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Larry J. Zissi v. State Tax Commission of Utah : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

890317

IN THE SUPREME COURT OF THE
STATE OF UTAH

LARRY J. ZISSI,)	
)	
Petitioner,)	Case No. 890317
)	
vs.)	ARGUMENT PRIORITY
)	CLASSIFICATION 14(a)
STATE TAX COMMISSION OF)	
UTAH,)	
)	
Respondent.)	

REPLY BRIEF OF PETITIONER

Petition for Review of Findings of Fact, Conclusions
of Law, Final Decision of the Utah State Tax Commission

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FILE

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STATEMENT OF FACTS

Petitioner disagrees with the statement in Respondent's Brief at Page 35 that the evidence showed that "amphetamine sold in powder form [is] (sic) an altogether different substance than that sold in the pill form." (R. 159). In fact, the testimony referred to was by Kendra Herlin, a sheriff's undercover narcotics officer. Her testimony was that there is a chemically slight difference between pill amphetamines and crystallized amphetamine powder, which a chemist would have to explain. She also said that the pills and powder are different in physical appearance, the pills being a slightly off-white, brownish color, and the powder being much more white. (R. 159). Petitioner believes this point is important because the Tax Commission contends that pill and powder amphetamines are different substances, justifying their different treatment under the Stamp Tax, when there is no evidence to support that conclusion.

SUMMARY OF ARGUMENT

The cases of United States v. Janis, 428 U.S. 433 (1976) and I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) provide guidance in the application of a balancing test which can provide one reason for application of the exclusionary rule in this proceeding. However, neither case controls on the facts of this case. Janis was the result of a determination that deterrence would not be

furthered by applying the exclusionary rule in an intersovereign situation. The situation in this case is intrasovereign involving an unconstitutional seizure by state law enforcement officers and an attempt to utilize the goods seized in a tax proceeding by the State Tax Commission. I.N.S. v. Lopez-Mendoza held that the exclusionary rule should not be applied to civil deportation proceedings because the application of the rule would allow the commission of an ongoing crime, because the INS has adequate procedures to protect against Fourth Amendment violations, and because the cost of imposing the rule in the streamlined deportation hearings would be too high.

This case is distinguishable, and the balancing test of Janis applied in this case indicates that the exclusionary rule should apply. County sheriffs and the State Tax Commission are different arms of the same sovereign. The Tax Commission has power to direct and receive information from the county sheriffs. Each is concerned with application of the laws of the State of Utah. And recent history shows that the power to exact large taxes or to seize funds or to forfeit properties are regularly used as one of the primary efforts in law enforcement, particularly regarding the possession of controlled substances. Because of that, application of the exclusionary rule in this proceeding will provide a significant deterrent effect.

On the other hand, there is nothing to indicate that the costs outweigh the benefits of deterrence. Application of the exclusionary rule would not result in any ongoing violations. Tax Commission hearing officers are or can become competent to determine these issues, they have not been shown to impose any burden which would prohibit consideration of such issues, nor has it been shown that such issues would be raised on any large scale.

A second and separate basis for application of the exclusionary rule in this proceeding is that the Illegal Drug Stamp Tax is, in fact, a quasi-criminal statute like the civil forfeiture statute found to require the application of the exclusionary rule in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). The tax is not even applicable without violation of the criminal law regarding possession of controlled substances, and the tax imposed can be and is, in this case, far greater than the fines which could be imposed for violation of the criminal provisions of the law. The tax imposed is also approximately 150 times the value of the amphetamines which were seized, making the Drug Stamp Tax an even harsher penalty than forfeiture. These are the elements the Supreme Court has used to determine a quasi-criminal statute, and because they are present in this case, the exclusionary rule should apply.

Finally, because the violation of Fourth Amendment rights in this case was egregious, involving a roadblock set up at the whim of five sheriff's deputies on patrol, and where there is no case law which would support the constitutionality of such a roadblock, this Court should hold that it would transgress the notions of fundamental fairness to employ the evidence seized as a result against Petitioner in this proceeding. For this reason, also, the exclusionary rule should apply.

This Court should also apply an exclusionary rule for violation of the Utah constitutional provisions governing search and seizure. Such a result is appropriate because the application of the exclusionary rule in a proceeding such as this is not well-settled, and because Drug Stamp Tax proceedings are unique Utah proceedings which should be limited by Utah constitutional provisions. Other states have imposed an exclusionary rule under their own constitutions, which is sometimes broader than the federal rule. Like those cases, the exclusionary rule should be applied in this case because of the violation of Article I, Section 14 of the Utah Constitution.

ARGUMENT**I.****THE EXCLUSIONARY RULE APPLIES IN THIS PROCEEDING
BECAUSE OF THE VIOLATION OF FOURTH AMENDMENT RIGHTS**

- A. United States v. Janis and I.N.S. v. Lopez-Mendoza are Distinguishable, and the Balancing Test They Employ Indicates the Exclusionary Rule Should Apply in Illegal Drug Stamp Tax Proceedings.

The United States Supreme Court held in United States v. Janis, 428 U.S. 433 (1976) (hereinafter "Janis"), that evidence obtained by state law enforcement officers pursuant to a search warrant later proved to be defective was admissible in a federal civil tax proceeding, and that the exclusionary rule would not apply. The facts of this case are distinguishable. First, this case involves an intra-sovereign violation, where the State of Utah attempts to use evidence obtained in violation of Fourth Amendment rights by the State's own officers. In Janis, the federal government attempted to utilize evidence obtained by state officers. This was a major factor in the Supreme Court's assessment of the deterrent effect of the exclusionary rule. The Court stated:

The additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. Janis, supra at 453-54.

Janis argued that the application of the rule to civil

proceedings has long been recognized in the federal courts, citing cases including United States v. Blank, 261 F.Supp. 180 (N.D. Ohio 1966); Pizzarello v. United States, 408 F.2d 579 (2nd Cir. 1969), cert. denied, 396 U.S. 986, and Suarez v. Commissioner of Internal Revenue¹, 58 T.C. 792 (1972), which are relied on by Petitioner in this case as well. With regard to those cases, the Supreme Court stated as follows:

[R]espondent does not critically distinguish between those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence, on the one hand, and those cases, such as the present one, on the other hand, where the officer has no responsibility or duty to, or agreement with, the sovereign seeking to use the evidence.

The seminal cases that apply the exclusionary rule to a civil proceeding involve "intra-sovereign" violations, a situation we need not consider here. Janis, supra at 455-56.

Vander Linden v. United States, 502 F.Supp. 693 (S.D. Iowa 1980) was decided after Janis and held that the exclusionary rule did apply in a federal tax proceeding to suppress evidence

¹The Tax Commission argues that the holding in Suarez v. Commissioner has been expressly overruled by Guzzetta v. Commissioner, 78 T.C. 173 (1982). However, Guzzetta only limited the application of Suarez to situations involving intrasovereign violations. The Tax Court stated, "In situations involving inter-sovereign violations of the Fourth Amendment, such as the case now before us, United States v. Janis, supra, controls. To the extent that Suarez is inconsistent with Janis with respect to the application of the exclusionary rule, we will no longer follow our prior decision." Guzzetta v. Commissioner, supra, 184.

illegally obtained by the Internal Revenue Service. The District Court stated:

The facts of the matter now before the Court are distinguishable from those in Janis in that the facts of this matter involve "intra-sovereign" violations while in Janis the situation concerned an "intersovereign" situation. . . .

This Court is of the opinion that the "deterrent effect" in an "intrasovereign" situation would be furthered by excluding illegally obtained evidence in subsequent civil trial proceedings. Id. at 697.

The Tax Commission attempts to distinguish Vander Linden v. U.S., supra, as well as Pizzarello v. U.S., supra, and U.S. v. Blank, supra, because those cases involved exclusion in a federal tax proceeding of evidence illegally obtained by federal agents. The Tax Commission attempts to distinguish these cases by stating that Utah County is a different sovereign than the State Tax Commission. (Brief of Respondent at 19). The Tax Commission contends that the evidence illegally seized should not be excluded because the Commission was not involved in the illegal seizure. (Brief of Respondent at 24).

In fact, this case involves an intrasovereign violation, like the cases relied on by Petitioner. County sheriffs and the State Tax Commission are each part of the same sovereign--the State of Utah. County sheriffs enforce the laws of the State of Utah. Defendants who they arrest are charged for crimes by the State of

Utah. The county attorney prosecutes those defendants for the State of Utah. Counties are created and given their powers by the state legislature. Utah Code Annotated, Title 17, Chapter 5.

The county is a part of the state and is subject to the control of the legislature. Hansen v. Public Employees' Retirement System Bd. of Admin., 122 Utah 44, 61, 246 P.2d 591 (1952).

Further, county sheriffs and other county officers are by statute agents of the Tax Commission for enforcement of the tax laws. Utah Code Annotated § 59-1-210 gives the Tax Commission the following powers:

(9) to confer with, advise, and direct . . . county officers in matters relating to . . . the collection of taxes; . . .

(14) . . . to require from all state and local officers any information necessary for the proper discharge of the duties of the commission.

Not only are county sheriffs and the State Tax Commission parts of the same sovereign State of Utah, but the Tax Commission may require sheriffs to provide information to the Tax Commission and may direct county sheriffs in matters relating to the collection of taxes. The Tax Commission's attempt to distinguish the federal cases relied on by Petitioner fails because the county sheriffs and the State Tax Commission are bound by an agency relation in respect to collection of taxes and are each part of the same sovereign.

The Tax Commission also relies on I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (hereinafter "Lopez-Mendoza") to support its contention that the exclusionary rule should not apply in this proceeding. In that case, the Supreme Court held that the exclusionary rule does not apply in civil deportation proceedings for illegal immigrants. Lopez-Mendoza did involve an intrasovereign violation, where INS agents unlawfully arrested the defendants and obtained their admissions of alienage. However, contrary to the Tax Commission's assertion, the Supreme Court did not hold that the exclusionary rule would not apply in any civil proceedings. The decision is limited to the facts of the case involving civil deportation proceedings. The Court stated that Janis "set forth the framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. Imprecise as the exercise may be, the Court recognized in Janis that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely causes." Lopez-Mendoza, supra at 1042.

On the benefits side of the balance, the question is the extent of deterrence of unlawful police conduct. Several of the factors relied on by the Supreme Court in Lopez-Mendoza as reducing the likely value of the exclusionary rule in a deportation proceeding are distinguishable from this case. First, the Court

held that deportation would still be possible if the exclusionary rule is applied by the use of other evidence. In this case, where the substances to be taxed were found as a result of an unconstitutional seizure, the tax will not be applied if the exclusionary rule is applied. The Court also felt the deterrence would be minimal because "the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers." Id. at 1044. There is no evidence of a similar effort by Utah County, and in this case there is clear evidence that any training has been ineffective because of the unconstitutional actions of the sheriff's deputies in instituting the roadblock involved here.

This case is also distinguishable from Lopez-Mendoza on the cost side of the balancing test. The Court said:

The first cost is one that is unique to continuing violations of the law. Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. Id. at 1046.

Application of the rule in deportation proceedings would allow an illegal immigrant to continue violation of the immigration law by his presence in the country.

The administrative burden of applying the exclusionary rule in INS proceedings was also a factor. The Court noted that an INS agent may make many arrests each day, and that immigration

judges average six deportation hearings per day. The State Tax Commission has not shown any such volume of cases. There is no reason it could not adequately consider the exclusionary rule in the few Drug Stamp Tax cases it is actually called upon to handle.

Application of the balancing test in this case shows that the deterrent benefits of application of the exclusionary rule in Drug Stamp Tax cases outweigh the costs. First, there is likely to be a deterrent benefit from application of the rule. In Janis, the Supreme Court said that concern over inadmissibility at a federal proceeding was unlikely to provide significant additional deterrence because the offending officer's zone of primary interest is not the federal law. Janis, supra at 458. The zone of interest of county sheriffs is to enforce the laws of the State of Utah. This includes criminal laws, including violation of the criminal provisions of the Drug Stamp Tax. It also includes the county sheriff's obligations to provide information requested by the Tax Commission and to act under directions by the Tax Commission in matters relating to the collection of taxes. The imposition of the Drug Stamp Tax is also within the practical zone of interest of the county sheriff's officers. The high taxes and penalties payable are an inducement to Fourth Amendment violations. Recent publicity regarding money seized and taxes imposed as a result of police seizures in drug cases demonstrates the importance attached to such

actions, not only by law enforcement but by the public in general. Deprivation of a suspect's funds and assets has become an important aspect of law enforcement. The Illegal Drug Stamp Tax is a weapon in the drug war, and sheriffs and other law enforcement are front-line combatants in that war. Having been given the weapon, they will use it to take any action they can to punish a person found with drugs. Putting constitutional limits on the use of that weapon will deter future unconstitutional searches and seizures by eliminating the inducement to utilize unconstitutional searches and seizures as a vehicle to impose the tax.

This case is an example of that fact. Here there was an unconstitutional roadblock violating the rights against unreasonable search and seizure of every person traveling a highway. If the exclusionary rule does not apply in this proceeding, this Court would sanction such methods as a means of insuring compliance with the Illegal Drug Stamp Tax or other tax laws. The ability to cause the financial ruination of a person by imposition of the Drug Stamp Tax by virtue of evidence from an illegal search or seizure could furnish substantial incentive by providing the perception of success to law enforcement personnel, even if the evidence seized were inadmissible in criminal proceedings. Without the application of the exclusionary rule in Drug Stamp Tax proceedings, there is nothing to prevent the Tax

Commission from requesting, directing, or just tacitly encouraging law enforcement officers to establish unconstitutional roadblocks or initiating other unconstitutional searches for the primary or at least collateral purpose of enforcing the Drug Stamp Tax. The state should not be able, in a case involving unconstitutionally obtained evidence, to choose to proceed under the civil tax rather than the criminal law and thereby utilize illegally seized evidence to impose a tax far in excess of any fines available for the related criminal violations in any event.

The costs of imposing the exclusionary rule in cases like this do not outweigh the deterrent benefits which would be realized by its application. First, the costs to society are not as great as in a criminal case. The exclusionary rule would not result in letting a criminal go free, just a prohibition of collection of a tax which has not been shown to result in significant revenue for the state in any event.

The Court in I.N.S. v. Lopez-Mendoza, supra, indicated that the exclusionary rule should be applied where egregious violations of Fourth Amendment rights occur, which transgress notions of fundamental fairness. Lopez-Mendoza, supra at 1050-51. Therefore, the Tax Commission will require some mechanism for determining egregious violations of the Fourth Amendment. The additional burden of determining a violation of the Fourth

Amendment, rather than an egregious violation, is small. Also, there will often be a prior determination in a criminal court of the constitutionality of the search and seizure which would be binding upon the parties in the tax proceeding. As pointed out above, unlike the situation in Lopez-Mendoza, the application of the exclusionary rule will not result in any continuing crime or violation. No one questions the right of law enforcement to seize and not return contraband. There is also nothing in this case to indicate that hearing officers of the Tax Commission are overburdened or face anything approaching the case load of the INS administrative law judges. There is no reason why the factual and legal issues of search and seizure law could not be adequately handled by the hearing officers of the Tax Commission. And there is nothing to indicate that the burden of doing so or that the volume of cases in which such issues would be raised would be great. For these reasons, the balancing test propounded in Janis and applied in Lopez-Mendoza produces a different result in this case and indicates that the deterrent values of applying the exclusionary rule exceed the costs.

B. The Exclusionary Rule Should be Applied to Illegal Drug Stamp Tax Proceedings Because They are Quasi-Criminal.

In fact, the exclusionary rule has been applied by the United States Supreme Court in one type of civil proceeding--forfeitures. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693

(1965) (hereinafter "One Plymouth Sedan"). In that case, the Court stated:

A forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. . . . It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. Id. at 700-701.

This holding was noted and approved in Janis. United States v. Janis, supra at 447. With regard to what is a quasi-criminal proceeding, the Court in One Plymouth Sedan stated as follows:

The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. One 1958 Plymouth Sedan v. Pennsylvania, supra at 697-98, quoting Boyd v. United States, 116 U.S. 616, 633-34.

Just as forfeiture proceedings are quasi-criminal, so is the Drug Stamp Tax. Each requires that for the penalty to be exacted, whether a forfeiture or an oppressive tax of 150 times the value of the substance seized, a finding of the commission of an offense is required. The Illegal Drug Stamp Tax specifically

states: "Nothing in this chapter requires persons lawfully in possession of marihuana or a controlled substance to pay the tax required under this chapter." U.C.A. § 59-19-107(2). In this case, the amount of the tax assessed was \$22,000. This tax is greater than the maximum fine available for criminal violation of the Drug Stamp Tax. U.C.A. § 59-19-106(2).

In United States v. Blank, 261 F.Supp. 180 (N.D. Ohio 1966), the District Court applied the ruling and reasoning of the Supreme Court in One Plymouth Sedan, to a tax case involving the application of the federal excise tax on gambling activities. The Court noted as follows:

Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum. Were this not the case, all suspected violators of revenue laws would be subject to the precise evil at which the Fourth Amendment is directed--the unreasonable disruption of the privacy of the home--no matter how slim or unfounded might be the suspicion of their illegal activity. If there is no constitutional check on the "investigative" efforts of federal administrative officials prosecuting civil claims, and there exist forfeiture and deficiency proceedings, civil in form, which inflict an onerous monetary penalty upon an accused which approximates the visitations of the criminal code, there is no practical

restraint upon such officials. United States v. Blank, supra at 182.

In concluding that the exclusionary rule should apply in that tax case, the Court stated:

Our decision today follows necessarily from the reasoning explicitly expressed by the Supreme Court in One 1958 Plymouth Sedan v. Com. of Pennsylvania. Id. at 183.

The Tax Commission has argued that the test for determining whether a proceeding is quasi-criminal in character for the purpose of application of the exclusionary rule under One Plymouth Sedan should be the same as the test for whether a statute, civil in its form, should, in fact, be found to be a criminal statute under the test of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Petitioner has discussed these factors at pp. 46-47 of the Brief of Petitioner in this case. However, that test is more stringent than the test for whether a statute is quasi-criminal for purposes of applying the exclusionary rule. Some constitutional rights, like the Fifth Amendment privilege against double jeopardy, and the Sixth Amendment right to counsel, can only be violated if there is a criminal proceeding. But the Fourth Amendment right against unreasonable searches and seizures can be violated whether or not a criminal proceeding ensues. An inquiry into the Kennedy v. Mendoza-Martinez factors does not determine whether the suit is quasi-criminal. In United States v. Ward, 448

U.S. 242 (1980), which has been cited by both Petitioner and Respondent, the issue was whether a requirement that discharges of oil into navigable waters be reported violated the privilege against self-incrimination because it could lead to a civil penalty for the discharge. After first determining that the Kennedy v. Mendoza-Martinez factors did not indicate that the statute imposing the civil penalty was, in fact, criminal, the Court went on as follows:

Our conclusion that § 311(b)(6) does not trigger all the protections afforded by the Constitution to a criminal defendant does not completely dispose of this case. Respondent asserts that, even if the penalty imposed upon him was not sufficiently criminal in nature to trigger other guarantees, it was "quasi-criminal," and therefore sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination. United States v. Ward, supra at 251.

This issue involved interpretation and application of Boyd v. United States, 116 U.S. 616 (1886), a case which was also relied upon by the Court in One Plymouth Sedan. The Supreme Court in United States v. Ward quoted the Boyd opinion as follows:

As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . . United States

v. Ward, supra at 252, quoting Boyd v. United States at 634.

Although the Court went on in United States v. Ward to find that the penalty imposed for discharge of oil in navigable waters was not quasi-criminal, the analysis of the Court makes clear that the seven factors stated in Kennedy v. Mendoza-Martinez do not control whether a civil penalty is so far quasi-criminal as to invoke the protections of the Fourth Amendment and the Fifth Amendment right against self-incrimination.

This Court should recognize that the Illegal Drug Stamp Tax is quasi-criminal. Its object is to penalize for the commission of the offense of possession of controlled substances. The tax cannot be applicable without a violation of the criminal law, and the tax itself far exceeds the maximum fine in a criminal proceeding for either the possession of controlled substances or for criminal violation of the Drug Stamp Tax. Proceedings such as this for assessment of the Illegal Drug Stamp Tax will always require a finding that two criminal laws have been violated. First, the laws prohibiting the illegal possession of controlled substances and, second, the criminal provisions of the Illegal Drug Stamp Tax Act itself. For these reasons, this Court should recognize that, regardless of the results of balancing under the Janis test discussed supra, the exclusionary rule applies to proceedings under the Illegal Drug Stamp Tax Act because it is, in

fact, a quasi-criminal proceeding in its character. For these reasons, this Court should hold that the exclusionary rule applies to Drug Stamp Tax proceedings.

C. The Exclusionary Rule Should Apply in this Proceeding Because of the Egregious Nature of the Violation of Fourth Amendment Rights.

The Supreme Court in I.N.S. v. Lopez-Mendoza, supra, in holding that the exclusionary rule does not apply to civil deportation proceedings, noted:

We do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. Id. at 1050-51.

The Court indicated that where egregious violations occur, the exclusionary rule should apply. For that reason, as well, the exclusionary rule should apply in this proceeding. The roadblock in this case occurred ten years after Delaware v. Prouse, 440 U.S. 648 (1979). In the intervening years, dozens of cases have interpreted that watershed Supreme Court decision with regard to roadblock seizures. Petitioner has not found one case in which a roadblock set up in the discretion of officers in the field has been held to be constitutional. The Tax Commission apparently concedes this issue, having not even addressed it in the Brief of Respondent in this case. The roadblock at issue here is an egregious violation of Fourth Amendment rights, not only

Petitioner's but also all other drivers on the roads of Utah. Five officers on patrol decided amongst themselves to institute a roadblock, the effect of which was to unconstitutionally seize every vehicle which happened along. There was no warrant obtained, no direction from administrative level officers regarding the establishment of the roadblock, or any showing of need. Petitioner believes the facts in this case constitute an egregious violation such that the use of the evidence obtained by virtue of the seizure would transgress notions of fundamental fairness. For that reason, also, this Court should hold that the exclusionary rule should be applied in this case and should clarify the status of the law regarding roadblock seizures in Utah.

II.

THE EXCLUSIONARY RULE APPLIES IN THIS PROCEEDING BECAUSE OF THE VIOLATION OF RIGHTS SECURED UNDER ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION

Petitioner argued in his earlier brief that the roadblock in this case was unconstitutional under Article I, Section 14 of the Utah Constitution, as well as under the United States Constitution. However, the issue of the application of the exclusionary rule for violations of the Utah Constitution was not separately addressed. The Tax Commission cites the Court to State v. Aime, 62 Utah 476, 220 P. 704 (1923), which held the exclusionary rule inapplicable in any proceeding where evidence was

obtained in violation of Article I, Section 14 of the Utah Constitution. State v. Aime has never been expressly overruled. However, in State v. Louden, 15 Utah 2d 64, 66, 387 P.2d 240 (1963), this Court stated:

We have no disposition to disagree with the doctrine that where police officers have obtained evidence by illegal methods, such as unlawful search in violation of the IV Amendment to the United States Constitution and Article I, Sec. 14 of our Constitution, it should not be used to convict a person of crime, as held by the United States Supreme Court in the case of Mapp v. Ohio. Although there are admittedly older decisions of this Court which indicate that under certain circumstances, evidence even though unlawfully obtained, may be used as evidence.

The Court in Louden appears to adopt the exclusionary rule for violations of Article I, Section 14 in the case of criminal proceedings, thus implicitly disapproving State v. Aime. This Court's recent pronouncement of interest in a separate Utah constitutional jurisprudence regarding Article I, Section 14 of the Utah Constitution, cited in Petitioner's brief at Page 25, also indicates the tacit assumption that the exclusionary rule applies for violations of Article I, Section 14 of the Utah Constitution.

This Court should rule that the exclusionary rule applies in this Drug Stamp Tax proceeding because the controlled substances on which the tax is assessed were discovered as the result of a seizure which was unconstitutional under the Utah Constitution.

One reason for this Court to so rule is that there is no definitive statement from the U.S. Supreme Court on the issue. The policy arguments and reasoning of the preceding sections apply equally with regard to the application of the exclusionary rule for violation of the Utah Constitution in this Drug Stamp Tax proceeding. And it is particularly appropriate for this Court to rule on the application of the exclusionary rule here because the Drug Stamp Tax is a unique Utah statutory provision which may not be analogous to any provisions on which the U.S. Supreme Court may eventually rule.

Unfortunately, there is very little Utah constitutional jurisprudence on this question. However, there are cases from other states which provide guidance. First, before Mapp v. Ohio, 367 U.S. 643 (1961) made the exclusionary rule applicable to state proceedings, there was a split of authority among the states as to whether the exclusionary rule applied for violation of state constitutional provisions. This split of authority was discussed by this Court in State v. Aime, supra. More recently, other states have held the exclusionary rule to be applicable in civil proceedings where state constitutional rights regarding search and seizure have been violated. The Oklahoma Supreme Court has held that under the Oklahoma Constitution the exclusionary rule applies in civil and criminal cases. Turner v. City of Lawton,

733 P.2d 375 (Okla. 1986). The courts of Washington have held that the exclusionary rule is more restrictive under the Washington Constitution than the federal exclusionary rule, and have applied the exclusionary rule to probation revocation hearings. State v. Lampman, 45 Wash.App. 228, 724 P.2d 1092 (1986).

The Tax Commission cites the Court to County of Henrico v. Ehlers, 379 S.E.2d 457 (Va. 1989) as a state court which has refused to apply the exclusionary rule in civil cases. That case dealt with whether the exclusionary rule should apply in an interpleader action, a situation much different from this proceeding. Also, that case did not deal with state constitutional law, but interpreted only the Fourth Amendment to the United States Constitution. Contrary to the Virginia Court, the courts of New York have held that evidence unconstitutionally seized for the purpose of a criminal investigation may not be subsequently utilized in a civil proceeding. See Ryan v. Manhattan & Bronx Surface Transit Operating Authority, 466 N.Y.S.2d 879, 120 Misc.2d 524 (1983), and cases cited therein.

For the reasons stated, and like the courts of Washington, Oklahoma, and New York, this Court should hold that the exclusionary rule applies in Drug Stamp Tax proceedings where the substance to be taxed is seized in violation of the Utah Constitution.

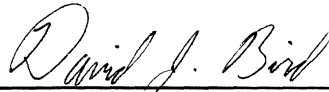
CONCLUSION

For the reasons stated herein, Petitioner requests that this Court hold that the exclusionary rule applies in Illegal Drug Stamp Tax proceedings where Fourth Amendment or Article I, Section 14 rights have been violated. Petitioner requests that this Court find that the roadblock in this case violated both the Fourth Amendment and Article I, Section 14 of the Utah Constitution, for the reasons stated in the Brief of Petitioner.

Although Petitioner contests and disagrees with many of the assertions and arguments made by the Tax Commission regarding other issues in this case, Petitioner believes that his earlier brief adequately addresses and anticipates the Tax Commission's arguments. Therefore, Petitioner believes those issues need not be addressed again but refers the Court to his earlier brief.

RESPECTFULLY SUBMITTED this 10th day of February, 1990.

RICHARDS, BIRD & KUMP, a P.C



David J. Bird
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY BRIEF OF PETITIONER was served this 16th day of February, 1990, by mailing four (4) true and correct copies hereof, postage prepaid, addressed to the following:

Lee A. Dever
Assistant Attorney General
130 State Capitol
Salt Lake City, Utah 84114

