

1980

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Ronald J. Yengich; O'Connel & Yengich; Attorney for Appellant;

Robert Hansen; Attorney for Respondent;

---

### Recommended Citation

Reply Brief, *State v. Belgard*, No. 15743 (Utah Supreme Court, 1980).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/1210](https://digitalcommons.law.byu.edu/uofu_sc2/1210)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

1

IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
 :  
 Plaintiff-Respondent :  
 :  
 v. :  
 :  
 VINCENT L. BELGARD, : Case No. 15743  
 :  
 Defendant-Appellant :

---

REBUTTAL BRIEF OF APPELLANT

An appeal from the conviction of Automobile Homicide  
in the Third Judicial District Court in and for Salt Lake  
County, State of Utah, the Honorable Jay E. Banks, Judge  
presiding.

RONALD J. YENGICH  
O'Connell & Yengich  
Attorneys at Law  
44 Exchange Place  
Salt Lake City, Utah 84111  
  
Attorney for Defendant-Appellant

ROBERT HANSEN  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114  
  
Attorney for Plaintiff-Respondent

FILED

MAY 9 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent	:	
	:	
v.	:	
VINCENT L. BELGARD,	:	Case No. 15743
	:	
Defendant-Appellant	:	

---

REBUTTAL BRIEF OF APPELLANT

An appeal from the conviction of Automobile Homicide in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge presiding.

RONALD J. YENGICH  
O'Connell & Yengich  
Attorneys at Law  
44 Exchange Place  
Salt Lake City, Utah 84111

Attorney for Defendant-Appellant

ROBERT HANSEN  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Plaintiff-Respondent

## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF THE FACTS . . . . .	2
ARGUMENT	
<u>POINT I: CHAVEZ MUST BE RETROACTIVELY APPLIED</u> . . . . .	2
<u>POINT II: THE CONSTITUTIONS OF UTAH AND THE UNITED STATES ARE OFFENDED IF THERE IS NO RELIGIOUS EXCEPTION TO THE GENERAL RULE OF SCHMERBER.</u> . . . . .	21
<u>POINT III: INVOLUNTARY BLOOD TESTS VIOLATE ARTICLE I SECTION 12 OF THE UTAH CONSTITUTION.</u> . . . . .	33
<u>POINT IV: SECTION 76-5-207(2) IS UNCONSTITUTIONALLY OVERBROAD, AND APPELLANT HAS STANDING TO SO ASSERT.</u> . . . . .	38
<u>POINT V: APPELLANT DID NOT CONSENT TO THE EXTRACTION OF HIS BLOOD.</u> . . . . .	41
CONCLUSION . . . . .	43

## CASES CITED

Adams v. Illinois, 405 U.S. 278, 31 L.Ed. 2d 202, 92 S. Ct. 916 (1972) . . . . .	10
Bell v. Maryland, 378 U.S. 226, 12 L.Ed. 2d 882, 84 S. Ct. 1814 (1964) . . . . .	17
Boyd v. United States, (citation omitted) . . . . .	27,28
Breithaupt v. Abram, 352 U.S. 432, 1 L.Ed. 2d 448, 77 S.Ct. 408 (1957). . . . .	21,24,28,38,41
Chimel v. California, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969) . . . . .	33

(continued)

Page

Compton v. People, 444 P.2d 263 (Colo. 1968) . . . . .	37
Cox v. State, 395 P.2d 954 (Okla. Cr. 1964) . . . . .	37
Escamilla v. State, 556 S.W. 2d 796, on reh. 561 S.W. 2d 205 (1977 Tx. Cr.). . . . .	43
Ex Parte Rebersak, 106 Ohio App. 425, 7 Ohio Ops 2d 172, 78 Ohio L Abs 280, 150 N.E. 2d 869 (1958) . . .	38
Franklin v. State, 357 So. 2d 21 (Fla. 1971) . . . . .	13
Gilbert v. Leach, 62 Mich. App. 722, 233 N.W.2d 840, aff'd 397 Mich 384, 245 N.W. 2d 18 (1975) . . . .	37,43
Great Northern Railway v. Sunburst Oil & Refining Co., 287 U.S. 358, 77 L.Ed. 300 53 S.Ct. 145 (1932) . .	13
Green v. State, 259 S.W. 2d 142 (Ark. 1953). . . . .	35,38,40
Griswold v. Connecticut, (Citation Omitted) . . . . .	28
Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772 (1966) . . . . .	10
Kilbreath v. Rudy, 16 Ohio St. 2d 70, 242 N.E. 2d 658, 660, 45 O.O. 2d 370 . . . . .	4
Linkletter v. Walker, 381 U.S. 618 (1965) . . . . .	9, 18
Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 A.L.R. 2d 933 (1961) . . . . .	10,29,32
Massey v. United States, 291 U.S. 608, 78 L.Ed. 1019, 54 S.Ct. 532 (1934) . . . . .	13,17
Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966) . . . . .	5
People v. Todd, 59 Ill. 2d 534, 322 N.E. 2d 447 (1975) .	37
Randall v. United States Marshal, 143 F.2d 830 (2nd Cir. 1944) . . . . .	13
Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) . . . . .	21,25,32
Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d 908 86 S.Ct. 1826 (1966) . . . . .	5,21,26,28,29,33,3

(continued)

Page

Schneckloth v. Bustamonte, 412 U.S. 218 36 L.Ed. 854, 93 S.Ct. 2041, (1973) . . . . .	42
State v. Anderson, 561 P.2d 1061 (Utah 1977) . . . . .	3,6,11
State v. Chavez, 605 P.2d 1226 (Utah 1980) . . . . .	2,3,4,5,6,8,10,11,21,43
State v. Durrant, 561 P.2d 1056 (Utah 1977) . . . . .	3,6,7,11,19
State v. Gordon, 549 P.2d 886 (Kan. 1976) . . . . .	39
State v. Grambrill, 81 A.10 (Md. App. 1911) . . . . .	18
State v. Groyet, 132 A.2d 623 (Vt. 1957) . . . . .	37
State v. Haley, 318 P.2d 1084 (Mont. 1957) . . . . .	37
State v. Johnson, 135 N.W. 2d 518 (Iowa 1965) . . . . .	37
State v. Merrow, 203 A.2d 659 (Me. 1965) . . . . .	36
State v. Munroe, 22 Conn. Supp. 321, 171 A.2d 419 (Cir. Ct. 1961). . . . .	36,39
State v. Sirmay, 40 Utah 525, 122 P. 748 (1912) . . . . .	34,35,38
State v. Van Dam, 554 P.2d 1234 (Utah 1976) . . . . .	34,43
State v. Wade, 572 P.2d 398 (Utah 1977) . . . . .	3,6,11
State v. Weltha, 292 N.W. 148 (Iowa 1946) . . . . .	36
Stovall v. Denno, 388 U.S. 293 (1967) . . . . .	9,10,11
Trammell v. State, (Tx. Cr. 1956) 287 S.W. 2d 487 . . . . .	35
United States v. Cameron, (C.A. 9 Calif.) 538 F.2d 254. . . . .	41
United States v. Chambers, 291 U.S. 217, 78 L.Ed. 763, 54 S.Ct. 434 (1934) . . . . .	16,17
United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) . . . . .	31,32
United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801) . . . . .	14
United States v. Seeger, 380 U.S. 163, 13 L.Ed. 2d 733, 85 S.Ct. 850 (1965) . . . . .	31,32
United States v. Townsend, (D.D.C. 1957) 151 F. Supp. 378. . . . .	36,43

Wainright v. Stone, 414 U.S. 21, 38 L.Ed. 2d 179, 94 S.Ct. 190 (per curiam 1973) . . . . .	12,13
Welsh v. United States, 398 U.S. 333, 26 L.Ed. 2d 308, 90 S.Ct. 1792 (1970) . . . . .	31,32
Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed. 2d 15, 92 S.C. 1526 (1972) . . . . .	30,32
Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949) . . . . .	25

### STATUTES CITED

Utah Code Ann. §41-6-44(b) (3) . . . . .	5
Utah Code Ann. §76-1-103 . . . . .	8
Utah Code Ann. §76-1-103(1) . . . . .	7
Utah Code Ann. §76-2-101 . . . . .	3
Utah Code Ann. §76-2-103(4) . . . . .	3,4
Utah Code Ann. §76-5-207 (1953 as amended) . . . . .	1,2,5,
Utah Code Ann. §76-5-207 . . . . .	4,44
Utah Code Ann. §76-5-207 (1) . . . . .	3
Utah Code Ann. §76-5-207 (2) . . . . .	38,39,

### OTHER AUTHORITIES

Arkansas Constitution Article II Section 8 . . . . .	35
Black's Law Dictionary, 5th Ed., p. 1281 . . . . .	5
<u>Cases and Materials on Constitutional Law</u> (Foundation Press 1975) pp. 546-7 . . . . .	9
<u>New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity</u> , 23 Emory Law Journal 381, 386 . . . . .	6,7
Utah Code of Criminal Procedure . . . . .	5
Utah Constitution Article I Sections 7 and 14 . . . . .	40

(Continued)

Page

Utah Constitution Article I Section 12 . . . . . 33,34,38,40,44

8 Wigmore Evidence §2264 (ed ed. 1940) pp.366-373 . . . .28



IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
 :  
 Plaintiff-Respondent :  
 :  
 v. :  
 :  
 VINCENT L. BELGARD, : Case No. 15743  
 :  
 Defendant-Appellant :

---

REBUTTAL BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Automobile Homicide, a Third Degree Felony, in violation of Utah Code Ann. §76-5-207 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant, VINCENT L. BELGARD, was charged by Information with the offense of Automobile Homicide, a Third Degree Felony, in violation of Utah Code Ann. §76-5-207 (1953 as amended) (T.6, Vol. II). On November 17, 1977, the appellant was convicted by a jury of the offense charged in the Information. On March 17, 1978, the appellant was sentenced by the above entitled court, the Honorable Jay E. Banks, Judge presiding, to zero to five years at the Utah State Prison. Appellant has previously filed two briefs in this matter and offers this brief in rebuttal to

## RELIEF SOUGHT ON APPEAL

The appellant, VINCENT L. BELGARD, seeks reversal of the judgment of guilt entered against him and a remand of the instant case to the trial court for new trial.

## STATEMENT OF THE FACTS

Appellant submits the Statement of Facts offered in the original Brief of Appellant submitted in the instant case.

## ARGUMENT

### POINT I

#### CHAVEZ MUST BE RETROACTIVELY APPLIED.

Contrary to respondent's assertion (R's brief pp. 73,74) State v. Chavez, 605 P.2d 1226 (Utah 1980) is a case of substantive law and in no way procedural. Further, respondent apparently cites no criminal case where a true holding on substantive law (as opposed to Constitutional due process, and true procedural law) is limited to prospective application only.

In Chavez, supra, appellant ran a red light, causing a collision which resulted in the death of a two-year old child. The concentration of ethyl alcohol in appellant's blood, some two hours after the collision, was .19% (approximately 2.4 times the statutory presumption of intoxication). Appellant was convicted of Automobile Homicide in violation of Utah Code Ann. §76-5-20<sup>1</sup> (1953 as amended) of the Utah Criminal Code. At the trial, appellant requested an instruction that criminal negligence was

an element of the offense charged, pursuant to Utah Code Ann. §76-2-103(4). The trial court rejected appellant's request and instructed that simple negligence was sufficient to convict. The trial court apparently based its ruling on three recent Utah cases, State v. Durrant, 561 P.2d 1056 (Utah 1977), State v. Anderson, 561 P.2d 1061 (Utah 1977) and State v. Wade, 572 P.2d 398 (Utah 1977).

This Court reversed appellant's conviction, and Durrant, Anderson and Wade, all supra, and in effect adopted the dissenting view of Justice Maughan in Durrant, supra.

It should be here noted that respondent's suggestion that the individual defendants in the above three cases, among "several convicted felons" might somehow obtain "release" (R.79) as a result of Chavez, supra, being applied to the case at bar, is actually absurd, as will be discussed infra. For the present, suffice it to say that final judgments are not subject to collateral attack.

Under the theory of Chavez, supra, it is recognized that the Utah Criminal Code, Title 76 Utah Code Ann. (as amended) is a comprehensive statute. Under §76-2-101, one must act with criminal intent to be guilty of a crime. The culpable state of mind required for a conviction can be no less than "criminal negligence" as defined by §76-2-103(4). Under §76-5-207 (1), negligence is required for a conviction. In order to reconcile the apparent contradiction between §§76-2-101, 76-2-103(4) and §76-5-207(1), negligence must be construed to mean criminal

negligence. The trial court instructed as to tort negligence. This court held that to be reversible error, noting:

"A higher level of culpability is required under §76-2-103(4) than is defined in Instruction 18."  
(605 P.2d at 1227)

The Court continued:

We are therefore of the opinion that our previous cases holding that automobile homicide requires only proof of simple negligence under §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 §76-2-103(4), and a determination thereof by the jury. As the Courts instruction 18 defined simple negligence and not criminal negligence, defendant is entitled to a new trial.  
(605 P.2d at 1228, Emphasis Supplied)

Nowhere is procedure mentioned, and respondent's attempts to so characterize the case are disingenuous. Although the erroneous instruction was clearly reversible error, this does not make the case procedural. The thrust of Chavez, supra goes not to instructions. Pather, it goes to what the law actually is and has been since 1973, as to the offense of Automobile Homicide

Chavez, supra, deals with the very substance of the law, stating that conduct is an offense under the Code only if criminal negligence, at least, is present. Indeed, Chavez, supra, is substantive law by definition. According to Black's:

Substantive Law. That part of law which creates, defines, and regulates rights, as opposed to "adjective or remedial law," which prescribes method of enforcing the rights or obtaining redress for their invasion. That which creates duties, rights and obligations, while "procedural or remedial law" prescribes methods of enforcement of rights or obtaining redress. Kilbreath v. Rudy, 16 Ohio St.2d 70, 242 N.E.2d 658, 660, 45 O.O.2d 370. The basic law of rights and duties (contract law, criminal law,

tort law, law of wills, etc.) as opposed to procedural law (law of pleading law of evidence, law of jurisdiction, etc.)  
(Black's Law Dictionary, 5th Ed.,  
p. 1281, Emphasis Supplied)

§76-5-207 under Chavez, supra, creates a duty to refrain from certain conduct and is clearly substantive in nature. Chavez, supra, goes directly to the facts that constitute an offense, unlike such "procedural" matters as the law of search and seizure, arrest, confessions, privilege, evidence in general, jurisdiction, and the like. Cases such as Schmerber v. California, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966), or Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) are clearly procedural, as is the law under Utah's Code of Criminal Procedure (Title 77, Utah Code Ann.). The law of Chavez, supra and the Utah Criminal Code is just as surely substantive. Chavez, supra, defined the law at the time the instant alleged offense was committed.

The mere fact that the substantive error in law made by the trial judge transmitted itself through an erroneous instruction of law does not make this a procedural case. Quite the opposite. Charges to the jury on matters of procedure are rare indeed.

The applicability of Chavez, supra to the instant case is obvious. The operative facts of the two cases cannot be distinguished. In both cases a traffic collision resulted in the death of an innocent party. In both cases the defendant driver's blood levels of alcohol exceeded the presumption of intoxication (.08%) set out in §41-6-44(b)(3). In both cases, defendant requested a correct instruction of the law, which was

refused by the trial court on authority of Durrant, Wade and Anderson, all supra.

Respondent stresses "that appellant's trial occurred years prior to the Chavez decision." (R.70). It should be noted that the actual events which gave rise to the prosecution in both Chavez, supra, and the case at bar, occurred seven days apart. Appellant was actually convicted some five months before Johnny Chavez even though the Chavez appeal was decided by this Court prior to the instant appellant.

It seems clear that had the instant case come before this Court prior to Chavez, supra, it would have been reversed on the same ground. It seems absurd that the result would be different because it reached this Court later, instead of before Chavez, supra.

Technically, Chavez, supra did not change the law. The law was set out by the Legislature through the Utah Criminal Code and became effective on July 1, 1973 (76-1-102). In Durrant, Anderson and Wade, all supra, this Court erroneously construed the law. In theory, Chavez, supra, merely corrected these errors, it did not change the substantive law of §76-5-207. In such a case, the "Blackstonian View", alluded to in respondent's brief (R.71) is entirely appropriate.

The Blackstone position is explored, in the due process sphere, by Rossum, New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity, 23 Emory Law Journal 381, 388. As to retroactive application of judicial decisions, the underlying logic of the position is perhaps stated best by

Blackstone himself:

... subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that it has been erroneously determined.

(23 Emory Law Journal at 386, emphasis originally supplied by Blackstone.)

As Rossum, supra, ably points out, this Blackstone doctrine is both defended and condemned by various legal scholars, as to its applicability in cases involving criminal procedure under the due process clause of the Fourteenth Amendment, and the Bill of Rights. The article, however, does not discuss the doctrine in cases of substantive criminal law.

Since the position respondent advocates is in effect the definition of the offense of automobile homicide under the law prior to the adoption of the Utah Criminal Code, (i.e. simple negligence is sufficient to convict), the so-called "Blackstonian view" is mandated by §76-1-103 (1) which states:

§76-1-103. Application of code—Offense prior to effective date.—(1) The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code. (Emphasis Supplied)

This is clearly indicated by the dissent of Justice Maughan in State v. Durrant, 561 P.2d 1056, 1058 (Utah 1977), where it is noted;

Ordinary or simple negligence was all that was necessary to convict one of automobile homicide under prior Utah law as set forth in §76-30-7.4, as enacted 1957. [Citation omitted] However, this statute was repealed when the new Utah Criminal Code was enacted in 1973.

(561 P.2d at 1059, 1060)

The new Code became effective in 1973. The events out of which both Chavez, supra, and the case at bar arose occurred in July of 1977. The provisions of the new Code governed, under §76-1-103, and the new Code as adopted by the legislature of this state expressly required as an element of all offenses, including Automobile Homicide, that a criminal intent, at least criminal negligence, be found by the jury to exist beyond a reasonable doubt.

Respondent claims that,

At the time the instant case was tried, the reversal this Court would make in [Chavez, supra] was totally unforeseeable. (R.78)

This is simply not so. A reading of the Utah Criminal Code reveals, to all but a layman, that the Chavez, supra, result is completely consistent with established practices of statutory construction. Further, the undeniable fact is that this result was clearly foreseen by not only appellant's counsel in the instant case, but Johnny Chavez's counsel in that case as well. In fact, counsel for appellant Belgard at trial also was co-counsel in the Chavez case.

Respondent's brief, Point IV, is somewhat confusing, if not misleading, on the doctrine of retroactive application in general, as well as retroactive application of Constitutional



procedural guarantees. A short excerpt from Gunther's Cases and Materials on Constitutional Law (Foundation Press 1975)

pp.546-7, serves to clarify the issues involved.

3. Incorporation and the retroactivity problem. Ordinarily, newly announced doctrines are given fully retroactive effect by American courts: the new standard is applicable to all cases pending in the judicial system. That general principle was perceived as a substantial brake on the incorporation of new constitutional rights into the due process clause: especially in light of the availability of collateral challenges via habeas corpus, the concern was that expansion of federal rights applicable in state criminal proceedings would flood the federal courts and open the prison gates by permitting the invocation of the new rules by prisoners whose convictions had long become final for direct review purposes. Those pragmatic considerations no doubt played a major role in inducing the Court to announce a major exception to the normal retroactivity rule in the midst of the rapid growth of selective incorporation during the 1960's. The legitimacy of those exceptions, and the appropriate contours of permissible prospectivity, have produced sharp divisions on and off the Court.

(a) A majority endorsed departures from the ordinary retroactivity rule in Linkletter v. Walker, 381 U.S. 618 (1965). The Court announced that "the Constitution neither prohibits nor requires retrospective effect" for new rulings. The proper approach was to "weigh the merits and demerits" of retroactivity in each case "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (Justice Black's dissent, joined by Justice Douglas, insisted, in this case and many later ones, that departures from full retroactivity were discriminatory and unjustified.) Two years later, Stovall v. Denno, 388 U.S. 293 (1967) articulated more fully the criteria which have since governed the Court's choice between retroactivity and prospectivity: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

(b) In Linkletter and other early decisions rejecting full retroactivity, the Court did not require "pure prospectivity": the new constitutional requirements were applied to all cases still pending on direct review at the time the new rule was announced. That was so in Linkletter, for example, involving the new exclusionary rule of Mapp v. Ohio. In later cases, the Court moved closer to "pure prospectivity". By the time of Stovall v. Denno, some new rulings were found purely prospective except with respect to the parties in the immediate cases before the Court. The fact that the Supreme Court challengers were the only retroactive beneficiaries of the new rules was described in Stovall as "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." The Stovall majority recognized that such a cut-off point made the challengers "chance beneficiaries" of the new rules, but thought the "anomalies" justified by the desirability of the prospectivity technique-- a technique facilitating "the implementation of long-overdue reforms, which otherwise could not be practicably effected." (Emphasis Added)

It bears noting that the status of the instant case was not collateral attack on a conviction, but rather a direct appeal. This case was pending within the judicial system at the time Chavez, supra was decided. Therefore, even if this were a procedural case where a new Constitutional standard had been applied, the new "rule" would properly be applicable here.

As previously noted however, the case at bar is not procedural. The cases respondent cites to bolster its position that Chavez, supra, be limited to prospective application are wholly inapplicable. Miranda, supra, Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772 (1966) Adams v. Illinois, 405 U.S. 278, 31 L.Ed. 2d 202, 92 S.Ct. 916 (1972) and Stovall v. Denno, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), are purely matters of procedure. Further, even under

the criteria of Johnson, supra the instant law (not procedural) is not applicable.

sponsored by the Center for the Study of the American West, funded by the National Endowment for the Humanities and the Utah State Office of the Museum and Library Service, Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

rule) would be retroactively applied.

The purpose of Chavez, supra, and the Utah Criminal Code, is to prevent and punish culpable behavior, i.e. behavior that is at least criminally negligent. The administration of justice can only be furthered by granting a criminal defendant a trial on the facts and the law; the correct law. Justice is served only when the jury is required to find beyond a reasonable doubt all of the elements of the offense charged, in order to return a verdict of guilty. Since appellant did rely on the law, and since he was convicted without the jury having been required to find all of the elements of the charged offense, his conviction must be reversed.

As to the reliance criterion stated in Stovall v. Denno, supra, it should be noted that the relevant reliance is that of law enforcement officers, in making decisions on procedural matters, such as an accused's right to counsel at a line-up. While respondent is no doubt correct that

"The trial judge's reliance [on Wade, Durrant and Anderson, all supra] was made in good faith[,]"  
(R.78)

such reliance cannot serve as a ground for limiting Chavez, supra, to prospective application. Triers of law are allowed no such reliance in determining what the law is, or is not.

Further, the state was not prejudiced by any reliance here. Indeed, appellant, at trial, relied on the clear language of the Code in requesting a correct instruction of the law. That

this proper request was refused cannot now be turned into some species of "reliance" by the prosecution.

Respondent cites Wainright v. Stone, 414 U.S. 21, 38 L.Ed. 2d 179, 94 S.Ct. 190 (per curiam 1973) in support of its position. That case is readily distinguishable and totally inapplicable to the case at bar. There, the highest State Court had ruled that its "infamous crimes against nature" statute was unconstitutionally vague, violating due process. This statute was over one hundred years old, and had acquired a considerable judicial gloss. The Supreme Court of the United States held that the State Supreme Court had the power to make its decision there retroactive, or prospective only.

Wainright v. Stone, supra, is similar to the instant case, in that it dealt with the very substance of what conduct constituted a criminal offense. There, the subsequent change in the law was not a correction of former judicial error in construing a comprehensive criminal code. The "change" was the total abolition of the offense charged, because the statute which made the conduct a crime was void for vagueness on its face.

Wainright v. Stone, supra, is a per curiam opinion some two pages long. While appellant concedes its correctness as to result, it is nevertheless based on a questionable rationale. The convictions there had been affirmed after direct appeal in the State courts. The case was one of a collateral attack on the final judgment of conviction by application for federal habeas corpus relief, based on a change in the law.

Interestingly, in the opinion that had found the infamous crimes against nature statute void, Franklin v. State, 357 So.2d 21 (Fla. 1971), another per curiam decision, the Supreme Court of Florida stated:

"In view of our former decisions, this judgment holding the felony statute void is not retroactive but prospective only. (257 So. 2d at 25)

The Florida Court did not specify what the date of retroactivity would be. Nor did it adopt a true prospective application, since there the rule was applied to the case actually before the Court, while the true "prospective only" doctrine (also known as the "Sunburst doctrine") applies the changed law only to subsequent cases. The parties to the action are bound by the old law. See Great Northern Railway v. Sunburst Oil & Refining Co., 287 U.S. 358, 77 L.Ed. 360 53 S.Ct. 145 (1932).

The Supreme Court of the United States, in Wainright v. Stone, supra, seemed to base its holding on the Florida Supreme Court's statement of "prospective only" application. Appellant points out that the result in Wainright v. Stone, supra, is the same under a more widely accepted theory: final judgments are not subject to collateral attack based on a subsequent change in the substantive law. See U.S. ex rel. Randall v. United States Marshal, 143 F.2d 830 (2d Cir. 1944) Massey v. United States, 291 U.S. 608, 78 L.Ed. 1019, 54 S. Ct. 532 (1934). In the case at bar, there is nothing offensive with the statute in question. Rather, it had been erroneously construed in certain prior cases.

elements required by the statute. In the instant case, therefore, the prospective-only application argued by respondent is not only inappropriate, but it would surely violate due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I Section 7 of the Utah Constitution, in allowing a conviction of a crime without proof of all the elements of the offense. In such a case, where all the statutory rigors had previously gone uncomplished by the State in obtaining felony convictions against defendants (as opposed to where the statute is void for vagueness), retroactive application is compelled.

The doctrine of retroactivity of judicial decisions is so engrained in American law that it is difficult to find appellate court decisions directly on point with the case at bar. An examination of the caselaw, however, quickly indicates the soundness of appellant's contention that Chavez, supra, be given retroactive application to the instant appeal.

An early case is United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801). The case is of historical interest, but more importantly, it is closely on point to the case at bar. The schooner Peggy was a French vessel which was seized by American privateers on April 23, 1800. On this date, the United States and France were in a state of "partial war". The circuit court for the district of Connecticut reversed the decision of the district judge, and decreed that the schooner Peggy, and her cargo were "lawful prize", and

the same are hereby condemned as forfeited to the use of United States, and of the officers and men of the Trumbull, one-half thereof to the United States, the other half to the officers and men,

This sentence and decree were pronounced on the 23d day of September, 1800.

(2 L.Ed. at 50)

On the 30th of September, 1800, a convention between France and the United States was signed in Paris. Article 4 of this convention provided

"Property captured, and not yet definitely condemned . . . shall be mutually restored."

(2 L.Ed. at 50)

On February 18, 1801 this convention was partially ratified by the President of the United States, with the consent of the Senate. Final ratification occurred on December 21, 1801.

On appeal, the Supreme Court of the United States, in an opinion written by Chief Justice Marshall, reversed the Circuit Court, and restored the schooner Peggy and its cargo to the French. The Chief Justice noted first that

This vessel is not considered as being definitely condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument. . . . The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. . . .

(2 L.Ed. at 50 Emphasis Supplied)

As to the retrospective application of a change in the substantive law, the Chief Justice stated:



It has been urged that the court can take no notice of the stipulation for the restoration of property not yet definitively condemned; that the judges can only inquire whether the sentence was erroneous when delivered, and that if the judgment was correct, it cannot be made otherwise by any thing subsequent to its rendition. . . .

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed. . . .

In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

(2 L.Ed. at 51 Emphasis Supplied)

The case of United States v. Chambers, 291 U.S. 217, 78 L.Ed. 763, 54 S. Ct. 434, (1934) while not directly on point, is nevertheless instructive. There, appellant had pled guilty in a prosecution by indictment under the National Prohibition Act. The alleged offense occurred prior to the enactment of the Twenty-First Amendment, which repealed both the Eighteenth Amendment and the Act in question. After the ratification of the Twenty-First Amendment, appellant filed a plea in abatement, and the District Court dismissed the indictment. The United States appealed.

The Supreme Court of the United States affirmed noting:

The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment, for a violation of the National Prohibition Act alleged to have been committed in North Carolina, would involve an attempt to continue the application of the statutory provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes



in question were alleged to have been committed while the National Prohibition Act was in effect. The continued prosecution necessarily depended upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose. (78 L.Ed. at 765)

In the case at bar we are not dealing with an entire statute, but only one element of a statute. And, of course, the "change" in the law is not due to a Constitutional Amendment, but rather due to a correction by this Court of cases previously, and erroneously, decided. Chambers, supra, and the instant case are identical as to the dispositive issues and facts: a legal standard which defines what conduct is a criminal offense is a matter of substantive law, and changes in the substantive law, from whatever source, are retroactively applied.

Another interesting case is Massey v. United States, 291 U.S. 608, 78 L.Ed. 1019, 54 S. Ct. 532 (1934), a per curiam opinion. The holding is concisely stated in the headnote to that case:

Where, at the time of the repeal of the Eighteenth Amendment and the consequent implied repeal of the National Prohibition Act, a judgment of conviction for conspiracy to violate such act had not become final by reason of a stay by a Federal Circuit Court of Appeals of its mandate pending a petition to the Supreme Court of the United States for a writ of certiorari to review its affirmance of such judgment, the defendant is entitled to a vacation of the judgment and a dismissal of the indictment. (78 L.Ed. at 1019)

Also see Bell v. Maryland, 378 U.S. 226, 12 L.Ed. 2d 882,

substantive law, subsequent to a conviction, and the affirmation of that conviction in an intermediate state appellate court. The Court there in reversing the conviction, also notes that a criminal conviction is not final while an appeal is pending.

A case that is remarkably similar to the case at bar is State v. Grambrill, 81 A. 10 (Md. App. 1911), where defendant's demurrer to an indictment was sustained, and the state appealed. The Court of Appeals affirmed. There, the statutory scheme contained an irreconcilable conflict relating to the punishment to be imposed for the offense charged. The Court applied traditional statutory construction techniques, and found the most recent statute impliedly repealed the former. The Court held that in a penal case,

"it is well settled that after the [implied] repeal of a law no penalty can be enforced nor punishment imposed for its violation when in force, . . .  
(81 A. at p. 12)

Thus, the Court gave full retroactive effect to the subsequent change in substantive law.

In summary, the instant case is not one where the relative recent prospective application rule of Linkletter, supra, is applicable. The issues here are of substantive law, not procedure. The instant case is not a collateral attack of a final judgment (in which case appellant concedes, under even the "Blackstonian view", relief would normally be unavailable), but rather it is a direct appeal of a pending case within the judicial system.

Respondent urges that the trial court's error in the law, and its instructions

"did not significantly impair the fact finding process in this case[,]"

(R.77)

in an apparent attempt to bolster its statement that the error was not prejudicial.(R.80) It is at once obvious that respondent is applying an incorrect procedural standard to the question of retroactivity, and that in fact the trial court's error was as prejudicial to appellant as possible. The trial court's incorrect instruction of law allowed the jury to convict appellant of a felony without finding beyond a reasonable doubt all elements of the offense charged.

In his dissent in State v. Durrant, supra, Justice Maughan noted that under the Model Penal Code (from which the Utah Criminal Code's criminal homicide section was patterned),

. . . death caused by an intoxicated driver may be manslaughter, a felony of the second degree or negligent homicide, a felony of the third degree. The legislature departed from the provisions of the Model Penal Code and made negligent homicide a Class A misdemeanor and included automobile homicide, a felony of the third degree.  
(561 P.2d at 1061)

Under a proper instruction, the jury could have found that a crucial element of the felony charged, a criminal intent, was not present. Appellant is entitled to have the jury find beyond a reasonable doubt all of the elements of the offense for which he is charged, at trial. It is not enough to have

respondent infer that such elements existed in his brief on appeal (R.76).

Indeed, respondent states that, as to the Court's instruction No. 25

" . . . a reasonable jury could not fail to understand that they could not convict the appellant for merely being negligent." (R.76)

Yet, as to the criminal negligence element of the offense charged, that instruction stated only

"3. That the defendant so operated or drove the motor vehicle in a negligent manner, . . . "

It is clear that the given instruction invited the jury to convict on a finding of mere negligence, and further, that it gave the jury no guidelines whatsoever in determining what conduct constituted sufficient negligence under the statute. In effect the instruction left the matter to the whim of the jury.

Here, appellant requested instructions that correctly stated the law, but instead the trial court gave instructions which erroneously stated the law. Appellant is entitled to a reversal. A reversal could not "prejudice" the State, since at trial appellant requested the proper instructions. No new grounds or issues have been "cooked up" to defeat justice. Rather, appellant's rights have been abridged, over his objection.

Finally, it must again be noted that respondent's contention that this is a procedural case which gives rise to a question of retrospective or prospective application are completely erroneous. The question here presented is not of retrospective

application. Rather, it is a matter of stare decisis. The law of Chavez, supra, controls all future cases, as well as cases pending in the judicial system at the date that decision was handed down by this Court.

Therefore, appellant's conviction must be reversed.

## POINT II

### THE CONSTITUTIONS OF UTAH AND THE UNITED STATES ARE OFFENDED IF THERE IS NO RELIGIOUS EXCEPTION TO THE GENERAL RULE OF SCHMERBER.

Respondent argues in his brief (R.7) that in Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966), the Supreme Court did not recognize a religious exception to the general rule of the case and that, therefore, this court should decline to do so.

Schmerber, supra, was a five to four decision, holding that a compulsory blood test, ordered by a law enforcement officer, upon probable cause and after a legal arrest, but without a search warrant, was not offensive to the Fourteenth, Fifth and Fourth Amendments to the United States Constitution.

Justice Brennan wrote for the majority. He found due process was not offended on the authority of Breithaupt v. Abram, 352 U.S. 432, 1 L.Ed. 2d 448, 77 S.Ct. 408 (1957), since the withdrawal of blood from Mr. Schmerber did not offend the sense of justice in the manner of Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Of course, Mr. Schmerber

was not a Navajo, nor did he have any other religious or psychological revulsion to the withdrawal of his blood.

Justice Brennan also held the Fifth Amendment proscription against a defendant's being compelled to give evidence against himself was not violated, because that amendment reaches only testimonial evidence, and not real or physical evidence.

As to the Fourth Amendment right to be free from unreasonable searches and seizures, Justice Brennan noted

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In *Wolf* we recognized "[t]he security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society" . . . . We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in *Mapp*.

The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect. . . .

Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers— "houses, papers and effects"— we write on a clean slate. . . .

We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusion as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness. (16 L.Ed. 2d at 917-918 Emphasis Su

Justice Brennan continued, discussing the search of the person, incident to arrest, exception to the Fourth Amendment's warrant requirement, noting;

" . . . the mere fact of a lawful arrest does not end our inquiry. The suggestion of [the cases validating searches of the person incident to arrest] apparently rests on two factors-- first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused; second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. 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. We need not decide whether such wishes would have to be respected.



We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

( 6 L.Ed. 2d at 919-920 Emphasis Supp.)

Chief Justice Warren "reiterated" his dissent in Breithaupt v. Abram, 352 U.S. 432, 440, 1 L.Ed. 2d 448, 453, 77 S.Ct. 408 (1957), "as the basis on which to reverse this conviction." (16 L.Ed. 2d at 921). Breithaupt, supra, was a case based on similar facts. There, petitioner had been involved in a collision in which three occupants of another car had been killed, and petitioner had been seriously injured. An almost empty pint of whiskey was found in petitioner's glove box. Petitioner was taken to a hospital emergency room, where, while he was unconscious, the smell of alcohol was detected on his breath. A state patrolman directed that a blood sample be withdrawn, which was subsequently shown to contain a .17% of alcohol. Evidence regarding the blood sample was introduced, over petitioner's objection, at his trial for involuntary manslaughter. Upon conviction, petitioner did not appeal, rather he sought habeas corpus relief from the Supreme Court of New Mexico, on the ground that admitting the result of the involuntary blood test violated his rights under the Fourteenth



Court of the United States affirmed, after granting certiorari.

Justice Clark, writing for the majority, held that Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949), which held the States were not bound to apply the exclusionary rule to evidence obtained in an illegal search, controlled the case. It is implicit that the involuntary blood test was illegal. It was also held that Rochin v. California, supra, was not violated because the "sense of justice" referred to in that case was not offended.

The Chief Justice's dissent, in which Justices Black and Douglas joined, stated

"The judgment in this case should be reversed if [Rochin, supra] is to retain its vitality and stand as more than an instance of personal revulsion. I cannot agree with the Court when it says 'we see nothing comparable here to the facts of Rochin.' It seems to me the essential elements of the cases are the same and the same result should follow."  
(1 L.Ed. 2d at 448)

Justice Warren acknowledged the State's interest in enforcing traffic laws and protecting the public, but found that the state interest in Rochin, supra, (curbing narcotics traffic) was at least equally important. Indeed, he found the two cases indistinguishable.

The Chief Justice criticized the majority's finding that, unlike Rochin, supra, there was nothing "brutal" or "offensive" in the involuntary blood taking, noting

The Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will. The latter may be manifested by physical

resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest . . . . Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process question here presented. The Court's opinion suggests that an invasion is "brutal" or "offensive" only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—the references to a "considerable struggle" and the fact that the stomach pump was "forcibly used" — the Court finds *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights. Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects . . . . The stomach pump too is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. . . . Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands. We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate it by force or stealth. (1 L.Ed. 2d at 454-455)

Schmerber, *supra*, was also forcefully dissented from by Justices Black and Douglas.

Justice Black disagreed

"with the Court's holding that California did not violate the petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime. (1 L.Ed. 2d at 921)

Justice Black found the testimonial vs. real evidence distinction relied upon by the majority to be wholly unconvincing, noting the court had cited no precedent of its own in so limiting the scope of the Fifth Amendment. Acknowledging Wigmore's "scholarly precedent" for the approach, he stated:

Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth Amendment goes no further than to bar the use of forced self-incrimination statements coming from a "person's own lips." It concedes, as it must so long as Boyd v. United States (citation omitted) stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.

. . . .

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against compulsory self-incrimination the broad and liberal construction that Counselman and other opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in Boyd v. United States, supra which Professor Wigmore criticized severely, see 8 Wigmore, Evidence, §2264 (ed ed. 1940), pp. 366-373, makes that one among the greatest constitutional decisions of this Court. . . . The court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees:

"A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

. . . .

The Court today departs from the teachings of Boyd. Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself", yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract. (10 L.Ed. 2d at 922-923)

Justice Douglas dissented in Schmerber, supra, by adhering to his dissent, and the dissent of the Chief Justice, in Breithaupt v. Abram, supra. Douglas added,

We are dealing with the right of privacy which, since the Breithaupt case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights. Griswold v. Connecticut (citation omitted). Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. (Citation omitted). Likewise the

Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons". Ibid. No clearer invasion of this right of privacy can be imagined than forcible blood-letting of the kind involved here.  
(1 L.Ed. 2d at 924)

The analysis of Schmerber v. California, supra, shows that when that case was decided it was not at all clear what the state of the law in question was. It was recognized, however, both in Brennan's opinion for the majority, and the dissents, that the holding represented the fringes of police behavior that was constitutionally permissible.

Indeed, it can be argued that Schmerber, supra, was incorrectly decided, and that after Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 A.L.R. 2d 933 (1961), the result should have been a reversal. In any event, Schmerber, supra, was meant to be, and should be, confined strictly to its facts. It is clear that, when as in the case at bar, there are alternative, reliable scientific procedures available to determine the alcoholic content of the blood (e.g. breathalyzer, urine tests), and when the accused has affirmatively expressed his lack of consent to an extraction of his blood, based on religious grounds, then the results of such a test cannot Constitutionally be used to obtain a conviction. Any other interpretation of Schmerber, supra, would render the rights protected by Fourth, Fifth, and First Amendments subject to the discretion, whim, and degree of force a law enforcement officer might decide to be appropriate on an ad hoc basis. Indeed, the current

and one fraught with potential abuses and hazards. An accused with a religious conviction against such tests, who is compelled to so submit, might easily suffer severe, and perhaps permanent emotional distress as a result. Similarly, one with a neuropathic phobia of needles might also suffer serious emotional harm. Or, in their resistance to such palpable assaults on their persons it is easily foreseeable that they might physically resist, causing injuries to others, and ultimately themselves. More frightening would be the result if such a forcible blood extraction were performed against the will of a hemophiliac, in which case serious physical injury, if not death, would surely result.

The cases respondent cites are not on point here. Respondent's cases are basically First Amendment cases, and while certainly freedom of religion is integral to the case at bar, it is nevertheless in quite a different context here than it is in respondent's cited cases.

Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed. 2d 15, 92 S.Ct. 1526 (1972) was a case affirming the reversal of convictions for violating a compulsory school attendance law, based on the First Amendment's guarantee of free exercise of religion. While the court there did find,

" . . . that the record in this case abundantly supports the claim that the traditional way of life of the Amish is . . . one of deep religious conviction, shared by an organized group, and intimately related to daily living[.]" (32 L.Ed.2d at 25)

it did not purport to set down any yard-stick-like test to determine the sincerity of religious conviction, especially as applied to the search and seizure context of the instant case.

In United States v. Seeger, 380 U.S. 163, 13 L.Ed. 2d 733, 85 S.Ct. 850 (1965) and Welsh v. United States, 398 U.S. 333, 26 L.Ed. 2d 308, 90 S. Ct. 1792 (1970) the tests of religious conviction, are in the context of one convicted of refusing to submit to induction to the draft, claiming the status of conscientious objector. The present case is tangentially related, at the most. Seeger, supra, however, noted that the status, as controlled by legislation, embraced all religions, as opposed to political, philosophical, or sociological views.

United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) has nothing to do with the search and seizure area. Rather, it denies, in its facts, a First Amendment immunity to laws prohibiting the use of marijuana and LSD. In the instant case, the focus is not on the First Amendment, except as it defines a zone of privacy from which one is free from unreasonable searches and seizures. Rather, here the focus is on the reasonableness of the search technique employed, the importance of the individual's bodily integrity and dignity, and the alternative methods available. In short, the tests advocated by respondent are taken out of their proper context, and, under the instant facts, are misleading and inappropriate. The interests involved in

Yoder, Seeger, Welsh, and Kuch, all supra, are not related to the interests involved in the case at bar.

Here, defendant's interests may be summarized as his right to personal integrity; his right to not incriminate himself; his right to be free from unreasonable searches, and to be protected by a neutral and detached magistrate; and his right to be secure in his religious beliefs and scruples. The State's interests include protecting the public's safety on the highways, and decreasing the number of drunken drivers. The State has chosen the criminal justice system to, in part, vindicate its interests. Our judicial system places certain barriers to the use of the criminal law, regardless of the guilt of an accused, including the protection of the due process clause of the Fourteenth Amendment, and the Fourth and Fifth Amendments of the Constitution of the United States. The interests that these amendments protect must be held to outweigh those asserted by the states (Mapp v. Ohio, supra, Rochin v. California, supra).

One more point must be made here. Respondent states:

"... the appellant failed in his burden to establish the validity and sincerity of his religious beliefs."  
(R.12)

The rule of law in this instance is almost too settled to bear citation. Any search or seizure without a warrant is per se unreasonable, and in violation of the Fourth, and Fourteenth Amendments. The burden is always on the prosecution to prove that the search falls into one of the recognized



in its burden, the evidence is inadmissible, as it was illegally obtained. See Chimel v. California, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969).

It would seem that the instant case may well be one of first impression. This Court should find that under the Fourteenth, Fifth, Fourth, and First Amendments to the Constitution of the United States, a "religious" exception exists to the general rule of Schmerber, supra, and that Schmerber, must be strictly confined to its facts.

### POINT III

#### INVOLUNTARY BLOOD TESTS VIOLATE ARTICLE I SECTION 12 OF THE UTAH CONSTITUTION.

Article I Section 12 of the Constitution of Utah deals with the rights of those accused of a crime. In relevant part it provides:

" . . . The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband. . . ."  
(Emphasis Supplied)

The protection provided by the framers of the Utah Constitution is expressly broader than the right to be free of self-incrimination contained in the Fifth Amendment to the federal Constitution, which states in relevant part:

. . . nor shall any person . . . be compelled in any criminal case to be a witness against himself.  
(Emphasis Supplied)

Clearly, the Utah Constitution's prohibition against self-incrimination goes to "evidence", both real and testimonial.

Note that the spousal privilege is limited to testimony. Note the Fifth Amendment is limited to the accused as a witness, yet,

as to self-incrimination, Utah's framers expressly provided that an accused cannot be compelled to give evidence against himself.

Respondent is able to cite only an admitted "dictum" in State v. Van Dam, 554 P.2d 1234 (Utah 1976) in support of its contention that the Article I Section 12 proscription of the of compelled evidence is limited to "testimonial" evidence. Appellant again asserts that the law on this issue is settled, and not open to question, by the holding of this Court in State v. Sirmay, 40 Utah 525, 122 P. 748 (1912), a case decided only sixteen years after the section in question was adopted, when the spirit and intent of the framer's was fresher to the Court than it was when the dicta in Van Dam, supra was uttered. As is pointed out in appellant's brief at pages 14 and 15, Sirmay, supra, clearly holds that the self-incrimination provision of Article I Section 12 encompasses real as well as testimonial or communicative evidence, and that therefore such evidence may only be received upon an accused's affirmative consent. Indeed, in light of Sirmay, supra, and Article I Section 12, it would seem that an involuntary blood test is prohibited even if an otherwise valid search warrant were issued. Of course, this question is not before the Court, because in the instant case, no impartial magistrate was interjected to determine the reasonableness of the extraction of appellant's blood. Rather, the officer on the scene made this decision for himself.

In light of Article I Section 12, and Section 14 (which prohibits unreasonable searches), Sirmay, supra, and the

facts of the case at bar (including the breaking of the skin and blood vessels to extract blood), it seems clear that the involuntary taking of blood complained of violated the Constitution of Utah, as Article I Section 12 is not limited to preclude only testimonial evidence.

While Sirmay, supra expressly holds the position here asserted, it is by no means the only authority for that position. Note Justice Black's dissent in Schmerber v. California, 384 U.S. 757, 773, 16 L.Ed. 2d 908, 921, 86 S.Ct. 1826, 1837 (1966), discussed at length in Point II, supra.

In Green v. State, 259 S.W. 2d 142 (Ark. 1953) the Supreme Court of Arkansas held that Article II Section 8 of that state's constitution, which provides:

"nor shall any person be compelled, in any criminal case, to be a witness against himself."  
(259 S.W. 2d at 143)

prohibited compelling an accused to submit to a physical exam, and then using the results of that exam as evidence against him. The distinction between "real" and "testimonial" evidence was not discussed, and was apparently considered irrelevant.

In Trammell v. State, (Tx. Cr. 1956) 287 S.W. 2d 487, a driving while intoxicated conviction was reversed on the ground that analysis of an accused's blood was inadmissible to prove intoxication where the State had failed to prove the accused had consented to the extraction of his blood. The State Constitution was held to be offended.

In United States v. Townsend, (D.D.C. 1957) 151 F. Supp 378, defendant had been convicted of "taking immoral, improper and indecent liberties with a female under 16 years old." His motion for a new trial was granted on the ground that evidence obtained from a compelled physical examination was inadmissible under the Fourth and Fifth Amendments. The Court noted such evidence was not only unreliable, but offensive to justice as well. Further, the presence or absence of force was held not determinative of either the issue of consent, or the violation of Constitutional guarantees of due process.

In State v. Munroe, 22 Conn. Supp. 321, 171 A.2d 419 (Circuit Court 1961) it was held that results from physical tests to determine the blood's content of alcohol, which an accused has consented to, are admissible. Likewise when an accused is unconscious when the test is conducted. The court found, however, that when duress is used to compel the test, the results are inadmissible under the "rules of evidence".

In State v. Merrow, 203 A.2d 659 (Me. 1965) it was held an accused must voluntarily consent to the taking of a blood sample in order for it to be admissible as evidence of intoxication in a prosecution for driving while intoxicated. Opinion of Justices, 255 A.2d 643 (Me. 1969) is in accord.

State v. Weltha, 292 N.W. 148 (Iowa 1940) holds it unconstitutional to take blood from an accused, to use as evidence against him, even if the accused were unconscious at the time. Without search warrant, the State Constitution was offended.

Compton v. People, 444 P.2d 263 (Colo. 1968) is an interesting post-Schmerber case. It holds that a blood test without consent does not violate due process, but that nevertheless it is inadmissible into evidence under statute. In order for a blood alcohol test to be admissible, there must be an affirmative finding that the accused consented to the test. There a conviction for causing a death by operating an automobile while under influence of intoxicating liquor was reversed.

People v. Todd, 59 Ill. 2d 534, 322 N.E. 2d 447 (1975) in another case involving an unusual statute. There, consent is required to make the results of a blood test admissible in a prosecution for driving under the influence.

In Gilbert v. Leach, 62 Mich. App. 722, 233 N.W. 2d 840, aff'd 397 Mich 384, 245 N.W. 2d 18 (1975), a civil case, the results of a blood alcohol test was held properly excluded since it was unconsented to. A free, voluntary and knowledgeable consent is required. The case was based on the State Constitution's prohibition of unreasonable searches and seizures.

Cox v. State, 395 P.2d 954 (Okla. Cr. 1964 ) holds that privilege against self-incrimination applies to real evidence as well as testimonial. While this case has been overruled, it nevertheless represents the sounder position of law.

In State v. Groyet, 132 A.2d 623 (Vt. 1957) and State v. Johnson, 135 N.W. 2d 518 (Iowa 1965) it is held that consensual blood taking is permissible. In State v. Haley, 318 P.2d 1084 (Mont. 1957), it was held that where, with written and oral

test in a manslaughter prosecution based on a drunken driving incident. Also see Ex Parte Rebersak, 106 Ohio App. 425, 7 Ohio Ops 2d 172, 78 Ohio L Abs 280, 150 N.E. 2d 869 (1958) where it is held that law enforcement officers may request, but not demand, a blood test. The constitutional right to refuse such a demand is "absolute".

In summary, prior to the Schmerber supra, decision, and Breithaupt, supra, the "weight of authority" as to the Constitution of compelled physical tests, under various state Constitutional proscriptions against self-incrimination, as well as the view towards the Fifth Amendment to the federal Constitution, was that such involuntary tests were impermissible. (See Green v. State supra, 359 S.W. 2d at 143) In Utah, under State v. Sirmay, supra, this was clearly the case. Schmerber and Breithaupt, both supra, are anomalies, and while they control as to the federal Constitutional questions, the result under Article I Section 12 of the Constitution of Utah is a matter already decided by this Court in Sirmay, supra and the clear wording of the section in question. Therefore, appellant's conviction in the case at bar must be reversed.

#### POINT IV

##### SECTION 76-5-207(2) IS UNCONSTITUTIONALLY OVERBROAD, AND APPELLANT HAS STANDING TO SO ASSERT.

In addition to appellant's position on this issue as stated in Point C of his brief (A-13), it is further noted that §76-5-207(2) is unconstitutionally over-broad in light of Article I Section 12 of the Utah Constitution, discussed at length

Respondent asserts that as this issue is raised for the first time on appeal, it should be dismissed. (R.26) Appellant responds that the issue here is sufficiently significant that this Court should decide it. Further, the procedural rule respondent seeks to invoke is not proper here, since the underlying rationale of the so-called "contemporaneous objection rule" barring review is not served. That rationale is that if a timely objection is made at trial, it can be ruled on, thus permitting the trial court to avoid evidentiary error. See State v. Gordon, 549 P.2d 886 (Kan. 1976). Here, no evidentiary error, as such is claimed. Rather, it is claimed that an entire procedural aspect of a statute is invalid. The issue is one of sufficient importance that this Court should hear it now on appeal, notwithstanding the failure to raise it at trial.

Respondent's argument that appellant lacks standing (R.26) is circular, and is based on the conclusion that the statute was constitutionally applied to appellant. Obviously, it is for this Court, not respondent, to determine that question.

As to §76-5-207(2), it should be noted that the section is expressly subject to the "rules of evidence". Therefore, simple construction of the statute, such that it is subject to the constitutions of the United States and Utah, as part of the "rules of evidence" will operate to save the statute. Similarly, an attempt to subrogate the Constitutions to the statute must fail. See State v. Munroe, 22 Conn. Supp. 321

171 A.2d 419 (1961):

"Where duress or force had been used in gaining incriminatory evidence from the accused such evidence has generally been excluded under a rule of evidence or because it so grossly did violence to the sanctity of the person as to be abhorrent to our sense of justice and thus violative of due process . . . " (171 A.2d at 421)

In Green v. State, 259 S.W. 2d 142 (Ark. 1953) the issue of statutes and compulsory mental examinations was discussed:

A statute compelling the defendant to submit to a mental examination in order that a psychiatrist may form an opinion to his sanity, and then permitting the alienist to testify in court . . . is on the borderline of the constitutional interdiction against compelling one to testify against himself; and although the statute has been held constitutional, [citation omitted], it should not be stretched, enlarged, or expanded. (259 S.W. 2d at 144)

Here of course we are dealing with an entirely different type of statute. But §76-5-207(2) is surely on the "borderline" of constitutionality, especially as to Article I Section 12 self-incrimination provision, as well as the Fourth and Fourteenth Amendments, and Article I Sections 7 and 14 of the Utah Constitution. Indeed, under the sweeping language of §76-5-207 (2), it can only be saved by a construction which subjects it to the rigors of both the federal and state constitutions in question.

Nor must this Court wait for the Supreme Court of the United States to decide the federal Constitutional issues involved herein, as respondent asserts (R.29). This Court obviously has jurisdiction to decide federal Constitutional issues, and only this Court can decide questions raised under the Constitution of Utah.



Finally, as to the Constitutionality of §76-5-207(2), note United States v. Cameron (C.A. 9 Calif.) 538 F.2d 254, an admittedly shocking case. It is there held that, as to body searches, Fourth Amendment standards are stricter than those of due process, and that the Constitution is violated when less obtrusive methods are available, but not employed, to obtain the desired specimen or exam.

#### POINT V

#### APPELLANT DID NOT CONSENT TO THE EXTRACTION OF HIS BLOOD.

Respondent's assertion that appellant consented to the extraction of his blood is simply untenable (R.14).

It is uncontradicted that the peace officer in question repeatedly told appellant that force would be used to take the test if he resisted. Appellant repeatedly stated he did not want the test. Under these facts, while appellant submitted to the test, he did not consent.

It should be noted that, as to the events at the hospital, where appellant placed himself on a gurney and allowed blood to be withdrawn without physical resistance, that very similar facts occurred in Rochin, supra, when the petitioner's stomach was pumped. There, a struggle occurred at petitioner's apartment, where he had been arrested, but not at the hospital, where petitioner was subdued and not violent. Nevertheless it could not be argued that he consented to the stomach pump procedure. See Breithaupt v. Abram, supra, dissent of

Chief Justice Warren, 1 L.Ed. 2d at 454, fn.1.

Respondent's statement that no coercion was involved (R.17) is similarly not true. The coercion was not physical, but the threats of force were sufficient coercion to nullify any "consent".

Respondent cites Schneckloth v. Bustamonte, 412 U.S. 218 36 L.Ed. 2d 854, 93 S.Ct. 2041, (1973) in support of its position that the instant appellant consented to have his blood withdrawn. There, the driver of a vehicle, Alcala, consented to a search of his automobile. (Alcala's reply to the request was "Sure, go ahead". Cf. appellant's responses here) The search turned up evidence which was used to convict Bustamonte for possessing a check with the intent to defraud.

The holding of that case was that Alcala's consent to the search was valid even though the police had not informed him he had a right to refuse the search. The Court held that, in this Fourth Amendment context, "voluntary" consent did not require knowledge of the right to refuse. It is equally clear that a coerced consent is invalid.

In contrast, the instant appellant repeatedly stated he did not want the test. He was repeatedly told force would be used. In Schneckloth, supra, the Court quoted an earlier case dealing with the voluntariness of confessions:

"Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self determination critically impaired, the use of his confession offends due process." (36 L.Ed. 2d at 862 )

Insofar as State v. Van Dam, 554 P.2d 1324 (Utah 1976) makes physical resistance the test for lack of consent, it is both incorrect, and poorly reasoned. Such a test invites the use of intimidation to obtain consents, and should not be sanctioned. Indeed the better position is that force is not determinative of consent (Gilbert v. Leach, 62 Mich. App. 722, 233 N.W. 2d 840, affd 397 Mich. 384, 245 N.W. 2d 18 (1976 ) , Escamilla v. State, 556 S.W. 2d 796, on reh. 561 S.W. 2d 205 (1977 Tx. Cr.), United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1959)).

Here, where appellant did not physically resist, but was coerced to allow the blood to be taken, it cannot be argued that he consented to the test.

### CONCLUSION

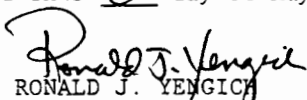
In summary, appellant reasserts his claim that &41-6-44.5 (1953 as amended) was not complied with; and that §76-1-401 (1953 as amended) is a bar to a subsequent prosecution of the automobile homicide charge that is the subject of this appeal.

Since State v. Chavez, 605 P.2d 1226 (Utah 1980) decides the point of law at issue in this appeal in appellant's favor; and since the instant case was, and is pending in the judicial

judgment), appellant's conviction must be reversed.

Further, appellant's conviction must be reversed because of the religious exception to the rule of Schmerber, supra; because the taking of appellant's blood without his consent violated Article I Section 12 of the Utah Constitution, and because §76-5-207 is unconstitutionally overbroad.

Respectfully submitted this 8 day of May, 1980.

  
RONALD J. YENGICH  
O'Connell & Yengich  
Attorneys at Law  
44 Exchange Place  
Salt Lake City, Utah 84111

Attorney for Appellant