

1990

## Utah v. Malstrom : Petition for Writ of Certiorari

Utah Supreme Court

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Stanley D. Malstrom; Pro Se.

R. Paul Van Dam; Attorney General; Barbara Bearnson; Assistant Attorney General; Attorneys for Appellee.

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UTAH COURT OF APPEALS

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900057-CA

DOCKET NO. \_\_\_\_\_

IN THE UTAH SUPREME COURT

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THE STATE OF UTAH,  
Plaintiff, Respondent

vs.

STANLEY MALSTROM,  
Defendant, Appellant

)  
( 900587  
) Court of Appeals  
) Case No. 900057-CA  
(  
) Priority No. 2  
(  
)

PETITION FOR WRIT OF CERTIORARI

Appeal from Judgment of Conviction  
entered in the Third Judicial District Court  
August 31, 1989.  
the Honorable Timothy Hansen, presiding,  
sentencing date October 24, 1989  
Court of Appeals Affirmance October 25, 1990

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FILED

DEC 24 1990

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

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THE STATE OF UTAH,	)	
Plaintiff/Respondent	(	Court of Appeals
	)	Case No. 900057-CA
vs.	(	
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## ISSUES

1. A "pro se" cannot be held to the same stringent standards as a law-trained attorney.
2. There was not sufficient evidence of "Practicing Medicine without a License to convict defendant.
3. Does the "Medical Practice Act" apply to persons who practice the "healing arts."
4. Plaintiff was required to affirmatively prove that Defendant was outside the exceptions to the criminal statute, given his religious and other status in the community.
5. Section UCA 58-12-30 is unconstitutionally overbroad and unclear.
6. The trial Court erred in allowing inflammatory, prejudicial, irrelevant testimony to be introduced against the defendant.
7. The denial of the Motion for New Trial, was an abuse of discretion by the trial Court.

## COURT OF APPEALS DECISION

On October 17, 1990, the Court of Appeals entered an affirmance of Conviction. later a substitute Order again affirmed the Defendant's conviction. In neither order did the Court enter any written opinion as to the merits of the appeal.

## JURISDICTION

1. The Court of Appeals entered its final ruling on October 25, 1990.

2. Justice Howe granted a thirty day extension for filing of this petition, making it due on December 24, 1990.

3. Rule 43(1) and (4) grant this Court jurisdiction to hear this appeal, most specifically as to the issues of exemptions and exceptions under the law which have been widely determined in a fashion which is foreign to the Court of Appeals decision. Furthermore, definition of Practicing Medicine without a License has been determined differently within the state. But most of all the issues presented here are of such great importance in Utah law that this Court should here them and issue an opinion which clarifies these issues.

## STATEMENT OF AUTHORITIES

**"License-several classes-Definitions.--The following classes of licenses shall be issued:**

(1) To Practice medicine and surgery in all branches thereof.

(2) (a) To practice as an osteopathic physician without operative surgery in accordance with the tenets of a professional school of osteopathy recognized by the department of registration.

(b) To practice as an osteopathic physician and surgeon in accordance with the tenets of a professional school of osteopathy recognized by the department of registration.

(3) To practice the treatment of human ailments in accordance with the tenets of the professional school, college or institution recognized by the department of registration of which the applicant is a graduate as designated in his application for license.

but without the use of drugs or medicine and without operative surgery. "Drugs and medicine" as used herein shall mean articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease for which an authorized prescription is required by law. Such articles shall not include devices or their component parts, intended for use in the diagnosis, cure, mitigation, treatment or prevention for disease for which an authorized prescription is not required by law.

(4) To practice the treatment of human ailments in accordance with the tenets of the professional school, college or institution recognized by the department of registration of which the applicant is a graduate as designated in his application for license, including the practice of obstetrics and the use of drugs and medicine, but without operative surgery, except operative minor surgery. The term "operative minor surgery" means the use of electrical or other methods of the surgical repair and care incident thereto of superficial laceration and abrasion, benign superficial lesions and the removal of foreign bodies located in the superficial structures; and the use of antiseptics and local anesthetics in connection therewith but it shall not include any surgery which requires blood transfusion or the entry into the abdominal or thoracic cavity or cranium.

(5) To practice obstetrics if a valid obstetrics license has been issued and is in force prior to the effective date of this act for such practice."

Utah Code Annotated 58-12-3 (1953) as amended (emphasis added)

**"Practicing medicine" defined-Exceptions.--**

Any person who shall diagnose, treat or profess to treat or prescribe or advise for, any physical or mental ailment of, or any physical injury to, or any deformity of, another: or who shall operate upon another for any ailment, injury or deformity, shall be regarded as practicing medicine or treating human ailments. But nothing in this section shall be construed to include the following cases:

(1) The administration of domestic or family remedies in case of emergency. \* \* \*

Utah Code Annotated 58-12-17 (1953) as amended

Medical Practice Act-Definitions--As used in this act, subject to the exemptions of section 58-12-29:\* \* \*

(2) The word 'diagnose' means to examine in any manner another person, parts or a person's body, substance, fluids, or materials excreted, taken or removed from a person's body, or produce by a person's body, to determine the source nature, kind or extent of a disease or other physical or mental condition, or to attempt to so examine or to determine, or to hold oneself out or represent that an examination or determination is being made or to make an examination or determination upon or from information supplied directly or indirectly by another person, whether or not in the presence of the person making or attempting the diagnosis.

(3) The words "drugs or medicine" mean articles, chemicals or compounds or biological preparations intended for internal or external use by man or intended to be used for diagnosis, cure, mitigation or prevention of diseases or abnormalities of man as recognized in any published United States Pharmacopoeia or National Formulary, or otherwise established as a drug or medicine.

(4) The words "practice of medicine" mean:

(a) To diagnose, treat, correct, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by means or instrumentality:

(b) To maintain an office or place of business for the purpose of doing any of the acts described in subsection (a) whether or not for compensation:

(c) to use, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human diseases or conditions in any printed material, stationery, letterhead, envelopes, signs, advertisements the designation "doctor," "doctor of medicine," "physician," "surgeon," "physician or surgeon," "Dr.," "M.D." or any combination, of these designation, unless the designation additionally contains the

description of the branch of the healing arts for which the person has a license."

Utah Code Annotated 58-12-28 (1953) as amended

**Medical Practice Act-Practice of medicine without a license a Felony-Exceptions.**

"It is unlawful to engage in the practice of medicine in this state without first obtaining a license. Any person who engages in the practice of medicine without a license is guilty of a felony; except the following persons may engage in activities included in the practice of medicine subject to the circumstance and limitations stated: \* \* \*

(4) any individual rendering aid in an emergency, when no fee or other consideration of value for the service is contemplated, charged or received;

(5) any individual administering a domestic or family remedy including those persons engaged in the sale of vitamins, health food or health food supplements, herb or other products of nature, except drugs or medicines for which an authorized prescription is required by law:

(6) a person engaged in good faith in the practice of the religious tenets of any church or religious belief without the use of any drugs or medicines for which an authorized prescription is required by law: \* \* \*"

Utah Code Annotated 58-12-30 (1953) as amended

**"Medical Practice Act-Scope of act.-**This chapter is designed solely for the regulation of the practice of medicine and does not apply to the regulation of \* \* \*the healing arts, \* \* \*and this act shall not change or limit the rights of persons lawfully practicing the other healing arts with respect to the practice of their professions \* \* \*"

Utah Code Annotated 58-12-38 (1953) as amended

STATEMENT OF CASE

### Nature of Case

This appeal is taken from a Judgment of Criminal Conviction. in which the defendant, Stanley Malstrom, was Convicted of a Third Degree Felony, "Practicing Medicine without a License".

The defendant appealed to the Court of Appeals which on October 25, 1990 issued its final opinion, without addressing any of the merits of the case.

### Proceedings

1. Trial of this matter was heard on August 31, 1989, at which time judgment of conviction was entered.

2. Motion for New Trial was filed on October 9, 1989.

3. Said Motion was denied on October 24, 1989, at which time defendant was sentenced.

4. Notice of Appeal was filed on November 22, 1989.

5. Oral argument was heard October 17, 1990, at which time the Court of Appeals entered its opinion of affirmance with no written opinion.

6. On October 25, 1990, the Court of Appeals entered a substitute Order, again affirming the conviction without any written opinion.

5. No previous or other appeal has been filed or heard in this matter.

### Facts

1. Stanley Malstrom is an herbalist, and an acupressurist.

who practices tenets of the L.D.S. religion, specifically as it relates to the Word of Wisdom.

2. On or about October 29, 1989. Carol Marshall, came to Mr. Malstrom's home, complaining of digestive problems. This visit was arranged through friends of Mr. Malstrom's, the Tishner's, and her husband, and was at the special request of same.

3. Complainant, Ms. Marshall, told Mr. Malstrom of her troubles and requested that he lay his hands on her.

4. Mr. Malstrom, did perform the service, and suggested to Ms. Marshall that she might be better off with an improved diet and a "green drink" (a mixture of vegetables, and pineapple known to many as a soothing substance for the digestive system).

5. Ms. Marshall never paid for any of the above services, nor were any drugs, prescribed, although she was told by Mr. Malstrom, at one point that she may have a sinus infection, and she should see her physician.

6. Subsequent to her visit to Mr. Malstrom, Ms. Marshall filed a Civil suit against him alleging that he had damaged fusion in her vertebrae, which action has not, to date, been tried, nor judgment entered.

7. On or about March 29, 1989 the State of Utah filed charges against Mr. Malstrom alleging "Practicing Medicine without a License". in which the civil Plaintiff, Carol Marshall was the complainant.

8. Mr. Maistrom appeared "pro se" at his trial on August

31, 1989, and was convicted of the charge.

9. Subsequent to the trial, Mr. Malstrom retained Robert Macri as an attorney, and Mr. Macri filed a Motion for New Trial on October 9, 1989.

10. Hearing on the Motion for New Trial was heard on October 24, 1989, which motion was denied, and Mr. Malstrom sentenced.

11. Due to problems in communication, Macri, has since withdrawn, leaving Malstrom to pursue this case "pro se".

12. Malstrom filed all of his briefs "pro se" but was represented at Oral Argument in front of the Court of Appeals by an attorney, Mr. George Brown.

13. The Court of Appeals affirmed his conviction.

14. Justice Howe granted Malstrom an extension of time for filing Petition for Writ of Certiorari, making it due December 24, 1990.

#### REASONS FOR ISSUANCE

1. A "pro se" cannot be held to the same stringent standards as a law-trained attorney.

Federal case law is very concise, that a "pro se" can not be held to the same standards as an attorney. It is important that this Court decide to what degree a "pro se" can be penalized for not being law trained, if he in fact meets all of his time obligations. It is an undisputed fact that all individuals have

a right to defend themselves, and to punish an individual for availing himself of a right is tantamount to denying the right.

In this case an untrained layman was required to prove his innocence, by supplying proof that he was outside the scope of the law, contrary to the standard that the prosecution carries the burden of establishing the law's just application.

Therefore it is appropriate under Rule 43(2) of the Utah Rules of the Supreme Court that this Court make a definitive statement on the subject.

2. There was not sufficient evidence of "Practicing Medicine without a License to convict defendant.

There is substantial statutory law regarding the definition of "Practicing Medicine," which has not been clearly interpreted by this Court or the Court of Appeals, had it been the Defendant would have been found innocent and it is appropriate under Rule 43(4) of the Rules of the Utah Supreme Court that this Court finally, once and for all end the controversy on the subject.

3. Does the "Medical Practice Act" apply to persons who practice the "healing arts."

Statutorily, the laws of this State are specifically clear that the "Medical Practice Act" does not apply to practitioners of the "healing arts." (See UCA 58-12-38) However, who is considered to be a practitioner has not been clearly defined in law and it is appropriate that this Court do so under Rule 43(4).

4. Plaintiff was required to affirmatively prove that Defendant was outside the exceptions to the criminal statute, given his religious and other status in the community.

The case law on the subject of exemptions is abundantly clear as to the fact that exceptions are part and parcel of the law itself, and that they must be proven not to apply in order to find a Defendant guilty. Exceptions and exemptions take one outside of the law which applies to all others. The Court of Appeals erred in not deciding this issue, and it is therefore appropriate that this Court settle this matter pursuant to Rule 43(4) of the Rules of the Utah Supreme Court.

5. Section UCA 58-12-30 is unconstitutionally overbroad and unclear.

This Court is required to decide issues of constitutionality and it is appropriate that this statute be either determined to be unclear and overbroad constitutionally or that this Court determine what limits it does have in its application, pursuant to Rule 43(4) of the Rules of the Utah Supreme Court.

6. The trial Court erred in allowing inflammatory, prejudicial, irrelevant testimony to be introduced against the defendant.

By upholding the conviction against the defendant, the Court of Appeals has ruled contrary to established case law on this subject. Had the inflammatory, irrelevant testimony been disallowed by the trial Court the prosecution would have had no case with which to proceed. (See Transcript of Trial at Court of Appeals record #891900633) Therefore, this Court must determine this issue in order to uphold the standard by which such evidence is judged, making this issue appropriate for this Court under Rule 43(1) and (2) of the Rules of the Utah Supreme Court.

7. The denial of the Motion for New Trial, was an abuse of discretion by the trial Court.

In Utah, it is established that a New Trial may be had to further the interests of Justice, in overlooking this issue the Court of Appeals failed to uphold this principle of law and therefore this is an appropriate issue for this Court to decide pursuant to Rule 43(1) and (2) of the Rules of the Utah Supreme Court.

#### Necessary Attachments

Court of Appeals Ruling

#### Conclusion

Petitioner respectfully urges the Court to accept his petition and hear his arguments.

Dated this 20th day of December 1990.

#### CERTIFICATE OF MAILING

I certify that four true and correct copies of the foregoing Petition for Writ of Certiorari mailed to the opposing counsel by placing same in the U.S. Mail first class postage prepaid, addressed to:

R. Paul Van Dam and Barbara Bearnson  
Attorney General  
236 State Capitol Bldg.  
Salt Lake City, Utah 84114

on the 22nd day of December 1990.

A handwritten signature in black ink, appearing to read "Stanley Cohen". The signature is written in a cursive style with a horizontal line underneath it.

FILED

OCT 25 1990

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

State of Utah,	)	
	)	ORDER OF AFFIRMANCE*
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 900057-CA
	)	
Stanley Malstrom,	)	
	)	
Defendant and Appellant.	)	

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Before Judges Jackson, Bench, and Orme (On Rule 31 Hearing).

This matter is before the court pursuant to Utah R. App. P. 31.

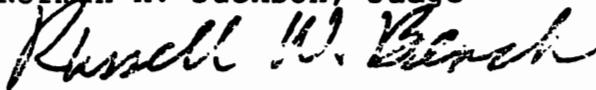
IT IS HEREBY ORDERED THAT defendant's conviction is affirmed.

DATED this 25th day of October, 1990.

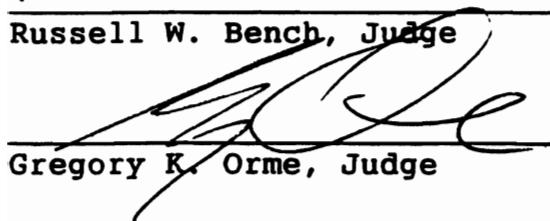
ALL CONCUR:



Norman H. Jackson, Judge



Russell W. Bench, Judge



Gregory K. Orme, Judge

\*This Order shall replace the Order of Affirmance issued herein on 17 October 1990.

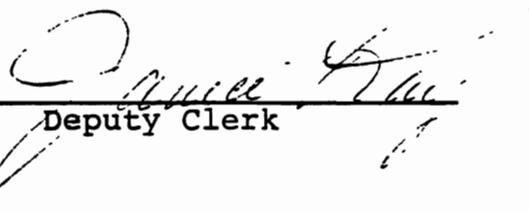
CERTIFICATE OF MAILING

I hereby certify that on the 25th day of October, 1990,  
a true and correct copy of the foregoing ORDER was deposited  
in the United States mail.

Stanley Malstrom  
7700 South Stephenson  
Salt Lake City, UT 84121

R. Paul Van Dam  
State Attorney General  
Barbara Bearnson  
Assistant Attorney General  
B U I L D I N G M A I L

DATED this 25th day of October, 1990

By   
Deputy Clerk