

1979

## State of Utah v. Vincent L. Belgard : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

VINCENT L. BELGARD,

Defendant-Appellant.

Case No.  
15743

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BRIEF OF RESPONDENT  
-----

APPEAL FROM THE CONVICTION OF  
HOMICIDE IN THE THIRD JUDICIAL DISTRICT  
AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JAY E. DAVIS, Judge.

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No. 15743

VINCENT L. BELGARD, :

Defendant-Appellant. :  
----- :

BRIEF OF RESPONDENT  
-----

STATEMENT OF THE NATURE OF THE CASE

The appellant, Vincent L. Belgard appeals from a conviction of automobile homicide in the Third Judicial Court, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Vincent L. Belgard, was charged with automobile homicide, a felony in the third degree, in violation of Utah Code Ann. § 76-5-207 (1953) as amended.

Appellant was also charged with failure to stop at the scene of an injury accident, a class A misdemeanor, in violation of § 41-6-31 of the Utah Code Annotated.



On November 17, 1977 the appellant was convicted by a jury on both counts; and received sentences of 0 - 5 years for automobile homicide, and one year for failure to stop at the scene of an injury accident. Both sentences are to run concurrently.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the convictions and judgments rendered in the lower court.

#### STATEMENT OF THE FACTS

At approximately 1:20 p.m. on July 28, 1977 several people witnessed the appellant, who was driving his automobile south on 700 east, run a red light at the intersection of 700 east and 3300 south and strike Michael Winn (who later died from injuries suffered) as he began to cross the intersection on foot. After striking the victim, the appellant continued southbound without stopping (T.89 Vol. II) ( T.5 Vol. III) (T.25 Vol. III). Three witnesses pursued the appellant in their vehicles to a point where he turned off 700 east and came to a stop at a residence about 635 east 3835 south (T.107 Vol. II). One of the witnesses made a citizen's arrest (T.125 Vol II) (T.11 Vol. III) (T.31 Vol. III) and another called the

police (T.12 Vol. III). The witnesses remained with the appellant until the police arrived, except for a "few seconds" (T.99 Vol.II, T.13 Vol.III) when he stepped inside the house to get a wash cloth to wipe blood from his nose and mouth. The witnesses testified that appellant's breath smelled of alcohol (T.101 Vol.II, T.13, 32 Vol. III) and also that his difficulty in walking and his slurred speech gave them the impression he was drunk. (T.98 Vol. II) About fifteen minutes later, Trooper Lynn Thompson arrived at the scene. He also testified that appellant appeared drunk due to his speech, difficulty in walking and the odor of alcohol on his breath (T.49, 50 Vol.III). However, because appellant had suffered some injuries he was not given a field sobriety test (T.32 Vol.1). For appellant's own safety, and to provide him with medical assistance, Trooper Thompson took him into custody and drove him to St. Marks Hospital (T.59 Vol.III). The officer advised appellant of the terms of Utah's implied consent law and § 76-5-207 of the Utah Code, and requested that he submit to a blood test (T. 49, 50 Vol. 1). Initially appellant objected to the test as a violation of "God's Law", (T.50 Vol. 1), but by the time arrangements for taking the blood

sample had been completed, the appellant voluntarily walked into the room, laid down on the gurney and extended his arm to have a blood sample drawn. (T.48 Vol.1), the sample was drawn by Ms. Kay Fowler, a registered nurse employed by the City-County Health Department to draw blood for the police department (T.69 Vol.III). The blood sample was analyzed by Mr. Lynn Davis, a chemist for the City-County Health Department, (T.79 Vol.III), who determined the blood alcohol content to be .28%. (T.90 Vol.III). Trooper Clark Bowles later testified that given the facts in evidence, the blood alcohol level of appellant could not have been less than .08% at the time of the accident. (T.14 Vol.III).

On August 1, 1977, before any complaints were filed (M.8) appellant was arraigned and plead guilty in the justice court before Judge Charles Jones on five counts: 1) driving under the influence, 2) improper registration, 3) fraudulent registration 4) no driver's license, and 5) no inspection (M.6-8). On August 3, 1977, Judge Jones vacated the plea of guilty, and appellant subsequently was tried in district court on the counts of automobile homicide and failure to stop at the scene of an injury accident (R.25) appellant was convicted on both counts (R. 97,98).

# ARGUMENT

## POINT I

### A.

APPELLANT'S BLOOD  
SAMPLE WAS NOT OBTAINED  
IN VIOLATION OF HIS RELI-  
GIOUS SCRUPLES, AND CON-  
SEQUENTLY THE ADMISSION OF  
THE RESULTS OF THE BLOOD  
ALCOHOL ANALYSIS WAS NOT  
A VIOLATION OF APPELLANT'S  
FOURTH AMENDMENT RIGHTS.

Appellant argues that the admission by the trial court of the results of the blood test was a violation of his Fourth Amendment Rights because the blood sample was drawn after he purportedly objected to the extraction of his blood on religious grounds.

The facts reflect that after Officer Lynn Thompson told appellant that a blood test was going to be taken, appellant merely stated "it is against God's law" and "I don't want it". No elaboration was made by appellant as to what he meant. (T. 47, 50, 53; Vol. I) Later, when final preparations were made for the test at the hospital, appellant freely and of his own accord walked into the room where the blood was to be drawn, laid down on the gurney, and extended his arm so that the blood could be taken. Ms. Kay Fowler, a registered nurse, proceeded to draw the blood in normal fashion without encountering any resistance from appellant. (T.48 Vol. 1).

No evidence was offered at trial to show that appellant belonged to any type of a religious organization or adhered to a personal religious dogma, a basic tenet of which forbade submitting to a blood sample.

Schmerber v. California, 384 U.S. 757 (1966), established the general rule that blood samples can be taken from arrested individuals without their consent so long as the police officer has probable cause to believe that the defendant has been driving while under the influence of intoxicating liquor, and the blood sample is taken in a proper medical environment by qualified medical personnel. Under such circumstances, there is no violation of the Fourth Amendment. Appellant contends, however, that the United States Supreme Court in Schmerber, supra, also carved out an exception to the above general rule at 384 U.S. 771 of its decision wherein the Court stated:

Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused, see n. 9, supra. We need not decide whether such wishes would have to be respected.

Appellant therefore claims he falls within this alleged exception.

At the outset, it is clear that the Court did not expressly establish a religious scruple exception to it's own decision in Schmerber. Rather, the Court explicitly refused to decide whether any such exception would be recognized. Thus, appellant's statement at p. 9 of his brief is inaccurate where he states:

. . . since the blood sample in this case was obtained against his wishes and in violation of his religious scruples, this case falls within the exception implicitly [sic] recognized by the United States Supreme Court in Schmerber.

Similarly, appellant's characterization of the above passage in Schmerber at p. 10 of his brief is also inaccurate and misleading where he says:

"Under the reasoning of Schmerber, supra, where a person refuses to consent to a blood test on religious grounds, a result opposite to that reached in Schmerber is appropriate."

In short, the United States Supreme Court refused to decide whether an objection to a blood test on religious grounds would make any difference. Indeed, appellant has failed to cite any case authority which has held that an extraction of blood over an arrested person's protests on religious grounds would violate the Fourth Amendment prohibition against unreasonable searches and seizures.

Although respondent was unable to locate caselaw directly on point within the context of the instant case, there is substantial caselaw determining when claims based on religious beliefs should be upheld, and when First Amendment protection has been denied to alleged religions or religious tenets that are shams designed to exploit the constitution, and which are devoid of religious sincerity. In Wisconsin v. Yoder, 406 U.S. 205, 215 - 216 (1972), the United States Supreme Court had to determine the legality of refusals by the Old Order Amish to send their children to school after the eighth grade. The Court stated:

Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

The courts have therefore developed certain criteria in determining the validity of religious claims including the history and age of the sect, Wisconsin v. Yoder, *supra*, Cruz v. Beto, 405 U.S. 319 (1972); whether the asserted religion has the characteristics associated with traditional

"recognized" religion, Remers v. Brewer, 361 F. Supp. 537 (N.D. Iowa 1973), aff'd 494 F.2d 1277 (8th Cir. 1974), Cert. denied 419 U.S. 1012 (1974), Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); and the sincerity of the belief of the religious sect, or the individual. United States v. Seeger, 380 U.S. 163 (1965), Welsh v. United States, 398 U.S. 333 (1970), Hemes v. McNulty, 432 F. 2d 1182 (9th Cir. 1970), Theriault v. Carlson, 495 F.2d 390 (5th cir. 1974).

In United States v. Seeger, the United States Supreme Court considered whether several conscientious objectors had established the validity of their religious objections to induction into the Armed Forces. The Court, holding that the petitioners qualified for conscientious objector status, stated that in order for a person to establish the validity of an alleged religious belief, if he is not a member of certain recognized exempt religious organizations, he must demonstrate "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . ." Seeger, at 176. "While the 'truth' of a belief is not open to question, there remains the significant question whether it is



'truly held'. This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact. . ." Seeger, at 185. The court also stated it is the duty of the court "to decide whether the beliefs professed by [Petitioners] . . . are sincerely held and whether they are, in [their own scheme of things, religious." Seeger, at 185.

Two years later, the District of Columbia District Court in United States v. Kuch, 288 F Supp. 439 (D.D.C. 1968) held that a woman who professed to be a member of a church which used Marijuana and LSD as its sacraments failed to demonstrate the sincerity of her religious beliefs. Consequently her motion to dismiss charges of unlawful obtaining and transferring marijuana, and unlawful sale, delivery and possession of LSD, was denied. Regarding her claim that handling the contraband was pursuant to a religious belief, the court stated:

What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence. . .

In short, she has totally failed in her burden to establish her alleged religious beliefs, an essential premise to any serious consideration of her motion to dismiss.

Kuch, at 438, 439.

In Welsh v. United States, 398 U.S. 333 (1970), another conscientious objector case, the Supreme Court made it clear that a belief must not only be sincere, but must be a constant and ongoing dogma. The Court stated that a conscientious objector must hold "deeply and sincerely. . . beliefs that. . . impose upon him a duty of conscience to refrain from participating in any war at any time. . ." Welsh at 340 (emphasis added).

Applying the above law to the facts in the instant case, it is clear that appellant failed to show at trial either that he belonged to an organized sect which had as a tenet of its beliefs the abhorrence of all blood extractions, or that he personally held such a "sincere and meaningful belief" which occupied in his life a place parallel to the God of an established sect. The fact that he merely told Officer Thompson that the blood test was against "God's Law", without elaborating as to why it was against God's Law, or what basic tenet of his religion it violated implies the shallowness of his alleged religious belief. Also, the fact of his eventual submission to the blood test without resistance (T. 48 Vol.I) further shows the lack of sincerity of his purported beliefs.

Similarly, appellant failed to show his alleged belief, that a blood extraction violated "God's Law", was a constant ongoing religious tenet. He did not comply with Welsh, supra, by showing that he was opposed to submitting to any blood sample at any time, and not just a sample that would tend to incriminate him. Indeed, the record evidences that he served in the Armed Forces, where blood tests are a requirement of entry, and was wounded in Vietnam, suggesting that he previously had submitted to blood tests. (T. 100 Vol.II)

In summary, the appellant failed in his burden to establish the validity and sincerity of his religious beliefs. Moreover, because the exception suggested by appellant has not been recognized by any court, the general rule of Schmerber, supra, should be the controlling law governing the blood test in this case. As articulated in Schmerber, the relevant questions are whether the intrusion is "justified in the circumstances," and "whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Schmerber, at 768.

A review of the facts reveal that Officer Thompson's decision to take a blood sample was justified and reasonable.

under the circumstances. A field sobriety test was inappropriate, as appellant was visibly injured and could have caused additional injury. Moreover, such a test might have reflected the injury to the appellant's head and the shock of having been involved in a serious accident rather than his state of inebriation. Also, as recognized by the Supreme Court in Schmerber, "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See Briethaupt v. Abram, 352 U.S., at 436 n.3." Schmerber, at 771. In an effort to be fair to the appellant, as well as to use a highly reliable method, Officer Thompson elected to have a blood sample taken. The reasonableness of taking of the sample was enhanced further by the fact that the appellant had to be taken to the hospital anyway for treatment of injuries he sustained in the accident, and Schmerber requires that blood samples be drawn in a 'Medical Environment'. Also, the appellant's objection that he believed it was "against God's Law" to submit to a blood sample was not sufficient to put Trooper Thompson on notice of any significant religious objection--nor did appellant request an alternative form of chemical analysis.

Additionally, Utah Code Ann. § 41-6-44.10(a) (1953), as amended, states:

No person, who has been requested pursuant to this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test shall not be a defense to taking a test requested by a peace officer nor be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

The Code states unequivocally that the police officer, not the arrested driver, is to determine which chemical test to use, and the failure of the officer to use any particular test is not a defense. In the instant case, Trooper Thompson determined that a blood test was most appropriate under the circumstances. In light of the reasons set forth above, administering a blood test was reasonable under the circumstances, and the actions of Trooper Thompson conform to both the spirit and letter of the rule established in Schmerber.

Finally, respondent submits that contrary to appellant's characterization of the facts, the transcript reflects that appellant consented to the blood test.

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the United States Supreme Court held that where a defendant consents to a search, the search is valid and does not violate the Fourth Amendment, and all evidence seized pursuant to the search is admissible. The question of whether consent was given is to be determined under the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973), People v. Renfrow, 172 Colo. 399, 473 P.2d 957 (1970). The fact that a defendant was under arrest, or even in handcuffs, does not per se mean that consent to a search was not voluntary and freely given. People v. Rodriguez, 168 C.A. 2d 452, 336 P.2d 266 (1959), People v. James, 19 Cal. 3d 99, 137 Cal. Rptr. 447, 561 P.2d 1135 (1977). In State v. Yoss, 146 Mont. 508, 409 P.2d 452 (1965), neither the fact that the defendant was under arrest, nor that he was warned that a search warrant would be obtained if he refused to consent to the search was enough to make the consent per se coerced, and the consent was held to be both voluntary and competent. No words need to be spoken at all for a person to consent to a search, and under appropriate circumstances, consent may be manifest by a gesture alone.

People v. James, 19 Cal. 3d. 99, 137 Cal. Rptr. 447, 561 P.2d 1135 (1977). See also State v. Radford 30 Or. App. 807, 568 P.2d 692 (1977). The degree of affirmative assistance given to the police by the defendant is relevant in determining whether the defendant consents to the search. State v. Knaubert, 27 Ariz. App. 53, 550 P.2d 1045 (1976).

In the instant case, Officer Thompson read and explained to appellant Utah's Implied Consent Law, § 41-6-4 which states that a person's driver's license will be revoked if he does not consent to a chemical test, and Utah's Automobile Homicide Law, § 76-5-207 which provides that in the case of an automobile accident resulting in serious injuries to another person, a policeman with probable cause may compel the driver to submit to a blood test. (T.47 Vol. 1).

Since the accident in question involved serious injuries to Michael Winn, which later resulted in his death, Officer Thompson correctly explained to appellant that if he did not consent to the blood test, the test would be taken by force if necessary. The appellant refused stating "it is against God's Law," and "I don't want it"

(T. 47,50,53 Vol.I), but when the final preparations were made for the test, the appellant freely and of his own accord walked into the room where the blood was to be drawn, laid down on the gurney and extended his arm to Ms. Kay Fowler who was to draw the blood. Ms. Fowler proceeded to draw the blood in her normal fashion without encountering any difficulty or requiring any assistance.

Although appellant knew that if he did not consent, a blood sample would be drawn anyway, because Trooper Thompson merely explained the relevant State law and did not threaten any illegal action, no coercion was involved. Under the rules explained in People v. James, supra, and State v. Knaubert, supra, consent may be unmistakably manifest by action alone without any words being spoken. The facts that appellant willingly walked into the room, laid down on the gurney and extended his arm to facilitate the blood extraction indicate that he freely and voluntarily consented to the blood sample.

Appellant's actions in failing to resist the blood extraction also fall within the holding of this court in State v. VanDam, 554 P.2d 1324 (Utah 1976). The petitioner in that case was charged with rape. The



prosecution took hair samples from him to use as evidence. Petitioner stated he would not resist the taking of the hair samples, but made clear that they were taken over his objections. On appeal, Petitioner asserted the taking of the hair samples over his objections constituted an "unreasonable search" and violated the Fourth Amendment. This court held that the search was not compulsory; that even though the appellant objected, his Fourth Amendment rights were not violated because he offered no resistance.

Defendant urges that the hair taking (after arrest and while in custody, when defendant volunteered that he wouldn't resist but would object) violated his Utah and federal constitutional rights under the Utah section and Fourth and Fifth federal Amendments. . .

As to state and federal constitutional provisions mentioned, defendant was not compelled to give a) evidence, b) or be a witness against himself. The officers relieved him of the hair (without any resistance). Under such circumstances the cases say no constitutional rights are violated. (Emphasis added.)

Applying the reasoning of VanDam to the instant case, although appellant objected to the blood test, because he did not "resist" the extraction of the blood sample, he was not "compelled" to give evidence, and consequently his Fourth Amendment rights were not violated.

In Summary, Respondent asserts that appellant failed to establish at trial the validity of his "religious scruples" objection to the blood test; that Schmerber, . supra, did not explicitly or implicitly recognize a religious exception; that the taking of the blood sample was reasonable under the circumstances as required by Schmerber; and that appellant, in fact, consented to the blood extraction. Consequently appellant's Fourth Amendment rights were not violated, and the blood test results were properly admitted into evidence.

B.

APPELLANT WAS NOT COM-  
PELLED BY THE THREATENED USE  
OF FORCE [TO PERMIT THE BLOOD  
SAMPLE TO BE TAKEN] IN VIOLA-  
TION OF HIS FOURTH AMENDMENT  
RIGHTS UNDER ROCHIN.

Appellant contends that his Fourth Amendment privacy rights were violated when Trooper Thompson told him that if he did not voluntarily submit to a blood test, the test would be compulsorily administered. In support of this argument appellant cites Rochin v. California, 342 U.S. 165 (1952).

Respondent submits this argument is without merit for several reasons:

First, Rochin, supra, is distinguishable from the instant case, and appellant's attempt to extend its holding to this case stretches it far beyond it's appropriate parameters. Rochin, supra, involved an incident where the police, after receiving information that appellant was selling narcotics, walked into appellant's apartment through his open door. Appellant was sitting half-dressed on his bed. The police saw two suspicious looking capsules on the night stand, but as they approached appellant grabbed the capsules and placed them in his mouth. The officers jumped on appellant and tried to

extract the capsules from his mouth, but he had already swallowed them. The police then handcuffed the appellant and took him to the hospital to have his "stomach pumped." In his vomit, the police found two capsules containing morphine that were used as evidence in his conviction. In response to this form of police misconduct, the court stated:

We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

342 U.S. at 172 (1952)

In Rochin, the brutal violation of the integrity of the appellants' person offends one's sense of decency, and is a shocking denial of due process and the Fourth Amendment right of privacy.

However, the Court nowhere licensed the extension of the holding to cases where violation of privacy rights were merely threatened. The case purported to protect only actual and blatant violations of one's privacy rights over his person, and appellant has cited no authority substantiating his suggested extension. In fact, the court took pains to limit the applicability of the decision stating:

In deciding this case we do not needlessly bring into question decisions in many states dealing with essentially different, even if related problems.

Rochin, at 174 (1952).

In the instant case, Officer Thompson did not engage in any behavior that even remotely resembles the facts of Rochin. Here, there was no physical violence, and no forcible intrusion violating the integrity of the appellant's person. Consequently, the Fourth Amendment privacy violations Rochin was designed to protect are conspicuously absent in this case.

In the alternative, assuming (without admitting) that Rochin does extend to cases involving mere "threats of violence," the police actions must still constitute

"conduct which shocks the conscience." Appellant argues that Trooper Thompson engaged in "indiscriminate threats of violence" and "psychological intimidation," and that this "shocks the conscience" and satisfies the test. This claim, however, is not supported by the record. Trooper Thompson merely advised appellant of the Utah statutory law governing the situation. He told him that 1) if he did not consent, his driver's license would be revoked pursuant to Section 41-6-44; and 2) because the accident victim was seriously injured, if the appellant did not submit voluntarily, the blood sample could be compulsorily extracted pursuant to Utah Code Ann. § 76-5-207.

In advising the appellant of the relevant Utah law, he was only fulfilling his duty. The tenor of these remarks do not ring of "violence" or "brutality." Rather, their tone is one of urging the appellant to submit to the blood test so that force would not be necessary. Certainly, Trooper Thompson's actions were not conduct which "shocks the conscience." Indeed, Trooper Thompson should be commended for his patience and restraint, and civility in encouraging appellant to submit voluntarily, rather than forcibly extracting the blood sample, as authorized by Utah Code Ann. § 76-5-207.

Finally, since Rochin was decided in 1952, it has been limited in scope and application by subsequent decisions. In Schmerber v. California, 384 U.S. 757 (1966), a blood sample was compulsorily extracted over the objections of the appellant. He challenged the trial court's admission of the blood sample as a violation of his privacy and due process rights under Rochin. The United States Supreme Court held that compelling a person to give a blood sample did not violate his privacy and due process rights when the blood sample was drawn in a hospital by qualified medical personnel (as was done in the instant case). See also Briethaupt v. Abram; Warden, 352 U.S. 432 (1957). In the instant case the blood test was administered in St. Mark's Hospital (T. 43 Vol. I) by Ms. Kay Fowler, who was authorized by the City and County Health Department to draw blood samples for the police (T. 47, 60 Vol. I).

Since Schmerber, supra, held that under certain circumstances a person's blood could forcibly be withdrawn, it follows that merely "threatening" to take blood, under the circumstances authorized in Schmerber, supra, does not violate one's privacy or due process rights.

C.

UTAH CODE ANN. § 76-5-207 (1953), AS AMENDED, IS NOT UNCONSTITUTIONALLY OVERBROAD; FUTHERMORE APPELLANT LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE ON THE BASIS OF OVERBREADTH.

Utah Code Ann. § 76-5-207(2), (1953), as amended, states:

The presumption established by section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentages, shall be applicable to this section and any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence.

Appellant argues that the statutory language allowing the results of any chemical test administered with or without a defendant's consent to be admissible subject only to the rules of evidence is unconstitutionally overbroad and violative of the principles set forth in Mapp v. Ohio, 367 U.S. 643 (1961), Rochin v. California, 342 U.S. 165 (1952), and Schmerber v. California, 384 U.S. 757 (1966).

At the outset, it should be noted that appellant's claim of overbreadth was not raised at trial, and is being



raised for the first time on appeal. Therefore, the issue was not timely preserved for appeal and should accordingly be dismissed. See First Equity Corp. of Florida v. Utah State University, 544 P.2d 887 (Utah 1975); David v. Mulholland, 25 Utah 2d. 56, 475 P.2d 834 (1970); and State v. Tritt, 23 Utah 2d 365, 463 P.2d 806 (1970).

Secondly, respondent submits that appellant lacks standing to attack the constitutionality of the statute on overbreadth grounds. The United States Supreme Court has repeatedly held that:

. . . One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

United States v. Raines, 362 U.S. 17 (1960).<sup>1</sup>

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1 Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. State of Texas, 223 U.S. 288, 295-296; People of State of New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160, 161; Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginian R. Co. v. System Federation, 300 U.S. 515, 558; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration, 179 U.S. 405; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347-348.

This same rule has also consistently been invoked by the Utah Supreme Court. In State v. Tritt, 23 Utah 2d 365, 463 P.2d 806 (1970), a case involving a conviction for contributing to the delinquency of a minor, petitioner claimed that the statute describing the offense was unconstitutionally vague. The Utah Supreme Court held the statute valid and stated:

It is a generally held rule that even if a statute may be unconstitutional as applied to certain individuals or situations it will not be stricken down at the behest of one who is not adversely affected by the defect.

Id. at P. 809.

See also State v. Phillips, 540 P.2d 936 (Utah 1975), Justice Hall's concurring opinion in Salt Lake City vs. Piepenburg, 571 P.2d 1299, 1301 (Utah 1977), State v. Barlow, 107 Utah 292, 153 P.2d 647 (1944), and State ex rel. Johnson v. Alexander, 87 Utah 376, 49 P.2d 408 (1935).

Appellant's first contention appears to be that Section 76-5-207 is unconstitutionally overbroad because it does not carefully specify under what conditions the chemical tests may be administered. However, regardless of the specificity of the phrase of the statute

in question, in the instant case all of the requirements of Schmerber and Rochin, supra, were fully and carefully complied with. The record indicates that the blood sample was drawn after appellant's arrest based on probable cause that he was intoxicated, and was administered in St. Mark's Hospital by a registered nurse authorized to draw blood samples for the police. The principles of Rochin, 342 U.S. 165 (1952), were also complied with in the present case (see Point I-B). Consequently, because appellant's constitutional rights were not "adversely affected" by the alleged constitutional defect of the statute, he lacks requisite standing to attack its validity on the assumption that it might violate the constitutional rights of others if applied to them under different circumstances.

The second ground for appellant's claim of overbreadth is that the statute allows in evidence of a chemical test result "regardless of who the test is administered to." Appellant's brief at p. 13. This claim assumes that appellant is part of a constitutional protected class of defendants who, because of their status in the class, need not allow blood samples to be extracted. (e.g. those who object to blood extraction)

because of certain religious scruples.) Respondent, has already shown in Point IA, supra, that appellant does not fit in such a class. Thus, he lacks standing to assert the argument on behalf of others. Moreover, respondent has also shown that the United States Supreme Court has not yet ruled that blood samples cannot be taken without the consent of such persons with alleged religious scruples, nor has it created such a constitutionally protected class. The Court expressly reserved the question for a later time in Schmerber v. California, 384 U.S. 757 (1966). Thus, Utah's statute should not be prematurely ruled unconstitutionally overbroad absent resolution of the above issue first. Additionally, when a court interprets a statute, it should presume that the legislature was aware of the relevant case law in effect at the time, and intended the statute to be read in light of, and in harmony with the existing case law. Moragne v. States Marine Lines Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), U.S. v. Thomas, 82 U.S. 337 (1872). Moreover, this Court stated in Greaves v. State, 528 P.2d 805 (Utah 1974), that:

. . . it is the well established rule that legislative enactments are endowed with a strong presumption of validity; and that they should not be declared unconstitutional if there is

any reasonable basis upon which they can be found to come within the constitutional framework; and that a statute will not be stricken down as being unconstitutional unless it appears to be so beyond a reasonable doubt. . . .

. . . In determining whether the statute carries out that purpose, it should not be given any tortured or strained application to conjectured or hypothetical situations, but should be understood and applied in a fair, realistic and practical manner to the situation confronted, and in the awareness that all of the law is not stated in one sentence or one paragraph, but a statute is to be construed and applied in relation to other requirements of the law.

Id. at p. 806-807.

In the case at bar, appellant objects to the language of Section 76-5-207 which allows police to use "any chemical test administered in any manner." Without specifying the constitutional standards enunciated in Schmerber, and Rochin, supra, which govern such activity. In short, appellant contends that the statute is unconstitutional overbroad because Schmerber and Rochin, supra were not codified in the statute. However, according to the above rules of statutory interpretation, this Court should presume that in enacting the statute, the legislature

intended that it be read in light of the governing standards of Schmerber and Rochin, supra. In other words the statute should be interpreted as requiring that when a blood test is taken without consent and without a warrant, it may be taken only upon probable cause after arrest, and by a qualified personnel in a medical setting. Consequently, the statute is not unconstitutionally overbroad.

In summary, even if appellant is allowed to raise the issue of unconstitutional overbreadth of Section 76-5-207, supra, for the first time on appeal his argument lacks merit because he has no standing to attack the statute, and because the statute is not overly broad in its application.

D.

THE ADMISSION INTO  
EVIDENCE OF THE CHEMICAL  
TEST RESULTS OF THE BLOOD  
SAMPLE DID NOT VIOLATE  
APPELLANT'S RIGHTS UNDER  
ARTICLE I, SECTION 12 OF  
THE UTAH CONSTITUTION.

Appellant concedes at pages 13-14 of his brief that the privilege against self-incrimination of the Fifth Amendment of the United States Constitution has been held to be applicable only to evidence which is of a testimonial or communicative nature, and does not extend to physical evidence such as blood samples taken involuntarily from an arrestee. Schmerber v. California, 384 U.S. 757 (1966). Nevertheless, appellant claims that the wording of Utah's Constitutional privilege against self-incrimination contained in Article 1, Section 12 extends a greater privilege to him than that accorded by the Fifth Amendment. He argues that Article 1, Section 12 prohibits the admissibility of any evidence taken without his consent, including non-testimonial physical evidence, which tends to incriminate him.

At the outset, respondent reasserts that the record shows appellants blood sample was not involuntarily extracted (Point I-A, supra), and therefore appellant's

privilege against self-incrimination was not violated under either the federal or state constitutional provisions. Assuming arguendo, however, that the blood sample was taken without appellant's consent, respondent submits that the extent of the privilege accorded by the Utah Constitution is no greater than that of the Federal Constitution. It should be noted that this issue has previously been before this court and has been rejected in dictum. See State v. VanDam, 554 P.2d 1324 (Utah 1976).

The language of the two constitutional provisions is as follows: Fifth Amendment of the United States Constitution - "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." Article I, Section 12 of the Utah Constitution - "The accused shall not be compelled to give evidence against himself. . . ."

A review of cases decided by the United States Supreme Court, the supreme courts of other jurisdictions with identical or similar language as found in Article 1, Section 12, and a review of Utah cases clearly refutes the interpretation of Article 1, Section 12, appellant would have this Court adopt.

One of the foremost authorities on evidence,



Professor Wigmore, discusses in his treatise on Evidence the history of the privilege against self-incrimination, the forms of disclosure protected, and the ever-present problem of interpretation of legislative intent as pertaining to the drafter of state constitutions. He gives a few indicia which can be used to help explain what the drafters of various constitutions meant by their words, and concludes with the assertion that "the probabilities substantially favor the conclusion that the constitutional protections were originally intended only to prevent a return to the hated practice of compelling a person, in a criminal proceeding directed at him, to swear against himself."<sup>2</sup>

The learned professor further states in § 2263 the interpretation of the privilege given by most every jurisdiction in the United States, including the United States Supreme Court:

The history of the privilege (§ 2250 supra)--especially the spirit of the struggle by which its establishment came about--suggests that the privilege is limited to testimonial

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2 Wigmore on Evidence, Section 2252, p.324.

disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person a sworn communication of his knowledge of facts which would incriminate him.

\* \* \*

In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion.<sup>3</sup>

The majority of courts in jurisdictions where this question of self-incrimination has arisen have found the state and federal self-incrimination statutes to be identical in application, though different in written form.

In State v. Moore, 79 Wash.2d 51, 483 P.2d 630 (1971), the Washington Supreme Court ruled that their state's constitutional provision in Art. I, § 9, providing that no person shall be compelled to give "evidence" against himself, provides the same guarantee as that provided in the Fifth Amendment to the Federal Constitution, and that protection of both constitutional provisions extended only to testimonial or communicative evidence.

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3 Wigmore on Evidence, Section 2263, p.378.

The Arizona Court in State v. Stelzriede, 101 Ariz. 385, 420 P.2d 170 (1966), held that the privilege against self-incrimination protects an accused only from being compelled to provide the state with evidence of a testimonial or communicative nature, and this privilege is not violated by a compulsion which makes a suspect the source of real or physical evidence. This ruling was in light of an Arizona constitutional provision almost identical to Utah's which states in Art. 2, § 10, that "no person shall be compelled in any criminal case to give evidence against himself. . . ."

The Oklahoma Constitution which states in part "no person shall be compelled to give evidence which will tend to incriminate him. . . ," was held in State v. Thompson, 538 P.2d 1080 (Okla. Crim. 1975), to be consistent with the common law, and affording no greater privilege than the Fifth Amendment. This ruling overturned an earlier 1964 decision, and brought the case law in line with the United States Supreme Court's decision in Schmerber, supra, limiting the privilege to testimonial evidence.

While respondent could discover no Utah cases where this Court has clearly indicated whether this state

follows the United States Supreme Court and the majority of other state supreme courts in limiting the privilege to testimonial evidence, there are three cases which shed some light on this issue.

In State v. Spencer, 28 Utah 2d 12, 497 P.2d 636 (1972), this Court stated that requiring a defendant to participate in a line-up did not violate his privilege against self-incrimination under Article 1, Section 12 of the State Constitution.

In State v. Sims, 30 Utah 2d 251 516 P.3d 354 (1973), this Court dismissed a defendant's contention that he was compelled to give evidence against himself when the police seized and subjected articles of clothing belonging to him to scientific tests.

Thus, in the above cases the compulsory production of non-testimonial evidence was not found violative of Article 1, Section 12 of the Utah Constitution.

Moreover, in State v. Kelbach, 23 Utah 2d 231, 461 P.2d 297 (1969), the Court dealt with an appeal from a murder conviction based, in part, on a claim that a paraffin test, taken to ascertain the presence of gun powder on the hands of the petitioner was an unconstitutional

search and seizure. In support of its conclusion that the appellant's Fourth Amendment rights were not violated the Court cited with approval to Annotation: Physical Examination or Exhibition of, or Tests upon, Suspect or Accused, As Violating Rights Guaranteed by Federal Constitution, 16 L. Ed.2d 1335-1336. When quoted in full, that passage also has bearing on the Fifth Amendment concerns involved in the instant case:

In numerous federal cases, the principle has been applied or recognized that it is proper, subject to qualifications relating to the concept of fundamental fairness, to make use of the body of a person charged with crime, or detained with reasonable cause, as the case may be, either as real or physical evidence in itself, or as the basis for evidence of that nature developed from such use (as distinguished from verbal or "testimonial" declarations), without violating prohibitions against self-incrimination as embodied in the Fifth Amendment, or implied by the due process clause of the Fourteenth Amendment, or without violating the Fourth Amendment prohibition against unreasonable searches and seizures as applicable directly to federal prosecutions, and, through the agency of the Fourteenth Amendment, to state prosecutions.

Summarizing up to this point, the United States Supreme Court, and the majority of state courts have held

that the privilege against self-incrimination is limited to testimonial evidence. Historical fact fortifies this position, indicating the intent of the drafters of the United States Constitutions and the state constitutions patterned after it, was to include only testimonial evidence in the privilege. Although this court has not specifically resolved this issue, there is caselaw indicating that non-testimonial evidence is not protected by Article 1, Section 12 of the Utah Constitution.

In support of his argument that it is an established doctrine of this court that Article 1, Section 12 of the Utah Constitution "is broader than the comparable federal self-incrimination privilege of the Fifth Amendment," Appellant's Brief at page 13, the appellant cites only two cases as authority. Appellant cites first to the 1912 case of State v. Sirmay, 40 Utah 525, 122 p.748 (1912), in which petitioner, convicted of first degree murder, appealed in part on the ground that matching his shoes against footprints at the scene of the murder compelled him to give evidence against himself in violation of the Utah Constitution.

The passage quoted by appellant states:

It is generally held, and as stated in 12 Cyc. 402, that although evidence, including documents and other articles, may have been obtained in a criminal case by unfair or illegal methods, it is nevertheless, as a general rule, admissible if relevant, provided the accused is not thereby compelled to do any act which incriminates him, and the confession or incriminating admission is not extorted from him; and by the weight of authority it is held to be error to compel the accused to submit to a comparison of footprints and to permit a witness who was present when the accused was forcibly compelled to place his foot in footprints, or to surrender his shoes for the purpose of making a comparison, to testify as to the result; but where the accused voluntarily places his foot in the tracks, or surrenders his shoes to the sheriff, he cannot object to evidence that they seemed to fit. (Emphasis added.)

Id. at 753.

The appellant relies on a sentence which stated that police may not properly admit evidence obtained by compelling a defendant to "do any act which incriminates him." However, on closer scrutiny, the fact that this statement becomes merely dicta, and inapplicable to the instant case is apparent. First, the statement was dicta, because the

court held that the petitioner voluntarily allowed his shoes to be compared to the footprints, so he was not "compelled to give evidence against himself." Secondly, the statement that evidence is admissible only if "the accused is not compelled to do anything which incriminates him" is relevant only to evidence obtained by "unfair or illegal methods." The evidence in the instant case (the blood test results) was fairly and legally obtained (see Points I A & B, supra). Also, although the Court said that an accused may not be compelled to do "any act," when read in context with the next phrase, which states: "and the confession or incriminating admission is not extorted from him," the scope of "any act" is limited to confessions or verbal admissions. Thus, although the phrase "compelled to do any act" is somewhat vague, the court intended it to refer only to testimonial evidence. Finally, the Sirmay decision was decided in 1912, long before this Court's more recent treatment of the issue in Spencer, Sims and Kelbach, supra.

Appellant also cites to State v. VanDam, 554 P.2d 1324 (Utah 1976) to illustrate that Art.1 Section 12 of the Utah Constitution extends broader self-incrimination protections than the Fifth Amendment. In VanDam, a rape



case, the court admitted in evidence hair samples taken without resistance from the defendant. Although this is clearly permissible under the Fifth Amendment, the defense appealed on the grounds that this violated Art. 1 Section of the Utah Constitution. In its opinion, the court acknowledged that the question of the breadth of Art. 1 Section 12, vis-a-vis the Fifth Amendment, was before the Court. However, as noted earlier, this question was not resolved because the case was disposed of on other grounds (the evidence was held admissible because its production was voluntary, not compulsory):

Defendant urges that the hair taking (after arrest and while in custody, when defendant volunteered that he wouldn't resist but would object) violated his Utah and federal constitutional rights under the Utah section and Fourth and Fifth federal Amendments. Defendant also urges that the Utah section had a broader application than the Fifth Amendment.

As to state and federal constitutional provisions mentioned, defendant was not compelled to give a) evidence, b) or be a witness against himself. The officers relieved him of the hair (without any resistance). Under such circumstances the cases say no constitutional rights are violated.

554 P.2d 1324,1325.

Since the court disposed of the case without ruling on the breadth of Article 1, Section 12, VanDam, supra, lends no strength to the claim that this section extends the privilege against self-incrimination to non-testimonial as well as testimonial evidence.

In summary, the claim that Article 1, Section 12 extends to non-testimonial evidence is not an established doctrine of this Court nor of a majority of those jurisdictions which have addressed the issue. Moreover, the authorities appellant cites to support this claim are not on point. Respondent submits that the extent of the privilege accorded by the Utah Constitution is the same as that of the United States Constitution, and consequently the lower court's decision to admit the results of the blood test should stand.

## POINT II

THE PROBATIVE VALUE OF THE BLOOD ALCOHOL TEST RESULTS WERE ESTABLISHED BY EXPERT TESTIMONY AND PROPERLY ADMITTED INTO EVIDENCE.

In the present case a blood test administered to appellant approximately 1.5 hours after the accident registered a blood alcohol level of .28%. Appellant argues that the test results were improperly admitted into evidence because the prosecution's expert witness allegedly did not establish the probative value of the test results as required by Utah Code Ann. § 41-6-44.5 (1953), as amended, which states:

In any action or proceeding in which it is material to prove that a person was driving under the influence of alcohol, the results of a chemical test or tests as authorized in § 41-6-44.10 shall be admitted as evidence if the chemical test was taken within one hour of the alleged incident. The level of the alcohol determined to be in the blood by the chemical test shall be presumed to be not less than the blood alcohol level of the person at the time of the incident. If the chemical test was not taken within one hour after the alleged incident, the evidence of the amount of alcohol in the person's blood as shown by the chemical test is admissible if expert testimony establishes its probative value and the results of said test may be given prima facie effect if established by expert testimony. (Emphasis added.)

Respondent submits that the probative value of the test results was established, and consequently the test should have prima facie effect as to the presumption of intoxication.<sup>4</sup>

Appellant admits that the leading case in this jurisdiction defining "probative value" is State v. Scott, 111 Utah 9, 175 P.2d 1016, 1021 (1947). This case states

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- 4 Utah Code Ann. § 76-5-207(2) states in relevant portion that "the presumption established by Section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentage shall be applicable to this section. . ."

Utah Code Ann. § 41-6-44(b) (3) states:

(b) In any criminal prosecution for a violation of subsection (a) of this section relating to driving a vehicle while under the influence of alcohol or in any civil suit or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, breath, or other bodily substance shall give rise to the following presumptions:

\* \* \*

3. If there was at the time 0.08 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol;

"that all evidence having probative value—that is, that tends to prove an issue, is admissible." The standard is clear and simple. The probative value threshold is met as long as evidence tends to prove an issue. The facts reflect that this standard was met.

Trooper Clark Bowles, an authority on the subject of alcohol absorption and burn-off rates, was called by the prosecution as an expert witness to establish the blood test's probative value (T.100 Vol. III). In calculating the outside parameters of the appellant's blood alcohol level at the time of the accident, Trooper Bowles used data on absorption and burn-off rates that he acquired through over one hundred experiments. (T.102 Vol. III.) He stated that on an empty stomach alcohol was absorbed into the blood stream within 15-30 minutes, and if there was food in the stomach the absorption process took from 1 to 1.5 hours (T.108 Vol. III). He testified that the absorption rate is relatively constant and does not vary much between individuals and the blood alcohol burn-off is also relatively constant (T.106 Vol. III). He also stated that the average burn-off rate is .015% per hour, extending possible up to .02% in some individuals (T.110, 119 Vol. III). Taking all these factors into consideration,

when presented the facts in evidence in this case (T.139 Vol. III), Trooper Bowles testified that it was not possible for appellant's blood alcohol level to have been below .08% at the time of the accident (T.141 Vol. III). Due to the many variables involved, such as when appellant last ate and consumed liquor prior to the accident, Trooper Bowles could not state with certainty what the exact blood alcohol level was at the time of the accident. However, he did state with certainty that appellant's blood alcohol level could not have been below .08% based on the facts in evidence.

This same issue arose in a case recently argued before this court. In State v. Chavez, \_\_\_ P.2d \_\_\_ (No. 16132, filed December 31, 1979), the petitioner, appealing a conviction for automobile homicide, claimed that the prosecution had not established the probative value of blood test results taken 1.5 hours after an accident. As in the instant case, the expert witness in Chavez, supra, Dr. Finkle, did not know when the appellant took his last drink, and so could not relate back the blood test results with absolute certainty. In fact, Dr. Finkle's conclusion that petitioner's blood alcohol level was above the statutory presumption (.08%) at the time of the accident

was stated more equivocally than was the conclusion of Trooper Bowles. Dr. Finkle stated it was "extremely unlikely" that the petitioner's blood alcohol would be below .10%, where as Trooper Bowles, in the instant case, testified that in his opinion "it would not be possible" for appellant's blood alcohol level to have been below .08% (T.141 Vol. III).

However, despite the uncertainty of the expert witness in Chavez, supra, this Court in the conclusion of that opinion stated:

Defendant also asserts that the District Court erred in admitting the results of the blood analysis, in instructing the jury concerning the presumptions of intoxication as set forth in Section 41-6-44(b) 3, and in denying defendant's motion to dismiss, contending that there was little or no evidence that defendant was intoxicated at the time of the collision. These arguments are without merit and we do not discuss them.

Green Sheet Opinion at page 4.

Because the court in Chavez, supra, found the prosecution to have met the probative value standard of Utah Code Ann. § 41-6-44.5 (1953), as amended, a similar result should be reached in this case, where an even stronger showing of probative value was made.

Appellant argues that if he consumed some alcohol between the accident and the time of his arrest, then Trooper Bowles could not state with certainty whether appellant's blood alcohol level was above .08% at the time of the accident.

Appellant's argument is totally hypothetical and without any relation to the facts established in the case. Appellant introduced absolutely no evidence indicating that he actually drank between the time of the accident and his arrest, and the evidence that was introduced at trial lends no support to this hypothetical. When appellant stopped and climbed out of his jeep, there were three witnesses at the scene. They observed that his face was splattered with blood, that he had blood on his teeth, and that he was bleeding from a cut on his forehead (T. 103,123,127,128 Vol. 1, T.35 Vol. II).

After one of the witnesses made a citizen's arrest, appellant pushed by him and entered the house, saying he was going to wash the blood from his face. The witnesses waited with appellant's brother in front of the house for him to return. Appellant was in the house and out of the sight of the witnesses only momentarily (from



30 seconds by one account (T. 126 Vol.1) to "a moment" or three to four minutes by another account (T. 10, 13 Vol. II)). He entered the house on the premise of washing the blood from his face and mouth, and he returned outside carrying a wash cloth. The witnesses also observed the appellant's slurred speech, poor balance, and difficulty in walking prior to his entering the house, and testified that he appeared to be drunk (T. 98 Vol. 1). Under these circumstances, the suggestion that during the few seconds he was alone in the house he drank sufficient alcohol to raise his blood alcohol level from below .08% to .28% is totally implausible and unsupported by the record.

Combining the facts stated above with the expert testimony of Trooper Bowles, the evidence presented in the case has "tended to prove the issue of intoxication and thus the probative value of the blood test results. State v. Scott, 175 P.2d 1016, 1021 (1947). Consequently the requirements of Utah Code Ann. § 41-6-44.5 (1953), as amended, were satisfied, and the blood test results should be given prima facie effect in establishing that appellant was legally drunk at the time of the accident.

In the alternative, Respondent submits that the

obligation to establish the "probative value" of the blood test results under § 41-6-44.5, supra, does not apply to automobile homicide prosecutions under Utah Code Ann. § 76-5-207 (1953), as amended, which expressly provides, in relevant part:

(2) The presumption established by section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentage shall be applicable to this section and any chemical test administered on a defendant . . . after his arrest. . . ., shall be admissible in accordance with the rules of evidence.

Respondent merely points out the fact that the legislature did specifically mention § 41-6-44(b) of the Motor Vehicle Act, to the exclusion of other statutes. Furthermore, § 76-5-207(2) specifies that ". . . any chemical test administered . . . shall be admissible in accordance with the rules of evidence." Respondent again points out the fact that the legislature specifically stated that the chemical tests be admissible according to the rules of evidence, not according to § 41-6-44.5.

### POINT III

THE PROSECUTION FOR AUTOMOBILE HOMICIDE WAS NOT BARRED BY UTAH'S SINGLE CRIMINAL EPISODE RULE AS PROVIDED IN UTAH CODE ANN. § 76-1-401 (1953), AS AMENDED.

In the instant case, after the appellant was arrested for a hit-and-run auto-pedestrian accident, it was discovered that he was driving while under the influence of alcohol, without a driver's license and without proper vehicle registration or safety inspection. Appellant was arraigned and pled guilty to these charges in Justice's court, August 1, 1977. Two days later his guilty pleas on the above charges were vacated, and he was then prosecuted in district court for automobile homicide and failure to stop at the scene of an injury accident.

Appellant argues that the subsequent prosecution in district court on the automobile homicide charge should have been barred by the operation of Utah's Single Criminal Episode Rule as Contained in Title 76, Chapter 1, sections 401 through 403 of the Utah Code Annotated (1953), as amended.

Respondent submits that the elements necessary to bar a subsequent prosecution have not been established, and consequently appellant's claim is without merit.

Utah adopted Utah Code Ann. § 76-1-403 (Supp. 1975) which bars a second prosecution for the same or different offense arising out of the same criminal episode that was the subject matter of the first prosecution. It reads:

- (1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or different offense arising out of the same criminal episode is barred if:
  - (a) The subsequent prosecution is for an offense that was or should have been tried under § 76-1-402(2) in the former prosecution; and
  - (b) The former prosecution
    - (ii) Resulted in conviction
- . . . ."

Further, Utah Code Ann. § 76-1-402(2) (Supp. 1975), reads:

- (2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, defendant shall not be subject to separate trials for multiple offenses when:
  - (a) The offenses are within the jurisdiction of a single court, and
  - (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

Whether or not these provisions apply depends on whether the conduct of the accused comes under the definition of "single criminal episode." Utah Code Ann.

§ 76-1-401 (Supp. 1975), defines "single criminal episode" as follows:

In this part unless the context requires different definition, 'single criminal episode' means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

As provided in these statutes, the following elements must be established to bar a subsequent prosecution:

1. The offenses are within the jurisdiction of a single court.
2. The offenses are known to the prosecuting attorney when the first information or indictment is brought.
3. The offenses must be closely related in time.
4. The offenses must arise from the same criminal objective.

If any one of these elements is not established, then a subsequent prosecution may not be barred.

Since the adoption of the Single Criminal Episode Rule in 1973, this court has dealt with these elements in the following cases: State v. Ireland, 570 P.2d 1206 (Utah 1977); State v. Cornish, 571 P.2d 577 (Utah 1977); State v. Cooley, 575 P.2d 693 (Utah 1978); State v. Schroeder, 598 P.2d 373 (Utah 1979); State v. Sosa, 598 P.2d 342 (Utah 1979); Hupp v. Johnson, \_\_\_ P.2d \_\_\_ No. 16603 (Utah 1980).

The first element that must be established is that the various offenses were within the jurisdiction of the same court (§ 76-1-402(2)(a), supra). The intent of the single criminal episode rule is to bar multiple prosecutions when those actions could have been joined. When joinder of separate offenses arising from the same course of conduct is not possible because the offenses are not within the jurisdiction of the same court, to hold that separate prosecutions are barred would frustrate the intent of the statute. It would also force the state into the undesirable position of prosecuting only some of the offenses committed by a defendant.

The leading case on this issue is State v. Cooley, 575 P.2d 693 (Utah 1978). Cooley, supra, involved a situation where a defendant was arrested and given two citations. One citation, a class A misdemeanor was for failing to stop at the command of a police officer. The other was for the class C misdemeanors of driving with an improper license and having no tail light on a boat trailer pulled by the defendant's motor vehicle. The defendant pled guilty to the class C misdemeanors before a justice of the peace, and then claimed that he could not subsequently be prosecuted in district court on the class A misdemeanor.

This Court held that the plea of guilty before the justice of the peace did not bar a subsequent prosecution in district court on the class A misdemeanor. The reasoning of the court was that although the offenses arose from the same criminal episode, the justice court did not have jurisdiction to hear the class A misdemeanor, and the district court did not have jurisdiction to hear the class B misdemeanor prosecutions. Because the offenses were not "within the jurisdiction of a single court." The subsequent prosecution was allowed.

Appellant, in the present case, concedes that Cooley, supra, is controlling (appellant's brief at p. 22-). However, without offering any new theory for its reversal and relying only on the Cooley, supra, dissent, appellant contends that the decision should be overturned. In essence appellant argues that pursuant to Art. VIII, Section 7 of the Utah Constitution, district courts have original jurisdiction in all criminal matters. However, as Cooley, supra, carefully sets forth, this broad grant of jurisdiction is qualified.

Article VIII, Section 7 of the Utah Constitution provides:

The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; . . . [Emphasis added.]

The district court's original jurisdiction may be limited by statutory prohibitions. One such limitation is found in Utah Code Ann. § 76-16-1 (1953), as amended, which provides:

All public offenses triable in the district courts, except cases appealed from justices' and city courts, must be prosecuted by information or indictment, . . . [Emphasis added]

Also, pursuant to Art. VIII Section 7 the prosecution of non-indictable misdemeanors has been delegated to justice's courts by legislative enactment:

U.C.A., 1953, 77 16 1. All public offenses triable in the district courts, except cases appealed from justices' and city courts, must be prosecuted by information or indictment . . . .

U.C.A., 1953, 78-5-4(1). Justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

(a) All class B and class C misdemeanors punishable by a fine less than \$300 or by imprisonment in the county jail or municipal, prison not exceeding six months, or by both such fine and imprisonment.

(b) All infractions and the punishments prescribed for them.

The clear implication of these provisions is that the original jurisdiction of district courts extends



only to cases brought by information and indictment. Since class B & C misdemeanor charges cannot be brought by information or indictment (see Haikki v. Faux, 16 Utah 2d 132, 396 P.2d 867 (1964)) they do not come under the original criminal jurisdiction of the district courts, and the single criminal episode rule is inapplicable.

Last year this court considered another case dealing with this same issue and affirmed the Cooley, <sup>supra</sup> decision. In State v. Sosa, 598 P.2d 342 (Utah 1979), a defendant appealed from a conviction in Ogden City Court on the misdemeanor charges of carrying a loaded firearm in a vehicle, and possession of marijuana, and a subsequent conviction in state district court for the felony of possession of a firearm by a convicted person. The appeal claimed that the district court prosecution was barred by the single criminal episode rule. This court rejected petitioner's claim and stated:

A felony or indictable misdemeanor must therefore be prosecuted by information or indictment in the district court. On the other hand, a non-indictable misdemeanor is appropriately prosecuted by complaint in Justice's or city courts.

\* \* \*

This is totally consistent with our decision in State v. Cooley.

Sosa, at 344, 345.

In this appeal the charges brought in the Justice Court were class B misdemeanors, whereas the subsequent prosecution for automobile homicide is a third degree felony. Applying the rule established in Cooley, supra, and reaffirmed in Sosa, supra, the subsequent prosecution may not properly be barred.

The second element that must be established to bar a subsequent prosecution, is that:

The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment. [Emphasis added]

Utah Code Ann. § 76-1-402(2)(b).

This requirement is satisfied only if the offense that is subsequently prosecuted is known when the defendant is arraigned on the first information or indictment. In this case, the misdemeanor offenses were not brought by information or indictment, they were not even brought by a complaint (M.7,9)! Consequently, because appellant was not arraigned on an information or indictment this element of the single episode rule was not satisfied.

The third element that must be established is that the prior and subsequently prosecuted offenses were closely related in time. Respondent submits that the

automobile homicide offense was not closely related in time to the misdemeanor charges appellant pled guilty to.

In State v. Ireland, 570 P.2d 1206 (Utah 1977), this Court dealt with a similar issue. In that case the defendant, at gunpoint, threatened a police officer, took his gun and locked him in the trunk of his patrol car. The defendant then fled in his own vehicle. Sixty-five miles later he picked up some hitchhikers. When the defendant realized he was being followed by the police, and that a roadblock was set up to apprehend him he informed the hitchhikers that they were his hostages. On appeal from his convictions for aggravated kidnapping and subsequently for aggravated robbery (taking the officer's gun) petitioner relied on the single criminal episode rule to bar the subsequent prosecution. This Court affirmed the convictions. The Court held that not only was the criminal purpose of the robbery unrelated to the kidnapping, but also that "there was a distinct difference in time, (that necessary to travel some 65 miles) [and] location, (two separate counties) . . ."

There was no evidence presented at trial in the present case as to how far the appellant had driven

prior to the accident. However the thrust of Ireland, supra, was not that the defendant had driven 65 miles between crimes, but the fact that the two offenses were separated by time and distance.

In the instant case there was a "distinct difference" in time and location between the misdemeanor offenses and the automobile homicide. Although the misdemeanor offenses were discovered at the time of the accident, they occured before the accident.

The driving under the influence offense occurred at the instant the appellant entered the car and began driving while intoxicated. The offenses of driving without a license, improper registration, and no vehicle safety inspection also occurred at the instant appellant began driving the car, for until a person begins driving it is not illegal to be without a driver's license in a car that is not properly registered and has not been safety inspected. However, the automobile homicide did not occur until some-time later when the vehicle appellant was driving struck and killed Michael Winn.

Consequently, because the class B misdemeanors were merely discovered, but not committed at the time of

the accident, they are not closely related in time as Utah Code Ann. § 76-1-401, (1953), as amended, has been interpreted and applied by this Court in State v. Ireland, supra.

Neither do the facts of the law support the existence of the final element, that the subsequent charge of automobile homicide stemmed from the same criminal purpose as the misdemeanor offenses. In State v. Cornish, 571 P.2d 577 (Utah 1977) the defendant was charged and convicted for failure to stop at the command of a police officer and the unlawful taking of a vehicle. The defendant appealed the subsequent prosecution for failure to stop, basing the appeal on the single criminal episode rule. This Court held that the rule did not apply because the offenses did not stem from the same criminal objective. The Court reasoned that "the offenses are different and the proof requirements are different," Cornish, at 578.

Similarly, the offenses and the proof requirements in the instant case are different.

Utah Code Ann. § 41-6-44 (1953), as amended, defines the offense of driving under the influence of alcohol. It states, in part:

It is unlawful . . . for any person who is under the influence of alcohol . . . to drive or be in actual physical control of any vehicle within this state. . . .

However, the offense of automobile homicide, is defined by Utah Code Ann. § 76-5-207 (1953), as amended, in the following manner:

Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor . . . to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner.

Section 76-1-207 (1), supra.

From these statutory definitions it is evident that the offenses of driving while under the influence, and automobile homicide are distinct and separate offenses. The automobile homicide offense requires proof of several elements not included in the driving under the influence offense.

The only similarity between the two offenses is a common element they share; that the driver operate the vehicle while legally drunk. Simply because the offenses share a common element does not give rise to any presumption that a defendant who commits both, albeit at t different time and place, acted with the same criminal objective. Such reasoning is no more logical than it would be to reason that because simple theft and armed robbery have theft as a common element, a man acts with the same criminal objective when he steals a candy bar at a grocery store as when he commits armed robbery at a service station.

When the appellant committed the offense of driving

under the influence of alcohol, the criminal objective was simply to drive the vehicle while he was drunk. However, the criminal objective at the time of the accident was much different. There, the criminal purpose was to drive while "incapable of safely driving" and to "negligently run a red light, resulting in the accident and death of the victim. Therefore, in the instant case the driving under the influence and automobile homicide offenses are different, the proof requirements are different, and the criminal objective was different.

The remaining misdemeanor offenses, i.e., driving a car improperly registered, without a safety inspection and without a license, are totally unrelated to the accident and the resulting automobile homicide charge.

This Court dealt with a similar issue in Hupp v. Johnson, No. 16602, \_\_\_ P.2d \_\_\_ (Utah 1980). In Hupp, <sup>supra</sup> the defendant appealed from the denial of a petition for an extraordinary writ to require a circuit court judge to dismiss a drunk driving complaint filed after the judge accepted pleas for driving without a license, no safety inspection sticker, and no registration certificate. The Court stated:

We reject the contention that § 76-1-401 is applicable. The citations charge separate, independent

offenses which were committed at different times and were entirely unrelated to each other. The four offenses were not committed to accomplish a "single criminal objective".

Id. at p.1 of greensheet opinion .

In the present case, the traffic offenses appellant was charged with have as little in common with the automobile homicide offense as did the traffic offenses with the subsequent prosecution in Hupp, supra. Consequently, appellant was not acting with the same "criminal purpose" when he drove the car without a license registration and safety inspection as when he struck Michael Winn and then fled the scene of the accident.

In summary, to bar a subsequent prosecution, it must be established that the offense subsequently prosecuted was under the jurisdiction of the same court that handled the prior convictions; the prosecutor was aware at the time of the first information or indictment that the subsequent charge could be brought; the offenses were closely related in time; and the offenses arose from the same criminal objective. If any one of these elements is missing the single criminal episode rule is inapplicable and the subsequent prosecution may not be barred. Respondent asserts that all of these elements were not established, and consequently the prosecution for automobile homicide was proper.



Assuming, arguendo, all of the aforementioned elements were established, respondent submits the application of the single criminal episode rule would still be inappropriate under alternate theories.

First, the justice court lacked jurisdiction to arraign the appellant. Consequently its actions were null and void, so in effect there was no prior prosecution. Utah Code Ann. § 77-57-2 (1953), as amended, states:

Other than as provided by section 77-13-17, proceedings and actions before a justices' court for a misdemeanor offense must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. The complaint shall be commenced before a magistrate within the precinct of the county or city in which the offense is alleged to have been committed. [Emphasis added].

This requirement is supported by the following statutes under title 77 chapter II of the Utah Code which deals with making complaints before a magistrate:

—Every person who has reason to believe that a crime or public offense has been committed must make complaint against such person before some magistrate having authority to make inquiry of the same. [Emphasis added].

Utah Code Ann. § 77-11-2 (1953), as amended.

—When a complaint is made before a magistrate charging a person with the commission of a crime or public offense, such magistrate must examine the complainant, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other persons and may take their depositions. [Emphasis added].

Utah Code Ann. § 77-11-3 (1953), as amended.

—When an officer or other person shall bring any person he has arrested without a warrant before a magistrate, it is the duty of such officer or person to specify the charge upon which he has made the arrest. It is then the duty of the magistrate or the county attorney to prepare a complaint of the offense charged, and cause the officer or some other person to subscribe and make oath to such complaint, and file it. [Emphasis added].

Utah Code Ann. § 77-11-4 (1953), as amended.

The statutes require that an action in justice court must be commenced by a complaint. If an action is not initiated by a formal complaint, this court has held that the justice court does not obtain jurisdiction. Spangler v. District Court of Salt Lake County, 104 Utah 584, 140 P.2d 755 (1943).

In Spangler, supra, this Court enforced the complaint under oath requirement of § 77-11-3 and § 77-57-2, supra, strictly, declaring the entire proceeding void because the complaining officer had not sworn an oath to the

complaint he signed. The Court stated:

While no set formula is required to constitute an oath in verifying a complaint, there must be an unequivocal act whereby affiant consciously takes upon himself the obligation of an oath . . . Where it is admitted, or established by proper proof, that nothing was done except to hand a written, typed or printed paper to the complaining party, who without more merely subscribed his name thereto, such does not constitute a complaint under oath as required by our statute.

Id. at 756, 758.

In the instant case the arresting officer did not swear an oath to the complaint, (T.52). He did not sign the complaint, (M.52). He never even brought a complaint before the justice of the peace. In fact, the record plainly indicates that the justice of the peace arraigned the appellant without any complaint at all (M. 79,26,45,49,52). The justice testified that he was assured by the county attorney's office that they would "bring . . . a complaint right up . . . " (M. 29). However the assurance of a complaint is not adequate. Utah Law clearly requires that the proceedings in a justice's court for a misdemeanor offense "must be commenced by a complaint under oath," Utah Code Ann. § 77-57-2 (1953), as amended. In summary, the justice's court never received jurisdiction over the

misdemeanor offenses, and any action taken by that court with respect to those offenses is null and void.

Consequently, because the prior prosecutions are vacated, there was not a subsequent prosecution under § 76-1-401 thru 403, supra.

Finally, before the automobile homicide prosecution was begun in district court, the justice court vacated its action in arraigning appellant and accepting his guilty pleas on the misdemeanor charges. As a result of the order to vacate, the appellant suffered no penalties from the purported actions of justice of the peace. Appellant paid no fines, he did not make any expenditures for attorney fees, he spent no more time in jail than he would have anyway while awaiting his trial on the felony charges, and there will be no residual effect on his driving record. In short, he has not been required to stand the expense and hardship of trial which was the concern of the dissent in State v. Cooley, 575 P.2d 693 (Utah 1978) cited at length in appellant's brief a p. 23.

#### POINT IV

THE NEW INTERPRETATION OF THE  
AUTOMOBILE HOMICIDE STATUTE, REQUIR-  
ING PROOF OF CRIMINAL NEGLIGENCE, AS  
AN ELEMENT OF THE OFFENSE SHOULD BE  
LIMITED TO PROSPECTIVE APPLICATION.

In *State v. Chavez*, \_\_\_ P.2d \_\_\_ No. 16132 (Utah 1980), this Court ruled that the negligence element of the automobile homicide statute (Utah Code Ann. § 76-5-207 (1955 as amended) requires a showing of criminal negligence rather than ordinary or simple negligence, and that failure to so instruct the jury was reversible error. Appellant argues that Chavez, supra, is dispositive of the instant case because the trial court rejected appellant's criminal negligence instruction and instead instructed the jury that ordinary negligence was the standard. It must be stressed that appellant's trial occurred years prior to the Chavez decision.

Respondent submits that even though Chavez, supra, did change the negligence requirement by overturning this Court's previous decisions in State v. Durrant, 561 P.2d 1056 (Utah 1977), State v. Anderson, 561 P.2d 1061 (Utah 1977), and State v. Wade, 472 P.2d 398 (Utah 1977), the Chavez, supra, decision should have prospective application only, and therefore is inapplicable to appellant's case.

The traditional theory with respect to retroactivity is the Blackstonian view that judges do not make law, they

merely discover it. Accordingly, when a court reverses a prior decision, the new rule is retroactive because it reveals what the true law has always been. However, modern scholars and jurists have taken a more pragmatic approach to the laws governing retroactivity. Justice Cardozo in Great Northern Railway v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), recognized that to avoid injustice or hardship, some decisions should not be applied retroactively, and each state should decide whether new rules of law should be given retroactive or prospective application. Id. at 364.

The United States Supreme Court followed this reasoning in Wainright v. Stone, 414 U.S. 21 (1973), a case factually similar to the instant case. In Wainright, supra, the petitioner had been convicted of violating Florida's "crimes against nature" statute. In a subsequent case involving the same offense the State Supreme Court held the same statute void for vagueness. However, because the new ruling reversed several previous opinions upholding the validity of the statute, the court gave the new ruling prospective effect only, stating, "In view of our former decisions, this judgement holding the felony statute void is not retroactive, but prospective only."

Franklin v. State, 257 So.2d 21 (Fla, Sup. Ct. 1971).

Because the law he was convicted under was held unconstitutional Stone appealed his conviction, to the State Supreme Court, however, the court rejected the appeal and affirmed the prospective effect of the new rule. Stone then collaterally attacked his conviction, and the case eventually was heard by the United States Supreme Court, which rejected the appeal, stating that the holding in Franklin v. State, supra:

. . . did not remove the fact that when appellees committed the acts with which they were charged, they were on clear notice that their conduct was criminal under the statute as then construed. Thus, the Florida Supreme Court expressly ruled in Franklin that "this judgment holding the felony statute void is not retroactive, but prospective only." and subsequently the Florida courts denied appellee Stone's request for relief based on the Franklin case. The State Supreme Court did not overrule Delancy with respect to pre-Franklin convictions. Nor was it constitutionally compelled to do so or to make retroactive its new construction of the Florida statute: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287

U.S. 358. 364 (1932).

It is thus, well settled law that this Court may, as a matter of constitutional law, give its opinions which overrule prior opinions prospective application only. (See also State v. Kelbach, 569 P.2d 1100 (Utah 1977)).

Because the overruling opinion (Chavez, *supra*) requiring an instruction on criminal negligence in automobile homicide cases, goes to a procedural error at trial, the standards developed to govern prospective versus retrospective application of a new criminal procedural ruling must be reviewed.

The criteria for retroactive application of a new court announced rule in criminal cases were announced by the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719 (1966). In that case the Court refused to retroactively apply Miranda v. Arizona, 384 U.S. 436 (1966). In determining whether to give retrospective or prospective effect to decisions adopting new rules in criminal cases, the Court listed three considerations: (1) the purpose of the new rule; (2) the reliance placed upon the former rule; and (3) the effect which retroactive application of the new rule would have on the administration of justice. See 384 U.S. at 727. The major thrust of the first factor



is whether the new ruling enhances "the reliability of the fact-finding process at trial," Johnson, supra, at 728. However, the court in Johnson, supra, noted that the question of whether the fact finding process is enhanced "is necessarily a matter of degree," Johnson, supra, at 728-729, and is "a question of probabilities." Id. at 729. In subsequent criminal procedure cases the United States Supreme Court has held that these "probabilities must in turn be weighed against the prior justified reliance upon the old standards and the impact of the retroactivity upon the administration of justice." Adams v. Illinois, 405 U.S. 278, 287 (1972), see also Stovall v. Denno, 388 U.S. 293, 298 (1970). After weighing these factors, if "the unusual force of the countervailing considerations," Id. at 285-286, (i.e. the prior reliance and the effect on the administration of justice) weighs in favor of prospective application, then the new ruling should be applied only to cases tried after the new rule has been announced. Johnson, supra, 384 U.S. at 732.

Turning now to the instant case, the first factor to be considered is the purpose of the new ruling. In State v. Chavez, \_\_\_ P.2d \_\_\_ No. 16132 (Utah 1980), the Court held:

We are therefore of the opinion that our previous cases holding that automobile homicide requires only proof of simple negligence under Section 76-5-207 are in error, and are overruled. And we hold that a conviction of automobile homicide requires an instruction on criminal negligence as that term is defined in Section 76-2-1-3(4), and a determination thereof by the jury.

The purpose of the ruling is to ensure that a person is not convicted of automobile homicide unless he acted with criminal negligence. The issue then is whether a prospective application of the Chavez, supra, ruling would frustrate this purpose and if so whether the integrity of the fact-finding process would be impaired. However, it must be kept in mind that this determination is "a matter of degree" Johnson, supra, at 728-729. On closer scrutiny the tenor of instruction #25 in the instant case indicates that the absence of a negligent homicide instruction did not impair the fact finding process to any significant degree. The pertinent part of instruction No. 25 stated:

2. That the defendant then and there drove the motor vehicle while under the influence of intoxicating liquor to a degree which rendered him incapable of safely driving a vehicle; and,
3. That the defendant so operated or drove the motor vehicle in a negligent manner; and,

4. That the defendant then and there injured Michael A. Winn, causing his death, by operating or driving such vehicle while in such intoxicated condition and in such manner.

If you find that the evidence proves each of the above elements beyond a reasonable doubt, then you must find the defendant guilty.

(R. 72)

From this instruction a reasonable jury could not fail to understand that they could not convict the appellant for merely being negligent. In addition to negligence, the jury was instructed that they must also be convinced "beyond a reasonable doubt" that appellant drove "while under the influence of an intoxicating liquor," and while "incapable of safely driving a vehicle." After reviewing the fact that his blood registered .28% alcohol content (3.5 times the level for statutory presumption of intoxication) (T. 90 Vol. II); that he ran a red light (T. 34-35, 42, 65 Vol. II); that he struck the victim while the victim was crossing in a pedestrian crosswalk (T. 65 Vol. II); and that he did not even swerve to avoid the accident or stop to render assistance (T. 46 Vol. II), the jury determined that the appellant drove his vehicle while under the influence of alcohol to a degree which rendered him incapable of driving safely. Implicit in this conclusion and the facts supporting it is

the notion that in such a situation the actor "ought to be aware of a substantial and unjustifiable risk that . . . the result would occur," and that such conduct is a "gross deviation from the standard of care that an ordinary person would exercise. . . ." See definition of criminal negligence Utah Code Ann. § 76-2-103(4) (1953), as amended. Therefore, even though a criminal negligence charge was not given to the jury, the facts of the case clearly show that criminal negligence was present. Consequently, the absence of a criminal negligence instruction did not significantly impair the fact-finding process in this case.

Under the Stovall, supra, test, the probability of degree to which the fact finding process might be impaired, by prospectively applying the new rule, must be weighed against the amount of reliance on the prior rule, and the burden retroactive application of the old rule would impose on the administration of justice.

The appellant was arrested in July of 1977, and convicted in November of that year for the crime of automobile homicide. The trial judge relied on the rulings of this court in State v. Durrant, 561 P.2d 1056 (1977) and State v. Anderson, 561 P.2d 1061 (1977) which held that in automobile

homicide cases only a simple negligence instruction was required. At the time the instant case was tried, the reversal this Court would make in State v. Chavez, \_\_\_, P.2d \_\_\_ No. 16132 (Utah 1980) was totally unforeseeable. In fact, 17 days after the appellant was convicted, this court, in State v. Wade, 572 P.2d 398 (Utah 1977) held that a criminal negligence instruction was not required in an automobile homicide case for a third time in one year.

In Adams v. Illinois, 405 U.S. 778 (1972) the United States Supreme Court determined that the right to counsel in a preliminary hearing should not be applied retroactively. In considering the reliance on the prior rule the Court stated:

We do not think that law enforcement officials are to be faulted for not anticipating Coleman. There was no clear foreshadowing of that rule. A contrary inference was not unreasonable in light of our decision in Hamilton v. Alabama.

Id. at 284.

The same reasoning applies to the facts of the instant case. The trial judge's reliance was made in good faith, and according to firmly established rulings of this court. There is no reasonable expectation that the judge should have anticipated the reversal this Court made in

Chavez, supra, by requiring that a criminal negligence instruction be given to the jury.

Finally, the retroactive application of Chavez, supra, would have a burdensome impact on the administration of justice. All of the automobile homicide convictions since 1973 would suddenly lose their finality. Determining the amount of prejudice resulting in each case would be extremely difficult, and many cases might require retrials. This burden would be magnified by the fact that in many of the cases, important pieces of evidence may have been lost, key witnesses may no longer be available, and even if they are available, crucial facts will have faded with time.

In view of the above, the retroactive application of Chavez, supra, would result not only in an increased burden on the administration of justice, but possibly in the release of several convicted felons simply because the trial judges relied on the court's established and reaffirmed interpretation of the automobile homicide statute. Such a result is inequitable and contrary to public policy.

Respondent submits that when the impact the prospective application of Chavez, supra, would have on the

administration of justice, the greater equities are served by limiting the new rule to prospective application. Indeed, this is a case where "the unusual force of the countervailing considerations strengthens [the] conclusion in favor of prospective application." Stovall v. Denno, 388 U.S. 293, 299 (1971).

Assuming arguendo, that the Chavez, supra, holding should be retroactively applied the decision of the lower court should not be reversed and remanded, because it did not involve prejudicial error.

Utah Code Ann. §77-42-1 (1953), as amended, states:

Judgment to disregard errors not affecting rights of parties. —After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

Accordingly prejudicial error is not presumed. The court must be persuaded of the prejudicial effect of an error.

The standard appropriate in determining prejudicial error is "whether the record discloses error of sufficient gravity to indicate substantial prejudice to the defendant."

rights." This test requires that a "reasonable probability of a more favorable result, for defendant, in the absence of such error, must exist." State v. Gaxiola, 550 P.2d 1298 1303 (Utah 1976), see also Willard M. Milne Inv. Co. v. Cox, 580 P.2d 607 (Utah 1978), State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970), Harrington v. California, 395 U.S. 250 (1969).

The record in the instant case does not disclose "error of substantial gravity to indicate substantial prejudice to the defendant's rights," not does it support a reasonable probability that on retrial a different result would obtain if a criminal negligence instruction were substituted for the simple negligence charge.

Appellant's proposed instruction No. 7 (R.93) defined criminal negligence in the language of Utah Code Ann. § 76-2-103(4) (1953), as amended, which states:

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.



The fact that appellant drove his vehicle through a red light; that his blood registered .28% alcohol content; that he struck and killed a boy who was walking in a pedestrian crosswalk; and that he did not swerve to avoid the accident, or stop to render assistance constitutes a "gross deviation" from the standard of care expected of a reasonable person. Given the facts of this, there is simply not a reasonable probability that a jury could find other than that the appellant "ought" to have been aware of the substantial and unjustifiable risk of his driving while intoxicated and incapable of driving safely, and running a red light.

Consequently, the judgment of the trial court should not be reversed and remanded for a new trial.

#### CONCLUSION

Based on the foregoing arguments, respondent submits that the conviction and sentence should be affirmed.

Respectfully submitted,

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