2011

State of Utah v. Scott Ray Bishop : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

State of Utah,

Plaintiff and Appellee,

vs.

Scott Ray Bishop,

Defendant and Appellant

Case #20110975

BRIEF OF APPELLANT

(REQUEST FOR PUBLISHED OPINION)

APPEAL FROM THE SECOND DISTRICT COURT, OGDEN, STATE OF UTAH, FROM A CONVICTION OF SPEEDING, INFRACTION BEFORE THE HONORABLE JUDGE HYDE

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DEFENDANT REQUESTS THAT THE COURT'S DECISION BE PUBLISHED

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BRIEF OF APPELLANT
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Jurisdiction of the Utah Court of Appeals

This court has appellate jurisdiction in this matter pursuant to the provisions of UCA 78A-4-103(2)(e).[1]

Issues Presented and Standards of Review

Defendant challenges the trial court's guilty verdict on three points, arguing that (1) the trial court's determination that UCA 41-6a-601 is not vague, and is therefore constitutional, is incorrect, (*See* R. at 75 (Tr. at 36, 37, 38, 39, 40, 41)), (2) the trial court's conclusion that Defendant committed a crime is inconsistent with case precedent, (*See* R. at 75 (Tr. at 50)), and (3)

[1] The term "UCA" is used throughout this document to refer to the Utah Code (Annotated) and is followed by the specific section of code.

the trial court's conclusion that Defendant violated UCA 41-6a-601 is inconsistent with Utah law and case precedent, (*See* R. at 75 (Tr. at 39, 41, 42, 43, 44, 45)), and that each of these failures, individually and together, constitute irreversible error in direct harm to Defendant.

The standard of review for point (1) is the Correction-of-Error Standard. A trial court's conclusion that a statute or ordinance is constitutional presents a question of law reviewed under a correction-of-error standard. See *State v. Lopes*, 980 P.2d 191, 193 (Utah 1999); *Grand County v. Emery County*, 969 P.2d 421, 422 (Utah 1998); *State v. Krueger*, 975 P.2d 489, 495 (Utah Ct. App. 1999); *State ex rel. W.C.P.*, 974 P.2d 302, 305 (Utah Ct. App. 1999). A statute is afforded a presumption of validity, and any reasonable doubt is resolved in favor of constitutionality. See *State v. Lopes*, 980 P.2d at 193; *Jeffs v. Stubbs*, 970 P.2d 1234, 1248, cert. denied, 119 S.Ct. 1803 (1999); *State ex rel. W.C.P.*, 974 P.2d at 305.

The standard of review for points (2) and (3) is the Correction-of-Error Standard. A trial court's conclusions of law in criminal cases are reviewed for correctness. See *State v. Tiedemann*, 2007 UT 49, ¶ 11, 162 P.3d 1106; *State v. Lowe*, 2010 UT App 156, ¶ 5, 234 P.3d 156; *State v. Perkins*, 2009 UT App 390, ¶ 8, 222 P.3d 1198. "Correctness"

means that an "appellate court decides the matter for itself and does not defer in any degree to the trial court's determination because it is the primary role of the appellate courts to say what the law is and ensure that it is uniform throughout the jurisdiction." *State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611 (citing *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)).

Controlling Statutory Provisions

All controlling statutory provisions are set forth in full in the Addenda.

Statement of the Case

On March 29, 2011, Defendant was detained by Trooper Shepherd, of the Utah Highway Patrol, and cited for violation of UCA 41-6a-601, to wit: traveling at a rate of 82 miles-per-hour on a section of highway that is posted as a 65 mile-per-hour speed zone. *See* R. at 1. The subject section of highway is within the jurisdiction of Riverdale City.

On May 16, 2011, a bench trial was held in the Riverdale City Justice Court, with Judge Reuben John Renstrom presiding.

During the trial, Defendant objected to UCA 41-6a-601 as vague and therefore unconstitutional, which objection

Judge Renstrom denied. Defendant then cross-examined Plaintiff's only witness, Trooper Shepherd, who substantiated specific facts.

At the conclusion of the trial, Judge Renstrom found Defendant guilty of violating UCA 41-6a-601 and sentenced Defendant to payment of a fine, at which time Defendant filed a Notice of Appeal to the Second District Court. *See* R. at 2.

On November 2, 2011, a bench trial was held in the Ogden District Court of the Second District Court, with Judge Noel S. Hyde presiding.

During the trial Plaintiff's only witness was Trooper Shepherd. Trooper Shepherd testified that on the date in question he was monitoring traffic on the North-bound lanes of I-15 at mile marker 340, that the posted speed limit for that section of highway is 65 miles-per-hour, that Defendant's speed at that location was 82 miles-per-hour, and that he cited me for Speeding. *See* R. at 75 (Tr. at 4, 5, 9, 13).

Under cross-examination, Trooper Shepherd testified that other than Defendant's speed exceeding the posted speed limit, Defendant did not do anything illegal, that there were no unusual weather or road conditions, that there were no actual or potential hazards on or around the

highway, that there was nothing unusual about the condition of the vehicle or of Defendant other than the vehicle was exceeding the posted speed limit, that Defendant did not cause any unusual behavior in or injury to anyone, that there were no circumstances other than the rate of speed the vehicle was being driven which would constitute a violation of law, that other than Defendant's speed exceeding the posted speed limit, there were no actual or potential hazards or conditions that made Defendant's driving and speed unreasonable or imprudent, and that Trooper Shepherd had not seen a Traffic Engineering Safety Study for that section of highway, did not know if one existed, and could not produce one for the court. *See* R. at 75 (Tr. at 13, 14, 15).

To be absolutely clear, Defendant asked Trooper Shepherd the question "were there any other conditions, actual or potential hazards, anything that you observed other than my speed exceeding the posted speed limit that you think would make my speed unreasonable or imprudent", to which Trooper Shepherd responded "No, there weren't". *See* R. at 75 (Tr. at 27).

In closing arguments, Defendant preserved the three issues subject of this appeal. Defendant objected to and challenged UCA 41-6a-601 as vague and therefore

unconstitutional. *See* R. at 75 (Tr. at 36, 37, 38, 39, 40, 41). Defendant pointed out that Clause 1 of UCA 41-6a-601 is the only clause within that statute wherein prohibitory language is found, and stated that "[i]f the ordinary person looks at UCA 41-6a-601 and reads through that statute and finds that the only prohibitory wording in that statute is found in clause (1), then they should know, they should be able to rely upon the fact that that is where the prohibition lies." *See* R. at 75 (Tr. at 39). Defendant stated that there was a lack of evidence of unreasonable or imprudent speed and reiterated Trooper Shepherd's testimony that "there were no conditions, no actual or potential hazards that existed at this time other than [Defendant's] rate of speed being over the posted speed limit." *See* R. at 75 (Tr. at 39, 41). In arguing the "reasonable and prudent" standard of speed, Defendant cited to *State v. Pilcher*, supra, as the foundation for his reliance upon that standard. *See* R. at 75 (Tr. at 41, 42, 43, 44, 45). Defendant stated that he had requested the Traffic Engineering and Safety Study for the relevant section of highway from Plaintiff, who had refused to provide it. *See* R. at 75 (Tr. at 48). Defendant stated that in the case against him, there was no "corpus delicti" because there was no injury, loss, or harm, which was substantiated by

the testimony of Trooper Shepherd. *See* R. at 75 (Tr. at 50).

Judge Hyde determined that:

a. UCA 41-6a-601 "is not unconstitutionally vague"; *See* R. at 75 (Tr. at 54).

b. Trooper Shepherd had measured Defendant's vehicle traveling at a rate of 82 miles-per-hour in a 65-mile per hour speed zone; *See* R. at 75 (Tr. at 55).

c. Trooper Shepherd "observed no other illegal conduct, did not observe any unusual road conditions, observed no debris or obstructions on the highway, did not observe any injury." *See* R. at 75 (Tr. at 55).

d. "[T]he basis for the issuance of the citation was traveling at a speed in excess of the posted speed limit." *See* R. at 75 (Tr. at 56).

e. "[V]iolation of [a] statute becomes the injury which meets the first element of a criminal offense." *See* R. at 75 (Tr. at 57).

f. "[T]he language of the statute proscribes conduct in the form of speeding in excess of the posted speed limit". *See* R. at 75 (Tr. at 57). and

g. Defendant violated UCA 41-6a-601 because Defendant had driven a vehicle at a speed of 82mph in a posted 65mph speed zone within an urban district and that Defendant failed to rebut the prima facie evidence of the 65mph speed limit because he did not show that his speed was reasonable and prudent given the existing conditions; *See* R. at 75 (Tr. at 59).

Based upon the foregoing determinations, Judge Hyde found Defendant guilty of violating UCA 41-6a-601 and sentenced Defendant to payment of a fine, at which time Defendant filed a Notice of Appeal to this Court and motioned the trial court for a Stay of Sentence pending the outcome of this appeal, which the trial court granted. *See* R. at 59, 60, 61, 72.

Statement of Facts

The uncontroverted facts in this case are:

a. That I-15, running in a North-South direction, has a typical surface and is divided into traffic lanes by a yellow and/or white stripe at the place where the charged offense occurred;

b. That on March 29, 2011, at approximately 1:59pm, Defendant operated the automobile described in

Citation #C112415567 on such designated portion of the highway, traveling North, in his lane of traffic, at a speed of 82 miles per hour, for a distance of one-half mile; *See* R. at 75 (Tr. at 9, 55).

c. That at the time and place the highway was posted as a 65-mile per hour speed zone; *See* R. at 75 (Tr. at 5, 55).

d. That Defendant was subsequently arrested or detained, and cited under statute UCA 41-6a-601 of the code for the State of Utah for driving the described automobile at the speed of 82 miles per hour, in excess of the posted speed limit; *See* R. at 75 (Tr. at 10, 13, 56).

e. That there are no circumstances or conditions, other than the rate of speed at which Defendant's automobile was being driven, which would constitute a violation of law; *See* R. at 75 (Tr. at 13, 55).

f. That there were no unusual weather or road conditions present; *See* R. at 75 (Tr. at 13, 55).

g. That there were no actual or potential hazards on or around the highway; *See* R. at 75 (Tr. at 13, 14, 55).

h. That, other than the rate of travel, there was nothing unusual about Defendant or the described automobile; *See* R. at 75 (Tr. at 14).

i. That there was no unusual behavior of anyone else that is directly attributable to Defendant; *See* R. at 75 (Tr. at 14).

j. That no injury was caused by Defendant; *See* R. at 75 (Tr. at 14, 55). and

k. That the extent of evidence relied upon by Plaintiff is that Defendant drove a vehicle at a speed greater than the posted speed limit for that section of highway, in violation of UCA 41-6a-601. *See* R. at 75 (Tr. at 14, 27, 56).

Summary of Argument

For the trial court to convict Defendant for a violation of UCA 41-6a-601 (Speeding), the trial court had to correctly determine that (1) UCA 41-6a-601 was not unconstitutionally vague but was in fact sufficiently explicit to inform the ordinary reader what conduct is prohibited, (2) Defendant had acted in a manner that was specifically prohibited by UCA 41-6a-601, and (3) an injury, loss, or harm was caused by Defendant's act, acts, or omission to act. This the trial court did not do.

The prohibition of UCA 41-6a-601 is that "[a] person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, giving regard to the actual and potential hazards then existing," yet lower courts throughout the State routinely find defendants guilty of violating UCA 41-6a-601, by relying solely on the prima facie evidence of a speed being unreasonable and imprudent, and therefore unlawful, simply by virtue of the speed exceeding the posted speed limit, even when the facts in evidence before the court, showing that no conditions or actual or potential hazards existed that precluded the defendant's speed from being reasonable and prudent, contradict and overcome the prima facie evidence created by the statute. This clearly indicates that even lower-court judges, educated in the realm of legal words and meanings, let alone the "ordinary reader", can not understand the prohibitions of the statute.

The variety of interpretations of the statute by lower-court judges throughout the judicial districts of Utah are in direct conflict with the wording of the statute and controlling case law, with its supporting cites and authorities, and therefore prove that this statute is vague and therefore unconstitutional.

At its most basic level, the American society is based upon the premise that the individual has the freedom to act according to the dictates of his conscience, so long as he does not infringe on the rights of another. The annuls of American jurisprudence bear this out by providing that, in order for a plaintiff to have standing to sue a defendant, the plaintiff must have a legal right which the defendant has breached, and that injury, loss, or harm (which need not be physical) ensued from the breach; this is true whether the case is a civil or a criminal case. This view is supported by the Utah Supreme Court in its *State v. Mauchley*, supra, decision. In the case of a criminal complaint, the State, as the plaintiff, prosecutes the case on behalf of the person or persons who have received the harm. The person being represented by the State may be singular, as in the victim of rape, murder, theft, etc, or it may be plural, as in the whole of the community, but in all cases harm must have occurred. Though there are certainly "victimless" crimes, where a particular victim is not readily apparent (such as is the case with vandalism of public property, the failure to pay a tax which is due, etc), "victimless" crimes, at their very heart, still require, as a basis for the crimes, that a harm be effectuated by the defendant, even when the facts show only

that the harm is shared by society as a whole. Each "victimless" crime has the common theme of requiring an expenditure of tax money in order to restitute society as a whole to its previous condition. This requirement of the expenditure of tax money is, of course, an incidence of harm to the public at large since it is from the public that the tax money must and always does come. However, no such harm can be proven, whether by a harm to the public highway itself or to any individual or entity, when a traveler simply travels at a speed which exceeds the prima facie speed limit, while still properly exercising his duties to use reasonable care at all times, to keep the vehicle under reasonable control, and to operate the vehicle so as to avoid danger, or in other words to avoid injury, loss, or harm to another.

The prosecution has failed to state a valid cause of action against Defendant in that the facts do not show that an injury, loss or harm occurred (and instead indicate the contrary) and, therefore, has failed to prove beyond a reasonable doubt that a crime was committed by Defendant.

From a statutory perspective, UCA 41-6a-601 provides that certain speeds are lawful and that exceeding these speeds is prima facie evidence that the speed is unreasonable and imprudent, and therefore unlawful. This

serves to provide a basic standard under which the typical traveler may travel from one location to another, under a variety of conditions and actual and potential hazards, in a generally safe and reliable fashion, while keeping the general flow of traffic unimpeded in its movement. The traveler who is willing to expend more of his resources of time and attention constantly evaluating the conditions and actual and potential hazards on and around the highway in exchange for the ability to travel at a greater speed is, however, afforded that opportunity. And, while the State bears the burden of proving that a speed was unreasonable or imprudent when a traveler's speed is at or below the prima facie speed limits created by the statute, presumably by the fact of an injury, loss, or harm to another entity, when a traveler chooses to travel at a speed which exceeds the prima facie speed limit created by the statute, that traveler must also accept the burden of providing evidence or soliciting testimony that no conditions or actual or potential hazards existed which would have made the speed unreasonable or imprudent. When such a defendant fails to provide or solicit such a showing of facts and evidence, the prima facie evidence is enough to convict him of violating the statute; however, when a defendant makes this showing, the statute can require no more of him, and he

must be found to have been compliant with the statute in its entirety.

The *State v. Pilcher*, supra, decision is still controlling case law within the State of Utah; the Utah Supreme Court still holds to the interpretation of speed law found in the *State of Idaho v. Trimming*, supra, decision; the Trimming defendant, with facts and evidence identical to Defendant's, was acquitted of the charges against him; and, according to the facts of this case, Defendant must be acquitted too.

Argument

POINT I

UCA 41-6a-601 is unconstitutional because it is vague

It is hornbook law that a penal statute is not constitutional or valid if it is so vague that persons of reasonable comprehension and understanding cannot understand what is required of them by the penal statute. I take this to be such an elementary proposition that I do not cite authority for it. This Court certainly does not need it.

In *State v. Pilcher*, supra, a case that dealt specifically with UCA 41-6-46 (1978) (the predecessor statute to the current UCA 41-6a-601), the Utah Supreme

Court, at ¶ 19, said "A statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited."

Court Interpretations

Though the Utah Supreme Court ruled in *State v. Pilcher*, supra, that UCA 41-6-46 (1978) (renumbered to UCA 41-6a-601 in 2005) was not unconstitutionally vague, a close study of various court rulings throughout the judicial districts in Utah shows that judges and attorneys, not to mention pro se defendants, have differing interpretations of UCA 41-6a-601 that are in sharp contrast to the interpretation given by the Utah Supreme Court in its *State v. Pilcher*, supra, decision.

In this case, Judge Hyde stated

> "in determining reasonableness and prudence, the prima facie evidence standard does create a rebuttable presumption. In order to rebut that presumption, the defendant would be required to show that the speed at which he was traveling was in fact reasonable and prudent based upon the same standards under which that speed limit was originally determined, and under [UCA 41-6a-602], those standards include the design speed of the highway, prevailing vehicle speeds, accident history, highway traffic, roadside conditions, and other highway safety factors. Those are all conditions which are built into the determination of the posted speed, and are not independent of it, and do not need to be separately established by the State each time an alleged violation occurs. The defendant, in order to overcome that prima facie showing must present sufficient evidence to overcome the presumption created by the statute that the speed, as determined

> based upon all these conditions, was, again based upon evidence that could presented by the defendant, not validly determined for that highway at that particular time. It is not sufficient simply to suggest that the State should be required to prove more. That is the purpose of prima facie evidence and presumptions, and until there is countervailing evidence presented of reasonableness under all of the defined circumstances, the burden of the defendant simply has not been met." *See* R. at 75 (Tr. at 58).

Judge Hyde's stated interpretation of UCA 41-6a-601 is that, to rebut the prima facie evidence created by UCA 41-6a-601(2) and (3), a defendant would be required to have a new traffic engineering and safety study done in order to show that the traffic engineering and safety study relied upon by the State was invalid.

In *State v. Pilcher*, supra, the Utah Supreme Court, at footnote 3, said

> "... defendant was allowed to present evidence to rebut the prima facie evidence as to the unreasonableness of his speed by cross-examination of the prosecution witness and by his testimony given in his own defense."

Neither of these methods of rebuttal would require a traffic engineer or a traffic engineering and safety study to be present. The only conclusion possible, then, is that presentment of evidence, either by cross-examination of the prosecution's witness or by testimony of the defendant himself, that the conditions and actual or potential hazards then existing did not preclude the defendant's

speed being reasonable and prudent, is sufficient to overcome the prima facie evidence created by UCA 41-6a-601(2) and (3).

The Utah Supreme Court goes further, in footnote 3, by stating

> "[t]he statute, the pertinent portions of which are in the main text, appears to allow as much. Subsection (2) establishes prima facie evidence of unreasonable speed when that speed is exceeded. Subsection (1) prohibits "speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing" without regard to posted speed limits." (underline added for emphasis)

These statements by the Utah Supreme Court are in direct conflict with the statements and interpretations by Judge Hyde.

For the record, Defendant agrees with the interpretation given by the Utah Supreme Court, and not that of Judge Hyde.

Not only the "ordinary reader" but also the man who is learned in the law has tremendous difficulty determining, understanding, and applying what is prohibited by the statute.

Statutory Language

The prohibitory language of the statute, "may not", is found only in UCA 41-6a-601(1), yet lower courts in this

State routinely find defendants guilty of violating UCA 41-6a-601, even when a defense of reasonable and prudent driving under existing conditions is proven by cross-examination of the prosecution's only witness, testimony by the defendant, and or stipulated facts.

The Court should note that, in addition to the absence of any prohibitory language, UCA 41-6a-601(2) and (3) do not even contain language that creates a requirement, such as "shall" or "must".

Additionally, the Utah Legislature, in UCA 41-6a-601(2) specified certain prima facie speed limits but made UCA 41-6a-601(2) "subject to" UCA 41-6a-602.

UCA 41-6a-602(1)(b) states

> "For each highway or section of highway, each speed limit shall be based on a traffic engineering and safety study consistent with the requirements and recommendations in the most current version of the 'Manual on Uniform Traffic Control Devices.'"[2]

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[2] Though the MUTCD specifically states that "[t]his Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation", the Utah Legislature specifically stated the requirement that "each speed limit shall be based on a traffic engineering and safety study consistent with the requirements and recommendations" of the MUTCD.

Unlike UCA 41-6a-602(1)(a), this portion of UCA 41-6a-602 is not limited to State Highways where the Department of Transportation has jurisdiction, but rather is a requirement on "each highway or section of highway", as defined at UCA 41-6a-102(21). (The only exception to this requirement is a section of highway that is designated as a reduced speed school zone, as defined in UCA 41-6a-303, and those sections of highway are excepted from the requirement only because UCA 41-6a-604(4) specifically states that UCA 41-6a-604 takes precedence over UCA 41-6a-602.)

This leaves both the legally-educated individual and the "ordinary reader" wondering why specific prima facie speed limits are specified at all in UCA 41-6a-601(2), since "each speed limit shall be based on a traffic engineering and safety study", and thus both varieties of reader are left to wonder whether it is the Legislative branch's view (through statute) or the Executive branch's view (through a Traffic Engineering and Safety Study[3]) that is to take precedence over the other, which begs the question of which view, if either, are prohibitory upon the

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[3] And, if the latter, how can Plaintiff refuse to provide a copy of the Traffic Engineering and Safety Study, once it has been requested by Defendant?

individual who travels upon the highways of the State, or are neither of them considered prohibitory.

This is the very definition of vagueness, which plagues this particular statute.

POINT II

The trial court's conclusion that Defendant committed a crime is inconsistent with case precedent

The corpus delicti must be proven in every criminal prosecution and has two elements:

> "The corpus delicti of a crime consists of two elements: (1) the fact of the injury or loss or harm, and (2) the existence of a criminal agency as its cause. [citations omitted] There must be sufficient proof of both elements of the corpus delicti beyond a reasonable doubt." *29A American Jurisprudence Second Ed.*, Evidence § 1476.

The facts show that the plaintiff admits there is no corpus delicti in this case because there is no injury, loss or harm.

Case Law

Without a corpus delicti there is no crime:

> "Component parts of every crime are the occurrence of a specific kind of injury or loss, somebody's criminality as source of the loss, and the accused's identity as the doer of the crime; the first two elements are what constitutes the concept of "corpus delicti." *U.S. v. Shunk*, 881 F.2d 917, 919 C.A. 10 (Utah).

In *State v. Mauchley*, 2003 UT 10, 67 P.3d 477 (2003), a criminal case, the Utah Supreme Court changed the

corroboration rule from the Corpus Delicti Rule to the Trustworthiness Standard. In discussing the previously-used Corpus Delicti Rule, the Court, at Id. ¶¶ 15 through 17, stated

> "The corroboration rule is most "often termed the 'corpus delicti' rule because the orthodox version of the rule requires corroboration of the corpus delicti, or body of the crime." [cites removed]. Here, the term "corpus delicti" means "evidence that the [charged] crime was committed." [cites removed]. Therefore, corroboration of the corpus delicti means to produce corroborative "evidence that the specified offense occurred." [cites removed].
>
> "Generally, "'[t]o establish guilt'" in a criminal case, "'the prosecution [must] show that [1] the injury or harm specified in the crime occurred, [2] this injury or harm was caused by someone's criminal activity, and [3] the defendant was the [perpetrator].'" [cites removed]. The corpus delicti, or body of the crime, involves only the first two elements, however. Id. Hence, when the corpus delicti rule requires corroboration of the corpus delicti, it requires only corroboration that a harm or injury occurred by criminal act. [rest of paragraph removed].
>
> "For example, in a homicide case, the State must produce evidence that a person died and that the death was caused by a criminal act in order to establish that an injury or harm occurred by criminal means. [cites removed]. Once it produces such evidence, however, the State may then introduce a defendant's confession to establish other elements of the crime, such as intent or malice. [cites removed]."

In these few paragraphs, the Court clearly described the difference between "corpus delicti" and the "corpus delicti rule", the difference being the actual body of the crime in contrast to the rule used for corroboration of the

crime having occurred (usually by confession of the defendant). At Id. ¶ 16, the Court gave the general description of the most basic elements of a crime that the prosecution must prove in any criminal case, though, of course, each crime may have further elements necessary to prove in order to gain a conviction.

Continuing, the Court proceeded to describe the new corroboration standard to be used, known as the Trustworthiness Standard, at Id. ¶ 19, stating

> "[...] Unlike the orthodox version of the corroboration rule, the new version focuses on the confession itself. [cites removed]. Specifically, "'the adequacy of corroborating [evidence] is measured not by its tendency to establish the corpus delicti but by the extent to which it supports the trustworthiness of the admissions.'""

Continuing, at Id. ¶ 42, the Court stated

> "As early as 1909, this court applied the corpus delicti rule to all crimes. Thus, in all criminal trials the State is required to introduce evidence, independent of a defendant's confession, that a harm or injury occurred by someone's criminal act. [cites removed]. Since then, however, the classes of crime have become more numerous and "modern statutes tend to define offenses more precisely and in greater detail than traditional case law." [cites removed]. As a result, defining the corpus delicti, or in other words, defining what the State must show to establish that the charged crime was committed before a confession may be admitted, [cites removed] has become more difficult and it has made the rule even more unworkable." (underline added for emphasis)

Then, at Id. ¶ 49, the Court stated

> "Under the trustworthiness standard, the State must still establish "[a]ll elements of the offense." [cites removed]. However, the elements may be established by independent evidence of the crime, a corroborated confession, or a combination of both. Id. Thus, the State does not have to provide independent evidence that a harm or injury occurred by criminal act before a confession may be admitted to help establish guilt." (underline added for emphasis)

And, at Id. ¶ 51, the Court stated

> "Substantial independent evidence supporting the trustworthiness of a confession need not necessarily include independent evidence of the crime. In cases such as this one, where there is no evidence of the crime independent of the confession, the State may nevertheless "establish the trustworthiness of the confession with other evidence typically used to bolster the credibility and reliability of an out-of-court-statement." [cites removed]."

In these paragraphs, the Court points out that, under the Corpus Delicti Rule, the introduction of a confession had to follow the establishment that a crime had occurred, while the Trustworthiness Standard version of the corroboration rule simply had to evince a level of trustworthiness of the person giving the confession. However, as pointed out at Id. ¶ 42, the necessity of proving the basic elements that a crime occurred has become more difficult, not less stringent. The court goes further, at Id. ¶ 49, by stating that the State must establish all elements of the offense, yet nowhere did the Court define the elements of any crime to be less than the bare minimum

standards produced at Id. ¶ 16, and, though the State "does not have to provide independent evidence that a harm or injury occurred by criminal act before a confession may be admitted," it is clear that an actual harm or injury must still exist and must be substantiated, either by independent evidence after the introduction of the confession or by the confession itself. Finally, at Id. ¶ 51, the Court states that "where there is no evidence of the crime, independent of the confession, the State may nevertheless 'establish the trustworthiness of the confession,'" thus pointing out, once again, that, as stated at Id. ¶ 49, either independent evidence must exist to substantiate a crime having been committed or a confession of the crime must exist ("the elements may be established by independent evidence of the crime, a corroborated confession, or a combination of both").

In *Manning v. United States*, 215 F.2d 945, (10th Cir. 09/09/1954), an analysis and result are found that mirror the *State v. Mauchley*, supra, decision.

The Court, in *Manning v. United States*, supra, discussed corroboration of the corpus delicti, and decided that a confession can provide proof of the elements of a crime, but that, whether from the confession itself or from

factual evidence of the corpus delicti, the State must prove that a crime has occurred.

The Court, at Id. ¶¶ 16 through 19, stated

> "The term "corpus delicti" is not synonymous with the whole of the charge. If the government must prove the whole charge, in order to corroborate the confession, of what use is the confession? As Wigmore says, 7 Wigmore on Evidence (3d ed. 1940) Supplement 1953, Sec. 2072, page 402, this "would be absurd". And, of course, it is not the law.
>
> "If the term "corpus delicti" does not signify the whole of the charge, what then is the meaning of the phrase?
>
> "Wigmore tells us that analysis of any crime will show three elements: First, the fact of an injury or a loss, as, in homicide, a dead person; in arson, a house burned; in larceny, property missing. Secondly, the fact of somebody's criminality (in contrast, e.g. to accident) as the cause of the injury or loss. The proof of these two elements involves the proof of the commission of a crime by somebody. Thirdly, the fact of the connection of the accused with the crime - his identity as the criminal, or the guilty agent through whom the wrong has occurred. 7 Wigmore on Evidence (3d ed. 1940) Sec. 2072, page 401.
>
> "Most American courts take the view that the phrase "corpus delicti" includes both the first and second elements, but does not include the third. In this view of the matter the rule requires corroboration of the confession by proof of (1) the fact of an injury or loss, and of (2) the fact of somebody's criminality as the cause of the loss or injury."

Then, at Id. ¶ 35, the Court stated

> "In the opinion the court said: "The corpus delicti does not properly include, as a third element, the agency of the accused as the criminal. This would make the term synonymous with the whole of the charge, and such a definition has been repudiated. See 4 Wigmore, Evidence (2d Ed. 1923) ? 2072(3), and therein cited Messel v. State, 176 Ind.

> 214, 95 N.E. 565 (rape under age), and State v. Schyhart, Mo.Sup., 199 S.W. 205 (killing cattle). It would require, in view of the corroboration rule, that the whole of the charge, including the criminal agency of the accused, be evidenced independently of the confession.It is to be noted, however, that in certain types of crimes involving scienter on the part of the accused it is not possible to separate, either conceptually or practically - that is in respect of the proof - the scienter, as an element of the corpus delicti, and the agency of the accused. So in the crime of receiving stolen goods knowing them to be stolen, and in the crime at bar, it is not possible to separate, either conceptually or practically, the element of guilty knowledge in the transportation and the element of agency of the accused as the criminal. But this cannot operate to diminish the duty of the Government to present evidence of both elements of the corpus delicti independent of the confession."" (underline added for emphasis)

Though both *State v. Mauchley*, supra, and *Manning v. United States*, supra, declare that a confession can supply proof of the elements of a crime (i.e. the "corpus delicti" as well as the "connection of the accused with the crime"), there is no confession in evidence in this case, and facts in evidence show that there was no injury and no violation of a legal right. Thus, even the plaintiff admits that the two most basic elements of a crime were absent in this case.

Victimless Crimes vs. Non-Crimes

Defendant is not arguing that there is no such thing as a "victimless crime" but only that Defendant's act, acts, or omission to act, did not constitute a crime,

victimless or not. The Utah Supreme Court recognizes that victimless crimes exist, but even in victimless crimes, a crime must have been committed. Victimless crimes might include, among other things, vandalism to public property, failure to pay taxes, etc, where no specific person or individual received harm yet an injury, loss or harm still occurred, and the public, in general, suffered the loss. In this case, however, since there is no injury, loss or harm, either to any individual or to the public at large, there is no evidence that a crime has been committed.

Statutory Presumption

The violation of a statutory prohibition, in and of itself, operates to create a presumption that a specific harm has occurred, and standing alone without rebuttal, that presumption is sufficient for the purpose of proving that a crime was committed. However, once a defendant, either by clear and convincing proof to the contrary or by the plaintiff's own admission or testimony, has provided evidence to the court which evinces the fact that there is no injury associated with the case, particularly where there is no attempted or actual malice, the presumption must fail and the plaintiff must prove by a showing of facts that an injury, loss or harm did in fact occur,

rather than simply relying on the statutorily-created presumption of an injury.

To be clear, Defendant is not claiming that, absent an injury-in-fact, a prosecutor representing the State or a municipality may not prosecute a defendant for violation of a statute, but only that once (1) evidence is introduced by the defendant, or (2) testimony is given under oath by the plaintiff's only witness, which specifically evinces that no injury has occurred (e.g. testimony given under oath by the prosecution's only witness that "there is no injury in this case" or an equivalent thereto), the plaintiff may no longer rely upon the statutorily-created presumption that an injury occurred to some entity, and must then introduce its own evidence that an injury did in fact occur, whether that injury be to an individual or to society as a whole.

In other words, consistent with the case-law precedent of this and every other State as well as that of the United States, States and their municipalities have standing to prosecute crimes perpetrated against an individual or against society as a whole, so long as there is either a presumption that an injury has occurred or factual evidence that an injury has occurred; however, once the presumption of an injury is rebutted, the plaintiff must provide

factual evidence of an injury to an individual or to society as a whole, or the defendant must be acquitted.

POINT III

The trial court's conclusion that Defendant violated UCA 41-6a-601 is inconsistent with Utah law and case precedent

The facts show that there were no conditions or actual or potential hazards that would make Defendant's speed unreasonable or imprudent.

Case Law

In *State v. Pilcher*, supra, at ¶ 19, the Utah Supreme Court said

> "A statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited. The statute need only be as definite and certain as the subject matter permits. Section 41-6-46 establishes speed limits within which an automobile may be operated: at a reasonable and prudent speed when any actual or potential hazard exists, and when no hazard exists, at a speed reasonable and prudent under the circumstances, with 20, 25, and 55 miles per hour being prima facie evidence of what is reasonable and prudent." (underline added for emphasis)

At Id. ¶ 22, the Utah Supreme Court, relying on the reasoning of a New York State Appellate court for an adequate explanation, quoted the other court as saying

> "The statute requires that the operator of a car shall not proceed at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. This test can be applied in evaluating the act or acts or omission to act under conditions that are actual and potential hazards at

> certain speeds... The statute as worded is an adequate standard by which a driver's conduct can be tested and is, therefore, held to be no abridgement of... constitutional rights..."

To be sure that there was no misinterpretation of its decision, and in support of the explicit prohibition found in UCA 41-6-46 (1978), the Utah Supreme Court, at Id. ¶ 12, referenced footnote 3 (located at Id. ¶¶ 31 and 32), which states

> "We note defendant's contention that 'if a defendant is not allowed to present evidence as to road conditions and comparable factors then he is denied due process.' However, defendant was allowed to present evidence to rebut the prima facie evidence as to the unreasonableness of his speed by cross-examination of the prosecution witness and by his testimony given in his own defense.
>
> "The statute, the pertinent portions of which are in the main text, appears to allow as much. Subsection (2) establishes prima facie evidence of unreasonable speed when that speed is exceeded. Subsection (1) prohibits "speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing" without regard to posted speed limits." [4] (underline added for emphasis)

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[4] This Court may note that the Utah Supreme Court affirmed Pilcher's conviction. However, Pilcher did not raise the issue of conditions and hazards or of the reasonable and prudent standard for speeding in his appeal. The Court had no choice but to affirm Pilcher's conviction once the constitutionality of the statute was settled, since it was the only cognizable issue raised by Pilcher in his appeal.

To show its reliance upon a decision in a specific case and its deference to and reliance upon the analysis contained therein, the Utah Supreme Court, at the end of footnote 3, then referenced *State of Idaho v. Trimming*, supra.

Prior to *State v. Pilcher*, supra, *State of Idaho v. Trimming*, supra, was not Utah case precedent and had never even been mentioned in a Utah Appellate Court decision (and has not since); the Utah Supreme Court, therefore, had no reason to justify its actions in the *State v. Pilcher, supra,* case, in relation to *State of Idaho v. Trimming, supra,* decision. Therefore, the only reason the Court could have for referencing *State of Idaho v. Trimming*, supra, was its reliance upon the analysis done by the *State of Idaho v. Trimming*, supra, court (as to the interpretation of the same legislated language which was before the Utah Supreme Court), which the Utah Supreme Court then used as the basis and foundation for its view that the language of UCA 41-6-46 (1978) was not vague, and therefore constitutional. The fact that the *State of Idaho v. Trimming*, supra, decision

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It is true that Pilcher was allowed to rebut the prima facie evidence, as was Defendant, but only Defendant attempted to do so.

was not incorporated into the body of the *State v. Pilcher*, supra, ruling is simply a function of the extensive nature of the analysis found in the *State of Idaho v. Trimming*, supra, decision. By referencing *State of Idaho v. Trimming*, supra, the Utah Supreme Court made the analysis contained therein case precedent for Utah law.

Although a 3-2 decision, *State of Idaho v. Trimming*, supra, has been cited by the higher courts of several states as foundation for rulings on cases regarding Speeding with facts and circumstances that match this case. Like the higher courts of several other States, the Utah Supreme Court cited *State of Idaho v. Trimming*, supra, as foundation for and interpretation of Utah's Speeding law and therefore that decision is relevant to this proceeding.

At ¶ 10 of *State of Idaho v. Trimming*, supra, the Idaho Supreme Court stated

> "Appellant has appealed from a judgment of conviction of driving an automobile on a public highway at a speed greater than was reasonable and prudent. The appeal is designed to test whether... driving a motor vehicle on a public highway in excess of the posted speed limit, <u>in and of itself</u>, constitutes a crime, <u>particularly</u> in the absence of any showing of conditions as to render the speed unreasonable and imprudent." (underline added for emphasis)

The court then stated, at Id. ¶ 12, that the Trimming defendant was charged with driving

> "his motor vehicle on a certain highway... 'at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing on said highway, to wit: at a speed of 75 miles an hour, which speed was 15 miles per hour greater than the prima facie limit of 60 miles per hour as established and posted on said highway."

At Id. ¶¶ 21 through 24, the court recites the facts, and those facts, other than location and numbers, match the facts of this case exactly. Particularly interesting is the summation of evidence found at Id. ¶ 24, which states

> "that there are no circumstances other than the rate of speed at which defendant's vehicle was being driven which would constitute a violation of law."

This is precisely what is shown by the facts in this case.

Particularly instructive to Defendant's case are ¶¶ 35 through 38 of the *State of Idaho v. Trimming*, supra, decision, where the court stated

> "The conduct, which [the statute] renders unlawful, is the driving of a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the hazards actual and potential then existing. If one drives in excess of certain designated speeds, as for instance, in excess of 60 miles an hour on a highway outside of an urban district, as did appellant, then such driving constitutes prima facie evidence that "the speed is not reasonable or prudent." Driving, however, in excess of such specified speed limit is not per se unreasonable or imprudent, but presumed to be under a rebuttable presumption, in the absence of evidence sufficient to overcome the presumption.

"The trial court's finding that the driving was greater than reasonable and prudent "under the facts set forth in the stipulation," in effect entirely disregarded the evidence as stipulated by counsel for both parties. Such is true simply because the evidence establishes without dispute that no circumstances existed at the time and place of the driving other than the speed at which appellant was driving the vehicle. Appellant's evidence offered in rebuttal of the presumption that such driving was not reasonable or prudent, to which respondent stipulated, is: that no condition or hazard whatsoever or at all existed which would render appellant's driving, at a speed of 75 miles an hour over the stretch of one-half mile, unreasonable or imprudent; that no actual or potential hazard then and there existed, including any weather or road hazard, or condition of appellant's automobile; that appellant so controlled his speed as was necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care, although in fact there was no other person, vehicle, or other conveyance on or so entering the highway at the time and place; and that in fact there was no intersecting crossroad.

"[The statute] does not prohibit the driving in excess of the limits specified. But if one does so drive, then he must assume the burden of proving that in so driving he was not unreasonable or imprudent under the conditions to which the statute refers. And if his evidence shows, as does appellant's in the case here, that no condition existed either actual, potential, or at all, which would render his speed "greater than is reasonable and prudent," then the burden of proof, of overcoming the prima facie presumption of unreasonable and imprudent driving, is fully met. There being no evidence of unreasonable or imprudent driving "under the conditions" then appellant was entitled to acquittal of the charge of unreasonable and imprudent driving, as a matter of law, the evidence being insufficient, as a matter of law, to support the court's finding of unreasonable and imprudent driving "under the facts as set forth in said stipulation."" (underline added for emphasis)

Going further, the court, at Id. ¶¶ 57 and 58, stated

> "The State throughout the case has the duty of proving beyond a reasonable doubt the defendant was driving at a speed in violation of the specific statutory provisions, and unless the State sustains that burden there should be a finding of not guilty. All that the presumption which is raised by a violation of the posted speed limit does is to create a prima facie case, and, standing alone and with no conflicting evidence, it would be sufficient to support a judgment. This presumption fails when the testimony of the State's witnesses is inconsistent with the presumption and in its very essence rebuts it." (underline added for emphasis)

Continuing, at Id. ¶¶ 69 and 70, the court states

> "The statutory provision that any speed in excess of the specified or established limits shall be prima facie evidence that the speed is not reasonable or prudent, is a rule of evidence and not a rule of substantive law. [cites removed]
>
> "Prima facie evidence," referred to in statutory enactments, is such evidence as in the judgment of the law is sufficient to establish guilt and, if credited by the finder of the facts, it is sufficient for that purpose, unless rebutted or the contrary proved. [cites removed]" (underline added for emphasis)

Statutory Language

In a very effective way, the *State of Idaho v. Trimming*, supra, decision deals with each of the constructs found in UCA 41-6a-601.

UCA 41-6a-601(1), which contains the prohibitory portion of the statute, states:

> (1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the

existing conditions, giving regard to the actual and potential hazards then existing, including when:

(a) approaching and crossing an intersection or railroad grade crossing;
(b) approaching and going around a curve;
(c) approaching a hill crest;
(d) traveling upon any narrow or winding roadway; and
(e) approaching other hazards that exist due to pedestrians, other traffic, weather, or highway conditions. (underline added for emphasis)

In contrast, UCA 41-6a-604(1), which contains the prohibitory portion of the speeding law within a school zone, states:

(1) A person may not operate a vehicle at a speed greater than 20 miles per hour in a reduced speed school zone as defined in Section **41-6a-303.** (underline added for emphasis)

There is a difference in what is specifically prohibited under these two statutes. Under the basic Speeding law applicable throughout the state (UCA 41-6a-601) the prohibited conduct is operating "a vehicle at a speed greater than is reasonable and prudent under the existing conditions". As an exception to the basic Speeding law, under the Speeding law applicable within a school zone (UCA 41-6a-604) the prohibited conduct is operating "a vehicle at a speed greater than 20 miles per hour". In the former there is a lack of a maximum speed, so long as any

hazards and conditions do not preclude it; in the latter there is a maximum speed, regardless of the conditions.

It should be noted that UCA 41-6a-601(1) is not subject to UCA 41-6a-601(2) or (3), or to UCA 41-6a-602 or UCA 41-6a-603. It must, therefore, be held to take precedence over, or be held above, these particular SubSections and Statutes, or in other words, it must be viewed as the primary, overriding purpose for UCA 41-6a-601.

The facts in evidence in this case are that no conditions or actual or potential hazards existed (among which would be those listed in UCA 41-6a-601(1)) which would preclude Defendant's speed from being reasonable and prudent.

UCA 41-6a-601(2) states:

> (2) Subject to Subsections (1) and (4) and Sections **41-6a-602** and **41-6a-603**, the following speeds are lawful:
> (a) 20 miles per hour in a reduced speed school zone as defined in Section **41-6a-303**;
> (b) 25 miles per hour in any urban district; and
> (c) 55 miles per hour in other locations.

There are, of course, many prosecutors and lower-court judges, who would argue that the limits specified in UCA 41-6a-601(2) are maximum speed limits and that the UCA 41-6a-601(1) "reasonable and prudent" language protects vehicle operators up to and including those speed limits.

This is precisely the argument proffered by the minority of the *State of Idaho v. Trimming*, supra, court. However, that logic is not supported by the majority decision of the *State of Idaho v. Trimming*, supra, court, and is instead soundly denounced by it when the court, at Id. ¶ 35, stated "[The statute] does not prohibit the driving in excess of the limits specified."

It is unnecessary to point out that it is the majority decision of the *State of Idaho v. Trimming*, supra, court with which the Utah Supreme Court agreed when they cited the *State of Idaho v. Trimming*, supra, decision, in *State v. Pilcher*, supra, footnote 3.

This Court should take judicial notice that, in support of the Utah Supreme Court's interpretation of and agreement with the *State of Idaho v. Trimming*, supra, majority decision, the State of Utah has many urban districts that have posted speed limits of 35, 40, 45 mph and higher, and other locations within the state that are posted as high as 65, 70, 75, and even 80mph, so the minority's erroneous interpretation, in the State of Idaho v. Trimming, supra, court, of the same language found in UCA 41-6a-601(2) as maximum limits simply flies in the face of logic. Simply put, UCA 41-6a-601(2) can not be meant by the Utah Legislature to be the maximum speeds that are to

be considered reasonable and prudent but must instead be interpreted as the minimum speeds that travelers upon the highways of the State can expect unless notified otherwise. In short, though UCA 41-6a-601(2) specifies certain speed limits that must be considered lawful, it simply does not state what is unlawful, it does not contain any prohibitory language, and it is not a prohibitory clause. These specifically listed speeds must be considered as the minimum speeds that are to be posted in the specified locations, and not the maximum speeds that a vehicle may be operated at in these various locations. The only exception to this is the 20-mile per hour speed-limit in a reduced speed school zone, and this is only an exception because it is specifically carved out as such in UCA 41-6a-604 as a maximum speed limit. No other applicable exceptions to the basic Speeding law can be found within the UCA.

Additionally, at ¶¶ 17 and 18 of *State of Idaho v. Trimming*, supra, these same indications of which speeds were considered lawful in certain areas also existed, yet the court had to rule that the Trimming defendant must be acquitted because, as the court said at Id. ¶ 35,

> "the conduct, which [the statute] renders unlawful, is the driving of a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the

> hazards actual and potential then existing," (underline added for emphasis)

and, as the court said at Id. ¶ 38,

> "[the statute] does not prohibit driving in excess of the limits specified. But if one does so drive, then he must assume the burden of proving that in so driving he was not unreasonable or imprudent under the conditions to which the statute refers", (underline added for emphasis)

which Defendant has done, exactly as did the Trimming defendant.

Additionally, UCA 41-6a-601(2) is specifically made subject to UCA 41-6a-601(1) (in addition to other particular SubSections and Statutes), which is evidence that the Utah Legislature intended for UCA 41-6a-601(1) to take precedence over UCA 41-6a-601(2).

UCA 41-6a-601(3) states:

> (3) Except as provided in Section **41-6a-604**, any speed in excess of the limits provided in this section or established under Sections **41-6a-602** and **41-6a-603** is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful. (underline added for emphasis)

This is, of course, the clause that law enforcement officers rely upon for their authority to arrest or detain a vehicle operator, and to cite the driver when the driver have exceeded the posted speed limit.

However, as was the case with the Trimming defendant, the facts in evidence in this case show that Defendant's

burden of proof, of overcoming the prima facie presumption of unreasonable and imprudent driving, is fully met and that, therefore, Defendant did not violate any law and must, therefore, be acquitted.

Identical to the facts, testimony, and evidence in the *State of Idaho v. Trimming*, supra, case, the facts, testimony, and evidence before the Court in this case are that:

a) Other than Defendant's speed exceeding the posted speed limit, Defendant was obeying the law; *See* R. at 75 (Tr. at 13, 55).

b) There were no unusual weather or road conditions; *See* R. at 75 (Tr. at 13, 55).

c) There were no actual or potential hazards on or around the highway; *See* R. at 75 (Tr. at 13, 14, 55).

d) There was nothing unusual about the condition of the vehicle or its operator; *See* R. at 75 (Tr. at 14).

e) Defendant did not cause any unusual behavior in or injury to anyone; *See* R. at 75 (Tr. at 14, 55). and

f) Other than Defendant's speed exceeding the posted speed limit, there were no actual or potential

hazards or conditions that made Defendant's driving or speed unreasonable or imprudent. *See* R. at 75 (Tr. at 14, 27, 56).

When the facts, testimony, and evidence are thus, substantive law (UCA 41-6a-601(1)) must always take precedence over prima facie evidence (UCA 41-6a-601(3)). Due to the foregoing facts and evidence, the posted speed limit is, therefore, irrelevant in this case.

Lastly, UCA 41-6a-601(4) states:

> (4) The governor by proclamation in time of war or emergency may change the speed limits on the highways of the state.

UCA 41-6a-601(4) is, of course, not an issue in this case since this State is not currently in a time of war or emergency during which the governor has proclaimed any changes to any speed limits on the highways of this State.

It should be noted that, although UCA 41-6a-603 allows each county and municipality to "determine the reasonable and safe speed limit for each highway or section of highway under its jurisdiction ..., each speed limit shall be established in accordance with" sections (1), (2), (3), and (5) of UCA 41-6a-602, UCA 41-6a-603 does not contain any prohibitory language that would allow such speed limits to take precedence over UCA 41-6a-601(1), and UCA 41-6a-601(1) is specifically not subject to UCA 41-6a-603. Additionally,

UCA 41-6a-207 states that local and municipal ordinances may not conflict with the statutes found in UCA Title 41, Chapter 6a, thus the foregoing discussion of UCA 41-6a-601 would apply to Defendant's case whether he were charged under the State statute of UCA 41-6a-601 or under a county or municipal statute for a Speeding violation, and lest the meaning of the word "highway", as defined for UCA Title 41, Chapter 6a, be misconstrued so as not to include those roads and streets within a county or municipality, Defendant here points out that the Utah Legislature has defined the word "highway" at UCA 41-6a-102(21) as "the entire width between property lines of every way or place of any nature when any part of it is open to the use of the public as a matter of right for vehicular travel."

Also, since UCA 41-6a-601(2) and (3) are subject to UCA 41-6a-602, it should be noted that UCA 41-6a-602(1)(b) requires that a traffic engineering and safety study be used as the basis for any speed limit (which, even then, is still no more than prima facie evidence) posted on a highway or section of highway, and that this is not limited to State Highways, as is the case with UCA 41-6a-602(1)(a); UCA 41-6a-602(2) allows for different prima facie speed limits to be posted when they are dependent upon exceptional conditions; UCA 41-6a-602(3) sets certain

maximums that "posted" speed limits (which are not maximum speed limits, but rather are still prima facie evidence and thus do not override UCA 41-6a-601(1)) in specific areas may be posted, and overrides the need for a traffic engineering and safety study as the basis for these particular posted speed limits in these particular areas; UCA 41-6a-602(4) requires consultation with various entities when erecting or changing posted speed limits in particular areas; UCA 41-6a-602(5) declares that posted speed limits are effective when their respective signs give appropriate notice; and nothing in UCA 41-6a-602 is worded in such a way that it could possibly take precedence over or supersede UCA 41-6a-601(1), nor does it contain any prohibition to the driver of a vehicle.

To summarize UCA 41-6a-601, the statute provides that (1) an individual is prohibited from traveling on a section of highway at a speed greater than is reasonable and prudent for the then-existing conditions; (2) certain speeds are authorized for certain types of highways, and, without evidence of hazards to the contrary, travelers may expect that they are authorized to travel at those speeds; (3) a traffic engineering and safety study may be obtained for a section of highway, and, based upon that study, a speed limit may be posted on that section of highway to

serve as prima facie evidence of a reasonable and prudent speed for that section of highway, providing that if a vehicle is traveling at a rate of speed higher than the posted limit, it is the traveler's burden to show, by their own and or by witness testimony, that the existing conditions did not preclude the speed from being reasonable and prudent, or if the vehicle is traveling at a rate of speed lower or equal to the posted limit, it is the prosecution's burden to show, presumably by an injury to another, that the speed was precluded by the existing conditions; and (4) the governor may change the limits during particular times and circumstances.

Model Utah Jury Instructions

In *Anderson v. Bradley*, 590 P.2d 339 (1979), the Utah Supreme Court, at ¶ 13, quoting one of the several jury instructions given, said:

> "A driver of a motor vehicle has a duty not to drive the vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, and having regard to the actual and potential hazards then existing, and speed is to be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care."

The Court, at Id. ¶ 19, then stated:

> "We opine that the instructions given were essentially correct and that they fairly stated the law as to the parties' respective duties."

The current Model Utah Jury Instructions, Second Edition, Criminal Instructions, does not provide a jury instruction for speed. However, the Model Utah Jury Instructions, Second Edition, Civil Instructions, CV608 (Speed), for which there is a reference to *Anderson v. Bradley*, supra, states:

> "A driver has a duty to drive at a safe speed. The speed limit at the place of this accident was [__] miles per hour. Driving at a speed in excess of the limit may be evidence of fault. However, conditions and circumstances may allow a driver to drive at a [lower/greater] speed with proper regard for existing and potential hazards."

Though the jury instruction quoted by the Court in *Anderson v. Bradley*, supra, is more explicit, both versions of the jury instruction for Speed clearly show that the overriding concern for the speed at which a vehicle is driven is the conditions and actual and potential hazards existing, and not the posted speed limit.

Conclusion and Precise Relied Sought

UCA 41-6a-601 is vague, and therefore unconstitutional; Plaintiff did not prove beyond a reasonable doubt that a crime had been committed, by

Defendant or any other entity; and the facts and evidence show that Defendant did not violate UCA 41-6a-601.

Defendant requests that the Court find that UCA 41-6a-601 is insufficiently explicit to inform the ordinary reader what conduct is prohibited and is therefore unconstitutional because it is vague. Defendant understands, however, that a statute is afforded a presumption of validity and that any reasonable doubt is resolved in favor of constitutionality. Therefore, should the Court find UCA 41-6a-601 to be constitutional, Defendant then requests the Court to provide a more definite statement, direction, and instruction to both the legally-educated individual as well as the "ordinary reader" as to the interpretation of UCA 41-6a-601, including instruction as to how and or under what conditions the prima facie evidence created by UCA 41-6a-601(2) and (3) may be rebutted.

Defendant further requests that this Court find that, according to the facts in evidence, Defendant did not commit a crime, that Defendant did not violate the prohibitions found in UCA 41-6a-601, reverse the trial court's verdict of guilty, and award those costs specified in Utah R. App. P. 34(c) to Defendant.

Respectfully,

Scott Bishop

Certificate of Compliance with Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because:

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Scott Bishop

Dated: February 10, 2012

Certificate of Service

I hereby certify that on this 10th day of February, 2012, two (2) true and correct copies of the foregoing Brief of Appellant were hand-delivered to the Appellee at the following address:

City of Riverdale, City Attorney
4600 South Weber River Drive
Riverdale, UT 84405

Scott Bishop

ADDENDA

UCA 41-6-46 (1978)

41-6-46. Speed regulations - Safe and appropriate speeds at intersections, crossings, and curves - Prima facie speed limits - Emergency power of the governor.

(1) No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(2) Where no special hazard exists the following speeds shall be lawful but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

(a) Twenty miles per hour.

When passing a school building or the grounds thereof during school recess or while children are going to or leaving school during opening or closing hours; provided, that local authorities may require a complete stop before passing a school building or grounds at any of said periods.

(b) Twenty-five miles per hour in any urban district.

(c) Fifty-five miles per hour in other locations.

The speed limits set forth in this section may be altered as authorized in **subsection (3)** and sections **41-6-47** and **41-6-48.**

(3) The governor by proclamation, in time of war or emergency, may change the speed on the highways of the state.

UCA 41-6a-102

As used in this chapter:

...

(21) "Highway" means the entire width between property lines of every way or place of any nature when any part of it is open to the use of the public as a matter of right for vehicular travel.

...

UCA 41-6a-207

41-6a-207. Uniform application of chapter -- Effect of local ordinances.

(1) The provisions of this chapter are applicable throughout this state and in all of its political subdivisions and municipalities.

(2) A local highway authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter.

(3) A local highway authority may adopt:

(a) ordinances consistent with this chapter; and

(b) additional traffic ordinances not in conflict with this chapter.

UCA 41-6a-303

41-6a-303. Definition of reduced speed school zone -- Operation of warning lights -- School crossing guard requirements -- Responsibility provisions -- Rulemaking authority.

(1) As used in this section "reduced speed school zone" means a designated length of a highway extending from a school zone speed limit sign with warning lights operating to an end school zone sign.

(2) The Department of Transportation for state highways and local highway authorities for highways under their jurisdiction:

(a) shall establish reduced speed school zones at elementary schools after written assurance by a local highway authority that the local highway authority complies with Subsections (3) and (4); and

(b) may establish reduced speed school zones for secondary schools at the request of the local highway authority.

(3) For all reduced speed school zones on highways, including state highways within the jurisdictional boundaries of a local highway authority, the local highway authority shall:

(a) (i) provide shuttle service across highways for school children; or

(ii) provide, train, and supervise school crossing guards in accordance with this section;

(b) provide for the:

(i) operation of reduced speed school zones, including providing power to warning lights and turning on and

off the warning lights as required under Subsections (4) and (5); and

(ii) maintenance of reduced speed school zones except on state highways as provided in Section **41-6a-302**; and

(c) notify the Department of Transportation of reduced speed school zones on state highways that are in need of maintenance.

(4) While children are going to or leaving school during opening and closing hours all reduced speed school zones shall have:

(a) the warning lights operating on each school zone speed limit sign; and

(b) a school crossing guard present if the reduced speed school zone is for an elementary school.

(5) The warning lights on a school zone speed limit sign may not be operating except as provided under Subsection (4).

(6) (a) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the Department of Transportation shall make rules establishing criteria and specifications for the:

(i) establishment, location, and operation of school crosswalks, school zones, and reduced speed school zones;

(ii) training, use, and supervision of school crossing guards at elementary schools and secondary schools; and

(iii) content and implementation of child access routing plans under Section **53A-3-402**.

(b) If a school crosswalk is established at a signalized intersection in accordance with the requirements of this section, a local highway authority may reduce the speed limit at the signalized intersection to 20 miles per hour for a highway under its jurisdiction.

(7) Each local highway authority shall pay for providing, training, and supervising school crossing guards in accordance with this section.

UCA 41-6a-601

41-6a-601. Speed regulations -- Safe and appropriate speeds at certain locations -- Prima facie speed limits -- Emergency power of the governor.

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing

conditions, giving regard to the actual and potential hazards then existing, including when:

(a) approaching and crossing an intersection or railroad grade crossing;

(b) approaching and going around a curve;

(c) approaching a hill crest;

(d) traveling upon any narrow or winding roadway; and

(e) approaching other hazards that exist due to pedestrians, other traffic, weather, or highway conditions.

(2) Subject to Subsections (1) and (4) and Sections **41-6a-602** and **41-6a-603**, the following speeds are lawful:

(a) 20 miles per hour in a reduced speed school zone as defined in Section **41-6a-303**;

(b) 25 miles per hour in any urban district; and

(c) 55 miles per hour in other locations.

(3) Except as provided in Section **41-6a-604**, any speed in excess of the limits provided in this section or established under Sections **41-6a-602** and **41-6a-603** is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

(4) The governor by proclamation in time of war or emergency may change the speed limits on the highways of the state.

UCA 41-6a-602

41-6a-602. Speed limits established on state highways.

(1) (a) The Department of Transportation shall determine the reasonable and safe speed limit for each highway or section of highway under its jurisdiction.

(b) For each highway or section of highway, each speed limit shall be based on a traffic engineering and safety study consistent with the requirements and recommendations in the most current version of the "Manual on Uniform Traffic Control Devices."

(c) The traffic engineering and safety studies shall include:

(i) the design speed;

(ii) prevailing vehicle speeds;

(iii) accident history;

(iv) highway, traffic, and roadside conditions; and

(v) other highway safety factors.

(2) In addition to the provisions of Subsection (1), the Department of Transportation may establish different speed limits on a highway or section of highway based on:

(a) time of day;

(b) highway construction;
(c) type of vehicle;
(d) weather conditions; and
(e) other highway safety factors.

(3) (a) Except as provided in Subsection (3)(b) and (c), a posted speed limit may not exceed 65 miles per hour.

(b) Except as provided in Subsection (3)(c), a posted speed limit on a freeway or other limited access highway may not exceed 75 miles per hour.

(c) (i) The department may establish a posted speed limit on a freeway or other limited access highway that exceeds the maximum speed limit in Subsection (3)(b) if the speed limit is:

(A) based on a highway traffic engineering and safety study; and

(B) is located on a portion of Interstate 15 that is between milepost 222 and milepost 64.

(ii) The department shall consider the roadway geometry and population density that may be appropriate for a higher speed limit when establishing a speed limit under this Subsection (3)(c).

(iii) If the department establishes a posted speed limit that exceeds the limit under Subsection (3)(b), the department shall evaluate the results and impacts of increasing a speed limit under this Subsection (3)(c).

(iv) The department shall report the findings of an evaluation conducted under Subsection (3)(c)(iii) to the Transportation Interim Committee no later than one year after a speed limit has been imposed under this Subsection (3)(c).

(d) This Subsection (3) is an exception to the provisions of Subsections (1) and (2).

(4) When establishing or changing a speed limit, the Department of Transportation shall consult with the following entities prior to erecting or changing a speed limit sign:

(a) the county for state highways in an unincorporated area of the county;

(b) the municipality for state highways within the municipality's incorporated area;

(c) the Department of Public Safety; and

(d) the Transportation Commission.

(5) The speed limit is effective when appropriate signs giving notice are erected along the highway or section of the highway.

UCA 41-6a-603

41-6a-603. Speed limits established by counties and municipalities.

(1) A county or municipality may determine the reasonable and safe speed limit for each highway or section of highway under its jurisdiction as specified under Title 72, Chapter 3, Highway Jurisdiction and Classification Act.

(2) Each speed limit shall be established in accordance with the provisions of Subsections **41-6a-602**(1), (2), (3), and (5).

UCA 41-6a-604

41-6a-604. Maximum speed in a school zone -- Penalty -- Minimum fines -- Compensatory service -- Waiver -- Recordkeeping.

(1) A person may not operate a vehicle at a speed greater than 20 miles per hour in a reduced speed school zone as defined in Section **41-6a-303.**

(2) (a) A violation of Subsection (1) is a class C misdemeanor and the minimum fine:

(i) for a first offense shall be calculated according to the following schedule:

Vehicle Speed	Minimum Fine
21 - 29 MPH	$ 50
30 - 39 MPH	$ 125
40 MPH and greater	$ 275

(ii) for a second and subsequent offense within three years of a previous conviction or bail forfeiture shall be calculated according to the following schedule:

Vehicle Speed	Minimum Fine
21 - 29 MPH	$ 50
30 - 39 MPH	$ 225
40 MPH and greater	$ 525

(b) (i) Except as provided under Subsection (2)(a)(ii), the court may order the person to perform compensatory service in lieu of the fine or any portion of the fine.

(ii) The court shall order the person to perform compensatory service observing a crossing guard if the conviction is for a:

(A) first offense with a vehicle speed of 30 miles per hour or more; or

(B) second and subsequent offense within three years of a previous conviction or bail forfeiture.

(iii) The court may waive the compensatory service required under Subsection (2)(b)(ii) if the court makes the reasons for the waiver part of the record.

(3) The Driver License Division shall develop and implement a record system to distinguish:

(a) a conviction or bail forfeiture under this section from other convictions; and

(b) between a first and subsequent conviction or bail forfeiture under this section.

(4) The provisions of this section take precedence over the provisions of Sections **41-6a-601, 41-6a-602, 41-6a-603,** and **76-3-301.**

UCA 78a-4-103

78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section **63G-3-602;**

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;
(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;
(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;
(i) appeals from the Utah Military Court; and
(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Model Utah Jury Instructions, Second Edition, Civil Instructions, CV608 (Speed)

A driver has a duty to drive at a safe speed. The speed limit at the place of this accident was [__] miles per hour. Driving at a speed in excess of the limit may be evidence of fault. However, conditions and circumstances may allow a driver to drive at a [lower/greater] speed with proper regard for existing and potential hazards.

Utah R. App. P. 34

Rule 34. Award of costs.

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(c) Costs of briefs and attachments, record, bonds and other expenses on appeal. The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or

memoranda and attachments not to exceed $3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

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