

1956

State of Utah v. John F. Ledkins : Brief of Defendant and Appellant

Utah Supreme Court

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In the Supreme Court

UNIVERSITY UTAH

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State of Utah

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Clerk, Supreme Court, Utah

STATE OF UTAH

Plaintiff and Respondent,

vs.

JOHN F. LEDKINS

Defendant and Appellant.

Case No. 8537

Brief of Defendant and Appellant

DAHL AND SAGERS

Attorneys for Defendant and Appellant

EVERETT E. DAHL

VICTOR G. SAGERS

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS	5
ARGUMENT	
POINT NO. I	
That the court trying the cause has no jurisdiction of the offense charged or of the person of the defendant because the statutes under which the defendant is charged are void and unconstitutional in that they are vague, indefinite, uncertain, ambiguous and are inconsistent with other Sections of the Utah Code Annotated, 1953, applicable to the Utah State Prison, and is an improper delegation of powers, under the provisions of Section I, Article V of the Constitution of the State of Utah.....	6
POINT NO. II.	
Does partial invalidity of a criminal statute invalidate the whole statute, or may the court eliminate those provisions of the section which are unconstitutional and leave standing that portion of a section which would have been constitutional if enacted alone?.....	16
POINT NO. III.	
That the defendant did not have a preliminary hearing as required by law in that he was not bound over on the charge of attempting to give or sell a drug to an inmate of the state prison, while a guard.....	20
CONCLUSION	21

AUTHORITIES CITED

CASES

	Page
State v. Packard, Utah, 250 P. 2d. 561	15
Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 127, 70 L. Ed. 322	15
Wynehamer v. People, 13 N. Y. 378, 427	17
United States v. Reese, 92 U. S. 214, 23 L. Ed 563.....	18
Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. Ed. 1059....	18
North Tintic Mining Company v. Crockett, 75 Utah 259, 284 Pac. 328	19
Union Trust Company v. Simmons, 116 Utah 422, 211 P. 2d. 190	19

STATUTES

Title 64-9-38, Utah Code Annotated, 1953.....	7
Title 64-9-41, Utah Code Annotated, 1953	7
Title 64-9-2, Utah Code Annotated, 1953	11
Title 64-9-13 (2), Utah Code Annotated, 1953	12
Title 64-9-64, Utah Code Annotated, 1953	12
Title 77-15, Utah Code Annotated, 1953	21

TEXTS

22 C. J. S., pages 71-72	13
Sutherland's "Statutory Construction," Chapter IX, paragraph 172	17

In the Supreme Court of the State of Utah

STATE OF UTAH

Plaintiff and Respondent,

vs.

JOHN F. LEDKINS

Defendant and Appellant.

Case No. 8537

Brief of Defendant and Appellant

STATEMENT OF FACTS

The defendant and appellant herein, John F. Ledkins, hereinafter referred to as defendant, was originally charged with KNOWINGLY VIOLATING RULES AND REGULATIONS WHILE A GUARD AT THE UTAH STATE PRISON (R. 2 & 7). Later at the preliminary hearing stage, a second count was added charging the defendant with ATTEMPTING TO SUPPLY DRUGS TO AN INMATE (R. 2 & 7). On Motion of the State, the first count was dismissed

(R. 3). After oral argument to the committing magistrate, Judge Leland Larsen, concerning the validity of the statutes in question, the defendant was bound over to the District Court on the second count.

The District Attorney filed an Information charging the defendant of KNOWINGLY VIOLATING RULES AND REGULATIONS WHILE A GUARD AT THE UTAH STATE PRISON by wilfully, knowingly attempt to supply drugs to an inmate (R. 8). At time of arraignment, the defendant filed a Demand for Bill of Particulars, Motion to Quash and Motion to Dismiss (R. 14-21). A Bill of Particulars was furnished the defendant by the District Attorney (R. 11 & 13).

A date was set for the argument of defendant's Motion to Quash and Motion to Dismiss, and on said day the said Motions were duly argued and submitted to the Court (R. 25-47). At that time the District Attorney dismissed the count of KNOWINGLY VIOLATING RULES AND REGULATIONS WHILE A GUARD AT THE UTAH STATE PRISON (R. 26). Upon leave of Court, the District Attorney was granted permission to amend the Information (R. 22 & 26).

Upon completion of oral argument, the Court permitted defendant to file a Brief on the following question: Does partial invalidity of a criminal statute invalidate the whole statute, or may the Court eliminate those provisions of the section which are unconstitutional and leave standing that portion of a section which would have been constitutional? (R. 22 & 44-47).

Defendant submitted a written Brief (not included in the record). The Court denied defendant's Motions (R. 23) and defendant was granted time in which to file an appeal to the Supreme Court.

The defendant is presently charged in the Amended Information of the crime of ATTEMPTING TO GIVE OR SELL A DRUG TO AN INMATE OF THE UTAH STATE PRISON, WHILE A GUARD, in violation of Title 64, Chapter 9, Sections 41 and 38, Utah Code Annotated, 1953 (R. 24).

Defendant filed a Petition for Intermediate Appeal, together with a Memorandum supporting said Petition (R. 59-66). On the 29th day of May, 1956, the Supreme Court granted an Interlocutory Appeal (R. 68). This case now has been continued without date pending determination of appeal (R. 79).

STATEMENT OF POINTS

POINT NO. I

THAT THE COURT TRYING THE CAUSE HAS NO JURISDICTION OF THE OFFENSE CHARGED OR OF THE PERSON OF THE DEFENDANT BECAUSE THE STATUTES UNDER WHICH THE DEFENDANT IS CHARGED ARE VOID AND UNCONSTITUTIONAL IN THAT THEY ARE VAGUE, INDEFINITE, UNCERTAIN, AMBIGUOUS AND ARE INCONSISTENT WITH OTHER SECTIONS OF THE UTAH CODE ANNOTATED, 1953, APPLICABLE TO THE UTAH STATE PRISON, AND IS

AN IMPROPER DELEGATION OF LEGISLATIVE POWERS, UNDER THE PROVISIONS OF SECTION I, ARTICLE V OF THE CONSTITUTION OF THE STATE OF UTAH.

POINT NO. II

DOES PARTIAL INVALIDITY OF A CRIMINAL STATUTE INVALIDATE THE WHOLE STATUTE, OR MAY THE COURT ELIMINATE THOSE PROVISIONS OF THE SECTION WHICH ARE UNCONSTITUTIONAL AND LEAVE STANDING THAT PORTION OF A SECTION WHICH WOULD HAVE BEEN CONSTITUTIONAL IF ENACTED ALONE?

POINT NO. III

THAT THE DEFENDANT DID NOT HAVE A PRELIMINARY HEARING AS REQUIRED BY LAW IN THAT HE WAS NOT BOUND OVER ON THE CHARGE OF ATTEMPTING TO GIVE OR SELL A DRUG TO AN INMATE OF THE STATE PRISON, WHILE A GUARD.

ARGUMENT

POINT NO. I

THAT THE COURT TRYING THE CAUSE HAS NO JURISDICTION OF THE OFFENSE CHARGED OR OF THE PERSON OF THE DEFENDANT BECAUSE THE STATUTES UNDER WHICH THE DEFENDANT IS

CHARGED ARE VOID AND UNCONSTITUTIONAL IN THAT THEY ARE VAGUE, INDEFINITE, UNCERTAIN, AMBIGUOUS AND ARE INCONSISTENT WITH OTHER SECTIONS OF THE UTAH CODE ANNOTATED, 1953, APPLICABLE TO THE UTAH STATE PRISON, AND IS AN IMPROPER DELEGATION OF LEGISLATIVE POWERS, UNDER THE PROVISIONS OF SECTION I, ARTICLE V OF THE CONSTITUTION OF THE STATE OF UTAH.

The statutes under which the defendant is charged are as follows:

"64-9-38. Duties of guards and keepers—Penalty for breach.—The guards, keepers and employees of the state prison must be ready at all times to attend to any duty required of them by the warden. The several keepers and guards are hereby expressly charged with all the duties and responsibilities of jailers. Any guard, keeper or other employee of the state prison who knowingly violates any rule or regulation adopted by the board, or who violates any of the provisions of this chapter, or who neglects to perform the duties required of him by the rules and regulations of the prison or by the provisions of this chapter, is guilty of a felony, and may be punished by a fine not exceeding \$1,000 or by imprisonment in the state prison for a period not exceeding three years, or by both such fine and imprisonment.

"64-9-41. Use of liquors and drugs forbidden.—No spiritous or fermented liquor, drug, medicine or poison shall, on any pretense whatever, be sold or given away in the prison or in any building appurtenant thereto, or on the land granted to the state for the use and benefit of the prison; and no such drug or medicine shall be given to, or suffered to be used by, any con-

vict in the prison unless he is ill, and then only under under the special direction of the prison physician."

Both of these statutes are challenged as to their validity on constitutional grounds for many different reasons and each of the statutes will be discussed separately for the purpose of clarity. The first section cited will be referred to hereinafter as the "section dealing with the duties of guards and keepers." The second section cited will be referred to hereinafter as the "section dealing with the use of drugs."

The constitutionality of the section dealing with the duties of guards and keepers is challenged upon the following grounds, any one of which is sufficient to declare the section void:

1. It is vague and ambiguous,
2. It is indefinite,
3. It is uncertain,
4. It is inconsistent with other sections of the Utah Code applicable to the Utah State Prison, and
5. It is an improper delegation of legislative powers.

This section begins "The guards, keepers and employees of the state prison must be ready at all times to attend to any duty required of them by the warden." There is no clear definition or limitation of the duties required, but, on the contrary, speaks of *any* duty required by the warden. Under this provision, the warden is the sovereign himself. Persons at the prison must perform their activities at the peril of committing a felony. It is a delegation of power by the legislature

of powers unheard of in the annals of law. A guard could be subjected to a felony prosecution for failure to arrive at work on time if he were ill or unavoidably detained. Said guard could conceivably be subjected to a felony for engaging in an exciting conversation while on duty. Such a provision violates all of the requirements of valid legislation.

This section proceeds as follows: "The several keepers and guards are hereby expressly charged with all the duties and responsibilities of jailers." The legislature has failed to spell out with any certainty what the duties and responsibilities of jailers are. Men of common intelligence must guess at its meaning at their peril of a felony prosecution and will differ as to its application and meaning.

The next sentence of this section is long and contains various phrases, including the punishment for violation. It begins: "Any guard, keeper or other employee of the state prison who knowingly violates any rule or regulation adopted by the board . . .". This phrase is another improper delegation by the legislature of its power to determine what acts constitute a felony. A few examples from the "Rules and Regulations Governing Officers of the Utah State Prison" offered into evidence by the State as Exhibit "A" at the preliminary hearing will clearly emphasize the challenges made to this section (R. 84). Paragraph 3 of said Rules provides as follows:

"COURTESY. Courtesy is demanded at all times and fellow officers should be treated with mutual respect and kindness. The discussion of controversial subjects shall be avoided at all times. The conduct of an officer of the institution should be that of a gentleman at all times and under all conditions."

Paragraph 4 of said Rules provides as follows:

"SMOKING ON DUTY. Smoking while on duty is prohibited, except in properly designated areas. No officer will attempt to carry on a conversation or meet a fellow-officer or visitor with a cigarette, cigar or pipe in his mouth; nor will he fail to remove his cap when introduced to ladies; or upon entering the office of a superior."

Paragraph 5 of said Rules provides as follows:

"PROPER CONDUCT ON DUTY. All officers shall, while within the prison, refrain from whistling, scuffling, immoderate laughter, boisterous conversation, exciting discussions, and all other acts which might tend to disturb the harmony and good order of the institution."

Paragraph 38 of said Rules provides as follows:

"PARKING FACILITIES. Parking facilities are furnished for automobiles. The keys to all cars shall be removed and the doors to cars shall be kept locked at all times."

A cursory examination by the Court of said Rules and Regulations will clearly show the dangerous results to be had if they were held to be a proper delegation of legislative powers.

The next phrase of this section provides as follows: "or who violates any of the provisions of this chapter, . . .". A thorough reading of the entire chapter will reveal that most sections deal with the administration of the prison, such as residence of warden, members and powers of the board of corrections, bonds required, keeping of journals and records

of the prison, appointment of parole agents, finances of prison, duties of clerk and prison physician, meetings, visitors, library, labeling of goods made by the prisoners and various other matters. Most of the sections are vague, administrative and are not criminal in nature with discretion left to the board of corrections and warden to prescribe methods of application. The enforcement of this section would place the burden of perfection upon all persons connected with the prison and would continually subject them to a felony prosecution. The legislature certainly did not intend to make every infraction of these various sections in the chapter to be a felony and eliminate any discretion by the board or warden to otherwise discipline the employees.

This sentence continues as follows: "or who neglects to perform the duties required of him by the rules and regulations of the prison or by the provisions of this chapter, is guilty of a felony, . . . ". This phrase makes pure negligence or neglect an act constituting a felony. Under such a provision, a guard who neglects to lock his car when he parks it in the parking lot would be guilty of a felony.

This sentence and the balance of the section proceeds to set forth the penalty for any breach of this section. The penalty for breach itself is inconsistent with the other provisions in this chapter as to enforcement of the various sections of the chapter. The second paragraph of Title 64-9-2, Utah Code Annotated, 1953, provides as follows:

"The board of corrections is empowered and directed, among other things, . . . to make and enforce all such general rules for the government and discipline

of the prison, as it may deem expedient, and from time to time to change and amend the same; . . . ”

Title 64-9-13 (2), Utah Code Annotated, 1953, pertaining to the general duties of the warden provide as follows:

“It shall be the duty of the warden under the rules and regulations adopted by the board for the government of the prison: (2) To give necessary directions to all inferior officers, keepers and guards, and to ascertain whether they have been careful and vigilant in their respective duties.”

Title 64-9-64, Utah Code Annotated, 1953, also provides as follows:

“Any person, firm, or corporation, which violates any of the provisions of this act shall be guilty of a misdemeanor.”

Such provisions as to enforcement and penalty of a violation of the sections of this chapter are inconsistent with each other and create an ambiguity and uncertainty and are not susceptible of uniform interpretation and application by those charged with the responsibility of applying and enforcing the provisions of this chapter. These provisions permit an administrative agency, an employee of the state, or the law enforcement branch of the state, the right and discretion to determine what are the violations of the various sections in this title and whether violators should be merely disciplined, charged with a felony, or charged with a misdemeanor.

The section dealing with the use of drugs is challenged upon the following grounds:

1. It is vague and ambiguous,
2. It is uncertain, and
3. It is indefinite.

This section consists of one sentence containing two (2) separate clauses separated by a semi-colon. The first phrase reads as follows: "No spirituous or fermented liquor, drug, medicine or poison shall, on any pretense whatever, be sold or given away in the prison or in any building appurtenant thereto, or on the land granted to the state for the use and benefit of the prison; . . .". This clause is vague, ambiguous, uncertain and indefinite in meaning. What is meant by sold or given away? Does it mean that no liquor, drug, medicine or poison can be brought on the prison at all? If such items are brought on to the prison property, then how are they placed in the hands of the persons to use them? How can the necessary insect eradication at the prison be carried out and how can the fruit trees be sprayed with insecticides? Is it a felony to have a Coca Cola dispensing machine in the entrance lobby of the prison for the use of prison employees and visitors? Just what is the legislature intending to prohibit, and whom is the legislature intending to punish? It is stated at 22 C.J.S. at page 71 and 72 as follows:

"In creating an offense which was not a crime at common law, a statute must, of course, be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty . . ."

The second clause of this section reads as follows: "and no such drug or medicine shall be given to, or suffered to be

used by, any convict in the prison unless he is ill, and then only under the special direction of the prison physician." This clause for some reason leaves out the items of liquor and poison and does not provide for the use of such items. The entire section does not authorize the use of any drugs or medicines by anyone else except the convicts. This clause is also vague, ambiguous, uncertain and indefinite of meaning even when read with the preceding clause. Would a guard be guilty of a felony if he carried a box of aspirins on the prison property and gave one to a fellow guard who had a headache? What offense do the dispensary personnel commit when they dispense drugs in the absence of the prison physician?

Perhaps the best example of how uncertain of interpretation this section is, is to read paragraph 11 of the Rules and Regulations Governing Officers of Utah State Prison offered into evidence as Exhibit "A" by the State. This regulation reads as follows:

"SEDATIVES, NARCOTICS OR POISONS. At no time shall sedatives, narcotics or poisons be permitted to fall into the hands of inmates; nor shall such items be permitted on assignments where food is being handled or stored; nor allowed in the institution proper unless authorized by the prison physician or warden. All poisons will be kept in vaults provided for that purpose; all drugs and medicines will be administered under the direct supervision of an officer. Each officer on all shifts must familiarize himself with instructions concerning drugs to be administered as prescribed by the prison physician."

There is an apparent conflict in the wording of the statute and the interpretation and regulation of the prison. It appears

that a guard would be at his peril in any course of conduct which he may take in the handling and dispensing of these items.

In the recent case of *State v. Packard*, Utah, 250 P. 2d 561, the Utah Supreme Court in an excellent decision very clearly sets forth the requirements of valid legislation and consolidated a fairly complete list of authorities on the question of uncertainty and vagueness in statutes. The Court adopted, as it has a number of times, the principle set forth in the case of *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 127, 70 L. Ed. 322, as follows:

“ . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . . ”

Justice Crockett, in *State v. Packard*, sets forth the tests a statute must meet in order to be valid and wrote as follows:

“Concerning the question of uncertainty or vagueness of statutes, the authorities seem to be in accord that the test a statute must meet to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it.”

The statutes in question here obviously do not meet the tests concerning uncertainty and vagueness. In addition, these

statutes are ambiguous, are inconsistent with other provisions of the same chapter, and constitute an improper delegation of legislative powers. Although the courts have gone a long way in permitting a delegation of certain powers to an administrative agency, the courts have never permitted the delegation of powers to any agency to prescribe rules and regulations, the violation of which is a felony.

POINT NO. II

DOES PARTIAL INVALIDITY OF A CRIMINAL STATUTE INVALIDATE THE WHOLE STATUTE, OR MAY THE COURT ELIMINATE THOSE PROVISIONS OF THE SECTION WHICH ARE UNCONSTITUTIONAL AND LEAVE STANDING THAT PORTION OF A SECTION WHICH WOULD HAVE BEEN CONSTITUTIONAL IF ENACTED ALONE?

This issue was raised by the lower court at the time the Motions to Quash and to Dismiss were argued. Judge Van Cott reasoned that assuming the objections raised against Title 64-38, Utah Code Annotated, 1953, were for the most part valid objections, could not the court eliminate the bad parts of the section and make it read "Any guard who violates any provision of this chapter is guilty of a felony." (R. 40 & 41). We have argued and contended in the argument on Point I that even that phrase is invalid as being indefinite and inconsistent with other penalty provisions in other sections of the same chapter. We urge, in addition, that if portions of a criminal statute are invalid, that any attempt by the court to save a sole

phrase of Section 38 would constitute a gross emasculation of the section and would in effect be judicial legislation of a criminal statute.

The sections under question are criminal sections in a chapter primarily administrative dealing with the state prison. Penal sections are to be construed strictly and in favor of the accused and in favor of liberty. Sutherland in his text called "Statutory Construction," in Chapter IX, deals with the issue raised herein, to wit: Statutes void in part. The Court is expressly invited to read paragraph 172 therein dealing with penal statutes. Mr. Sutherland expresses the law that statutes of a civil nature within certain limitations are severable when part is void and part is valid, "But the rule is more stringent in regard to criminal statutes. As said by Johnson, J., in *Wynehamer v. People*, 13 N. Y. 378, 427:

'Laws in relation to civil rights are sometimes held to be unconstitutional, in so far as they affect the rights of certain persons, and valid in respect to others. This is done mainly upon the ground that the courts will not construe them to relate to such cases as the legislature had not power to act upon. To statutes creating criminal offenses, such a rule of construction ought not to be applied, and I cannot find any trace of its having been applied. It is of the highest importance to the administration of criminal justice that acts creating crimes should be certain in their terms and plain in their application; and it would be in no small degree unseemly that courts should be called upon, in administering the criminal law, to adjudge an act creating offenses at one time valid, and at another time void. It must, I think, stand as it has been enacted, or not stand at all.'

The United States Supreme Court has discussed this subject and the leading case concerning it is *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563. Chief Justice Waite rendered the opinion and said as follows:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution . . .

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

United States v. Reese is still followed by the United States Supreme Court and one of the last cases is *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 70 L. Ed. 1059. In that case

Chief Justice Taft delivered the opinion and after citing *United States v. Reese* and a host of federal and state cases said:

"The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity."

The *United States v. Reese* case has been followed in Utah and has been quoted even though the cases under discussion were civil in nature. *United States v. Reese* was quoted by Judge Elias Hansen in a license tax case of *North Tintic Mining Company v. Crockett*, 75 Utah 259, 284 Pac. 328. The Utah Supreme Court has on one other occasion had an opportunity to discuss the severability question involving a banking statute in the case of *Union Trust Company v. Simmons*, 116 Utah 422, 211 Pac. 2d 190.

The Utah cases above cited deal with civil statutes which within certain limitations and clear legislative intent may be severable. In the case at hand, however, the question of severability deals with a criminal statute and any construction given must be strict and in favor of the accused and of liberty. The citations contained herein pertaining to criminal law clearly establish that if part of a criminal section is void, the whole section must fail. Such law is sound. A person should definitely know the offense with which he is charged and not have it left up to the courts to legislate statutory crimes.

POINT NO. III

THAT THE DEFENDANT DID NOT HAVE A PRELIMINARY HEARING AS REQUIRED BY LAW IN THAT HE WAS NOT BOUND OVER ON THE CHARGE OF ATTEMPTING TO GIVE OR SELL A DRUG TO AN INMATE OF THE STATE PRISON, WHILE A GUARD.

Apparently due to the vagueness, indefiniteness and uncertainty of the meaning and wording of the sections discussed herein and in a frantic effort to find some charge which they may stick against the defendant, the State has amended and amended the Complaints and Informations filed against the defendant (R. 2, 7, 8 & 24). At the preliminary hearing the defendant was finally bound over on the Amended Complaint of ATTEMPTING TO SUPPLY DRUGS TO AN INMATE (R. 3 & 7). The Amended Information now on file, to which the defendant objected (R. 26), now charges the defendant of ATTEMPTING TO GIVE OR SELL DRUGS TO AN INMATE (R. 24).

It will be noted that defendant was bound over at the preliminary hearing on an attempt TO SUPPLY drugs to an inmate. He is presently charged with an attempt TO GIVE OR SELL drugs to an inmate. This raises the question of what is meant by give or sell. Is the word supply synonymous with the word give or sell?

If the words give, sell and supply are interchangeable and synonymous with each other, that adds impetus to the arguments set forth in Point No. I as to the uncertainty of meaning of words give or sell in said section of the statute.

If the word supply is different from the meaning of give or sell, then the defendant has not had a preliminary hearing on the present charge as provided by Title 77-15, Utah Code Annotated, 1953.

This is a dilemma of which the defendant cannot afford a satisfactory solution and serves to emphasize the points raised in the argument of Point No. I.

CONCLUSION

The statutes under which the defendant is charged herein have so many defects that a volume on statutory construction could have been written fully discussing each word and phrase of these sections. Because of the variety and great number of defects in these sections, an attempt has been made herein to only make a brief mention of the major defects present.

This is not a case where a single word or comma is indefinite or uncertain, but is a case where practically every sentence and phrase is fraught with flagrant violations of good and valid criminal legislation. The Court itself may well find additional objections to these sections which are not even mentioned herein.

These sections are without a doubt a classic example of how not to draft criminal legislation. The words and phrases are vague, indefinite, ambiguous, uncertain, the penalty provided in the section dealing with the duties of guards and keepers is inconsistent with other penalty provisions in the chapter and the provisions dealing with delegation of powers

amount to a complete usurpation of legislative authority in making and defining crimes constituting a felony or misdemeanor.

It is readily apparent that the keepers, guards, employees, warden and even the board of corrections are continually violating the terms of these statutes by the improper application or the lack of application of the provisions of this chapter.

The law is for all. The law must be such that all the people can understand it. It must be of uniform application. Power should never be placed in one department of government where the laws can be made, can be interpreted and enforced, all at the same time. Such a situation is wholly repugnant to the spirit, intent and wording of the constitutions of the state and nation.

Respectfully submitted,

DAHL AND SAGERS
Attorneys for Defendant and Appellant

EVERETT E. DAHL
VICTOR G. SAGERS