upon defense counsel's promise that an appeal is "on its way." The file is created then assigned to the judge on rotation for accepting new cases. Counsel can then file a motion with the newly-assigned judge and raise the issue. Then that judge has a case, and can begin making rulings on the matter.

It can be extraordinarily complicated to try to secure a defendant's release from custody, or to get a stay of the justice court sentence, pending one's appeal. Hopefully the rule can be clarified in the future to make appropriate resolution of some of these procedural problems.

III. Remand Without Notice

Another problem arises when our clients fail to appear at the initial stage of the trial de novo appeal. According to Rule 38, the district court may dismiss the appeal and remand the case back to the justice court if the defendant fails to appear or "fails to take steps necessary to prosecute the appeal."²¹ While this may be helpful in practice, it may not be entirely fair to a defendant.

When counsel asks for a trial de novo, the justice court has the responsibility to transfer the file to the district court. The district court, in turn, will generate its own file and set a new court date. The problem is that defendants may not get notice of the new court date. This may be because the district court does not look for the defendant's address in the justice court file, or perhaps it is because the justice court does not put the defendant's address in its file. Of course, it can always be that the defendant has chosen, for whatever reason, not to appear. Whatever the problem may be, the fact remains that defendants often do not receive notice from the district court of their new date. As a result, they may not appear. Because of their failure to appear the district court dismisses the appeal and remands the case.

If we as counsel are planning to pursue a trial de novo, we must take great care to inform our clients of new court dates. Perhaps to avoid this problem, we should also advise our clients to call the district court and/or our offices periodically to find out the new date. That way we avoid the potential problem of losing our appeal for something that is not our client's fault.

IV. Loss of Privileges

The last complication of a justice court appeal is that a plea of guilty or a finding of guilt at trial followed by an appeal may subject a defendant to a number of collateral consequences. First, on drug, DUI, and reckless driving cases, the Driver License Division will most likely pull a defendant's license upon receipt of the conviction.²² It does not matter to the Division that the defendant's conviction is actually wiped clean and that the process starts over with the filing of a notice of appeal in justice court. The Division treats the justice court plea or finding of guilt as a conviction and pulls the license. The problem is that the Driver License Division does not get notice of the trial de novo from the justice court. It's a classic situation of the left hand not knowing what the right hand is doing.

There are additional collateral consequences: defendants may lose their funding for student loans.²³ They may be subject to deportation or suffer other immigration consequences.²⁴ If the defendant is in the military, it is likely that he or she will not be able to bear arms because of the conviction.²⁵

Counsel may not have considered that by entering a plea, her client may lose a significant number of privileges. Other independent agencies and/or government entities may take actions against the defendant, merely because he has entered a plea and a "conviction" has been entered. As of yet, there is no solution. The statute requires that there be a finding or verdict of guilt before a defendant may pursue the appeal.²⁶ What other agencies will do with that finding of guilt is slightly up in the air. Practically speaking, they may do nothing. But the risk is there, and the fact remains that these agencies have been known to act following a guilty plea or such a finding.

Conclusion

There is no question that the justice courts serve a wonderful purpose. They alleviate the rather stressful burden of the district courts by taking jurisdiction over the class B and class C misdemeanors. Additionally, clients who are charged in justice court usually get two chances to have their cases heard. The benefits to these defendants are outstanding and crucial. But we must be aware that several complications may arise from trying to move the case from justice court to the district court. Outside of the extraordinary writ, justice court judges remain insulated from any sort of judicial review of the legal conclusions made in favor of the prosecution. Defendants may have great difficulty securing a stay of a justice court sentence pending the trial de novo. Defendants may not obtain notice of their new court dates. Finally, criminal defendants may lose a significant number of privileges merely because they have entered a plea or because they have been found guilty.

If we are aware of these consequences, then we can adequately advise our clients in pursuing their appeals in district court.

1. Arguably because Lucero could not take the trial de novo option.

2. Measure for Measure. Act iii. Sc. 2.

3. *Jones v. Barnes*, 463 U.S. 745, 757 (1983) (emphasis added).

4. Utah Code Ann. §§ 78-5-120(4).

5. Utah R. Civ. Pro. 65B(d)(2).

6. Utah R. Civ. Pro. 65B(a).

7 See e.g., *Dean v. Henriod*, 1999 UT App 50

8 A Salt Lake County study done by the Institute for Law and Policy Planning found that nearly two-thirds of jail bookings were from misdemeanor offenses, with the justice courts accounting for 43 % of the jail population. The study also noted another problem: "Justice court judges recognize that they are key contributors to the jail's population. . . . [J]udges feel frustrated by the ability of the Sheriff/Jail Director to let inmates out before sentences are completed through early release and award of good time. This frustration has resulted in the use of consecutive sentences, resulting in inmates being in jail over one year and blocking early release while exacerbating crowding."

9. Salt Lake County Criminal Justice System Assessment, prepared for the Salt Lake County Criminal Justice Advisory Council, April 28, 2004, by the Institute for Law and Policy Planning. The study found that every sentence of "jail or pay a fine" originated from a justice court. This is arguably an unconstitutional practice. The Utah Constitution prohibits " . . . imprisonment for debt except in cases of absconding debtors." Utah Const. Art. I §§ 16.

10. *Report Says County Jail Need Not Be So Packed*, The Salt Lake Tribune, May 1, 2004; *Cooperation Called Solution to Jail Crowding*, The Salt Lake Tribune, May 6, 2004; *S.L. County Justice Overhaul Urged*, Deseret Morning News, April 29, 2004.

11. Utah R. Crim. Pro. R. 38(d).

12. Utah R. Crim. Pro. R. 38(e) and (f).

13. These questions may or may not be answered in the near future. The Utah Supreme Court has heard arguments on a case, *Bernat v. Allphin*, Case Number 20030567, which is awaiting a decision. In that case, defendant alleges that the current trial de novo scheme violates the double jeopardy clause. Unless a justice court sentence is automatically vacated upon filing the notice of appeal, he argues, then defendants are forced to keep vestiges of their justice court conviction throughout the trial de novo. It is unclear what the Supreme Court will do with the case, though it is possible they may address some of the stay questions brought up in this article. This will definitely be a case to keep an eye on.

14. Utah R. Crim. Pro. R. 38(d) and (e).

15. Utah R. Crim. Pro. R. 27(f).

16. Utah R. Crim. Pro. R. 27(b).

17. Utah Code Ann. §§ 78-5-120 (emphasis added).

18. This issue was interestingly discussed in 2001 in an article in the Utah Law Review. *Bates, Benjamin. Exploring Justice Courts in Utah and Three Problems Inherent in the Justice Court System*, 2001 Utah L. Rev. 731. In that note, the author recommends that the district court, and not the justice court, should make the determination regarding the certificate of probable cause.

19. *Ulmer v. Lubeck*, 2003 UT App 110; *Zakharian v. Burton*, 2003 UT App 111, though note 17, *infra*, refers to the possibility that the Supreme Court may take a look at this matter.

20. Utah R. Crim Pro. R. 38(c).

21. Utah R. Crim. Pro. R. 38(g). Another potential problem is Rule 38(g)(2). Exactly what does it mean to fail "to take steps necessary to prosecute the appeal"? Potentially any delay (i.e. continuances) subjects a defendant to dismissal for not moving the case on promptly.

22. Utah Code Ann. §§ 53-3-220(1) requires an automatic suspension of the driver license for several misdemeanors: DUIs, drug- and reckless-driving cases are among several offenses for which suspension is required.

23. 20 USCS §§ 1091(r). The 1998 Drug Free Student Loans Act denies federal grants, federally subsidized loans, and work-study funds to college students who have been convicted of any drug offense. This can be a felony or a misdemeanor, and includes sale or possession. If the conviction is for the purchase of a controlled substance, a person is ineligible for one year for the first offense, two years for the second, and indefinitely for the third. If the conviction is for the sale of a controlled substance, then the offender is ineligible for two years on the first offense and indefinitely for the second.

24. Most criminal convictions may subject a non-citizen defendant to immigration consequences. The Immigration & Naturalization Service (INS) defines a "conviction" as a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea, and/or admission of facts warranting guilt and the imposition of some type of penalty. 8 USCS §§ 1101(a)(48); INA §§ 101(a)(48). Certain kinds of convictions may be deportable offenses and others may make a person ineligible for admission to the country. But the mere fact that a defendant enters a plea in order to pursue an appeal may be grounds for the INS to take administrative action. The following article in the Michigan Bar Journal has an excellent summary of immigration consequences. *Ronald Kaplovitz, Criminal Immigration: the Consequences of Criminal Convictions on Non-U.S. Citizens*, 82 MI Bar Jnl. 30 (Feb. 2003) (available online at <http://www.michbar.org/journal/article.cfm?articleID=544&volumeID=41#fn5ref>).

25. This is because of the Lautenberg Amendment, 18 USCS §§ 922(g)(9), which prohibits a person convicted of a misdemeanor from possessing a firearm or ammunition. The Utah Court of Appeals has agreed to hear this issue. In *Salt Lake City v. Gary Newman*, 20040452-CA, defendant has alleged that he had to file an extraordinary writ in order to obtain review of a justice court legal

conclusion. His basis was that he could lose his military status by entering a guilty plea and pursuing the trial de novo.

26. Utah Code Ann. §§ 78-5-120(1).

Posted by at May 3, 2005 12:21 PM

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APPENDIX EEE

Court's Minutes

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	RULING ON MOTION
	:	NOTICE
	:	
vs.	:	Case No: 071100143 MO
	:	
JERALD RIO DAVIS,	:	Judge: CLINT S. JUDKINS
Defendant.	:	Date: July 30, 2007

PRESENT

Clerk: lindac

Prosecutor: BAIRD, TONY C

Defendant

Defendant's Attorney(s): LAURITZEN, ARDEN W

DEFENDANT INFORMATION

Date of birth: November 11, 1958

Video

CHARGES

1. PUBLIC NUISANCE - Infraction

HEARING

The Court denies both of defendant's motions. The State will prepare an Order. Trial date set.

BENCH TRIAL is scheduled.

Date: 09/19/2007

Time: 10:30 a.m.

Location: COURTROOM 1

FIRST JUDICIAL DISTRICT

135 NORTH 100 WEST

LOGAN, UT 84321

before Judge CLINT S. JUDKINS

APPENDIX FFF

Objection to the Oral Order of the Court and to the Judgement of Conviction

A.W. Lauritzen (1906)[§]
15 East 600 North #1
P.O. Box 171
Logan, UT 84321
435-753-3391

10-9-07
COPY

IN THE FIRST DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

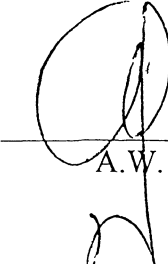
JERALD RIO DAVIS,
Defendant.

OBJECTION TO ORAL VERDICT,
JUDGEMENT AND SENTENCE

Case No. 071100143 MO
Judge Clint S. Judkins

COMES NOW the Defendant, by and through is Attorney of record, with this his
Objection to the ruling from the bench, Judgment and Sentence as entered on the 19th day of
September, 2007 in that the Judge's Order imposed the maximum sentence and in that, the
Defendant was convicted of an infraction with the ordinance prescribing the maximum fine of
Fifty Dollars (\$50.00). No jail time may be imposed upon conviction of the infraction under
either municipal or state law and in that Defendant has suffered the maximum penalty, no
probation or further sanction may be imposed should the fine be paid as required by the Court in
its written Judgement.

Dated the 8th day of October, 2007.



A.W. Lauritzen

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, OBJECTION TO ORAL VERDICT, JUDGEMENT AND SENTENCE, postage prepaid, to the following listed below on the 9th day of ~~September~~ ^{October}, 2007.

Meghan Gudmundson

Jonathan E. Jenkins, Esq.
108 North Main
Logan, UT 84321

**United States Constitution
14th Amendment**

Amendment 14 - Citizenship Rights. Ratified 7/9/1868. *Note History*

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Constitution
Article I, Section 1

Article I, Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

No History for Constitution

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Last revised: Thursday, May 01, 2008

Utah Constitution
Article I, Section 24

Article I, Section 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

No History for Constitution

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Last revised: Thursday, May 01, 2008

Utah Constitution
Article V, Section 1

Article V, Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

No History for Constitution

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Last revised: Thursday, May 01, 2008

Utah Constitution
Article VIII, Section 1

Article VIII, Section 1. [Judicial powers -- Courts.]

The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

No History for Constitution

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Utah Constitution
Article VIII, Section 4

**Article VIII, Section 4. [Rulemaking power of Supreme Court -- Judges pro tempore -
- Regulation of practice of law.]**

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

No History for Constitution

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Last revised: Thursday, May 01, 2008

Utah Constitution
Article XI, Section 5

Article XI, Section 5. [Cities and towns not to be created by special laws -- Legislature to provide for the incorporation, organization, dissolution, and classification of cities and towns -- Charter cities.]

The Legislature may not create cities or towns by special laws.

The Legislature by statute shall provide for the incorporation, organization, and dissolution of cities and towns and for their classification in proportion to population. Any incorporated city or town may frame and adopt a charter for its own government in the following manner:

The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.

Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be not less than sixty days subsequent to its completion and distribution among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.

Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total votes cast for mayor on the next preceding election, and any such amendment may be submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.

Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power

to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the Legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.

The power to be conferred upon the cities by this section shall include the following:

(a) To levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred.

(b) To furnish all local public services, to purchase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

(c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or both, including, in the case of public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

No History for Constitution

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Last revised: Thursday, May 01, 2008

Tennessee Constitution
Article II, Section 2

this state shall extend to any other land and territory now acquired, or that may hereafter be acquired, by compact or agreement with other states, or otherwise, although such land and territory are not included within the boundaries herein before designated.

Section 32. That the erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for.

Section 33. That slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this state.

Section 34. The General Assembly shall make no law recognizing the right of property in man.

Section 35. To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:

Section 35a. The right to confer with the prosecution.

Section 35b. The right to be free from intimidation, harassment and abuse throughout the criminal justice system.

Section 35c. The right to be present at all proceedings where the defendant has the right to be present.

Section 35d. The right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.

Section 35e. The right to be informed of all proceedings, and of the release, transfer or escape of the accused or convicted person.

Section 35f. The right to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction or sentence.

Section 35g. The right to restitution from the offender.

Section 35h. The right to be informed of each of the rights established for victims.

The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

ARTICLE II.

Distribution of Powers.

Section 1. The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.

Section 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Legislative Department.

Section 3. The legislative authority of this state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people. Representatives shall hold office for two years and senators for four years from the day of the general election, except that the speaker of the Senate and the speaker of the House of Representatives each shall hold his office as speaker for two years or until his successor is elected and qualified provided however, that in the first general election after adoption of this amendment senators elected in districts designated by even numbers shall be elected for four years and those elected in districts designated by odd numbers shall be

Tennessee Constitution
Article IV, Section 4

and the items or parts of items disapproved or reduced shall be void to the extent that they have been disapproved or reduced unless repassed as hereinafter provided. The governor, within ten calendar days (Sundays excepted) after the bill shall have been presented to him, shall report the items or parts of items disapproved or reduced with his objections in writing to the House in which the bill originated, or if the General Assembly shall have adjourned, to the office of the secretary of state. Any such items or parts of items so disapproved or reduced shall be restored to the bill in the original amount and become law if repassed by the General Assembly according to the rules and limitations prescribed for the passage of other bills over the executive veto.

ARTICLE IV.

Elections.

Section 1. Every person, being eighteen years of age, being a citizen of the United States, being a resident of the state for a period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides. All such requirements shall be equal and uniform across the state, and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this state shall be subject to the performance of military duty, as may be prescribed by law.

Section 2. Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.

Section 3. Electors shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest or summons, during their attendance at elections and in going to and returning from them.

Section 4. In all elections to be made by the General Assembly, the members thereof shall vote viva voce, and their votes shall be entered on the journal. All other elections shall be by ballot.

ARTICLE V.

Impeachments.

Section 1. The House of Representatives shall have the sole power of impeachment.

Section 2. All impeachments shall be tried by the Senate. When sitting for that purpose the senators shall be upon oath or affirmation, and the chief justice of the Supreme Court, or if he be on trial, the senior associate judge, shall preside over them. No person shall be convicted without the concurrence of two-thirds of the senators sworn to try the officer impeached.

Section 3. The House of Representatives shall elect from their own body three members, whose duty it shall be to prosecute impeachments. No impeachment shall be tried until the Legislature shall have adjourned *sine die*, when the Senate shall proceed to try such impeachment.

Section 4. The governor, judges of the Supreme Court, judges of the inferior courts, chancellors, attorneys for the state, treasurer, comptroller, and secretary

Tennessee Constitution
Article VI, Section 1

of state, shall be liable to impeachment, whenever they may, in the opinion of the House of Representatives, commit any crime in their official capacity which may require disqualification but judgment shall only extend to removal from office, and disqualification to fill any office thereafter. The party shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law. The Legislature now has, and shall continue to have, power to relieve from the penalties imposed, any person disqualified from holding office by the judgment of a Court of Impeachment.

Section 5. Justices of the peace, and other civil officers not herein before mentioned, for crimes or misdemeanors in office, shall be liable to indictment in such courts as the Legislature may direct; and upon conviction, shall be removed from office by said court, as if found guilty on impeachment; and shall be subject to such other punishment as may be prescribed by law.

ARTICLE VI.

Judicial Department.

Section 1. The judicial power of this state shall be vested in one Supreme Court and in such Circuit, Chancery and other Inferior Courts as the Legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.

Section 2. The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the state. The judges shall designate one of their own number who shall preside as chief justice. The concurrence of three of the judges shall in every case be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. Said court shall be held at Knoxville, Nashville and Jackson.

Section 3. The judges of the Supreme Court shall be elected by the qualified voters of the state. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every judge of the Supreme Court shall be thirty-five years of age, and shall before his election have been a resident of the state for five years. His term of service shall be eight years.

Section 4. The Judges of the Circuit and Chancery Courts, and of other Inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every judge of such courts shall be thirty years of age, and shall before his election, have been a resident of the state for five years, and of the circuit or district one year. His term of service shall be eight years.

Section 5. An attorney general and reporter for the state, shall be appointed by the judges of the Supreme Court and shall hold his office for a term of eight years. An attorney for the state for any circuit or district, for which a judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the state five years, and of the circuit or district one year. In all cases where the attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore*.

Utah Code Annotated
§10-3-703

10-3-703. Criminal penalties for violation of ordinance -- Civil penalties prohibited -- Exceptions.

(1) The governing body of each municipality may impose a minimum criminal penalty for the violation of any municipal ordinance by a fine not to exceed the maximum class B misdemeanor fine under Section **76-3-301** or by a term of imprisonment up to six months, or by both the fine and term of imprisonment.

(2) (a) Except as provided in Subsection (2)(b), the governing body may prescribe a minimum civil penalty for the violation of any municipal ordinance by a fine not to exceed the maximum class B misdemeanor fine under Section **76-3-301**.

(b) A municipality may not impose a civil penalty and adjudication for the violation of a municipal moving traffic ordinance.

Amended by Chapter 156, 2003 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§10-8-6

10-8-6. Borrowing power -- Warrants and bonds.

They may borrow money on the credit of the corporation for corporate purposes in the manner and to the extent allowed by the Constitution and the laws, and issue warrants and bonds therefor in such amounts and forms and on such conditions as they shall determine.

No Change Since 1953

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Utah Code Annotated
§10-8-60

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10-8-60. Nuisances.

They may declare what shall be a nuisance, and abate the same, and impose fines upon persons who may create, continue or suffer nuisances to exist.

No Change Since 1953

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§10-8-84

10-8-84. Ordinances, rules, and regulations -- Passage -- Penalties.

(1) The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city.

(2) The municipal legislative body may enforce obedience to the ordinances with fines or penalties in accordance with Section **10-3-703**.

Amended by Chapter 323, 2000 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§76-1-103 (1)

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76-1-103. Application of code -- Offense prior to effective date.

(1) The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code.

(2) Any offense committed prior to the effective date of this code shall be governed by the law, statutory and non-statutory, existing at the time of commission thereof, except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date. An offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

Enacted by Chapter 196, 1973 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§76-1-104

76-1-104. Purposes and principles of construction.

The provisions of this code shall be construed in accordance with these general purposes.

- (1) Forbid and prevent the commission of offenses.
- (2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal.
- (3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition or differences in rehabilitation possibilities among individual offenders.
- (4) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

Enacted by Chapter 196, 1973 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§76-3-301

76-3-301. Fines of persons.

(1) A person convicted of an offense may be sentenced to pay a fine, not exceeding:

(a) \$10,000 for a felony conviction of the first degree or second degree;

(b) \$5,000 for a felony conviction of the third degree;

(c) \$2,500 for a class A misdemeanor conviction;

(d) \$1,000 for a class B misdemeanor conviction;

(e) \$750 for a class C misdemeanor conviction or infraction conviction; and

(f) any greater amounts specifically authorized by statute.

(2) This section does not apply to a corporation, association, partnership, government, or governmental instrumentality.

Amended by Chapter 291, 1995 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§76-10-801 (1)

76-10-801. "Nuisance" defined -- Violation -- Classification of offense.

(1) A nuisance is any item, thing, manner, condition whatsoever that is dangerous to human life or health or renders soil, air, water, or food impure or unwholesome.

(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues, or retains a nuisance, is guilty of a class B misdemeanor.

Enacted by Chapter 196, 1973 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§76-1-801 (2)

76-10-801. "Nuisance" defined -- Violation -- Classification of offense.

(1) A nuisance is any item, thing, manner, condition whatsoever that is dangerous to human life or health or renders soil, air, water, or food impure or unwholesome.

(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues, or retains a nuisance, is guilty of a class B misdemeanor.

Enacted by Chapter 196, 1973 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§76-10-803

76-10-803. "Public nuisance" defined -- Agricultural operations.

(1) A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing any act or omitting to perform any duty, which act or omission:

(a) annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;

(b) offends public decency;

(c) unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway;

(d) is a nuisance as defined in Section **78B-6-1107**; or

(e) in any way renders three or more persons insecure in life or the use of property.

(2) An act which affects three or more persons in any of the ways specified in this section is still a nuisance regardless of the extent to which the annoyance or damage inflicted on individuals is unequal.

(3) (a) Agricultural operations that are consistent with sound agricultural practices are presumed to be reasonable and do not constitute a public nuisance under Subsection (1) unless the agricultural operation has a substantial adverse effect on the public health and safety.

(b) Agricultural operations undertaken in conformity with federal, state, and local laws and regulations, including zoning ordinances, are presumed to be operating within sound agricultural practices.

Amended by Chapter 3, 2008 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§77-18a-1 (1953 As Amended)

77-18a-1. Appeals -- When proper.

(1) A defendant may, as a matter of right, appeal from:

(a) a final judgment of conviction, whether by verdict or plea;

(b) an order made after judgment that affects the substantial rights of the defendant;

(c) an order adjudicating the defendant's competency to proceed further in a pending prosecution; or

(d) an order denying bail, as provided in Subsection **77-20-1(7)**.

(2) In addition to any appeal permitted by Subsection (1), a defendant may seek discretionary appellate review of any interlocutory order.

(3) The prosecution may, as a matter of right, appeal from:

(a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;

(b) a pretrial order dismissing a charge on the ground that the court's suppression of evidence has substantially impaired the prosecution's case;

(c) an order granting a motion to withdraw a plea of guilty or no contest;

(d) an order arresting judgment or granting a motion for merger;

(e) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(f) an order holding a statute or any part of it invalid;

(g) an order adjudicating the defendant's competency to proceed further in a pending prosecution;

(h) an order finding, pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that an inmate sentenced to death is incompetent to be executed;

(i) an order reducing the degree of offense pursuant to Section **76-3-402**; or

(j) an illegal sentence.

(4) In addition to any appeal permitted by Subsection (3), the prosecution may seek discretionary appellate review of any interlocutory order entered before jeopardy attaches.

Amended by Chapter 93, 2006 General Session

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Last revised: Thursday, May 01, 2008

Utah Code Annotated
§78-2a-3 (e)

§ 78-2a-2

JUDICIAL CODE

Note 1

statewide, whether those rulings are constitutionally based or not; therefore, as Court of Appeals adjudicates cases only in three-judge panels, rulings of panel of Court of Appeals also

apply statewide. U.C.A. 1953, 78-2a-2(2). *Renn v. Utah State Bd. of Pardons*, 1995, 904 P.2d 677. Courts ⇌ 91(2); Courts ⇌ 248

§ 78-2a-3. Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

Utah Code Annotated
§78-3-4(8)

(8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:

- (a) there is no justice court with territorial jurisdiction;
- (b) the matter was properly filed in the circuit court prior to July 1, 1996;
- (c) the offense occurred within the boundaries of the municipality in which the district courthouse is located and that municipality has not formed a justice court; or
- (d) they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.

(9) The district court has jurisdiction of actions under Title 78, Chapter 3h, Child Protective Orders, if the juvenile court transfers the case to the district court.

Laws 1951, c. 58, § 1; Laws 1983, c. 75, § 2; Laws 1986, c. 47, § 50; Laws 1987, c. 161, § 305; Laws 1988, c. 248, § 10; Laws 1991, c. 268, § 23; Laws 1992, c. 290, § 8; Laws 1993, c. 59, § 6; Laws 1996, c. 198, § 50, eff. July 1, 1996; Laws 1997, c. 216, § 2, eff. July 1, 1997; Laws 1998, c. 313, § 1, eff. July 1, 1998; Laws 2000, c. 323, § 11, eff. March 16, 2000; Laws 2004, c. 201, § 2, eff. May 3, 2004.

Codification C. 1943. Supp., § 104-3-4.

Cross References

Concurrent jurisdiction with juvenile court, see § 78-3a-105.
 District court jurisdiction, see Const. Art. 8, § 5.
 Extraordinary writs, judicial code, see § 78-35-1 et seq.
 Jurisdiction of district courts, see Const. Art. 8, § 5.

Library References

Administrative Law and Procedure ⇨663.	C.J.S. Attorney and Client §§ 59 to 60.
Attorney and Client ⇨36.	C.J.S. Criminal Law §§ 157 to 158.
Courts ⇨156, 176.5.	C.J.S. Infants §§ 41, 53 to 54.
Criminal Law ⇨86, 93.	C.J.S. Justices of the Peace § 127.
Infants ⇨196.	C.J.S. Municipal Corporations §§ 204 to 205.
Justices of the Peace ⇨141.	C.J.S. Public Administrative Law and Procedure § 186.
Municipal Corporations ⇨642.	
Westlaw Key Number Searches: 106k156;	
231k141; 106k176.5; 45k36; 15Ak663;	
268k642; 110k86; 110k93; 211k196.	

Research References

ALR Library

89 A.L.R. 2d 506, Age of Child at Time of Alleged Offense or Delinquency, or at Time of Legal Proceedings, as Criterion of Jurisdiction of Juvenile Court.

Treatises and Practice Aids

SF28 American Law Institute-American Bar Association 93, White Coats and Blue Collars: Physician Collective Bargaining Legislation on the National and State Levels.

Notes of Decisions

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Utah Code Annotated
§78-3-13.4

Cross References

Judicial Council Rules of Judicial Administration, see Jud. Admin., Rule 1-101 et seq.

Library References

Courts ☞74, 78. C.J.S. Courts §§ 7, 121, 124 to 126.
Westlaw Key Number Searches: 106k74;
106k78.

§ 78-3-12. Repealed by Laws 1988, c. 152, § 26 and c. 248, § 50, eff. April 25, 1988

§ 78-3-12.5. Costs of system

(1) The cost of salaries, travel, and training required for the discharge of the duties of district court judges, court commissioners, secretaries of judges or court executives, court executives, and court reporters shall be paid from appropriations made by the Legislature.

(2) Except as provided in Subsection (1), the Judicial Council may directly provide for the actual and necessary expenses of operation of the district court, including personnel salary and benefits, travel, training, facilities, security, equipment, furniture, supplies, legal reference materials, and other operating expenses, or may contract with the county in a county seat or with the unit of local government in municipalities other than a county seat for the actual and necessary expenses of the district court. Any necessary contract with the county or unit of local government shall be pursuant to Subsection 78-3-13.4(4).

Laws 1988, c. 152, § 19; Laws 1991, c. 268, § 25; Laws 1996, c. 198, § 51, eff. July 1, 1996; Laws 1997, c. 10, § 139, eff. May 5, 1997.

Library References

Counties ☞136. C.J.S. Counties § 175.
Judges ☞22(3). C.J.S. Judges §§ 75, 81.
States ☞129 to 134. C.J.S. States §§ 226, 230 to 241.
Westlaw Key Number Searches: 360k129 to
360k134; 227k22(3); 104k136.

§ 78-3-13. Repealed by Laws 1988, c. 152, § 26; Laws 1988, c. 248, § 50, eff. April 25, 1988

§ 78-3-13.4. Transfer of court operating responsibilities—Facilities—Staff—Budget

(1) A county's determination to transfer responsibility for operation of the district court to the state is irrevocable.

(2)(a) Court space suitable for the conduct of judicial business as specified by the Judicial Council shall be provided by the state from appropriations made by the Legislature for these purposes.

(b) The state may, in order to carry out its obligation to provide these facilities, lease space from a county, or reimburse a county for the number of

square feet used by the district. Any lease and reimbursement shall be determined in accordance with the standards of the State Building Board applicable to state agencies generally. A county or municipality terminating a lease with the court shall provide written notice to the Judicial Council at least one year prior to the effective date of the termination.

(c) District courts shall be located in municipalities that are sites for the district court or circuit court as of January 1, 1994. Removal of the district court from the municipality shall require prior legislative approval by joint resolution.

(3) The state shall provide legal reference materials for all district judges' chambers and courtrooms, as required by Judicial Council rule. Maintenance of county law libraries shall be in consultation with the court executive of the district court.

(4)(a) At the request of the Judicial Council, the county or municipality shall provide staff for the district court in county seats or municipalities under contract with the administrative office of the courts.

(b) Payment for necessary expenses shall be by a contract entered into annually between the state and the county or municipality, which shall specifically state the agreed costs of personnel, supplies, and services, as well as the method and terms of payment.

(c) Workload measures prepared by the state court administrator and projected costs for the next fiscal year shall be considered in the negotiation of contracts.

(d) Each May 1 preceding the general session of the Legislature, the county or municipality shall submit a budget request to the Judicial Council, the governor, and the legislative fiscal analyst for services to be rendered as part of the contract under Subsection (b) for the fiscal year immediately following the legislative session. The Judicial Council shall consider this information in developing its budget request. The legislative fiscal analyst shall provide the Legislature with the county's or municipality's original estimate of expenses. By June 15 preceding the state's fiscal year, the county and the state court administrator shall negotiate a contract to cover expenses in accordance with the appropriation approved by the Legislature. The contracts may not include payments for expenses of service of process, indigent defense costs, or other costs or expenses provided by law as an obligation of the county or municipality.

Laws 1988, c. 152, § 20; Laws 1991, c. 268, § 26, Laws 1996, c. 198, § 52, eff. July 1, 1996.

Cross References

Budgetary Procedures Act, see § 63-38-1 et seq

State officials, reports of expenditures and appropriations, see § 67-10-1 et seq

Library References

Counties ⇨ 136.
Courts ⇨ 74

Judges ⇨ 22(3)

Utah Code Annotated
§78-3-14.5 (2)

§ 78-3-13.4

JUDICIAL CODE

States ☞129, 90.

Westlaw Key Number Searches: 104k136;

227k22(3); 360k129; 360k90; 106k74

C.J.S. Counties § 175

C.J.S. Courts § 121.

C.J.S. Judges §§ 75, 81.

C.J.S. States §§ 154 to 155, 160, 230 to 241.

§ 78-3-13.5. Repealed by Laws 1967, c. 222, § 9

§ 78-3-14. Repealed by Laws 1988, c. 152, § 26; Laws 1988, c. 248, § 50, eff. April 25, 1988

§ 78-3-14.2. District court case management

(1) The district court of each district shall develop systems of case management.

(2) The case management systems developed by a district court shall:

(a) ensure judicial accountability for the just and timely disposition of cases;

(b) provide for each judge a full judicial work load that accommodates differences in the subject matter or complexity of cases assigned to different judges; and

(c) provide that judges of the district court and judges of the court formerly denominated the circuit court who took office prior to July 1, 1991, are entitled to be assigned only cases from the subject matter jurisdiction of their respective courts as that jurisdiction existed on June 30, 1996. If the volume of such cases does not constitute a full work load, other cases shall be assigned.

(3) A district court may establish divisions within the court for the efficient management of different types of cases. The existence of divisions within the court may not affect the jurisdiction of the court nor the validity of court orders. The existence of divisions within the court may not impede public access to the courts.

Laws 1996, c. 198, § 53, eff. July 1, 1996.

Library References

Courts ☞78, 70, 50

Westlaw Key Number Searches: 106k78;
106k70; 106k50.

C.J.S. Courts §§ 7, 106, 123 to 126.

United States Supreme Court

Access to courts,

Access to courts, identification of underlying cause of action and lost remedy, government conspiracy to destroy or cover up evidence of crime, torture and

death of foreign spouse of American citizen by foreign army officers allegedly paid by the CIA, see *Christopher v. Harbury*, U.S.D.C.2002, 122 S.Ct. 2179, 536 U.S. 403.

§ 78-3-14.5. Allocation of district court fees and forfeitures

(1) Except as provided in this section, district court fines and forfeitures collected for violation of state statutes shall be paid to the state treasurer.

(2) Fines and forfeitures collected by the court for violation of a state statute or county or municipal ordinance constituting a misdemeanor or an infraction

shall be remitted 1/2 to the state treasurer and 1/2 to the treasurer of the state or local governmental entity which prosecutes or which would prosecute the violation.

(3) Fines and forfeitures collected for violations of Title 23, Wildlife Resources Code of Utah, Title 41, Chapter 22, Off-highway Vehicles, or Title 73, Chapter 18, State Boating Act, shall be paid to the state treasurer.

(a) For violations of Title 23, the state treasurer shall allocate 85% to the Division of Wildlife Resources and 15% to the General Fund.

(b) For violations of Title 41, Chapter 22, or Title 73, Chapter 18, the state treasurer shall allocate 85% to the Division of Parks and Recreation and 15% to the General Fund.

(4) Fines and forfeitures collected for violation of Section 72-7-404 or 72-7-406, less fees established by the Judicial Council, shall be paid to the state treasurer for deposit in the B and C road account. Fees established by the Judicial Council shall be deposited in the state General Fund. Money deposited in the class B and C road account is supplemental to the money appropriated under Section 72-2-107 but shall be expended in the same manner as other class B and C road funds.

(5) Until July 1, 2007, fines and forfeitures collected by the court for a violation of Subsection 41-1a-1303(2) related to registration of vehicles after establishing residency shall be remitted:

(a) 50% to the state or local governmental entity which issued the citation for a violation to be used for law enforcement purposes; and

(b) 50% in accordance with Subsection (2).

(6) Fines and forfeitures collected for any violations not specified in this chapter or otherwise provided for by law shall be paid to the state treasurer.

(7) Fees collected in connection with civil actions filed in the district court shall be paid to the state treasurer.

(8) The court shall remit money collected in accordance with Title 51, Chapter 7, State Money Management Act.

Laws 1988, c. 152, § 21, Laws 1990, c. 128, § 7; Laws 1996, c. 198, § 54, eff. July 1, 1996; Laws 1998, c. 270, § 352, eff. March 21, 1998; Laws 2004, c. 273, § 1, eff. July 1, 2004; Laws 2004, c. 349, § 6, eff. July 1, 2004.

Historical and Statutory Notes

Composite section by the Office of Legislative Research and General Counsel of Laws 2004, c. 273, § 1 and Laws 2004, c. 349, § 6

Cross References

Compromise of traffic charges, plea in abeyance fee, surcharge, see § 77-2-4.2
 Fines and forfeitures, distribution and allocation, see § 63-63a-2
 Traffic mitigation surcharge, distribution of monies, see § 63-63b-102

Utah Code Annotated
§78-5-101

Section 78-5-140. Dissolution of Justice Courts

§§ 78-5-0.5 to 78-5-41. Repealed

§ 78-5-101. Creation of justice court—Not of record

Under Article VIII, Section 1, Utah Constitution, there is created a court not of record known as the justice court. The judges of this court are justice court judges.

Laws 1989, c. 157, § 10, Laws 1997, c. 216, § 4, eff. July 1, 1997, Laws 1999, c. 21, § 103, eff. May 3, 1999

Cross References

Certification of justice courts, see Jud Admin, Justice Court Recert Standards App B
Rules of Civil Procedure, applicability, see Rules Civ Proc, Rule 81

Library References

Courts 41, 49 C J S Courts §§ 4 93 to 100
Westlaw Key Number Searches 106k41, 106k49.

Research References

Forms

15A Am. Jur Pl & Pr Forms Justice of the Peace § 3, Statutory References

§ 78-5-101.5. Creation of justice courts—Classes of justice courts

(1)(a) For the purposes of this section, to “create a justice court” means to

- (i) establish a justice court, or
- (ii) establish a justice court under Title 11, Chapter 13, Interlocal Cooperation Act.

(b) A municipality or county that has created a justice court may change the form of its court to another listed in Subsection (1)(a) without being considered to have created a court

(2) Justice courts shall be divided into the following classes

- (a) Class I: 501 or more citations or cases filed per month,
- (b) Class II: 201–500 citations or cases filed per month,
- (c) Class III: 61–200 citations or cases filed per month, and
- (d) Class IV: 60 or fewer citations or cases filed per month

(3) Municipalities or counties can elect to create a Class I or Class II justice court by filing a written declaration with the Judicial Council on or before July 1 at least two years prior to the effective date of the election. Upon demonstration of compliance with operating standards as established by statute and the Judicial Council, the Judicial Council shall certify the creation of the court pursuant to Section 78-5-139

Utah Code Annotated
§78-5-101.5

Section

78-5-140. Dissolution of Justice Courts.

§§ 78-5-0.5 to 78-5-41. Repealed**§ 78-5-101. Creation of justice court—Not of record**

Under Article VIII, Section 1, Utah Constitution, there is created a court not of record known as the justice court. The judges of this court are justice court judges.

Laws 1989, c. 157, § 10; Laws 1997, c. 216, § 4, eff. July 1, 1997; Laws 1999, c. 21, § 103, eff. May 3, 1999.

Cross References

Certification of justice courts, see Jud Admin, Justice Court Recert Standards App B
Rules of Civil Procedure, applicability, see Rules Civ Proc, Rule 81

Library References

Courts ⇄ 41, 49

C J S Courts §§ 4, 93 to 100

Westlaw Key Number Searches 106k41,
106k49

Research References**Forms**

15A Am Jur Pl & Pr Forms Justice of the
Peace § 3, Statutory References

§ 78-5-101.5. Creation of justice courts—Classes of justice courts

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- (i) establish a justice court; or
- (ii) establish a justice court under Title 11, Chapter 13, Interlocal Cooperation Act.

(b) A municipality or county that has created a justice court may change the form of its court to another listed in Subsection (1)(a) without being considered to have created a court.

(2) Justice courts shall be divided into the following classes:

- (a) Class I: 501 or more citations or cases filed per month;
- (b) Class II: 201–500 citations or cases filed per month,
- (c) Class III: 61–200 citations or cases filed per month; and
- (d) Class IV: 60 or fewer citations or cases filed per month.

(3) Municipalities or counties can elect to create a Class I or Class II justice court by filing a written declaration with the Judicial Council on or before July 1 at least two years prior to the effective date of the election. Upon demonstration of compliance with operating standards as established by statute and the Judicial Council, the Judicial Council shall certify the creation of the court pursuant to Section 78-5-139.

(4)(a) Except as provided in Subsection (5), municipalities or counties can elect to create a Class III or Class IV justice court by establishing the need for the court and filing a written declaration with the Judicial Council on or before July 1 at least one year prior to the effective date of the election.

(b) In evaluating the need for the creation of a Class III or Class IV justice court, the Judicial Council shall consider factors of population, case filings, public convenience, availability of law enforcement agencies and court support services, proximity to other courts, and any special circumstances.

(c) The Judicial Council shall determine whether the municipality or county seeking to create a Class III or Class IV justice court has established the need for the court.

(d) Upon demonstration of compliance with operating standards as established by statute and the Judicial Council, the Judicial Council shall certify the creation of the court pursuant to Section 78-5-139.

(5)(a) The following municipalities may create a justice court by filing a written declaration with the Judicial Council: American Fork, Bountiful, Brigham City, Cedar City, Clearfield, Elk Ridge, Kaysville, Layton, Logan, Moab, Murray, Ogden, Orem, Park City, Price, Provo, Richfield, Roosevelt, Roy, Salem, Salt Lake City, Sandy, Spanish Fork, St. George, Taylorsville, Tooele, Vernal, and West Valley City.

(b) To form a Class I or Class II justice court, the municipalities listed in Subsection (5)(a) shall file a written declaration with the Judicial Council on or before July 1 at least two years prior to the effective date of the election.

(c) To form a Class III or Class IV justice court, the municipalities listed in Subsection (5)(a) shall file a written declaration with the Judicial Council on or before July 1 at least one year prior to the effective date of the election.

(d) Upon demonstration of compliance with operating standards as established by statute and the Judicial Council, the Judicial Council shall certify the creation of the court pursuant to Section 78-5-139.

(6) Upon request from a municipality or county seeking to create a justice court, the Judicial Council may shorten the time required between the city's or county's written declaration or election to create a justice court and the effective date of the election.

(7) The Judicial Council may by rule provide resources and procedures adequate for the timely disposition of all matters brought before the courts. The administrative office of the courts and local governments shall cooperate in allocating resources to operate the courts in the most efficient and effective manner based on the allocation of responsibility between courts of record and not of record.

Laws 1998, c. 313, § 2, eff. July 1, 1998; Laws 1999, c. 166, § 2, eff. May 3, 1999.

Library References

Courts ⇨41
Westlaw Key Number Search 106k41
C J S Courts §§ 93 to 100

Utah Code Annotated
§78-5-104 (1)

1920, 57 Utah 365, 195 P. 194. Justices Of The Peace ⇨ 58(1)

Failure of the complaint filed in a justice's court to allege one of the grounds specified in Comp. Laws 1917, § 7426, showing that the action was commenced in the city or precinct as required by such section, did not deprive the justice of the peace, or the district court on appeal, of jurisdiction, notwithstanding sections 7447 and 7448, since section 7426 is not directed to the question of jurisdiction, but is a legislative direction as to the place of commencing actions. Silver City Mercantile Co. v. District Court of Utah County, 1920, 57 Utah 365, 195 P. 194. Justices Of The Peace ⇨ 58(5)

4. Presumptions as to jurisdiction

No presumption exists in favor of the jurisdiction of the justice's courts. Silver City Mercantile Co. v. District Court of Utah County, 1920, 57 Utah 365, 195 P. 194. Justices Of The Peace ⇨ 59

5. Waiver of objections

Under Comp. Laws 1907, § 3668, providing where actions shall be commenced in justices' courts, and section 3669, providing for changing the place of trial where suit is brought in the wrong district, the privilege of bringing suit in a particular district is personal to defendant and may be waived. Beck v Lewis, 1917, 49 Utah 368, 164 P. 480. Justices Of The Peace ⇨ 60

Under Comp. Laws 1907, § 3668, prescribing where actions in justices' courts shall be commenced, and section 3669, providing for changing place of trial where suit is brought in wrong precinct, the defendant waives objection to the precinct by suffering a default judgment, especially where the complaint stated jurisdictional facts and no application for changing the place

of trial was made. Beck v. Lewis, 1917, 49 Utah 368, 164 P. 480. Justices Of The Peace ⇨ 60

6. Determination of questions of jurisdiction, generally

Comp. Laws 1888, § 3537, requires actions in a justice court to be begun and tried in the precinct or city of defendant's residence, unless there be no justice court therein; and section 3595 provides for dismissal without prejudice when it is objected at the trial and appears by the evidence that the action is brought in the wrong county, precinct, or city. Held, that defendant need not specially appear to move for such dismissal, but may object by answer, and prove the facts on the trial. Kansas City Hardware Co. v. Nielson, 1894, 10 Utah 27, 36 P. 131. Justices Of The Peace ⇨ 61

7. Place of holding court

Under express provisions of Comp. Laws 1907, § 687, where more than one precinct is embraced in a town, the justices of such precincts may hold court in any part of the town State v Maughan, 1909, 35 Utah 426, 100 P 934. Justices Of The Peace ⇨ 71

8. Change of venue

Under Comp. St. 1907, § 3668, prescribing where actions in justices' courts shall be commenced and section 3669, providing for changing place of trial where suit is brought in wrong precinct, justice does not lose jurisdiction over suit brought before him in wrong precinct until affidavit setting forth facts as required by section 3669 is filed. Beck v. Lewis, 1917, 49 Utah 368, 164 P. 480. Justices Of The Peace ⇨ 73(1)

§ 78-5-104. Jurisdiction

(1) Justice courts have jurisdiction over class B and C misdemeanors, violation of ordinances, and infractions committed within their territorial jurisdiction, except those offenses over which the juvenile court has exclusive jurisdiction.

(2) Justice courts have jurisdiction of small claims cases under Title 78, Chapter 6, Small Claims Courts, if the defendant resides in or the debt arose within the territorial jurisdiction of the justice court.

Laws 1989, c. 157, § 13; Laws 1991, c. 268, § 39; Laws 1993, c. 159, § 11; Laws 1997, c. 215, § 16, eff. July 1, 1997.

Cross References

Transfer of small claims cases, see Jud. Admin., Rule 4-801.

Utah Code Annotated
§78-5-108

§ 78-5-106.5. Justice court judge administrative responsibilities

(1) Justice court judges shall comply with and ensure that court personnel comply with applicable county or municipal rules and regulations related to personnel, budgets, and other administrative functions.

(2) Failure by the judge to comply with applicable administrative county or municipal rules and regulations may be referred, by the county executive or municipal legislative body, to the state Justice Court Administrator.

(3) Compliance with appropriate administrative requirements shall be considered as part of the Judicial Council's judicial performance evaluation program for justice court judges.

(4) Repeated or willful noncompliance may be referred, by the county executive or municipal legislative body, to the Judicial Conduct Commission.

Laws 2003, c. 51, § 2, eff. May 5, 2003.

Library References

Justices of the Peace ☞21, 20, 10.

C.J.S. Justices of the Peace §§ 9, 13 to 14.

Westlaw Key Number Searches: 231k21,
231k20, 231k10

§ 78-5-107. Place of holding court

(1)(a) County justice court judges may hold court in any municipality within the precinct but may exercise only the jurisdiction provided by law for county justice courts.

(b) County justice court judges may also, at the direction of the county legislative body, hold court anywhere in the county as needed but may only hear cases arising within the precinct.

(2) A municipal justice court judge shall hold court in the municipality where the court is located and, as directed by the municipal governing body, at the county jail or municipal prison.

Laws 1989, c. 157, § 16; Laws 1991, c. 92, § 1; Laws 1993, c. 5, § 1; Laws 1993, c. 227, § 390.

Library References

Criminal Law ☞254.1.

C.J.S. Justices of the Peace § 59.

Justices of the Peace ☞71

Westlaw Key Number Searches: 231k71;
110k254.1.

§ 78-5-108. Trial facilities—Hours of business

(1) A justice court judge shall conduct all official court business in a courtroom or office located in a public facility which is conducive and appropriate to the administration of justice.

(2) Each county, city, or town shall provide adequate courtroom and auxiliary space for the justice court. The facility need not be specifically constructed for or allocated solely for the justice court if existing facilities adequately serve the purposes of the justice court.

Utah Code Annotated
§78-5-110

JUSTICE COURTS

(3) County and municipal justice courts shall be open and judicial business shall be transacted.

(a) five days per week, ~~for~~

(b) no less than four days per week for at least 11 hours per day.

(4) The legislative body of the county, city, or town shall establish operating hours for the justice courts within the requirements of Subsection (3) and the code of judicial administration

(5) The hours the courts are open shall be posted conspicuously at the courts and in local public buildings

(6) The clerk of the court and judges of county and municipal courts shall attend the court at regularly scheduled times

Laws 1989, c 157, § 17, Laws 2004, c 245, § 1, eff May 3, 2004

Library References

Clerks of Courts ⇨64 1

Courts ⇨72, 73

Justices of the Peace ⇨71

Westlaw Key Number Searches 106k72,
106k73, 231k71 79k64 1

C J S Courts §§ 7, 121, 249 254

C J S Justices of the Peace § 59

§ 78-5-109. Laws, ordinances, and reference materials provided by counties, cities, and towns

Each county, city, or town shall provide and keep current for each justice court in its jurisdiction a copy of the motor vehicle laws of Utah, appropriate copies of the Utah code, the justice court manual published by the state court administrator, state laws affecting local government, the county, city, or town ordinances, and other legal reference materials as determined to be necessary by the judge

Laws 1989, c 157, § 18

Library References

Counties ⇨137

Courts ⇨73

Municipal Corporations ⇨262

Westlaw Key Number Searches 106k73
104k137, 268k262

C J S Counties § 175

C J S Courts § 7

C J S Municipal Corporations §§ 955 to 956

§ 78-5-110. Compensation and expenses—Clerical personnel

(1) The county, city, or town creating or maintaining a justice court shall provide and compensate clerical personnel to conduct the business of the court

(2) The selection, supervision, and discipline of court clerical personnel shall be in accordance with local government personnel policies

(3) Clerical personnel are governed by Title 52, Chapter 3, regarding employment of relatives

(4) The county, city, or town assumes the cost of travel and training expenses of clerical personnel at training sessions conducted by the Judicial Council

Laws 1989, c 157, § 19, Laws 2003, c 51, § 3, eff May 5, 2003

(3) County and municipal justice courts shall be open and judicial business shall be transacted:

- (a) five days per week; or
- (b) no less than four days per week for at least 11 hours per day.

(4) The legislative body of the county, city, or town shall establish operating hours for the justice courts within the requirements of Subsection (3) and the code of judicial administration.

(5) The hours the courts are open shall be posted conspicuously at the courts and in local public buildings.

(6) The clerk of the court and judges of county and municipal courts shall attend the court at regularly scheduled times.

Laws 1989, c. 157, § 17; Laws 2004, c. 245, § 1, eff. May 3, 2004.

Library References

Clerks of Courts ⇨64 1	C J S Courts §§ 7, 121, 249, 254
Courts ⇨72, 73.	C J S Justices of the Peace § 59
Justices of the Peace ⇨71	
Westlaw Key Number Searches 106k72,	
106k73; 231k71, 79k64 1	

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Laws 1989, c. 157, § 18.

Library References

Counties ⇨137	C J S Counties § 175
Courts ⇨73	C J S Courts § 7
Municipal Corporations ⇨262	C J S Municipal Corporations §§ 955 to 956
Westlaw Key Number Searches 106k73,	
104k137; 268k262	

§ 78-5-110. Compensation and expenses—Clerical personnel

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(4) The county, city, or town assumes the cost of travel and training expenses of clerical personnel at training sessions conducted by the Judicial Council.

Laws 1989, c. 157, § 19, Laws 2003, c. 51, § 3, eff. May 5, 2003

Utah Code Annotated
§78-5-111

Library References

Counties ⇨137	C J S Counties § 175
Courts ⇨55	C J S Courts §§ 107 to 109
Municipal Corporations ⇨262	C J S Municipal Corporations §§ 955 to 956
Westlaw Key Number Searches 104k137, 268k262 106k55	

§ 78-5-111. Justice court staff to be provided

(1) Each county, city, or town creating and maintaining a justice court shall provide

- (a) sufficient staff public prosecutors to attend the court and perform the duties of prosecution before the justice court,
- (b) adequate funding for the costs of defense for persons charged with a public offense who are determined by the court to be indigent under Title 77, Chapter 32, and
- (c) sufficient local peace officers to attend the justice court when required and provide security for the court

(2) The county attorney or district attorney may appoint city prosecutors as deputies to prosecute state offenses in municipal justice courts

Laws 1989 c 157 § 20, Laws 1993, c 38, § 115, Laws 1998, c 282, § 81, eff. May 4, 1998

Library References

Counties ⇨137	C J S Counties § 175
Courts ⇨71	C J S District and Prosecuting Attorneys §§ 49 to 52 57
District and Prosecuting Attorneys ⇨3(1)	C J S Municipal Corporations §§ 955 to 956
Municipal Corporations ⇨262	
Westlaw Key Number Searches 104k137, 268k262 131k3(1) 106k71	

§ 78-5-112. Repealed by Laws 1992, c. 219, § 19, eff. July 1, 1992

§ 78-5-113. Process to any part of the state—Service

- (1) Process from a justice court may be issued to any place in the state.
 - (2) Subpoenas in any action or proceeding of a justice court may be issued to any place in the state
 - (3) All warrants issued by a justice court for violation of any state law or local ordinance within a court's jurisdiction are directed to the sheriff, and constable of the county, or to the marshal or city police of the town or city.
- Laws 1989 c 157, § 22

Library References

Justices of the Peace ⇨78	C J S Justices of the Peace § 66
Witnesses ⇨9	C J S Witnesses §§ 2, 20 to 22 25
Westlaw Key Number Searches 231k78 410k9	

§§ 78-5-114, 78-5-115. Repealed by Laws 1991, c. 268, § 49, eff. January 1, 1992

Utah Code Annotated
§78-5-116 (1)

§ 78-5-116. Disposition of fines

(1) Except as otherwise specified by this section, fines and forfeitures collected by a justice court shall be remitted, 1/2 to the treasurer of the local government responsible for the court and 1/2 to the treasurer of the local government which prosecutes or which would prosecute the violation.

(2)(a) For violation of Title 23, the court shall allocate 85% to the Division of Wildlife Resources and 15% to the general fund of the city or county government responsible for the justice court

(b) For violation of Title 41, Chapter 22, Off-highway Vehicles, or Title 73, Chapter 18, State Boating Act, the court shall allocate 85% to the Division of Parks and Recreation and 15% to the general fund of the city or county government responsible for the justice court.

(3) The surcharge established by Section 63-63a-1 shall be paid to the state treasurer.

(4) Fines, fees, court costs, and forfeitures collected by a municipal or county justice court for a violation of Section 72-7-404 or 72-7-406 regarding maximum weight limitations and overweight permits, minus court costs not to exceed the schedule adopted by the Judicial Council, shall be paid to the state treasurer and distributed to the class B and C road account.

(5) Revenue deposited in the class B and C road account pursuant to Subsection (4) is supplemental to the money appropriated under Section 72-2-107 but shall be expended in the same manner as other class B and C road funds.

(6) Until July 1, 2007, fines and forfeitures collected by the court for a violation of Subsection 41-1a-1303(2) related to registration of vehicles after establishing residency shall be remitted.

(a) 50% to the state or local governmental entity which issued the citation for a violation to be used for law enforcement purposes, and

(b) 50% in accordance with Subsection (1).

Laws 1989, c. 157, § 25, Laws 1991, c. 138, § 2, Laws 1991, c. 212, § 7, Laws 1991, c. 268, § 41; Laws 1998, c. 270, § 353, eff. March 21, 1998, Laws 2004, c. 273, § 2, eff. July 1, 2004; Laws 2004, c. 349, § 7, eff. July 1, 2004

Historical and Statutory Notes

Composite section by the Office of Legislative Research and General Counsel of Laws 2004, c. 273, § 2 and Laws 2004, c. 349, § 7

Cross References

Fines and forfeitures, distribution and allocation, see § 63-63a-2
Traffic mitigation surcharge, distribution of monies, see § 63-63b-102

Library References

Fines c-20.
Westlaw Key Number Search 174k20

Utah Code Annotated
§78-5-132

§ 78-5-129. Compensation—Annual review and adjustment

(1) The governing body of each municipality or county shall annually review and may adjust the compensation paid.

(2) The salary fixed for a justice court judge may not be diminished during the term for which the judge has been appointed or elected.

(3) A copy of the resolution, ordinance, or other document fixing the salary of the justice court judge and any adjustments to the document shall be furnished to the state court administrator by the governing body of the municipality or county.

Laws 1989, c. 157, § 38.

Library References

Justices of the Peace ⇨14
Westlaw Key Number Search: 231k14
C.J.S. Justices of the Peace § 15

§ 78-5-130. Monthly reports to court administrator and governing body

(1) Every justice court judge shall file monthly with the state court administrator a report of the judicial business of the judge. The report shall be on forms supplied by the state court administrator.

(2) The report shall state the number of criminal and small claims actions filed, the dispositions entered, and other information as specified in the forms.

(3) A copy of the report shall be furnished by the justice court judge to the governing body in the municipality or county, or to the person or office in the county, city, or town designated by the governing body.

Laws 1989, c. 157, § 39.

Library References

Justices of the Peace ⇨21
Westlaw Key Number Search: 231k21
C.J.S. Justices of the Peace § 14

§ 78-5-131. Repealed by Laws 1993, c. 1, § 164, eff. Jan. 28, 1993

§ 78-5-132. Term of office for county court

(1)(a) The term of a county justice court judge is four years beginning the first Monday in February 1991.

(b) Judges holding office when this act takes effect or appointed to fill any vacancy hold office until reappointed or a successor is appointed and certified by the Judicial Council.

(2)(a) The term of office of a municipal justice court judge is four years, beginning the first Monday in February 1992.

(b) Judges holding office when this section takes effect or appointed to fill any vacancy hold office until reappointed or a successor is appointed and certified by the Judicial Council.

Laws 1989, c. 157, § 41, Laws 1993, c. 1, § 162.

Utah Code Annotated
§78-5-134 (2)

Library References

Justices of the Peace ☞8
Westlaw Key Number Search 231k8
C J S Justices of the Peace § 8

§ 78-5-133. Repealed by Laws 1993, c. 1, § 164, eff. Jan. 28, 1993

§ 78-5-134. Justice court judges to be appointed—Procedure—Report to Judicial Council—Retention election—Vacancy

(1) As used in this section:

(a) "Appointing authority" means:

(i) the chair of the county commission in counties having the county commission form of county government;

(ii) the county executive in counties having the county executive-council form of government;

(iii) the chair of the city commission, city council, or town council in municipalities having the traditional management arrangement established by Title 10, Chapter 3, Part 1, Governing Body;

(iv) the city manager, in the council-manager optional form of government defined in Section 10-3-1209; and

(v) the mayor, in the council-mayor optional form of government defined in Section 10-3-1209.

(b) "Local legislative body" means:

(i) the county commission or county council; and

(ii) the city commission, city council, or town council.

(2) Justice court judges shall be appointed by the appointing authority and confirmed by a majority vote of the local legislative body.

(3)(a) After a newly appointed justice court judge has been confirmed, the local legislative body shall report the confirmed judge's name to the Judicial Council.

(b) The Judicial Council shall certify the judge as qualified to hold office upon successful completion of the orientation program and upon the written opinion of the county or municipal attorney that the judge meets the statutory qualifications for office.

(c) A justice court judge may not perform judicial duties until certified by the Judicial Council.

(4) Upon the expiration of a county justice court judge's term of office the judge shall be subject to an unopposed retention election in accordance with the procedures set forth in Section 20A-12-201.

(5) Upon the expiration of a municipal justice court judge's term of office a municipal justice court judge shall be reappointed absent a showing of good cause by the appointing authority.

Utah Code Annotated
§78-5-134 (5)

Library References

Justices of the Peace ⇐8
Westlaw Key Number Search 231k8
C J S Justices of the Peace § 8

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(i) the county commission or county council; and

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(2) Justice court judges shall be appointed by the appointing authority and confirmed by a majority vote of the local legislative body.

(3)(a) After a newly appointed justice court judge has been confirmed, the local legislative body shall report the confirmed judge’s name to the Judicial Council

(b) The Judicial Council shall certify the judge as qualified to hold office upon successful completion of the orientation program and upon the written opinion of the county or municipal attorney that the judge meets the statutory qualifications for office.

(c) A justice court judge may not perform judicial duties until certified by the Judicial Council.

(4) Upon the expiration of a county justice court judge’s term of office the judge shall be subject to an unopposed retention election in accordance with the procedures set forth in Section 20A-12-201.

(5) Upon the expiration of a municipal justice court judge’s term of office a municipal justice court judge shall be reappointed absent a showing of good cause by the appointing authority.

- Laws 1989, c. 157, § 43; Laws 1991, c. 244, § 4; Laws 1993, c. 1, § 163; Laws 1993, c. 159, § 12; Laws 1996, c. 243, § 192, eff. April 29, 1996; Laws 1996, c. 254, § 4, eff. Jan. 1, 1997; Laws 1997, c. 10, § 143, eff. May 5, 1997; Laws 1998, c. 313, § 3, eff. July 1, 1998; Laws 2001, c. 71, § 2, eff. April 30, 2001.**

Justices of the Peace 🔑 3. 8

C.J.S. Justices of the Peace §§ 6, 8

Westlaw	Key	Number	Searches	231k3,
				231k8.

(1)(a) Municipal justice courts shall deposit public funds in accordance with **Section 51-4-2**

- 355

Utah Code Annotated
§78-5-134 (5) (d)

(a) If an appointing authority asserts good cause to not reappoint a municipal justice court judge, at the request of the judge, the good cause shall be presented at a formal hearing of the local legislative body.

(b) The local legislative body shall determine by majority vote whether good cause exists not to reappoint the municipal justice court judge.

(c) The decision of the local legislative body is not subject to appeal.

(d) In determining whether good cause exists to not reappoint a municipal justice court judge, the appointing authority and local legislative body shall consider:

(i) whether or not the judge has been certified as meeting the evaluation criteria for judicial performance established by the Judicial Council; and

(ii) any other factors considered relevant by the appointing authority.

(6) Before reappointment or retention election, each justice court judge shall be evaluated in accordance with the performance evaluation program established in Subsection 78-3-21(4).

(7)(a) At the conclusion of a term of office or when a vacancy occurs in the position of justice court judge, the appointing authority may contract with a justice court judge in the county or an adjacent county to serve as justice court judge.

(b) The contract shall be for the duration of the justice court judge's term of office.

(8) Vacancies in the office of justice court judge shall be filled as provided in Section 20A-1-506.

Laws 1989, c. 157, § 43; Laws 1991, c. 244, § 4; Laws 1993, c. 1, § 163; Laws 1993, c. 159, § 12; Laws 1996, c. 243, § 192, eff. April 29, 1996; Laws 1996, c. 254, § 4, eff. Jan. 1, 1997; Laws 1997, c. 10, § 143, eff. May 5, 1997; Laws 1998, c. 313, § 3, eff. July 1, 1998; Laws 2001, c. 71, § 2, eff. April 30, 2001.

Library References

Justices of the Peace ⇌ 3, 8

C.J.S. Justices of the Peace §§ 6, 8

Westlaw Key Number Searches: 231k3;
231k8

§ 78-5-135. Funds collected—Deposits and reports—Special account—Accounting

(1)(a) Municipal justice courts shall deposit public funds in accordance with Section 51-4-2.

(b) The treasurer shall report to the city recorder the sums collected and deposited. The recorder shall then apportion and remit the collected proceeds as provided in Section 78-5-116.

(c) The municipality shall retain all small claims filing fees including the governmental filing fee for actions filed by the municipality as provided in Section 78-6-14.

(2)(a) County justice courts shall deposit public funds in accordance with Section 51-4-2.

Utah Code Annotated
§78-38-9

Research References

Forms

Land Use Prac. & Forms. Handling Land Use
Case § 16 1, Definition

§ 78-38-9. Nuisance—Right of action to abate nuisances—Drug houses and drug dealing—Gambling—Group criminal activity—Prostitution—Weapons

(1) Every building or place is a nuisance where:

(a) the unlawful sale, manufacture, service, storage, distribution, dispensing, or acquisition occurs of any controlled substance, precursor, or analog specified in Title 58, Chapter 37, Controlled Substances;

(b) gambling is permitted to be played, conducted, or dealt upon as prohibited in Title 76, Chapter 10, Part 11, Gambling, which creates the conditions of a nuisance as defined in Subsection 78-38-1(1);

(c) criminal activity is committed in concert with two or more persons as provided in Section 76-3-203.1;

(d) parties occur frequently which create the conditions of a nuisance as defined in Subsection 78-38-1(1);

(e) prostitution or promotion of prostitution is regularly carried on by one or more persons as provided in Title 76, Chapter 10, Part 13, Prostitution, and

(f) a violation of Title 76, Chapter 10, Part 5, Weapons, occurs on the premises.

(2) It is a defense to nuisance under Subsection (1)(a) if the defendant can prove that the defendant is lawfully entitled to possession of a controlled substance.

(3) Sections 78-38-10 through 78-38-16 govern only an abatement by eviction of the nuisance as defined in Subsection (1).

Laws 1992, c. 141, § 7, Laws 1996, c. 69, § 2, eff. April 29, 1996, Laws 1999, c. 136, § 1, eff. May 3, 1999.

Cross References

Forcible entry and detainer, judgment for restitution, damages, and rent, see § 78-36-10

Forcible entry and detainer, time for appeal, see § 78-36-11

Injunctions, generally, see Rules Civ. Proc., Rule 65A

Nuisance offenses, criminal code, see § 76-10-801 et seq.

Nuisances, brothels, see § 47-1-1 et seq.

Unlawful detainer by tenant, see § 78-36-3

Library References

Nuisance §§ 3, 19, 25

Westlaw Key Number Searches 279k3, 279k19, 279k25

C.J.S. Nuisances §§ 10 to 14, 18, 20 to 23, 25, 28 to 45, 48 to 57, 59 to 60, 62, 92 to 97, 99, 102 to 106

§ 78-38-10. Nuisance—Abatement by eviction

(1) Whenever there is reason to believe that a nuisance under Sections 78-38-9 through 78-38-16 is kept, maintained, or exists in any county, the

Utah Rules of Criminal Procedure
Rule 26

Rule 26. Written orders, judgments and decrees.

(a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and orders shall be served upon opposing

counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(c) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered based on a ruling after a hearing or argument, the stipulation of counsel, the motion of counsel or upon the court's own initiative, and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made. If the order, judgment, or decree is the result of a hearing, the order shall include the date of the hearing, the nature of the hearing, and the names of the attorneys and parties present at the hearing.

(d) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(e) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record .

Utah Rules of Judicial Conduct Canon 2

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all activities.

A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

C. A judge shall not belong to any organization, other than a religious organization, which practices invidious discrimination on the basis of race, sex, religion, or national origin.

Hyde Park City Ordinance 10-332

C

PART

10-320. ABATEMENT OF WEEDS AND DELETERIOUS OBJECTS.

10-321. REAL PROPERTY TO BE KEPT CLEAN. It shall be an infraction for any person owning or occupying real property to allow weeds to grow higher on such property than is permitted by this part or not to remove from such property any cuttings of such weeds or any refuse, unsightly or deleterious objects after having been given notice from the health director as hereinafter provided.

10-322. WEEDS - DEFINED. Weeds shall include any vegetation commonly referred to as a weed, or which shall have been designated a noxious weed by the Utah commissioner of agriculture.

10-323. STANDARDS OF WEED CONTROL

A. It is hereby declared that the above stated weeds constitute a nuisance when they:

1. Create a fire hazard, a source of contamination, or pollution of the water, air or property, a danger to health, a breeding place or habitation for insects or rodents or other forms of life deleterious to humans or are unsightly or deleterious to their surroundings.

B. The cut weeds shall be removed from the premises within 48 hours after cutting.

PART

10-330. NUISANCES ON PROPERTY.

10-331. DEFINITION OF NUISANCE. For the purpose of this part the term "nuisance" is defined to mean any condition of use of premises or of building exteriors which are deleterious or injurious, noxious or unsightly which includes, but is not limited to keeping or depositing on, or scattering over the premises any of the following:

- A. Lumber, junk, trash, or debris.
- B. Abandoned, discarded or unused objects or equipment such as furniture, stoves, refrigerators, freezers, cans or containers.

10-332. DUTY OF MAINTENANCE OF PRIVATE PROPERTY. No person owning, leasing, occupying or having charge of any premises shall maintain or keep any nuisance thereon, nor shall any such person keep or maintain such premises in a manner causing substantial diminution in the value of the other property in the neighborhood in which such premises are located.

Hyde Park City Ordinance 10-300 through 10-343

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C

10-333. STORAGE OF PERSONAL PROPERTY. Unsheltered storage of old, unused, stripped and junked machinery, implements, equipment or personal property of any kind which is no longer safely usable for the purposes for which it was manufactured, for a period of 30 days or more (except in licensed junk yards) within this municipality, is hereby declared to be a nuisance and dangerous to the public safety.

10-334. ABATEMENT OF NUISANCE BY OWNERS. The owner, owners, tenants, lessees or occupants of any lot within this municipality on which such storage as defined in the foregoing section 10-333 is made, and also the owner, owners or lessees of the above described personal property involved in such storage shall jointly and severally abate such nuisance by the prompt removal into completely enclosed and secured buildings or be used for such purposes, or otherwise to remove such property from the municipality.

PART

10-340. DANGEROUS BUILDINGS.

10-341. ADOPTION OF A CODE FOR THE ABATEMENT OF DANGEROUS BUILDINGS. The "Uniform Code for the Abatement of Dangerous Buildings," 1976 edition, printed as code in book form by the International Conference of Building Officials (providing for a just, equitable and practicable method whereby buildings or structures which from any cause endanger the life, limb, health, morals, property, safety or welfare of the general public or their occupants, may be required to be repaired, vacated, or demolished), three copies of which have been filed for use and examination by the public in the office of the clerk of this municipality, is hereby approved and adopted as the Abatement of Dangerous Buildings Code of this municipality.

10-342. APPLICATION The provisions of the Abatement of Dangerous Buildings Code shall apply to all dangerous buildings as therein defined which now exist or which may exist or hereafter be constructed in this municipality.

10-343. ALTERATIONS, ADDITIONS AND REPAIRS. All buildings or structures which are required to be repaired under the provisions of the Abatement of Dangerous Buildings Code shall be subject to the provisions of subsections (a), (b), (c), (d), (e) and (i) of Section 104 of the Uniform Building Code.

Hyde Park City Penalty Ordinance 10-359

10-356. COLLECTION BY LAW SUIT. In the event collection of expenses of destruction and removal are pursued through the courts, the municipality shall sue for and receive judgment for all of said expenses of destruction and removal, together with reasonable attorneys' fees, interest and court costs, and shall execute upon such judgment in the manner provided by law.

10-357. COLLECTION THROUGH TAXES. In the event that the inspector elects to refer the expenses of destruction or removal to the county treasurer for inclusion in the tax notice of the property owner, he shall make in triplicate an itemized statement of all expenses incurred in the destruction and removal of the same, and shall deliver the three copies of the statement to the county treasurer within ten days after the completion of the work of destroying or removing such weeds, refuse, garbage, objects or structures. Thereupon, the costs of the work shall be pursued by the county treasurer in accordance with the provisions of section 10-14-4, Utah Code Annotated 1953, as amended, and the recalcitrant owner shall have such rights and shall be subject to such powers as are thereby granted.

10-358. CRIMINAL PROCEEDING. The commencement of criminal proceedings for the purpose of imposing penalties for violations of this chapter shall not be conditioned upon prior issuance of a notice or the granting to the defendant of an opportunity to abate or remove the nuisance. The provisions of this chapter relating to notice and abatement shall be deemed merely alternative and additional methods of securing conformity to the provisions of this chapter.

10-359. PENALTY FOR FAILURE TO COMPLY.

- A. Any owner, occupant or person having an interest in the property subject to this chapter who shall fail to comply with the notice or order given pursuant to this chapter shall be guilty of a class C misdemeanor for each offense and further sum of \$50.00 for each and every day such failure to comply continues beyond the date fixed for compliance.
- B. Compliance by any owner, occupant or person to whom a notice has been given as provided in this chapter shall not be admissible in any criminal proceeding brought pursuant to this section.

Blacks Law Dictionary 7th Edition, West Group 1999

Hist. A money payment from a tenant to the tenant's lord

common fine. A sum of money due from a tenant to a lord to defray the cost of a court leet or to allow the litigants to try the action closer to home — Also termed *head-silver*

A pecuniary criminal punishment or civil penalty payable to the public treasury — fine, b.

excessive fine. 1. *Criminal law* A fine that is unreasonably high and disproportionate to the offense committed • The Eighth Amendment proscribes excessive fines An example of an excessive fine is a civil forfeiture in which the property was not an instrumentality of the crime and the worth of the property was not proportional to the owner's culpability. 2. A fine or penalty that seriously impairs one's earning capacity, esp from a business

fresh fine. *Hist* A fine levied within the past year.

Fine and Recovery Act. *Hist* A statute, enacted in 1833, that abolished the use of fines as a method of conveying title to land See FINE (1) 3 & 4 Will. 4, ch 74

de annuando levato de tenemento quod fuit de antiquo dominico (fi-nee a-nə lan-doh la-vay-to dee ten-ə-men-toh kwod fyoo it dee an-ti-kwoh də-min-ə koh) [Latin "a fine to be annulled levied from a tenant which was of ancient demesne"] *Hist* A writ for disannulling a conveyance of land in ancient demesne to the lord's prejudice

aplendo pro terris (fi-nee kap-ee-en-doh ter-is) [Latin "a fine to be taken for"] *Hist.* A writ that an imprisoned felon use in some circumstances to obtain release from jail and to recover lands and goods during imprisonment

alienation. *Hist* A fee paid by a tenant lord upon the alienation of a feudal land and substitution of a new tenant • It payable by all tenants holding by knight's tenants in capite by socage tenure — portened to fine

endowment. *Hist* A fee paid by a tenant to the tenant's lord • If not widow could not be endowed of her land.

re (fi-nəm fay sə-ree) [Latin] *Hist* a composition or compromise, to

relinquish a claim in exchange for consideration

"In the thirteenth century the king's justices wield a wide and a common law power of ordering that an offender be kept in custody They have an equally wide power of discharging him upon his making fine with the king We must observe the language of the time In strictness they have no power to impose a fine No tribunal of this period unless we are mistaken is ever said to impose a fine To order the offender to pay so much money to the king — this the judge may not do If he did it he would be breaking or evading the Great Charter for an amercement should be affeered not by royal justices but by neighbours of the wrong doer What the judges can do is this — they can pronounce a sentence of imprisonment and then allow the culprit to make fine that is to make an end (*finem facere*) of the matter by paying or finding security for a certain sum of money In theory the fine is a bilateral transaction a bargain it is not imposed it is made 2 Frederick Pollock & Frederic W Maitland *The History of English Law Before the Time of Edward I* 517 2d ed (1899)

2. To make a settlement of a penalty • Magna Carta (ch 55) specifically limited "[a]ll fines which were made with us unjustly and contrary to the law of the land" (*omnes fines qui injuste et contra legem terra facti sunt nobiscum*)

fine non capiendo pro pulchre placitando (fi-nee non kap-ee-en doh proh pəl-kree plas ə tan-doh) [Latin "a fine not to be taken for pleading fairly"] *Hist* A writ prohibiting court officers from taking fines for fair pleading (i.e., *beaupleader*)

fine print. The part of an agreement or document — usu in small, light print that is not easily noticeable — referring to disclaimers, restrictions, or limitations

fine pro redisseisina capiendo (fi nee proh re dis-see-zin-ə kap ee en doh) [Law Latin "a fine to be taken for again disseising"] *Hist* A writ that entitled a person imprisoned for twice dispossessing someone (*redisseisin*) to release upon payment of a reasonable fine

fines le roy (finz læ roy) [Law French] *Hist* The king's fines • A fine or fee that was paid to the monarch for an offense or contempt

fine sur cognizance de droit, comme ceo que il ad de son done (fin səi kon ə zants də droyt, kom say oh kweel ad də sawn dawn) [Law French "a fine upon acknowledgment of the right, as that which he has of his gift"] *Hist* The most common fine of conveyance, by which the defendant (also called the *deforciant*) acknowledged in court that he had already con-

Transcript No. 1, Page 3

1 premature since the ordinance does not allow for a sentence
2 greater than allowed by state law.

3 In ruling on this, let me read from my notes. The
4 defendant's motion to dismiss and quash the conviction does
5 not allege any wrongdoing on the part of the Hyde Park
6 justice court. The defendant's motion only alleges that
7 injustice happens in Utah justice courts. The defendant does
8 not allege any wrongdoing on the part of Hyde Park's justice
9 court and therefore defendant's argument is not relevant and
10 moot.

11 Further, the defendant has appealed the justice court
12 decision to this court and therefore the justice court
13 decision is moot at this point. Therefore, defendant's
14 motion is denied.

15 In regards to defendant's motion to dismiss, the court
16 finds that the defendant has not overcome the long-standing
17 presumptions regarding constitutionality. The court finds
18 that plaintiff's ordinance is not unconstitutionally vague
19 and therefore defendant's motion is denied.

20 Counsel, will you prepare an order to that effect?

21 **MR. JENKINS:** I will, Your Honor. Thank you.

22 **THE COURT:** Very well. With that, counsel, it would
23 appear that we need to set this matter for trial; is that
24 correct?

25 **MR. LAURITZEN:** Yes, please.