

1952

# State of Utah v. August Schrieber : Appellant's Reply to Additional Points and Authorities Submitted by Respondent

Utah Supreme Court

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## Recommended Citation

Reply Brief, *State v. Schrieber*, No. 7737 (Utah Supreme Court, 1952).  
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In the  
**Supreme Court of the State of Utah**

STATE OF UTAH,

*Respondent,*

vs.

Case No.  
7737

AUGUST SCHREIBER,

*Defendant and Appellant.*

**APPELLANT'S REPLY TO  
ADDITIONAL POINTS AND  
AUTHORITIES SUBMITTED  
BY RESPONDENT**

**FILED**

JAN 23 1952

GRANT MACFARLANE,  
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Clerk, Supreme Court, Utah

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ARROW PRESS, SALT LAKE

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The respondent submitted certain authorities in a supplement to its brief on the morning the case was argued before the court on appeal. At that time the Court granted appellant leave to file a reply to those additional authorities within ten days.

## ARGUMENT

Respondent's additional authorities were submitted in support of its contention that the statute (Section 105-36-17, Utah Code Annotated 1943, as amended), pursuant to which the trial court made its October 20, 1949 order, was violative of Article Seven, Section 12 of the Utah Constitution. The following facts and circumstances of record must be recalled for a proper consideration of the said contention.

At the time the October 20, 1949 order was made and entered by the court the defendant and appellant was not a prisoner in the state penitentiary, but rather was on probation under a previous order of the court suspending sentence; the defendant had been on probation for several months and had complied fully with the conditions of his probation. A favorable report was made by his probation officer. It is significant to note that the trial court did not base its order of June 9, 1951, upon the unconstitutionality of the statute, but affirmatively stated that it deemed the statute to be constitutional. No claim has been made at any time herein that the order suspending sentence and placing defendant on probation was invalid. No claim has been made that termination of probation and discharge of defendant was not found to be compatible with the public interest.

It is appellant's position that respondent misconceives the nature of the order of October 20, 1949, and the statute pursuant to which the order was made. The statute and order do not transgress the pardoning power embraced

within the constitutional provision. Both the statute and the order pertain to the exercise of an inherent judicial function, the power of a court to suspend sentence and place a defendant on probation, to designate the period of probation and to *subsequently terminate the probation and discharge the defendant where the conditions of the probation have been fulfilled and where such action be compatible with the public interest*. There is a vital distinction which must be drawn between the power to pardon on one hand and the power to suspend sentence and place a defendant on probation and subsequently terminate the probation and discharge the defendant on the other hand. This distinction was recognized by courts long before either the Federal Constitution or the Constitution of the State of Utah was adopted and was unquestionably recognized by the framers of said constitutions.

15 Am. Jur., Criminal Law, Section 481.

The great weight of authority is to the effect that a statute authorizing a court to suspend sentence for reasons compatible with the public interest and to place a defendant on probation, controlling in its discretion the period of probation, does not do violence to constitutional provisions vesting the pardoning power in the executive department of the government.

Annotation, 26 A. L. R. 400,  
Annotation, 101 A. L. R. 1402.

The statute, pursuant to which the October 20, 1949 order was made, must be read and studied as a whole to appreciate its purpose and effect. This statute does nothing

more nor less than to confer upon the courts the power to suspend sentence, place a defendant on probation and to subsequently terminate the probation and discharge the defendant and dismiss the action when the probation requirements have been satisfied. The statute does not give the courts an independent power to dismiss an action after a defendant has been committed to the state penitentiary and has commenced to serve the term of his sentence; nor was the order of October 20, 1949, made and entered upon such circumstances. The defendant had been placed on probation; good reason was shown to the court why the period of probation should be shortened and, pursuant to that, the court, by its order, discharged defendant from the further supervision of the parole department and dismissed the action.

Certainly, if a court has the power to suspend sentence and place a defendant on probation for a period determined in its good discretion, the court has the incidental power to discharge a defendant and dismiss the action and close the case by an order of dismissal when finally the court deems that the probation requirements have been satisfied. The essential question is, therefore, whether the power which the statute gives to the courts to suspend sentence and place a defendant on probation for a period determined by the court is constitutional; the power to ultimately conclude the matter by an order of discharge and dismissal is incidental to that.

The said Utah statute was originally enacted in the Laws of 1923, page 144, section 1. Prior to that time there was some doubt as to the power of a court to indefinitely

suspend sentence. *In re Flint*, 25 Utah 338, 71 Pac. 531. Since the enactment of the said statute this Court has had frequent occasion to consider it. *State v. Zolantakis*, 70 Utah 296, 259 Pac. 1044; *Ex Parte Follett*, ... Utah ..., 225 P. (2d) 16; *Williams v. Harris*, 106 Utah 387, 149 P. (2d) 640. In the above mentioned cases this Court considered at length the provisions of the Utah statute relating to the power of the courts to suspend sentence and place a defendant on probation. In none of those cases has the Court questioned the constitutionality of the statute. Impliedly at least, the Court has held in those cases that the said provisions are constitutional.

Appellant submits, therefore, that the order of October 20, 1949, was simply an incidental part of the power given to the court by the statute to suspend sentence and place the defendant on probation for a period determined in the discretion of the court. If the provision in the statute providing for the ultimate disposition of a probation is invalid, the whole statute is invalid. However, appellant submits that the statute is constitutional, because it vests in the courts a power which is inherently judicial, the power to suspend sentence, place on probation and ultimately terminate the probation and discharge the defendant where in the court's discretion the probation conditions have been fulfilled and the action is compatible with the public interest.

It seems hardly necessary to say that the power embraced in the statute is one which is widely and frequently exercised by both State courts and Federal courts. It has as its purpose the reformation of convicted persons without



the detriment of imprisonment. Few, if any, authorities on criminal rehabilitation and reform would question its wisdom.

Respectfully submitted,

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