

2009

Utah v. Robinson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

CHANCE L. ROBINSON,

Defendant/Appellant.

CASE NO. 20090015-CA

(Defendant is currently incarcerated.)

BRIEF OF APPELLANT

**APPEAL FROM DISTRICT COURT'S DENIAL OF DEFENDANT'S
MOTION TO QUASH BINDOVER AND SUBSEQUENT JUDGMENT,
SENTENCE, AND ORDER FOR COMMITMENT, IN THE FOURTH
JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF
UTAH, THE HONORABLE FRED D. HOWARD, PRESIDING.**

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

CHANCE L. ROBINSON,

Defendant/Appellant.

Case No. 20090015-CA

BRIEF OF APPELLANT

JURISDICTION

Appellant Chance L. Robinson (“Mr. Robinson”), appeals from the trial court’s denial of his motion to quash the bindover by ruling dated September 15, 2008, and the subsequent entry of judgment against him. This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

ISSUE: Whether the statute under which Mr. Robinson was convicted of possession or use of methamphetamine, Utah Code Ann. §§ 58-37-2(1), -8(2)(a)(i), is unconstitutional in that it makes a person criminally liable for his status, in

violation of *Robinson v. California*, 370 U.S 660 (1962), and in that it violates the Due Process and Uniform Operation of Laws clauses of the United States and Utah Constitutions?

STANDARD OF REVIEW: An appellate court reviews a decision concerning the constitutionality of a statute for correctness. *Merrill v. Utah Labor Comm’n*, 2009 UT 26, ¶ 5 (“The constitutionality of a statute is a question of law that we also review for correctness”).

DETERMINATIVE STATUTORY PROVISIONS

(Included in Addendum)

Utah Code Ann. § 58-37-2(1)(c), (ii)

Utah Code Ann. § 58-37-8(2)(a)(i)

STATEMENT OF THE CASE

1. Mr. Robinson was originally charged with five separate counts: (1) possession or use of heroin; (2) possession of drug paraphernalia; (3) driving under the influence (impaired, not blood alcohol content); (4) driving on a revoked or suspended license; and (5) operating a vehicle without insurance. Record at 3-4.

2. A preliminary hearing was held on these charges on June 17, 2008, at which time the magistrate dismissed the license and insurance charges for lack of evidence but bound Mr. Robinson over on the heroin, paraphernalia, and DUI charges. Record at 133, pp. 31-32.

3. Shortly thereafter, on July 11, 2008, the State amended the information to add a charge of possession or use of methamphetamine. Record at 49-50.

4. On July 29, 2009, a second preliminary hearing was held as to the methamphetamine charge only. Record at 134. At that time, the State conceded that it was prosecuting Mr. Robinson on the methamphetamine charge based solely on the fact that a blood test showed that he had the substance in his bloodstream. Record at 134, p. 8, lines 3-8.

5. At that time, Mr. Robinson objected that this charge violated his constitutional rights and that there was insufficient evidence to support a finding of probable cause. Specifically, Mr. Robinson argued that prosecuting and convicting a person for merely having a controlled substance in his body or in his bloodstream is prohibited by *Robinson v. California*, 370 U.S 660 (1962), which made clear that the United States Constitution does not allow the state to prosecute someone because of their status; rather, only a person's actions may subject a person to criminal liability. Record at 134, p. 5-6.

6. Overruling Mr. Robinson's evidentiary objection, the Court bound over the charge but ordered briefing on the constitutional issue. Record at 134, p. 11. Accordingly, Mr. Robinson filed a motion to quash bindover based on this issue. Record at 58-73.

7. After briefing and argument on the issue, Record at 58-73, 75-86, 87-94, the trial court overruled the motion. Record at 98-102.

8. On September 16, 2008, the State amended the DUI charge to DUI-metabolite and Mr. Robinson entered a plea of guilty to the amended DUI and the methamphetamine charges. Record at 135. The methamphetamine plea was entered pursuant to *State v. Sery*, 758 P.2d 935 (Utah App. 1988), that is, Mr. Robinson retained his right to appeal the trial court's denial of his motion to quash. Record at 135, p. 4.¹

9. On November 25, 2008, Mr. Robinson was sentenced on both charges (as well as charges stemming from another case that is not the subject of this appeal) and judgment was entered against him. Record at 117-21, 136.

10. On that same date, Mr. Robinson filed his Notice of Appeal. Record at 123-24.

STATEMENT OF THE FACTS

1. On August 10, 2007, Officer Ellswood reported to Officer Owens that he intended to stop the vehicle that Mr. Robinson was driving for not having insurance and the driver probably having a suspended license. Record at 133, p. 6, 11.

¹ In addition, Mr. Robinson plead guilty to charges in a second, unrelated case. Record at 106-112, 135 pp. 2-4. Neither these charges nor Mr. Robinson's plea to the DUI-metabolite charge are the subject of this appeal.

2. During that traffic stop, the officer determined that Mr. Robinson might be impaired and asked Officer Owens to respond to the scene. Record at 133, p. 7.

3. Officer Owens had Mr. Robinson get out of the car and perform certain field sobriety tests. Record at 133, p. 8.

4. At the conclusion of these tests, the officer concluded that Mr. Robinson was impaired and therefore placed him under arrest. Record at 133, p. 8-9.

5. Thereafter, the officers had Mr. Robinson provide a blood sample. Record at 133, p. 10. That sample came back positive for methamphetamine. Record at 134, pp. 4-5, 8 (specifically, although the exhibit is not in the record, at the preliminary hearing, the State introduced into evidence a toxicology report showing that Mr. Robinson had methamphetamine in his blood). This is the sole evidence introduced that Mr. Robinson “possessed or used” methamphetamine. Record at 134, p.8. lines 3-8.

6. Although the trial court stated in its ruling that “Defendant chose to ingest the drugs,” Record at 100, there is no evidence whatsoever in the record that Mr. Robinson acted voluntarily and knowingly to ingest the drugs.

7. There was no evidence introduced as to where, when, or how the methamphetamine came to be in Mr. Robinson’s bloodstream.

SUMMARY OF ARGUMENT

Under both the federal and state Due Process Clauses, U.S. Const. amend XIV and Utah Const. art. I, § 7, a person should not be subject to criminal liability for matters that are outside their control. Indeed, in 1962, the U.S. Supreme Court held as much in *Robinson v. California*, when it held that a person cannot constitutionally be convicted simply for being an addict. Being an addict is a status and status crimes are unconstitutional, the *Robinson* Court held.

Mr. Robinson's conviction in this case falls within precisely the same ambit. Although his status was different from that of the *Robinson* defendant (one being an addict and the other having a controlled substance in his bloodstream), neither one of them were capable at the time of the arrest to change their condition – their status.

In addition to being a prosecution for a status offense, as explained below, the statute under which Mr. Robinson was charged and convicted opens up criminal defendants to violations of the Uniform Operation of Laws Clause of the Utah Constitution.

ARGUMENT

I. STANDARD OF REVIEW

An appellate court reviews a decision concerning the constitutionality of a statute for correctness. *Merrill v. Utah Labor Comm'n*, 2009 UT 26, ¶ 5 (“The

constitutionality of a statute is a question of law that we also review for correctness”).

II. STATUTORY FRAMEWORK

Subject to certain exceptions not relevant here, under Utah Code Ann. § 58-37-8(2)(a), “it is unlawful: (i) for any person knowingly and intentionally to *possess or use* a controlled substance analog or a controlled substance.” (Emphasis added.)

The term “possess or use” is defined by statute to mean: “the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or *consumption*, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances.” Utah Code Ann. § 58-37-2(1)(ii) (emphasis added).

In turn, “consumption” as used in this definitional statute “means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.” Utah Code Ann. § 58-37-2(1)(c). This latter provision was added to the statute in 2003, shortly after the events underlying the Utah Supreme Court’s decision in *State v. Ireland* 2006 UT 17, 133 P.3d 396, but before the court’s decision in that case. In *Ireland*, the State argued that a person’s having a controlled substance in

his or her bloodstream constituted “consumption” and therefore fell within the prohibited “possession or use” criminalized by Utah Code Ann. § 58-37-8(2)(a)(i). The *Ireland* court rejected this reading of the term “consumption” and held that “consumption” was “a catchall term encompassing all methods of *introducing* controlled substances into the body.” *Id.* ¶ 20 (emphasis added).

In the course of arriving at this holding, the court noted the then-recent amendment to the definitions under the Utah Controlled Substances Act and stated that “[o]ur analysis of the possession or use subsection is . . . based on the version of the statute under which Ireland was charged, . . . and would likely be different if we were to interpret the current version of the statute.” *Id.* ¶ 18. Mr. Robinson does not argue that this dicta from the Utah Supreme Court is an improper reading of the statute in its current form.

Instead, Mr. Robinson argues that, for the reasons discussed below, the statute in its current form is unconstitutional.

III. MR. ROBINSON’S CONVICTION FOR POSSESSION OR USE OF METHAMPHETAMINE VIOLATES HIS RIGHTS UNDER *ROBINSON v. CALIFORNIA*

A. Status Crimes Such as That with Which Mr. Robinson Is Charged Are Unconstitutional Under Both the United States and Utah Constitutions

Consider a person that smokes a marijuana joint in Logan, Utah and then is driven by someone to St. George, beginning in Cache County and then passing

through Weber, Davis, Salt Lake, Utah, Juab, Millard, Beaver, and Iron Counties, before arriving in Washington County. Under the terms of the current statute with its definition of “consumption,” that person would be subject to prosecution in ten separate counties in Utah and one county in Idaho where the actual consumption occurred, and would face up to at least five years of incarceration (assuming a six month sentence for each charge). Indeed, with these multiple prosecutions and convictions, the likelihood of incarceration would increase because each subsequent court would consider the prior convictions as a basis for imposing a harsher sentence.² This outrageous scenario would only be compounded should the individual decide to return from St. George to his Logan residence. The fact that marijuana stays in the body for up to thirty days further compounds the problem.

There are many other scenarios that are simply unacceptable as a constitutional matter but that are perfectly plausible under the current statute. For instance, imagine the person that uses drugs in Nevada and then traveled to Utah, a completely different state. Now, in addition to the problems of multiple prosecutions for what is actually only one crime, there is the problem of forum shopping by law enforcement because they can now pursue prosecution in either of

² The same could happen even if the individual never left the county of the original offense because, as written, the statute would allow the State to arrest and prosecute the person many times prior to the drug leaving his system.

the two states. What about the individual that smokes marijuana in Oregon or California (where enforcement and punishment of marijuana use are substantially more lax than in Utah) and then travels to Utah without bringing any of the drug with him, other than in his bloodstream? Or, what if he uses it in a country where marijuana use is legal before flying to Utah? In Utah, under the current statute, such a person can be prosecuted and punished for conduct that was perfectly legal where he was when he did it.

As shown below, under United States Supreme Court precedent, that is truly cruel and unusual punishment. But it also denies that person, who *did* nothing illegal or wrong after finishing the joint in Logan or Nevada or California or a foreign country, the opportunity to conform his actions to the law. That violates the individual's right to due process.

B. The Case of *Robinson v. California*

Nearly fifty years ago, the United States Supreme Court decided the case of *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the defendant went to trial on the charge of violating § 11721 of the California Health and Safety Code.³

³ That section provided:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any

Id. at 660. At trial, an officer testified that he had examined the defendant's arms and found them to be scarred and bearing numerous needle marks. *Id.* at 661. The officer further testified that, under questioning, the defendant admitted occasional use of narcotics. *Id.* Another officer gave expert testimony that the scarring and needle marks were the result of the use of unsterile hypodermic needles. *Id.* at 662. The defendant testified and denied the confession and explained the scarring and other marks as resulting from an allergic condition contracted when he was in the military. *Id.* This was corroborated by two other witnesses. *Id.*

The jury was instructed that it was a violation of the law for a person "either to use narcotics, or to be addicted to the use of narcotics." *Id.* The judge further explained that

[t]hat portion of the statute referring to the "use" of narcotics is based upon the "act" of using. That portion of the statute referring to "addicted to the use" of narcotics is based upon a condition or status. They are not identical. . . . To be addicted to the use of narcotics is said to be a status or condition

provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

Id. at 660 n.1.

and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.

Id. at 662-63 (alterations by the Court). Finally, the judge instructed the jury that it could convict if it found either that the defendant had used narcotics or that he was addicted thereto. *Id.* at 663. The jury convicted and the state appellate courts affirmed. *Id.* at 663-64.

In its analysis, the Supreme Court noted that it was bound by the state courts' interpretation that the statute prohibited a person from *either* using *or* being addicted to narcotics. *Id.* at 666. "The statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale, or possession, or for antisocial or disorderly behavior resulting from their administration. . . . Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'" *Id.* "California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether he has been guilty of any antisocial behavior there." *Id.*

The Supreme Court held the conviction to be a violation of the Fourteenth Amendment. The Court determined that addiction is an illness, not unlike leprosy or venereal disease, and asserted that convicting a person of having either of those

diseases would be universally recognized as the infliction of a cruel and unusual punishment. *Id.* at 666-67. The Court supported this conclusion by noting that addiction is a disease that may be contracted innocently or involuntarily. *Id.* at 667.

C. Like the Statue at Issue in *Robinson*, the Utah Controlled Substance Act Makes One's Status Criminal and That Is Unconstitutional

The Utah statute, like the California statute at issue in *Robinson*, in addition to making the traditional use of controlled substances illegal, also makes their after-effects illegal. In the case of the California statute, it was the after-effect of being addicted. In the case of Utah's section 58-37-2(1)(c), it is the after-effect of having a controlled substance in one's body. Each of these is a status offense; there is no particular conduct that is prohibited by the relevant portion of the statute. Instead, it is simply the status of having been affected by a controlled substance at some previous time.

While it is certainly true that in the large majority of cases, a person will be addicted to narcotics or a person will have a controlled substance in his or her body only because they somehow ingested it, the state remains free to prosecute these individuals for that actual ingestion. Indeed, the State is perfectly free to use the status of being an addict or of having a controlled substance in the body as evidence of that ingestion.

What the State is not free to do is impose punishment for something that it has not proven was a voluntary act by the defendant. The Supreme Court noted that addiction may occur innocently and involuntarily. The same is true of having a controlled substance in one's body. For instance, some third party may inject the controlled substance into the defendant's body without their knowledge or even over their objection. Alternatively, a person may ingest the controlled substance not realizing what it is they are taking into themselves. Additionally, a person attending a party could unintentionally inhale second hand smoke from another person and then be subject to being criminally charged in every county he passes through in the State of Utah for the next thirty days.

In such circumstances, as the Supreme Court noted, the State is perfectly free to require the person to take remedial steps to prevent further harm from the presence of the condition (addiction or having the substance in the body) but it may not punish them for it. To do so would be cruel and unusual punishment under the Eighth and Fourteenth Amendments.

In addition, it violates the very notion of due process imposed on the states by the Fourteenth Amendment.

Under the due process clauses of the Fourteenth Amendment to the Constitution of the United States and of article I, section 7 of the Utah Constitution, government may not deny a person life or liberty except on principles "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U.S. 312, 316-17, 47 S. Ct.

103, 71 L. Ed. 270 (1926). The due process clauses protect those principles that are "implicit in the concept of ordered liberty" and without which "a fair and enlightened system of justice would be impossible." *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 (1937), *overruled on unrelated part*, *Benton v. Maryland*, 395 U.S. 784, 795, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969).

State v. Herrera, 895 P.2d 359, 374 (Utah 1995) (Stewart, Assoc. C.J., dissenting).

If due process means anything more than simply having notice and a hearing before one's life, liberty, or property may be taken by the State,⁴ it certainly means that the State may not punish someone for something that is beyond that person's ability to control. *Swayne v. LDS Social Servs.*, 795 P.2d 637, 642 (Utah 1990); *Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints*, 615 P.2d 1250, 1256 (Utah 1980); *Brockert v. Skornicka*, 711 F.2d 1376, 1381 (7th Cir. 1983); *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1366 (D.C. Cir. 1975). It is clear that a statute that punished someone because of their race would be unconstitutional under the Fourteenth Amendment. To a large degree, that is

⁴ *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2007 UT 17, ¶ 28, 156 P.3d 782 ("The *bare essentials* of due process thus mandate adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner" (emphasis added)); *Foote v. Utah Bd. of Pardons*, 808 P.2d 734, 735 (Utah 1991) (holding that the Utah Constitution affords at least as great a protection of liberty interests when compared as the federal Due Process Clause); *State v. Copeland*, 765 P.2d 1266, 1271 (Utah 1988) (holding certain statutory requirements violated due process requirements of the Utah Constitution because they were arbitrary and capricious); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989) (holding unconstitutional a cap on damages as violative of state constitutional due process).

because there is nothing a person can do to change his or her race; it is a matter not within the person's control. The same would be true for punishing someone because of their height or hair color. It would even extend to matters over which a person does have some control, for instance, their weight.

In the case of illegal drugs, once the person has ingested them (for which they can constitutionally be punished, if the act was done knowingly and intentionally), there is nothing that that person can do to change his status of having the illegal substance in his body or being addicted thereto, except to wait for nature to take its course. Assuming no further introduction of controlled substance, over time, the addiction will fade and the controlled substance will leave the body. Until it does, however, under the Utah and California statutes, the person remains subject to repeated prosecution and there is nothing he or she can do to prevent it.⁵

In this case, the only evidence the State offered at the preliminary hearing was that there was methamphetamine in Mr. Robinson's blood. There was no evidence as to how that methamphetamine got there, whether it was ingested voluntarily, or even where it was ingested. Given the state of the record in this

⁵ A prosecution for traditional possession of a controlled substance does not have this problem because a person can refuse to take possession of the item or, if he somehow came into possession unknowingly, he can dispose of it immediately upon becoming aware that he is in possession.

case, the State has not shown adequate evidence (indeed, it has not shown any evidence) that the “possession or use” that it charged was “knowing[] and intentional[]” as required by the possession statute. Utah Code Ann. § 58-37-8(2)(a)(i). More importantly, given the state of the record, it is certainly possible that other counties may charge Mr. Robinson for the same “possession or use.” Most important of all, once Mr. Robinson had ingested the controlled substance (assuming, without supporting evidence, he did so voluntarily), there was nothing he could do to conform with the law at time of his arrest. Of course, if Mr. Robinson actually did voluntarily ingest the methamphetamine, the State was free to prosecute him for that in the jurisdiction and venue where such ingestion occurred. There is no evidence in the present case that the original ingestion of a controlled substance, whether voluntary or not, occurred in Utah County or even Utah for that matter. Similarly, the State was also free to pursue a prosecution of him for driving under the influence, which it has done successfully.⁶ The Court, however, should not allow the State to skimp on its obligation to prove that Mr. Robinson actually *acted* to break the law.

The trial court ruled that Mr. Robinson “chose to ingest the drugs. He had the choice of throwing them away or destroying them prior to ingesting them. However, once he made the choice to ingest the drugs and drive, he also made the

⁶ This appeal will not in any way impact that prosecution or Mr. Robinson’s conviction or sentence as to that count.

choice to be prosecuted for drug use or possession because it may create substantial public health and safety hazards” Record at 100 (internal quotation marks and citation omitted).

In this reasoning, the trial court erred. Specifically, Mr. Robinson is not arguing that he is somehow immune or protected against a DUI prosecution. Indeed, he has entered his plea to and has been sentenced on that charge. It is clear that a person who is intoxicated, regardless of how they became intoxicated (voluntarily or involuntarily, knowingly or unknowingly), is not allowed to operate a motor vehicle while in that condition. Conditions and statuses may, of course, restrict the activities a person is allowed to engage in. Accordingly, in the present case, Mr. Robinson is not appealing his DUI conviction.

That, however, is not what happened in the prosecution of this charge. Rather, the government prosecuted Mr. Robinson for simply existing while drugs were in his body. The State does not have the evidence to prosecute actual ingestion of drugs (both because it cannot determine proper venue and because it cannot prove that Mr. Robinson in fact ingested them knowingly and voluntarily). Instead, it seeks to punish him solely for his status.

This violates both the Cruel and Unusual Punishments Clause and the Due Process Clause of the United States Constitution. U.S. Const. amend. VIII, XIV. Accordingly, the Court should reverse the conviction.

IV. The Crime with Which Mr. Robinson Is Charged Is Unconstitutional Under the Utah Constitution

A. The Crime Charged Against Mr. Robinson Violates the Utah Constitution's Due Process Clause

Mr. Robinson has been convicted solely for having methamphetamine in his bloodstream. The prosecution has admitted that this is the entire theory of its entire case. He was not convicted of ingesting methamphetamine. There was no testimony from any witness at the preliminary hearing that Mr. Robinson actually ingested the methamphetamine into his body in a voluntary or knowing manner. From the state of the record, there is no way to know how the methamphetamine came to be in Mr. Robinson's body. Nor, assuming that Mr. Robinson did in fact ingest the controlled substance voluntarily, is there any evidence as to where such ingestion occurred.

Accordingly, for all the record shows, Mr. Robinson may now stand convicted of a crime caused by the forceful injection of methamphetamine into his bloodstream over his conscious objection. Or it may have been administered to him while he was asleep. Or he may have ingested it while he was in a jurisdiction where such ingestion was legal.

The point is, once it was in his system, whether it got there in violation of Utah law or not, there is nothing Mr. Robinson could do to conform his actions to

the requirements of the “consumption” statute. All he could do was wait until his body’s natural metabolic processes cleansed his system.

As noted above, if due process of Utah Const. art. I, § 7, is to mean anything beyond notice and a hearing, it has to mean that a person cannot be prosecuted and convicted for something beyond his ability to control. *Swayne v. LDS Social Servs.*, 795 P.2d 637, 642 (Utah 1990); *Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints*, 615 P.2d 1250, 1256 (Utah 1980). In this case, the State has done just that and the Utah Constitution requires this Court to reverse that action.

B. Mr. Robinson’s Prosecution Violates the Constitutional Requirement of Uniform Operation of Laws

Section 24 of Article I of the Utah Constitution provides: “All laws of a general nature shall have uniform operation.” This provision has been interpreted as requiring the State to treat similarly situated people similarly.

Operational uniformity . . . requires that persons similarly situated be treated similarly. *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984). We have adopted a two-part test to measure whether a statute meets this standard: “First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objective of the statute.” *Id.* (citations omitted); *accord Schofield*, 2002 UT 132 at P12; *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995); *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989).

State v. Merrill, 2005 UT 34 ¶ 33, 114 P.3d 585.

In this case, the effect of the portion of the statute that allows for a possession or use conviction based solely on the presence of a controlled substance being within a defendant's body violates the uniform operation of laws clause. For instance, two people who both ingested an equal amount of a controlled substance at the same time should be equally subject to prosecution. How long the substance will remain in each person's body, however, will vary based on many factors, including their respective body sizes, their respective bodies' general metabolism rate, and the type of controlled substance at issue. This has the effect of subjecting one of them to prosecution for a longer period of time. Accordingly, the law does not apply equally to all people within a class.

This last factor – the type of controlled substance – adds even more to the injustice of the statute at issue here because it will cause some people to be subject to prosecution for longer periods of time even though they have committed a less serious crime. For instance, our legislature has defined simple use or possession of marijuana to be a class B misdemeanor, while simple use or possession of methamphetamine, cocaine, and heroin are all defined as felonies with much more serious potential penalties, as well as the loss of various civil liberties that are not affected by a misdemeanor conviction. *See* Utah Code Ann. §§ 58-37-8(2)(b)(ii), -(2)(d). Clearly, the legislature has, as it is entitled to do, come to the judgment

that possession of these other substances is more serious than is possession of marijuana.

It is generally, recognized, however, that marijuana remains in the body of a user for a period much longer than do heroin, cocaine, or methamphetamine. This creates a situation where a user of a minor illegal drug is exposed to prosecution for a much longer period than is the user of a felony-level substance. In other words, in the current “consumption” statute, the legislature has effected a classification treating marijuana use more harshly than the use of other controlled substances, even though it is clearly the legislatively-enacted policy of this State that marijuana use is a less serious violation. Thus, the classifications created by the legislature are not reasonably related to the legislature’s objectives. This is a violation of the Uniform Operation of Laws clause and should not be permitted by the Court. Utah Const. art. I, § 24.

CONCLUSION

Accordingly, for the foregoing reasons, the trial court's denial of Mr. Robinson's motion to quash and his subsequent conviction and sentence should be reversed.

Respectfully submitted this 10th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing
BRIEF OF APPELLANT to be mailed, first-class, postage prepaid, this 10th day of
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ADDENDA

ADDENDUM 1
(Relevant Statutory Provisions)

58-37-2. Definitions.

(1) As used in this chapter:

. . .

(c) "Consumption" means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.

. . .

(ii) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that the person be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating

that the person had the ability and the intent to exercise dominion and control over it.

58-37-8. Prohibited acts -- Penalties.

(1) Prohibited acts A -- Penalties: . .

(2) Prohibited acts B -- Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

ADDENDUM 2

(Ruling re: Defendant's Motion to Quash Bindover)