

2015

Clearfield City, Plaintiff/Appellee v S. Steven Maese, Defendant/ Appellant

Utah Court of Appeals

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Case № 20150962-CA

In the Utah Court of Appeals

Clearfield City,
Plaintiff *and* Appellee,

-v-

S. Steven Maese,
Defendant *and* Appellant.

Brief of Appellant

Appeal from a conviction of Speeding, a class C misdemeanor under Utah Code § 41-6a-601, reduced to an infraction upon the City's motion.

This judgment was entered in the Second Judicial District Court, Farmington Department, the Honorable John R. Morris presiding.

The Appellant is not incarcerated.

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ORAL ARGUMENTS REQUESTED

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In the Utah Court of Appeals

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Brief of Appellant

STATEMENT OF JURISDICTION

Under Utah Code Ann. § 78A-4-103(2)(e), the Court of Appeals has jurisdiction over this matter. The Appellant, S. Steven Maese, appeals a conviction of Speeding, a class C misdemeanor under Utah Code § 41-6a-601, but reduced by motion to an infraction.

STATEMENT OF ISSUES

POINT I. The Utah Constitution states, "... no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Does the Utah Constitution's Separation of Powers clause prevent prosecutors from designating the level of an offense or is lawmaking a merely advisory exercise?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

Interpreting “the Utah Constitution is a question of law. We therefore review [the district court’s decision] for correctness....”¹ Maese preserved this issue by moving the trial court to dismiss the charges and by moving for a jury trial.²

POINT II. The Utah Supreme Court stated it observed a “virtually unanimous intention on the part of the framers of the Constitution to preserve a constitutional right to trial by jury in civil cases and in noncapital criminal cases.”³ Therefore, does Utah’s constitutional right to a jury trial require jury trials for criminal infractions?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

Again, interpreting “the Utah Constitution is a question of law. We therefore review [the district court’s decision] for correctness....”⁴ Maese preserved this issue by moving the trial court for a jury trial.⁵

¹ *State v. Hernandez*, 2011 UT 70, ¶ 3, 268 P.3d 822

² R. at 117-127, 210-11.

³ *International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418, 419 (Utah 1981).

⁴ *State v. Hernandez*, 2011 UT 70, ¶ 3, 268 P.3d 822

⁵ R. at 130-143.

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

This Court's interpretation of the following rules, statutes, and constitutional provisions is important to the issues on appeal and their full texts, along with the trial court's findings and conclusions are attached at ADDENDUM A:

RULES

- Utah Rules of Criminal Procedure 4(d);

STATUTES

- Utah Code § 76-1-105.
- Utah Code § 76-1-103(1).
- Utah Code § 76-3-402.

CONSTITUTIONAL PROVISIONS

- Utah Constitution, Article I, Section 10.
- Utah Constitution, Article I, Section 12.
- Utah Constitution, Article V, Section 1.

STATEMENT OF THE CASE

On March 21, 2013, Clearfield City charged, by information, Santiago Steven Maese with Speeding, a class C misdemeanor under Utah Code § 41-6a-601.⁶ On November 13, 2014, the City amended the charge to an infraction.⁷ On January

⁶ R. at 62.

⁷ R. at 84.

28, 2015 and on constitutional grounds, Maese moved for a jury trial.⁸ The Justice Court denied the motion.⁹

Following a bench trial on July 8, 2015, Judge James L. Beesley convicted Maese of Speeding.¹⁰ Judge Beesley sentenced Maese to three days in jail, suspending the jail upon payment of the fine.¹¹ Maese forfeited his posted bail.¹²

Maese sought a trial *de novo* and the justice court sent the case to district court.¹³ At the District court, on August 31, 2015, Maese moved to dismiss the charges.¹⁴ The District court denied Maese's motion.¹⁵ At trial on November 5, 2015, Maese verbally moved for jury trial. Maese moved for the jury under the separation of powers argument detailed in his motion to dismiss.¹⁶ The District court denied the Motion.¹⁷ The District court convicted Maese of Speeding.¹⁸

⁸ R. at 42.

⁹ R. at 39.

¹⁰ R. at 17-18.

¹¹ *Ibid.*

¹² R. at 72.

¹³ R. at 16

¹⁴ R. at 117-127.

¹⁵ R. at 169-170.

¹⁶ R. at 210-11.

¹⁷ *Ibid.*

¹⁸ R. at 178-179.

STATEMENT OF FACTS

On March 8, 2013, Trooper Scott Wilson of the Utah Highway patrol saw Santiago Steven Maese driving 15 miles per hour over the posted speed limit.¹⁹

SUMMARY OF ARGUMENT

Courts throughout Utah rely on *West Valley City v. McDonald* for the proposition that amending a misdemeanor to an infraction is perfectly legal.²⁰ And in the unpublished *Hurricane City v. Barlow*, citing *McDonald*, this Court stated in a footnote it “has previously determined that a city may charge a speeding violation as an infraction rather than a class C misdemeanor.”²¹ But this is incorrect.

McDonald holds that amending misdemeanors to infractions does not violate Utah R. Crim. P. 4(d). That holding is valid and Maese does not challenge it. But that Court specifically stated Utah constitutional arguments were unpreserved.

Yet the Utah Constitution specifically separates powers between the branches of government granting the legislative branch exclusive authority to define offenses *and designate* their penalties. Still, prosecutors across the state have usurped the essential legislative function of designating the penalties for offenses. By prosecuting a legislatively defined misdemeanor as an infraction, Clear-

¹⁹ R. at 213.

²⁰ *West Valley City v. McDonald*, 948 P.2d 371 (Utah Ct. App. 1997).

²¹ *Hurricane City v. Barlow*, 2009 UT App 115.

field City (an executive branch) impermissibly exercises an essential legislative function, violating Separation of Powers.

One of the legal side effects of reducing misdemeanors to infractions — if not the very purpose — is depriving defendants of jury trials. But statutes and court rules barring jury trials for even the most minor criminal offense, an infraction, violate the Utah Constitution. The plain text of the Utah Constitution's jury trial provision, taken with the drafters' clear intent and historical traditions of that right in Utah, guarantee the right to trial by jury in all criminal prosecutions. Any law or rule to the contrary is unconstitutional.

ARGUMENT

POINT I. Under the Utah Constitution's Separation of Powers Clause, Cities Charging and Courts Adjudicating Legislatively-Designated Misdemeanors as Infractions is Prohibited.

Allowing prosecutors to unilaterally designate a misdemeanor as an infraction is unconstitutional under the Utah Constitution's Separation of Powers clause; only the legislature can define crimes and their penalties.

A. Designating the penalty for an offense is an essential legislative function which cannot be assumed by, or delegated to, another branch.

The Utah Supreme Court stated in *Carter v. Lehi City* that prosecuting crimes is the "quintessential executive act."²² By charging and adjudicating legislatively-designated misdemeanors as infractions, prosecutors and courts unconstitutionally usurps the essential legislative function of setting criminal penalties. No statement of law or legal principle allows prosecutors to exercise the essential legislative function of designating an offense's penalty. The Legislature never delegated such authority to prosecutors or courts, nor could it under the Utah Constitution's Separation of Powers provision:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to ei-

²² *Carter v. Lehi City*, 2012 UT 2, ¶ 46, 269 P.3d 141 (citations omitted).

ther of the others, except in the cases herein expressly directed or permitted.²³

In *State v. Gallion*, the Utah Supreme Court stated the intent of Separation of Powers is to “prevent those, who exercise the power assigned by the Constitution to their department, from aggrandizement of their power, however derived, by exercising functions appertaining to another department.”²⁴

Gallion answered whether the Legislature properly delegated authority to the Utah Attorney General to add, delete, or reschedule substances proscribed by the Utah Controlled Substances Act.²⁵ The Utah Supreme Court held that delegation violated Separation of Powers because it delegated to an executive branch official the authority to define those same offenses and, effectively, fix their penalties.²⁶

That Court stated:

A determination of the elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments, which must be made exclusively by the legislature.²⁷

...

The Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested.²⁸

²³ Utah Const. Art. V, § 1.

²⁴ *State v. Gallion*, 572 P. 2d 683, 687 (Utah 1977).

²⁵ *Id.* at 685.

²⁶ *Id.* at 689.

²⁷ *Id.* at 690.

...

The power of the legislature to repeal or amend the penalty to be imposed for crime is not a matter of judicial concern. It is part of the sovereign power of the state, and it is the exclusive right of the legislature to change or amend it.²⁹

Similarly, the United States Supreme Court elucidated this bedrock principle nearly a century ago in *Ex parte United States*.³⁰ There, a federal district court judge declined to impose a mandatory minimum sentence prescribed by Congress after taking into account “the peculiar circumstances” of the defendant which the judge reckoned warranted leniency.³¹ The Court declined to recognize inherent judicial authority to disregard statutorily defined crimes and punishments crafted through the legislative process. The Court explained:

... if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to en-

²⁸ *Id.* at 687 (quoting *Western Leather and Finding Co. v. State Tax Commission*, 87 Utah 227, 231, 48 P.2d 526, 528 (1935)).

²⁹ *Id.* at 688 (quoting *Belt v. Turner*, 25 Utah 2d 380, 381, 483 P.2d 425 (1971)).

³⁰ *Ex parte United States*, 242 U.S. 27 (1916).

³¹ *See id.* at 38-39.

force a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.³²

Where the overstepping judge in *Ex parte United States* actually considered facts and circumstances warranting leniency, here, the district court considered nothing before allowing a misdemeanor to be charged as an infraction.

By designating speeding a misdemeanor, the Legislature determined that a jail sentence may be warranted, at least under some set of circumstances. But here, the prosecution decrees (and the trial court allows) that no set of circumstances exists warranting a jail sentence; not for a habitual violator; not for putting others in extreme danger. In this case, the trial court “permanently set aside” a “plain legislative command fixing a specific punishment for crime,” without inquiring into the offense’s underlying factual allegations or the offender.

Beyond *State v. Gallion* and *Ex parte United States*, we find another Utah analogue in *State v. Mohi*. There, the Utah Supreme Court struck a statute allowing prosecutors to choose, with no statutory guidance, whether to prosecute minors charged with serious offenses as juveniles or adults, as unconstitutional.³³ It stressed that “the classic ‘prosecutorial discretion’ question is *which* law to apply

³² *Id.* at 42.

³³ *State v. Mohi*, 901 P.2d 991, 1006 (Utah 1995) The *Mohi* Court never considered whether the statute violated Separation of Powers, but found it violated Utah’s Uniform Operation of Laws provision.

to an offender rather than how to apply the *same* law to different offenders.”³⁴ To that end, “Once an offender is charged with a particular crime, that offender must be subjected to the same or substantially similar procedures and exposed to the same level of jeopardy as all other offenders so charged to satisfy the constitutional requirement of uniform operation of the laws.”³⁵

By accepting an amendment of statutory misdemeanors to infractions, the trial court improperly permitted Clearfield to assume the essential legislative function of fixing the penalty for Speeding. This contradicts the Utah Constitution’s mandate that “no person charged with the exercise of powers properly belonging to one ... department[], shall exercise any functions appertaining to either of the others.”³⁶

Under the Utah Constitution, only the legislature has the power to define crimes and prescribe penalties.

B. Utah Code designates speeding a misdemeanor and prohibits any reduction in the level of an offense before conviction.

Although the Utah Constitution prohibits executive and judicial authority to reduce misdemeanors to infractions, Utah Code is equally clear on the subject.

³⁴ *Id.* at 1004 (citation omitted) (emphasis by the Court).

³⁵ *Ibid.*

³⁶ Utah Const. art. V, § 1.

Long ago the Utah Legislature abolished common law crimes providing that “no conduct is a crime unless made so by this code, other applicable statute or ordinance.”³⁷ The Code designates offenses as “felonies, misdemeanors, or infractions.”³⁸ And the Legislature determined “[a]ny offense which is an infraction within this code is expressly designated ...”³⁹ At the time of Maese’s offense, the Legislature designated that a “violation of any provision of the [Traffic Code] is a class C misdemeanor, unless otherwise provided.”⁴⁰ Subsequently, the Legislature redesignated much of the Traffic Code, amending most violations to infractions, but it retained speeding as a class C misdemeanor.⁴¹ Finally, and most importantly, the Legislature mandates that “[t]he provisions of this code *shall* govern the construction of, *the punishment for*, and defenses against any offense defined in this code.”⁴²

³⁷ Utah Code § 76-1-105.

³⁸ Utah Code § 76-3-102 (2013).

³⁹ Utah Code § 76-3-105.

⁴⁰ Utah Code § 41-6a-202(2) (2013).

⁴¹ See H.B. 348, 61st Leg., Gen. Sess. (Utah 2015) (amending Utah Code § 41-6a-202(2) to make all traffic offenses infractions “unless otherwise provided,” and adding language specifically providing that speeding is a class C misdemeanor).

⁴² Utah Code § 76-1-103(1) (emphasis added).

Unquestionably, the above code governs the designation of offenses. But this Court's decision in *West Valley City v. McDonald* implies that prosecutors are free to reduce misdemeanors to infractions. So a thought experiment: If an executive can choose to reduce an offense's designation at will, what prevents it from increasing an offense's designation? Utah Code. We have no prosecutions for felony jaywalking, nor infraction homicide, because of Utah Code. An offense's designation can be no more, and no less, than what statute mandates.

The trial court questioned whether Maese's interpretation would prohibit prosecutorial discretion to plea bargain.⁴³ The answer, again, lies in Utah Code. Another thought experiment: Without using distinguishable facts, could an executive plea bargain capital murder to a class C misdemeanor? Theoretically, yes. But this is because of lesser included offenses: Capital homicide (death penalty) could be charged as aggravated murder, a first degree felony (25 to life); aggravated murder could be charged as murder (15 to life), a first degree felony; murder could be charged as attempted murder, a second degree felony; attempted murder could be charged as aggravated assault, either a second or third degree felony; aggravated assault could be charged as attempted aggravated assault, a Class A misdemeanor; attempted aggravated assault could be charged as assault, a Class B misdemeanor; assault could be charged as attempted assault, a Class C

⁴³ See R. at 192.

misdemeanor. And all of these charges are permissible *under the same facts* as lesser included offenses. This example shows prosecutors' ability to pick which crime to charge. But charging homicide as an infraction is impossible under the statutory scheme. Charging speeding as an infraction is equally impossible.

At the time of the offense, the Legislature designated speeding as a class C misdemeanor under its catchall provision,⁴⁴ and it has since done so explicitly.⁴⁵ Although the Legislature prescribes a precise process to reduce the level of an offense *after* conviction,⁴⁶ it prescribes no such process for reducing an offense's designation *before* conviction.

In this case, the trial court allowed Clearfield to charge speeding as an infraction, despite Utah Code designating it a Class C Misdemeanor. This charge is nonexistent and therefore contrary to Utah Code.

C. The only mechanism for reducing an offense's designation must be invoked post-conviction.

In *State v. Barrett*, the Utah Supreme Court suggested a court commits a "rogue" act by reducing the degree of an offense without legislative authorization.⁴⁷ *Bar-*

⁴⁴ See Utah Code § 41-6a-601. (2013)

⁴⁵ See Utah Code § 41-6a-601(4) (2015) (speeding "is a class C misdemeanor").

⁴⁶ See Utah Code § 76-3-402 "Conviction of lower degree of offense - Procedure and limitations"

⁴⁷ *State v. Barrett*, 2005 UT 88, ¶ 13, 217 P.3d 682.

rett held the trial court abused its discretion by reducing a conviction two levels without agreement from the prosecution, as required under section 76-3-402.⁴⁸

The processes prescribed for reducing offenses after conviction, or through the prosecution of inchoate offenses,⁴⁹ would be superfluous if prosecutors and judges were free to do so at whim. In *Hall v. Utah State Dep't of Corrections*, this Court stated that courts must "avoid interpretations that will render portions of a statute superfluous or inoperative," thus "when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision."⁵⁰ No provision of Utah Code permits reducing the level of offense before conviction. Thus the specific provisions governing reductions of offenses, section 402, must govern.

D. The Utah Supreme Court's rulemaking authority cannot permit a change in a criminal offense's designation.

The plain language of Rule 4 of the Utah Rules of Criminal Procedure grants no authority to accept an amended information reducing an offense's statutory des-

⁴⁸ *Id.* at ¶ 46.

⁴⁹ See Utah Code §§ 76-4-101 through -401; for instance, an *attempt* to commit a class B misdemeanor is a class C misdemeanor (see Utah Code § 76-4-102(1)(h).).

⁵⁰ *Hall v. Utah State Dep't of Corrections*, 2001 UT 34, ¶ 15, 24 P.3d 958 (citations and quotation marks omitted).

ignation. Rule 4 never provides that speeding is an infraction, nor does it provide or so much as imply the authority to reduce the level of an offense.

The Utah Supreme Court's rulemaking authority is limited by constitution and statute to rules relating to "procedure and evidence for use in the courts."⁵¹ In *Brickyard Homeowners' Ass'n v. Gibbons Realty*, the Utah Supreme Court distinguished between procedural and substantive rules, which lie outside of its rulemaking authority:

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for the invasion. 'Practice and procedure' may be described as the machinery of the judicial process *as opposed to the product thereof*.⁵²

By permitting the arbitrary designation of offense levels, courts impermissibly determine the substantive "product" of the judicial process. In this case, the trial court has decreed not a procedural step, but the outcome of the process – a conviction or acquittal for an infraction rather than a misdemeanor.

⁵¹ Utah Const. art. VIII, § 4; Utah Code § 78A-3-103(1).

⁵² *Brickyard Homeowners' Ass'n v. Gibbons Realty*, 668 P.2d 535, 539 (Utah 1983) (quoting *Avila South Condominium Assoc. v. Kappa Corp.*, Fla., 347 So.2d 599, 608 (1977)).

Also, the trial court's reliance on *West Valley City v. McDonald* is misplaced.⁵³ Given the arguments before it, this Court in *McDonald* was necessarily limited to considering the *rights* of the defendant under Rule 4. Whereas here, Maese challenges the *authority* of courts and prosecutors to designate the penalty for an offense under the Utah Constitution. Just as the First Amendment does not explicitly prohibit treasonous speech, it does not permit it either. At that, this Court in *McDonald* never addressed whether an interpretation of Rule 4 that permits the amendment of a misdemeanor to an infraction exceeded courts' rulemaking authority or violated Separation of Powers. It does both.

The *McDonald* Court acknowledged, "The charge in the amended information—speeding...—was exactly the same as in the original information; *only the classification, and therefore the penalty, was changed.*"⁵⁴ Prosecutors and judges enjoy no authority under Utah law to change the penalty for an offense.

Accordingly, under the interpretive maxim *expressio unius est exclusio alterius* ("the inclusion of one implies the exclusion of the alternative"),⁵⁵ the Legislature prohibits the prosecutorial and judicial authority claimed here. That is, the Legis-

⁵³ See Ruling & Order, p. 3, ¶ 1 (citing *McDonald*, 948 P.2d 371, 373-74 (Utah Ct. App. 1997)).

⁵⁴ *West Valley City v. McDonald*, 948 P.2d 371, 373-74 (Utah Ct. App. 1997) (emphasis added).

⁵⁵ *Duke v. Graham*, 2007 UT 31, ¶ 15, 158 P.3d 540.

lature has expressed when and how the level of an offense may be reduced — after conviction, by the court, upon a number of certain findings, and limited by certain conditions — meaning it cannot be done otherwise.⁵⁶ And, as discussed above, to do so violates the Utah Constitution’s Separation of Powers provision.

E. The district court lacks subject matter jurisdiction over an offense not designated in Utah Code. Its only authority is to dismiss.

Under Utah Rule of Criminal Procedure 25, “The court shall dismiss the information or indictment when ... [t]he court is without jurisdiction....”⁵⁷ In *Thompson v. Jackson*, this Court stated subject matter jurisdiction “is the power and authority of the court to determine a controversy and without which it cannot proceed.”⁵⁸ “If a court acts beyond its authority those acts are null and void.”⁵⁹ In *State v. Todd* it stated subject matter jurisdiction “is derived from the law.”⁶⁰ “It can neither be waived nor conferred by consent of the accused.”⁶¹ In criminal cases, “[t]he trial court simply would lack the judicial power to convict the de-

⁵⁶ See Utah Code § 76-3-402.

⁵⁷ Utah R. Crim. P. 25(b)(4).

⁵⁸ *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987).

⁵⁹ *Ibid.*

⁶⁰ *State v. Todd*, 2004 UT App 266, ¶ 9, 98 P.3d 46.

⁶¹ *Ibid.*

fendant of a nonexistent crime.”⁶² “Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action.”⁶³

In Utah Code, infraction speeding is nonexistent. Utah courts lack subject matter jurisdiction over non-existent offenses. Accordingly, the trial court retains only the authority to dismiss the action against Maese.

POINT II. The Utah Constitution Unequivocally Guarantees Defendants Charged with Infractions the Right of Trial by Jury.

Analyzing the Utah Constitution’s text, historical context, and Utah’s traditions at the time of its adoption reveals the Constitution guarantees the right to jury trials in *all* criminal cases, including prosecutions for infractions. Yet Utah Code and the Utah Rules of Criminal Procedure provide jury trials for all offenses except infractions.⁶⁴

The framers of the Utah Constitution, however, viewed the right of a trial by jury as sacrosanct in all criminal and civil cases, and conceived of no circumstance by which that right should be denied; including the right to a jury trial for so-called “petty” offenses which was well established in the Utah territory long before, and in the state long after, the Constitution was adopted.

⁶² *State v. Norris*, 2004 UT App 267, ¶ 21, 97 P.3d 732.

⁶³ *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987) (citation omitted).

⁶⁴ See Utah Code § 77-1-6(2)(e); Utah R. Crim. P. 17(d).

Accordingly, any Utah statute or procedural rule denying the right of a jury trial in prosecutions for infractions is unconstitutional.

A. The plain language of the Utah Constitution guarantees the right to jury trials in all cases.

In *American Bush v. City of South Salt Lake*, the Utah Supreme Court stated when courts interpret the Utah Constitution, courts should “analyze its text, historical evidence of the state of the law when it was drafted, and Utah’s particular traditions at the time of drafting.”⁶⁵ A court’s goal is to “discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect.”⁶⁶

In *State v. Hernandez*, the Utah Supreme Court stated because “the best evidence of the drafters’ intent is the text itself, our analysis begins with a review of the constitutional text.”⁶⁷ And in *Salt Lake City v. Ohms*, it stated, “if a constitutional provision is clear, then extraneous or contemporaneous construction may not be resorted to.”⁶⁸

In its current state, Article I, § 10 of the Utah Constitution states:

⁶⁵ *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235.

⁶⁶ *Ibid.*

⁶⁷ *State v. Hernandez*, 2011 UT 70, ¶ 8, 268 P.3d 822 (citations and quotations omitted).

⁶⁸ *Salt Lake City v. Ohms*, 881 P.2d 844, 850, n. 14 (Utah 1994).

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.⁶⁹

Article I, § 12 of the Utah Constitution states in relevant part:

In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed ...⁷⁰

In 1996, a ballot measure amended Article I, § 10 to accommodate the consolidation of circuit courts into the district court system.⁷¹ The original provision stated:

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.⁷²

Here, sections 10 and 12 are plain and unambiguous. These provisions guarantee the right of a jury trial in all criminal prosecutions. Section 10 addresses ju-

⁶⁹ Utah Const. Art. I, § 10.

⁷⁰ Utah Const. Art. I, § 12.

⁷¹ *Minutes of the Utah Constitutional Revision Commission*, pp. 12-13, December 8, 1995, attached in Addendum B.

⁷² Utah Const. Art. I, § 10 (1896).

ry trials in general, and by the language, “In *other cases*, the Legislature shall establish the number of jurors,” “*in no event* shall a jury consist of fewer than four persons,” and “In criminal cases the verdict *shall* be unanimous,” the section contemplates no situation where a defendant in a criminal action would not be entitled to a jury.

If the drafters intended to limit the right based on the possibility of incarceration, they would have stated so explicitly. Section 12 addresses the rights of criminal defendants in particular, stating, “In criminal prosecutions the accused *shall* have the right ... to have a speedy public trial by an impartial jury.” This language is also unequivocal, making no provision for a prosecution lacking the right to a jury trial.

B. The framers conceived of no circumstance, whether civil or criminal, under which the right to trial by jury should be denied.

Assuming ambiguous text, the Utah Supreme Court stated constitutional interpretation may also be informed by “historical evidence of the drafters’ intent.”⁷³

In *Intern. Harvester Credit v. Pioneer Tractor*, the Utah Supreme Court squarely held that article I, § 10 guarantees the right to a jury trial in all civil cases. The court’s reasoning there was equally if not more applicable to criminal jury trials:

⁷³ *State v. Hernandez*, 2011 UT 70, ¶ 8, 268 P.3d 822 (citations and alterations omitted).

The wording of Article I, § 10 lends itself to argument over the intended meaning as to noncapital criminal cases and civil cases. ... A careful reading, however, of the proceedings of the constitutional convention, *Official Report of the Proceedings and Debates of the Convention*, 1895, Vol. I, Pages 258-62, 274-97, 492-95, discloses a *virtually unanimous intention on the part of the framers of the Constitution to preserve a constitutional right to trial by jury in civil cases and in noncapital criminal cases.*

Although there was dispute in the convention over the number of jurors, and the degree of concurrence necessary for a verdict, there is repeated reference to the intention to insure the underlying right of trial by jury. The whole tenor of the discussion in the constitutional convention, the preliminary drafts, and the final language of Article I, § 10, indicates no intention to limit the constitutional right to a jury to capital criminal cases.

... the constitutional designation of the number of jurors to be used in courts of original jurisdiction and in courts of inferior jurisdiction presupposes the existence of the basic right itself. It is not plausible that the framers would mandate the number of jurors to be used in a jury, and the number of jurors required to return a verdict, without intending to secure the basic right itself.

...

The jury historically has been an integral part of the Anglo-American legal system. *It would require the clearest language to sustain the conclusion that there was an intention to abolish an institution so deeply rooted in our basic democratic traditions and so important in the administration of justice, not only as a buffer between the state and the sovereign citizens of the state, but also as a means for rendering justice between citizens. We refuse to give a strained meaning to the terms of our Constitution which would result in dispensing with an institution that has the sanction of the centuries.*⁷⁴

⁷⁴ *Intern. Harvester Credit v. Pioneer Tractor*, 626 P.2d 418, 419-20 (Utah 1981) (emphasis added).

Thus, whether infractions are criminal or civil in nature, there is no question that Maese was entitled to a jury trial.

Indeed, the debate over the original provision never considered circumstances whereby a civil litigant or criminal defendant would be denied the right to trial by jury. The debate was whether the number of jurors in any case should remain at 12, or be reducible by constitution or statute. And no delegate understood the right to be limited by the potential punishment attached to an offense. In fact, arguing against the ultimately successful reduction in the number of jurors for noncapital felonies and “other cases,” delegate John Rutledge Bowdle said:

I claim that a man’s liberty is not in jeopardy only when the doors of the penitentiary may stand before him, or when his life is at stake. His reputation might be just as sacred, or more sacred than his life. I believe that when a man is on trial for any crime he should have a fair and impartial trial by a jury, as the gentleman concedes, the best jury, that is a jury of twelve ... ⁷⁵

The 1996 article I, section 10 amendment explicitly intended a technical rather than substantive change. Members of the Constitutional Revision Committee which proposed the amendment to the Legislature, including two now-former Utah Supreme Court chief justices, never intended to alter the substance of the right as it has stood since the founding. The reason for the amendment was to

⁷⁵ Official Report of The Proceedings And Debates Of The Convention Assembled To Adopt A Constitution For The State Of Utah, 291-92 (1898), attached in Addendum B.

address the consolidation of inferior circuit courts with general jurisdiction district courts by establishing jury size based upon the type of case at issue rather than the type of court.⁷⁶

The Utah Constitutional Revision Commission understood that Utah courts have not determined if Utah's constitutional jury right extends to those charged with petty offenses or infractions, and they never intended for the amendment to resolve that issue.

Mr. James Housley, Deputy District Attorney, Salt Lake County ... *expressed concern that one could argue that people are entitled to a jury trial, even for petty offenses.* Under federal constitutional provisions there have been a number of cases that have differentiated between petty cases and serious cases, he said. The differentiation is basically at six months potential incarceration *but Utah Supreme Court cases have discussed the differentiation without actually holding that this is what is covered by the state constitution.* He said they would likely not be precluded from using the federal interpretation. He requested that the use of the word 'shall' not be intended to change the jurisprudence surrounding the right to jury trial.⁷⁷

Then-Chief Justice Michael Zimmerman stated the Commission's "express intention is not to change anything and not to affect existing case law."⁷⁸ Zimmer-

⁷⁶ *Minutes of the Utah Constitutional Revision Commission*, pp. 12-13, December 8, 1995, attached in Addendum B; *Proposition No. 3: Jury Trial Resolution*, Utah Voter Information Pamphlet, p. 27, 1996, attached in Addendum B.

⁷⁷ *Minutes of the Utah Constitutional Revision Commission*, pp. 14-15, December 8, 1995.

⁷⁸ *Id.*, p. 13.

man's successor at the high court, Justice Christine Durham, agreed, indicating "the Judicial Council's motivation in proposing the amendment was to maintain the operational status quo under the constitution."⁷⁹ Yet the article I, § 10, amendment drafters could have easily restricted the right to offenses carrying the possibility of incarceration, but consciously refrained.

In fact, early drafts of the proposed 1996 amendment, which took the form of a joint resolution of the Utah Legislature, explicitly limited the right, stating, "Parties have the right to trial by jury in any criminal case in which the Legislature has established a term of incarceration as a possible sentence."⁸⁰ But these were ultimately rejected.

The article I, section 10 drafters — at the time of the framing, and a century later with the amendment — demonstrated no intention to restrict the jury trial right based on the possibility of incarceration.

C. Utah's traditions when the constitution was adopted entitled those charged with petty offenses to jury trials.

In *State v. Hernandez*, the Utah Supreme Court largely gleaned the framers' understanding of the right to a preliminary hearing in criminal cases by referring to

⁷⁹ *Id.*, p. 15.

⁸⁰ See Jury Trial Resolution, 1996 General Session, November 27, 1995 Draft, 1996FL-0689/003, attached in Addendum B.

the territorial laws in force at the time.⁸¹ In finding that defendants have a constitutional right to preliminary hearings in prosecutions for class A misdemeanors, despite no such federal right, the court stressed that Article XXIV, § 2 of the Utah Constitution provides that “All laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature.”⁸² Thus, the *Hernandez* Court ultimately applied the definition of indictable offenses found in the Utah territorial laws.

By the same thinking, whether a defendant charged with an infraction is entitled to a trial by jury turns on the framers’ understanding, the original public meaning of the terms “criminal cases” and “criminal prosecutions,” as used in Article I, §§ 10 and 12. At the time of the framing, Utah territorial law provided:

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, *either of the following punishments*:

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office; *or*,

⁸¹ *State v. Hernandez*, 2011 UT 70, ¶¶ 11-21, 268 P.3d 822.

⁸² *Id.* at ¶ 12.

5. Disqualification to hold and enjoy any office of honor, trust or profit in this Territory.⁸³

Accordingly, criminal offenses were not restricted to those punishable by death or imprisonment, but also included those punishable by *fine, removal from office, or disqualification*. The territorial law at the time of the framing stated, “Issues of fact must be tried by jury unless a trial by jury be waived in criminal cases not amounting to felony ...”⁸⁴

Infractions under current Utah Code are materially the same: They are punishable by fine, forfeiture, and disqualification, or any combination.⁸⁵ Moreover, the territorial Penal Code at the time of the framing defined numerous crimes not punishable by imprisonment, or punishable by imprisonment of six months or less,⁸⁶ the benchmark for “petty offenses” under federal constitutional jurisprudence beyond which a jury trial is guaranteed.⁸⁷

⁸³ UTAH COMP. LAWS § 4378 (1888) (emphasis added), attached in Addendum B.

⁸⁴ UTAH COMP. LAWS § 5318 (1888), attached in Addendum B.

⁸⁵ Utah Code § 76-3-201(2).

⁸⁶ See UTAH COMP. LAWS § 4401 (1888) (Taking rewards for deputation, punishable by \$1,000 fine); § 4438 (Refusing to aid officers in arrest, etc., punishable by \$100 fine); § 4479 (Duties of officers to prevent duels, punishable by \$500 fine); § 4484 (Assault, punishable by \$300 fine and three months jail); § 4515 (Keeping open places of business on Sunday, punishable by \$5-\$100 fine); § 4519 (Performing unnecessary labor on Sunday, punishable by \$25 fine); § 4522 (Selling liquor at camp or field meetings, punishable by \$5-\$500 fine); §

Defendants charged with offenses not punishable by imprisonment or with so-called "petty offenses," routinely demanded and received jury trials in justice courts around the time of the framing of the Utah Constitution.⁸⁸

4524 (Procuring females to play on musical instruments in public, punishable by \$100 fine and one month jail); § 4525 (Procuring female to exhibit herself for hire, punishable by \$100 fine and one month jail); § 4573 (Putting extraneous substances in packages of goods usually sold by weight with intent to increase weight, punishable by \$25 fine for each offense); § 4598 (Disturbing the peace, punishable by \$200 fine and two months jail), attached in Addendum B.

⁸⁷ See *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (holding that potential imprisonment of greater than six months triggers right to jury trial under Sixth Amendment).

⁸⁸ See e.g., Box Elder News, "Jury Disagrees," July 29, 1915 (defendants charged under city ordinance for failing to gain permission to sell fruit on railroad company land, punishable by fine of \$5 to \$100, demanded and received a jury trial in justice court, resulting in a hung jury); Deseret Evening News, "Police Court," September 27, 1893 (defendant charged with violating ordinance related to sewer connections tried by jury in justice of the peace court); Deseret Evening News, "A Jury Trial," April 24, 1895 (defendant demanded jury trial for vagrancy charge); Deseret Evening News, "Today's Police Court," July 10, 1895 (defendant charged with building code ordinance received jury trial); Deseret Evening News, "Police Court," October 14, 1895 (defendant received jury trial for vagrancy); Deseret Evening News, "Police Court Notes," February 12, 1897 (defendant set for trial for allowing females in place of business after 9 p.m.); Deseret Evening News, "Demanded a Jury Trial," March 22, 1897 (defendant demanded and received jury trial for drunkenness); Deseret News, "Those Vagrancy Cases: Sentences in Six of Them Were Corrected With the City System," July 1, 1901 (defendant found guilty of vagrancy in jury trial); Deseret News, "Jury in Vagrancy Case," February 24, 1909 (defendant received jury trial in vagrancy case, punishable by

More than a century ago, in *Salt Lake City v. Robinson*, the Utah Supreme Court addressed a very similar issue in determining whether punishment for violations of municipal ordinances was civil or criminal in nature, the Court stated:

the courts of this state have always regarded the proceedings instituted for violations of ordinances as in their nature criminal, and not civil. Trials, so far, as we are aware have always been conducted upon that theory. Again the rules of evidence and the quantum of proof, as well as the rules of construction and procedure applicable to criminal prosecutions, have always been applied and enforced in prosecutions for violations of city ordinances by the courts of this state. ... We are clearly of the opinion that, under our statutes, prosecutions like the one at bar are in their nature criminal, and that the rules pertaining to criminal prosecutions for misdemeanors under the statute are applicable.⁸⁹

The same is true of infractions. That is, the rules of evidence, the quantum of proof, and the rules of construction are the same in a prosecution for a felony, misdemeanor, or infraction. The action is prosecuted by information in the name of a governmental entity rather than a private party. The action is subject to the Utah Rules of Criminal Procedure rather than the Utah Rules of Civil Procedure. Defendants are subject to arrest for an infraction, and may be arrested if they fail to appear and face the charge of an infraction, rather than face default judgment

three months jail); Deseret News, "Busy Day in Ogden Police Court: Continuous Session of Eight Hours — Jury Failed to Agree on Walter Smith's case," March 4, 1903 (defendant tried by jury for disturbing the peace, punishable by \$200 fine and two months jail), attached in Addendum B.

⁸⁹ *Salt Lake City v. Robinson*, 39 Utah 260, 116 P.442 (Utah 1911).

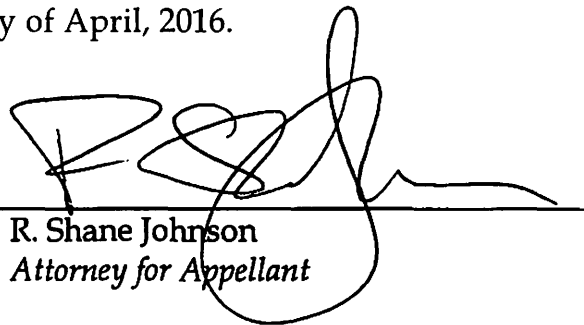
in a civil action for failing to timely answer. There is also no question that the drafters of the "Utah Criminal Code" intended infractions to be "in their nature criminal," when they designated criminal offenses as "felonies, misdemeanors, or infractions."⁹⁰

Utah's traditions at the time the Constitution was adopted entitled defendants to juries even for petty offenses, like infractions.

CONCLUSION

Maese respectfully requests this Court grant his appeal, declare as unconstitutional the practice of amending misdemeanors to infractions, declare as unconstitutional Utah Code subsection 77-1-6(2)(e) and Rule 17(d) of Criminal Procedure, and order Judge John Morris to dismiss the Amended Information against Maese for lack of subject matter jurisdiction. Petitioner also requests costs and, under the Court's equitable powers, attorney's fees.

RESPECTFULLY SUBMITTED on this 27th day of April, 2016.



R. Shane Johnson
Attorney for Appellant

⁹⁰ Utah Code § 76-3-102.

CERTIFICATE *of* SERVICE


This is to certify that on the 27th day of April, 2016, two true and correct copies of the foregoing were served by the method indicated below, and addressed to the following:

Stuart Williams (8995)
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☐ Overnight Mail

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R. Shane Johnson
Attorney for Appellant

CERTIFICATE *of* COMPLIANCE

I, R. Shane Johnson, on this 27th day of April, 2016, certify that this brief is submitted in compliance with rule 24(f)(1) of the Utah Rules of Appellate Procedure.

This Brief of Appellants contains 7090 words in the argument section pursuant to the word count of the word processing system used to prepare the brief. And, the Brief of Appellant complies with the typeface requirements of Utah Rules of Appellate Procedure 72(b) because it has been prepared **using Microsoft Word, Book Antiqua, size 13 font.**



R. Shane Johnson
Attorney for Appellant

ADDENDUM A

(RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS)

1 THE COURT: I'm just going to reiterate that McDonald
2 did not address the Utah Constitution. Period. My argument
3 distinguishes between the federal constitution's petty offense
4 kind of cutoff level and that of the Utah Constitution. At the
5 time of the framing, petty offenses were entitled to jury
6 trials, number one. Number two, the City argues that 4(d)
7 permits this authority. Nowhere in 4(d) does it say you can
8 reduce the level of offense. 4(d) says you can amend an
9 information and charge a different offense if the substantial
10 rights of so and so aren't impacted. 4(d) doesn't explicitly
11 prohibit this, but it cannot permit it, and it doesn't by its
12 plain terms permit it. It's been used when it was challenged,
13 when the defendant in McDonald said I have a right to a jury
14 trial; therefore, under 4(d), the amendment of the information
15 has impacted my rights, the court said no actually it did not
16 because you don't have a right to a jury trial under the
17 federal constitution if you're charged with a petty offense.

18 And we're not going to reach your claim that you have
19 a right to a jury trial under the state constitution because
20 you failed to raise it below. So 4(d) does not prohibit what's
21 being claimed here, but it cannot permit it under the Court's
22 limited rule making authority and under separation of powers.
23 And I'll leave it at that.

24 THE COURT: Thank you, gentlemen. Let me address the
25 first motion. I assume that's the motion for a jury trial. I

1 struggle with getting past West Valley City v. McDonald, which
 2 I did believe held that if you reduce a misdemeanor charge to
 3 an infraction, the possibility of jail time evaporates and that
 4 therefore under Rule 17(d) the defendant is not entitled to a
 5 jury trial. The trial courts are the inferior courts. The
 6 appellate courts, if they have ruled on a case, have
 7 established by that ruling precedent which the trial courts
 8 must follow. I find that I'm unable to distinguish McDonald and
 9 would therefore have to conclude that in fact no jury trial
 10 would be allowed for an infraction.

11 Now, addressing the other motion to dismiss, which
 12 invokes separation of powers, to my mind, I think the
 13 (inaudible) here is trying to prove too much. The defendant was
 14 charged with an offense, and an existing offense, and therefore
 15 I believe the courts have jurisdiction. Subject matter
 16 jurisdiction. And I guess the defendant, the appellant here, is
 17 arguing that the prosecutor doesn't have the authority to
 18 reduce the offense to an infraction. And because he doesn't
 19 have that authority, it removes the Court's subject matter
 20 jurisdiction because he's being charged essentially with an
 21 offense that doesn't exist.

22 Again, as I asked counsel, I do believe there's a
 23 difference between the elements of the offense and the degree
 24 of the offense. The existence of the elements of the offense
 25 means it is a crime and the Court has subject matter

1 jurisdiction. The degree of the offense is generally charged as
2 provided. But here, we get into the authority of the prosecutor
3 to in fact prosecute the case in a manner which serves the
4 public interest and in accordance with the authority which it
5 was granted by applicable law, statutory decision or
6 constitutional.

7 So the argument that the prosecutor may not do this I
8 think goes a bit too far. The legislature gave City attorneys
9 the authority to prosecute certain criminal matters and the
10 authority extends from the constitution itself, which was all
11 cited, and was then embodied in the Utah code. Inherent in the
12 authority to prosecute would be the discretion or in the area
13 of how to move a case forward, prosecutorial discretion. I
14 don't see any problem with prosecutorial authority. It's
15 granted by the constitution as implemented by the legislature.
16 The prosecutors have the authority to bring charges, dismiss
17 charges, amend charges. They can, in fact, enter into diversion
18 types of agreements. Pleas in abeyance, for instance.

19 Prosecutors also have the authority to reduce the
20 degree of charges for any one of a number of reasons. Perhaps
21 the most important of which is that it affects sentencing. But
22 it also affects the ability or the impact a charge may have in
23 other areas of a defendant's life and whether or not that
24 charge in fact at some point can be removed from the record. So
25 the decision to reduce the misdemeanor traffic infraction--

1 violation to an infraction appear to be within the authority
2 delegated to the prosecutor by the legislature, thus the
3 authority to prosecute cases and determine how that should go
4 forward. I don't find a violation of separation of powers in
5 the reduction of this charge to a misdemeanor. So I will
6 specifically find no violation of separation of powers. I will
7 find the prosecutor has the authority and the discretion to
8 prosecute cases as they choose and within the authority which
9 was conferred by our legislature, which does include some
10 discretion. And so I'm afraid I can't get there either. So I
11 will deny that motion as well.

12 So, gentlemen, where are we going from here?

13 MR. JOHNSON: Well, Your Honor, I wonder if we can
14 discuss with the prosecution about a potential resolution?

15 (Counsel confer)

16 THE COURT: You can use the conference room and I'll
17 just finish my calendar.

18 (PROCEEDING CONCLUDED)

19

20

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C E R T I F I C A T E

Rule 4. Prosecution of public offenses.

Utah Rules

Utah Rules of Criminal Procedure

As amended through January 1, 2016

Rule 4. Prosecution of public offenses

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. If issued, the information shall include the citation number. Failure to include the number will not affect the court's jurisdiction. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(c) The court may strike any surplus or improper language from an indictment or information.

(d) The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced. If an additional or different offense is charged, the defendant has the right to a preliminary hearing on that offense as provided under these rules and any continuance as necessary to meet the amendment. The court may permit an indictment or information to be amended after the trial has commenced but before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment

or within 14 days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

(f) An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.

(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.

(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.

History. Amended effective April 1, 2012; November 1, 2015.

§ 76-1-105. Common law crimes abolished.

Utah Statutes

Title 76. Utah Criminal Code

Chapter 1. General Provisions

Current through 3-28-2016

§ 76-1-105. Common law crimes abolished

Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance.

Cite as Utah Code § 76-1-105

History. Amended by Chapter 32, 1974 General Session

§ 76-1-103. Application of code - Offense prior to effective date.

Utah Statutes

Title 76. Utah Criminal Code

Chapter 1. General Provisions

Current through 3-28-2016

§ 76-1-103. Application of code - Offense prior to effective date

- (1) The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code.
- (2) Any offense committed prior to the effective date of this code shall be governed by the law, statutory and non-statutory, existing at the time of commission thereof, except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date. An offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

Cite as Utah Code § 76-1-103

History. Enacted by Chapter 196, 1973 General Session

§ 76-3-402. Conviction of lower degree of offense - Procedure and limitations.

Utah Statutes

Title 76. Utah Criminal Code

Chapter 3. Punishments

Current through 3-28-2016

§ 76-3-402. Conviction of lower degree of offense - Procedure and limitations

- (1) If at the time of sentencing the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, and after having given any victims present at the sentencing and the prosecuting attorney an opportunity to be heard, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.
- (2) If the court suspends the execution of the sentence and places the defendant on probation, whether or not the defendant is committed to jail as a condition of probation, the court may enter a judgment of conviction for the next lower degree of offense:
 - (a) after the defendant has been successfully discharged from probation;
 - (b) upon motion and notice to the prosecuting attorney;
 - (c) after reasonable effort has been made by the prosecuting attorney to provide notice to any victims;
 - (d) after a hearing if requested by either party under Subsection (2)(c); and
 - (e) if the court finds entering a judgment of conviction for the next lower degree of offense is in the interest of justice.
- (3)
 - (a) An offense may be reduced only one degree under this section, whether the reduction is entered under Subsection (1) or (2), unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced two degrees.
 - (b) In no case may an offense be reduced under this section by more than two degrees.
- (4) This section does not preclude any person from obtaining or being granted an expungement of his record as provided by law.

- (5) The court may not enter judgment for a conviction for a lower degree of offense if:
 - (a) the reduction is specifically precluded by law; or
 - (b) if any unpaid balance remains on court ordered restitution for the offense for which the reduction is sought.
- (6) When the court enters judgment for a lower degree of offense under this section, the actual title of the offense for which the reduction is made may not be altered.
- (7)
 - (a) A person may not obtain a reduction under this section of a conviction that requires the person to register as a sex offender until the registration requirements under Title 77, Chapter 41, Sex and Kidnap Offender Registry, have expired.
 - (b) A person required to register as a sex offender for the person's lifetime under Subsection 77-41-105(3)(c) may not be granted a reduction of the conviction for the offense or offenses that require the person to register as a sex offender.
- (8) As used in this section, "next lower degree of offense" includes an offense regarding which:
 - (a) a statutory enhancement is charged in the information or indictment that would increase either the maximum or the minimum sentence; and
 - (b) the court removes the statutory enhancement pursuant to this section.

Cite as Utah Code § 76-3-402

History. Amended by Chapter 145, 2012 General Session , §12, eff. 5/8/2012.

Amended by Chapter 103, 2007 General Session

§ 10. Trial by jury.

CONSTITUTION OF THE STATE OF UTAH

Article I. DECLARATION OF RIGHTS

Current through November 3, 2015

§ 10. Trial by jury

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

§ 1. Three departments of government.

CONSTITUTION OF THE STATE OF UTAH

Article V. DISTRIBUTION OF POWERS

Current through November 3, 2015

§ 1. Three departments of government

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

§ 12. Rights of accused persons.

CONSTITUTION OF THE STATE OF UTAH

Article I. DECLARATION OF RIGHTS

Current through November 3, 2015

§ 12. Rights of accused persons

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

ADDENDUM B

(OTHER AUTHORITIES)

not reflect an intention to change the statutory scheme or existing law.

Chair McKeachnie stated that the commission did not formally address the intent language noted on page 94 of the packet.

Mr. Bird stated that the voter information pamphlet could indicate that the commission recommended and the legislature passed a resolution that appears to be antiquated and redundant language and that there is no intent to make a substantive change to law.

MOTION: Mr. Jensen moved to include, in the House and Senate Journals, and in the voter information pamphlet, the intent language, "This deletion is not intended to make a substantive change in the existing law," found on page 94 of the packet.

Rep. Pignanelli asked how the intent language would be structured. He expressed concern how the commission could express the electorates intent.

Ms. Waits Baskin stated that the House and Senate Journals would reflect the intent of the legislature in making the amendment and the voters would know, through the Voter Information Pamphlet, that the intent of the amendment was not to change current statutory interpretation but merely to remove archaic language from the constitution.

The commission voted on the motion which passed unanimously. Sens. Beattie and Dmitrich, Justice Durham, Rep. Harward, and Ms. Wood were absent during the vote.

The commission recessed for lunch.

**5. "Jury Trial Resolution," 1996FL-0689/003, 11-27-95 DRAFT
"Trial by Jury," 1996FL-0761/002, 11-29-95 DRAFT -**

Chief Justice Michael D. Zimmerman, Utah Supreme Court, referred to the letter on page 99 of the packet that was sent to the commission. When the court consolidation bill passed in 1991, it immediately consolidated the circuit and district courts in districts five through eight, he said. He explained that the Utah Constitution requires eight-person juries in the trial court of general jurisdiction, regardless of the type of case. Unless there is a change in the constitution, court consolidation will require the trial of lesser civil and criminal cases by an eight-person jury, even though historically these types of cases have been tried in the circuit court by a four- or six-person jury. The consolidated district courts in the Fifth through Eighth Judicial Districts have been using eight-person juries since 1992 without undue problems. Consolidation of the courts in the populous Wasatch Front has brought with it the need for the same flexibility regarding jury size. That is the reason for the proposed amendment, he said. The flexibility will allow cost

savings by permitting juries of less than eight in rural districts where consolidation has already occurred.

Mr. Strong asked if the resolution would be putting in constitution that a capital case jury shall consist of twelve.

Chief Justice Zimmerman explained that currently the constitution states that in capital cases the right of trial by jury shall remain inviolate.

Justice Durham noted that there is some federal constitutional doctrine to the effect that twelve may be required. She said she did not think it had yet been decided. She expressed concern should the constitutional amendment pass and not the implementing statutes.

Mr. Ralph Dewsnap, Utah Trial Lawyers Association, stated any change of the constitution which either grants more power to the Legislature or takes some away should be closely scrutinized. He said anytime there is an amendment, it may be considered to amend everything that preceded it, both by way of judicial interpretation and the text of the constitution itself. There is not, and never has been, a provision in the state constitution that guaranteed the right to a civil jury trial. It is an implied right. There are Supreme Court cases that hold that this section of the constitution grants the right to a civil jury trial. If the constitution is amended and the Legislature is granted the authority to set the number of jurors, it can be a potential problem to allow the Legislature to do away with the right to civil trial by specifying that the number of jurors in certain trials will be 0 or 2. He suggested that one way to address that potential problem is to make explicit in the constitution that there is an inviolate right to civil jury trial unless waived.

Justice Durham said the language suggested by Mr. Dewsnap would not fix the problem he raised because civil cases generally would apply possibly to adjudication in juvenile court and also to small claims court.

Chief Justice Zimmerman stated their express intention is not to change anything and not to affect existing case law. If that intent is expressed in the CRC report to the Legislature, it may address the problem.

Chair McKeachnie pointed out that the commission could put the intent in its report to the Legislature and make sure that it is read into the record in the House and Senate Journals and could be in the Voter Information Pamphlet.

Mr. Sullivan read the Seventh Amendment of the United State Constitution. He was not sure if that language would solve the problem or not.

Justice Durham said that has been construed as a matter of federal law to be extremely limited. For any statutory rights created by Congress, it is up to Congress to decide whether they go to a jury or to bench trial.

Mr. Tim Shea, Administrative Office of the Courts, explained that case law developing the right to a jury trial in civil cases relies on the waiver provision. A right cannot be waived unless it exists; therefore, the Supreme Court inferred that there was a jury right established by the original constitution in 1896. The court relied upon the legislative history that went into that provision to distinguish between cases of common law and cases in equity. However, none of that is in the constitution itself. It has all been inferred from the last two sentences of the constitutional provision which are left undisturbed by the proposed amendment. Because the amendments only shift the responsibility for establishing the size of juries from the constitution to the Legislature, the change to those few sentences would not change the jurisprudence that has been built up around the rest of that body of law.

Ms. Wood asked if it would be acceptable to include a sentence stating that in no event will a jury consist of less than four jurors.

Chief Justice Zimmerman said he did not think the language suggested by Ms. Wood answers Mr. Dewsnap's concerns. He said language could be added that the right to civil jury shall not be impaired.

Justice Durham said if Ms. Wood's language were included, it would deal with Mr. Dewsnap's concern about the Legislature using its power to establish the size of juries which social science research suggests that could not perform any of the traditional functions of a jury.

Chief Justice Zimmerman said if the commission inserted the language he proposed, it would address Mr. Dewsnap's concern, but is vague enough that it does not forbid the growth of alternative dispute resolution, for example. It would be left to the courts to imply as of the date of the amendment.

Mr. James Housley, Deputy District Attorney, Salt Lake County, indicated that the proposal originally repealed and reenacted this section, which he indicated would inadvertently uproot an entire universe of jurisprudence that has already been developed around the idea of a jury trial in Utah. In negotiations with the court administrator's office, the court administrator's office proposed the alternative current language. Mr. Housley concurred with the proposal with the exception of the word "shall" on line 19. He expressed concern that one could argue that people are entitled to a jury trial, even for petty offenses. Under federal constitutional provisions there have been a number of cases that have differentiated between petty cases and serious cases, he said. The differentiation is basically at six months potential incarceration but Utah Supreme

Court cases have discussed the differentiation without actually holding that this is what is covered by the state constitution. He said they would like not to be precluded from using the federal interpretation. He requested that the use of the word "shall" not be intended to change the jurisprudence surrounding the right to jury trial.

Ms. Watts Baskin asked if there was another reason, other than the concern for court costs, that the change is being proposed.

Chief Justice Zimmerman said they now feel that they can change certain areas and save money whether it is passed or not. He said it is a flexibility issue. In some of the smaller courts, it may be harder to physically accommodate eight jurors rather than four, he said.

Justice Durham indicated the Judicial Council's motivation in proposing the amendment was to maintain the operational status quo under the constitution.

Mr. Sullivan asked if there was a difference between something being inviolate and something being impaired.

Chief Justice Zimmerman said he did not think it would make any difference. He felt legislative history is more important than the precise word chosen when the court is making an interpretation of the issue.

Ms. Wood stated that the language proposed by Chief Justice Zimmerman may have the opposite effect of what is intended by limiting legislative authority.

MOTION: Mr. Sullivan moved to adopt proposed legislation, "Jury Trial Resolution," dated 12-7-95 along with the legislative history discussion and with the following amendment:

Line 19: after "statute" insert ", but in no event shall a jury consist of fewer than four persons"

Ms. Wood indicated that the proposed language parallels and preserves the current constitutional provision. Currently in courts of inferior jurisdictions, it is four jurors.

The commission voted on the motion which passed unanimously. Sens. Beattie, Dmitrich, and Hillyard and Reps. Harward and Pignanelli were absent during the vote.

Justice Durham urged that the commission's minutes include a reference to the fact that the commission no more means to impair the right to stipulate to a jury smaller than four than the current constitution prevents someone from stipulating to a jury smaller than eight.

Mr. EVANS (Weber). If you will permit me_I know that you want to get it right. The substitute which I offer provides that a jury shall be waived in civil cases, if not demanded, as the Legislature might provide. That makes a provision that unless a jury is demanded it is waived. That system is in effect now in New York, Michigan, and Tennessee, and in quite a number of other states, and I intend to speak about that. It is adopted in those states and the people are trying a vast number of cases before the courts, without resorting to the jury at all.

Mr. EICHNOR. I will read it again: "The right of trial by jury shall remain inviolate, but in civil actions the jury shall consist of nine in district courts, and in inferior courts of six, or less, as the Legislature may provide; a verdict in such cases, may be rendered by concurrence by two-thirds of the jurors. A jury may be waived in civil cases and in misdemeanors by consent of both parties, expressed in open court." That fixes it in the bill of rights. We know exactly what we have. We know exactly what we present to the people; there can be no misgivings in the minds of the people when we present the Constitution for their adoption or rejection.

"In civil actions or misdemeanors the jury may consist of any number, less than the number fixed in this section." I think that comes right down to the root of all this argument. Let us fix it in the bill of rights and fix it such a way that a Legislature in simple aberration of the mind will not endanger the jury system. I believe we ought to show something for our work, ought to show something for the time we are consuming here. Fix it right in the bill of rights, and we know what we have and no one can take it from us. All this talk about bulwark of liberty_what will be the bulwark of liberty in in Utah? The bill of rights will be the main spring of the liberty of this State, and I hope that every amendment will be voted down, and when the time comes I shall introduce this.

Mr. BOWDLE. The bill, as amended by Mr. Van Horne, does not meet my approbation. Neither does the one that was introduced by the gentleman from Weber. There is one trouble with the amendment as I see it introduced by Mr. Evans, that is this: It provides that in offenses less than a felony a person may be tried by a jury of less than twelve; the argument that the gentleman has made against a jury of twelve is broken in my opinion by his concession that in all criminal cases it shall be twelve. If it shall be twelve in all criminal cases of felony, why, if nine is so good, if nine be such an admirable jury, or any jury less then nine be such a great institution, why does he concede that when we come to try a man for his life, it shall be twelve. The very admission is that a

jury of twelve is better than nine. He admits it when he makes that argument. I claim that a man's liberty is not in jeopardy only when the doors of the penitentiary may stand before him, or when his life is at stake. His reputation might be just as sacred, or more sacred than his life. I believe that when a man is on trial for any crime he should have a fair and impartial {292} trial by a jury, as the gentleman concedes the best jury, that is a jury of twelve, and for that reason I am not in favor of that amendment. I am not in favor of a sliding jury system. I believe we ought to know what kind of a jury we are going to have. If we are going to have a jury of twelve men, let us have a jury of twelve, and not leave it to the Legislature. If we are going to have a jury of nine, let us say so, and not have a jury this year of nine, and the next Legislature that meets thinks that is not quite good enough and they make a change, saying we have a jury of twelve. We have a jury of twelve for two years. The next Legislature comes along and says that it is too much expense, let us cut it down to eight, or six, or five. People rebel against it and you keep going

back, and from that one thing to the other all the time, and you do not know where you are. Gentlemen, let me ask you this question. Solve it each one for yourself; if you had grave property interests at stake would you prefer to have a jury of eight, a jury of twelve, or a jury of four? On general principles, everything else being equal, there is not a man in this house, I do not believe, even the gentleman that has argued that the jury system should be cut down, but would say I will take the largest number you give me. Why? Because he feels that in that his interests are more nearly protected than in the smaller number. He feels that the opportunities for the other side to come around and work the jury, are not so good. Therefore, I am not in favor of cutting the jury down to a smaller number.

I can see my way to vote for a jury of nine, but as I now see it, I cannot consent to vote to give it into the hands of the Legislature, to make it any number less than that. Nor, am I in favor of referring it to them to fix any number.

I say let us fix it here now and settle that matter. Why, says the gentleman, we are progressing. Yes, it has taken five hundred years to come from a jury of twelve down to have this Convention say that a jury of nine will do. If it takes five hundred years to come from the idea of twelve down to nine, I think we can safely fix it at nine and rest easy there for a time at least. We are not going to grow so rapidly at that ratio, that we will need to have a jury of five or six in the age of the gentleman that has just been speaking. One thing further on that same thing. It is said that it is a great saving of expense_a great saving of expense. The

For ☐

Against ☐

Proposition No. 3

JURY TRIAL RESOLUTION

Votes cast by the members of the Legislature at the
1996 General Session on final passage:

HOUSE (75 members): Yeas, 69; Nays, 3; Absent, 3.

SENATE (29 members): Yeas, 28; Nays, 1; Absent, 0.

Official Ballot Title:

Shall the Utah Constitution be amended to modify the provisions on jury size for certain types of court cases so that: (a) juries in capital cases must consist of twelve persons, (b) juries in all other felony cases must consist of at least eight, and (c) juries in other cases must have their sizes established by the Legislature, but in no event can a jury be less than four?

Impartial Analysis

Proposal

Proposition 3 amends the present provisions in the Utah Constitution which establish jury sizes based upon *which court* hears the case and instead provides for jury size to be established based upon *which type of case* the court hears. The proposal also imposes a restriction on the Legislature that in no event shall a jury consist of less than four persons.

Jury Sizes and Proposed Constitutional Changes

The Legislature and the Judiciary have consolidated the circuit courts into the district courts, eliminating the circuit courts. This change means that circuit courts, courts of inferior jurisdiction which heard less complicated and less serious civil and criminal matters, no longer exist, and district courts, courts of general jurisdiction, try the types of cases the circuit courts previously handled while retaining their own caseload as district courts. Courts of general jurisdiction, district courts, are presently required by Article I, Section 10 to have an eight member jury in all cases, except in capital cases which require twelve jurors.

Under this proposal, all cases that were tried at the circuit court with a four member jury, such as Class B and C misdemeanor trials, would still be tried with a four member jury in the consolidated district court. Similarly, all cases that were tried at the circuit court with a six member jury, such as Class A misdemeanor trials, would still be tried with a six member jury in the consolidated district court. Felony cases currently tried by an eight member jury or capital cases currently tried

by a twelve member jury in the district court would still be tried by the same size juries in the consolidated district court.

Unless there is a change in the Utah Constitution, the present constitutional language will require the trial of lesser civil and criminal cases by an eight member jury in the consolidated district courts, even though these types of cases historically have been tried in the circuit court by a four or six member jury.

Legislation Effective on Passage of Proposition 3

S.B. 53, Trial by Jury, 1996 General Session, will become law on January 1, 1997 only if Proposition 3 is approved. The bill retains language on capital and felony case size juries, retains the denial of jury trials in small claims cases, and retains the right of parties to agree to a lesser-sized jury in all cases except capital cases. S.B. 53 changes jury sizes in other types of cases in the district court, designates that a verdict must be unanimous in criminal cases and not less than three-fourths of the jurors in civil cases, and repeals the language specifying jury sizes in justice court cases. The bill eliminates juries in juvenile court in the adjudications of minors charged with what would constitute a crime if committed by an adult.

Effective Date

Proposition 3 takes effect January 1, 1997.

Fiscal Impact

Proposition 3 should result in reduced jury costs.

JURY TRIAL RESOLUTION

1996 GENERAL SESSION

STATE OF UTAH

A JOINT RESOLUTION OF THE LEGISLATURE PROPOSING TO AMEND THE UTAH CONSTITUTION; AMENDING THE PROVISIONS ON TRIAL BY JURY; PRESERVING THE RIGHT TO A TRIAL JURY IN CRIMINAL CASES; REPEALING THE REQUIREMENT OF EIGHT-PERSON JURIES IN GENERAL JURISDICTION COURTS; AND PROVIDING AN EFFECTIVE DATE.

This resolution proposes to change the Utah Constitution as follows:

~~REPEALS AND REENACTS: Article 1, Section 10;~~

ARTICLE I, SECTION 10

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

Section 1. It is proposed to ~~repeal and reenact~~ ^{amend} Article I, Section 10, Utah Constitution, to read:

Article I, Section 10. [Trial by jury.]

~~Parties have the right to trial by jury in any criminal case in which the Legislature has established a term of incarceration as a possible sentence. The right to trial by jury in civil cases is preserved. A jury in a civil case is waived unless demanded. The verdict in a criminal case shall be unanimous. The verdict in a civil case shall be by not less than three-fourths of the jurors. A trial jury shall consist of twelve persons in a capital case. The Legislature shall have the power to implement the provisions of this section.~~

Section 2. Submittal to electors.

~~The lieutenant governor is directed to submit this proposed amendment to the electors of the state of Utah at the next general election in the manner provided by law.~~

Section 3. Effective date.

~~If approved by the electors of the state, the amendment proposed by this joint resolution shall take effect on January 1, 1997.~~

sentence, to determine and impose the punishment prescribed.

Punishments
here deter-
mined.

§ 4376. (1880) Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code.

Witness' testi-
mony may be
read against
him on prose-
cution for per-
jury.

§ 4377. (1880) The various sections of this Code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceedings, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

Crimes and
public offence
defined.

§ 4378. (1880) A crime or public offence is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust or profit in this Territory.

Crimes, how
divided

§ 4379. (1880) Crimes are divided into:

1. Felonies; and,
2. Misdemeanors.

Felony and
misdemeanor
defined.

§ 4380. (1880) A felony is a crime which is, or may be punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor.

Punishment
of felony
and of
misdemeanor
prescribed.

§ 4381. (1880) Except in cases where a different punishment is prescribed by this Code, every offence declared to be a felony is punishable by imprisonment in the penitentiary not exceeding five years.

Punishment of
misdemeanor

§ 4382. (1880) Except in cases where a different punishment is prescribed by this Code, every offence declared to be a

CHAPTER II.

FORMATION OF THE JURY

SECTION.

5318 When trial by jury deemed to be waived.

5319 Jury to consist of how many persons.

5320 Court may issue venire.

5321 Jurors may be summoned orally.

5322 Officer must return venire to court with endorsement.

5323 Jurors may be summoned from any part of incorporated city.

SECTION.

5324 Who is not competent to act as juror.

5325 Who is exempt from liability to act as juror.

5326 Person exempt may serve, when.

5327 When juror can be excused.

5328 What persons exempt must state under oath.

5329 Challenge to jurors.

§ 5318. s 16. A trial by jury shall be deemed to be waived unless a jury be demanded by the defendant. If he demand a jury, it shall be formed in the manner provided in this Chapter.

§ 5319. s 17. The jury in a criminal case tried before a justice of the peace, shall consist of six persons having the following qualifications:

1. They shall be male citizens of the United States over the age of twenty-one years; and

2. Able to read and write the English language; and

3. Residents of the precinct at least six months before

When trial by jury deemed to be waived.

Jury to consist of six persons. Qualifications of.

fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

§ 4398. (1935) Every executive officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. Extortion.

§ 4399. (1935) Every person who with intent to defraud, presents for allowance or for payment to any county court, auditor of public accounts, city council, or other officer authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of a misdemeanor. Fraudulently presenting bills or claims to public officers for payment.

§ 4400. (1935) Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor. Buying appointments to office.

§ 4401. (1935) Every public officer, who, for any gratuity or reward, appoints another person to a public office, or presents another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding one thousand dollars. Taking rewards for appointments.

§ 4402. (1935) Every person who wilfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, wilfully exercises any of the functions of his office after his term has expired and a successor has been elected or appointed, and has qualified, is guilty of a misdemeanor. Exercising functions of office wrongfully.

§ 4403. (1935) Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, wilfully or unlawfully withholds or detains from his successor or other person entitled thereto Refusal to surrender books, etc., to successor.

Resisting public officers in the discharge of their duties.

§ 4436. (1901) Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both.

Assaults, etc., by officers under color of authority.

§ 4437. (1902) Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year.

Refusing to aid officers in arrest, etc.

§ 4438. (1903) Every male person above eighteen years of age who neglects or refuses to join the *posse comitatus* or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offence, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by fine of not exceeding one hundred dollars.

Compounding crimes.

§ 4439. (1904) Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law, in which crimes may

for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written or printed, to or censuring another for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.

Punishment for sending or accepting challenge to fight a duel, and for provoking for fighting, etc.

§ 4479. (1944) Every judge, justice of the peace, sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any persons to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by fine not exceeding five hundred dollars.

Duties of officers to prevent duels.

§ 4480. (1944) No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of either of the provisions of this Chapter, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.

Witnesses' privilege.

CHAPTER IX.

ASSAULT AND BATTERY.

SECTION.

4483 Assault defined.

4484 Assault, how punished.

4485 Battery defined.

SECTION.

4486 Battery, how punished.

4487 Assault with caustic chemicals.

4488 Assault with deadly weapons.

Assault defined.

§ 4483. (1948) An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Assault, how punished.

As amended February 18, 1978.

§ 4484. (1949) An assault is punishable by a fine in any sum less than three hundred dollars, or by imprisonment in the county jail not exceeding three months.

Battery defined.

§ 4485. (1950) A battery is any wilful and unlawful use of force or violence upon the person of another.

Battery, how punished.

As amended February 18, 1978.

§ 4486. (1951) A battery is punishable by a fine in any sum less than three hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both.

Assault with caustic chemicals.

§ 4487. (1957) Every person who wilfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprison-

sentation where any wines, liquors, or intoxicating drinks are bought, sold, used, drank, or given away, or who purchases any ticket of admission, or directly or indirectly pays any admission fee to or for the purpose of witnessing or attending any such place, amusement, spectacle, performance, or representation, is guilty of a misdemeanor.

Keeping open
places of busi-
ness on Sun-
day

§ 4515. (1960) Every person who keeps open on Sunday any store, workshop, bar, saloon, banking house, or other place of business, for the purpose of transacting business therein, is punishable by fine not less than five nor more than one hundred dollars.

Limitation in
operation of
preceding sec-
tion.

§ 4516. (1960) The provisions of the preceding section do not apply to persons who, on Sunday, keep open hotels, boarding houses, baths, restaurants, taverns, livery stables,

or retail drug stores for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation.

§ 4517. (1882) Every person who wilfully disturbs or disquiets any assemblage of people, met for religious worship, by noise, profane discourse, rude, or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor.

Disturbing religious meeting.

§ 4518. (1881) Every person who sells or furnishes any malt, vinous, or spirituous liquors to any person in the auditorium or lobbies of any theatre, melodeon, museum, circus, or caravan, or place where any farce, comedy, tragedy, ballet, opera, or play is being performed, or any exhibition of dancing, juggling, wax-work figures and the like is being given for public amusement, and every person who employs or procures, or causes to be employed or procured, any person to sell or furnish any malt, vinous, or spirituous liquors at such place, is guilty of a misdemeanor.

Sale of liquors at theatres and employing women to sell thereat.

§ 4519. (1884) Every person who performs any unnecessary labor, or does any unnecessary business on Sunday, is guilty of a misdemeanor, and shall be fined in any sum not exceeding twenty-five dollars.

Performing unnecessary labor on Sunday.

§ 4520. (1885) Labor employed by employees of such

Preceding section does not

works as are usually kept in constant operation, and in 1111- apply to cer-
gating, is not included in the foregoing section. tain kinds of
labor.

§ 4521. (1986) For the purposes of this act, Sunday shall When Sunday
commence at midnight Saturday, and terminate the following commences
midnight. and ends.

§ 4522. (1987) Every person who erects or keeps a booth, Selling liq-
tent, stall, or other contrivance for the purpose of selling or uors at camp
otherwise disposing of any wine, or spirituous, or intoxicating or field meet-
liquors, or any drink of which wines, spirituous or intoxicating ings.
liquors form a part, or for selling or otherwise disposing of
any article of merchandise, or who peddles, or hawks about
any such drink or article, within one mile of any camp or
field meeting for religious worship, during the time of hold-
ing such meeting, is punishable by fine of not less than five
nor more than five hundred dollars.

§ 4523. (1988) The provisions of the preceding section Limitation of
do not apply to any person carrying on a regular business in preceding
section.

Read "performed" for "employed," sec. 4520, line 1, page 595.

the sale of liquors or other articles, which business was established prior to the appointment of the meeting referred to in such section.

Procuring females to play on musical instruments in public.

As amended February 18, 1878.

§ 4524. (1869) Every person who causes, procures or employs any female to play for hire, drink or gain upon any musical instrument in any drinking saloon, dance room or dance cellar, public garden, or any public highway, common or street, or on a vessel, steamboat or railroad car, or in any lewd house, or disorderly place whatsoever, where two or more persons are assembled together, is punishable by fine in any sum less than three hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and any female so playing upon any musical instrument whatsoever, is punishable by fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding one month, or by both.

Female playing musical instruments in public

Procuring female to exhibit herself for hire.

As amended February 18, 1887.

§ 4525. (1860) Every person who causes or procures or employs any female to dance, promenade or otherwise exhibit herself for hire, drink or gain, in any drinking saloon, dance cellar or dance room, public garden, public highway or in any place whatsoever (theatres excepted), where two or more persons are assembled together, is punishable by a fine in any sum less than three hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and every female so dancing, promenading or exhibiting herself, is punishable by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both.

Female exhibiting herself for hire

gently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package, containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony.

§ 4573. (2008) Every person who, in putting up any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay, or other goods usually sold in bags, bales, boxes, barrels, or packages by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel, or package, is punishable by a fine of twenty-five dollars for each offence.

Putting extraneous substances in packages of goods usually sold by weight with intent to increase weight.

§ 4574. (2009) Every person who adulterates or dilutes any article of food, drink, drug, medicine, spirituous or malt liquor, or wine, or any article useful in compounding them, with a fraudulent intent to offer the same or cause or permit it to be offered for sale as unadulterated or undiluted, and every person who fraudulently sells, or keeps or offers for sale the same, as unadulterated or undiluted, is guilty of a misdemeanor.

Adulterating food, drugs, liquors, etc.

§ 4594. ⁽²⁰¹²⁾ Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Remaining present at place of riot, etc., after warning to disperse.

§ 4595. ⁽²⁰⁰⁰⁾ If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this Chapter, neglects to proceed to the place of assembly, or as near there-to as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

Magistrate neglecting or refusing to disperse rioters.

§ 4596. ⁽²⁰⁰¹⁾ Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention, (without deadly weapons), either as principal, aid, second, umpire, surgeon, or otherwise, is punishable by imprisonment in the penitentiary not exceeding two years.

Prize fights.

§ 4597. ⁽²⁰¹²⁾ Every person wilfully present as a spectator at any fight or contention mentioned in the preceding section, is guilty of a misdemeanor.

Persons present at prize fights.

§ 4598. ⁽²⁰¹¹⁾ Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood, family, or person, by loud or unusual noise, or by tumultuous, or offensive conduct, or by threatening, traducing, quarreling, challenging to fight, or fighting, is punishable by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding two months.

Disturbing the peace.

§ 4599. ⁽²⁰⁰⁴⁾ If two or more persons assemble for the

JURY DISAGREES

On Monday of this week, Messrs D. A. Buchannon, Charles Roblnette and William Halling were haled into Justice Christensen's court charged with violating the city ordinance. The defendants were arrested for peddling fruit at the O. S. L. Railroad station. In violation of Sec. 83 of Chapter 18 of the City Ordinance, which reads as follows, "Any person who shall ply any vocation upon the platform or ground of any railroad company, **** without the consent of said company **** shall, upon conviction thereof, be punished by a fine of not less than five nor more than one hundred dollars for each offense."

The defendants demanded a jury trial and four citizens were secured to pass upon the evidence presented. The city called a number of witnesses to prove that the defendants had been selling fruit on the station platform on the east side of the tracks and it was also brought out that the railroad company had granted the sole privilege of selling fruit on its property to Knudson Bros. The defense argued that in as much as the city sold the defendants a license to peddle fruit at the depot, the city was morally obligated to protect them in their rights and see that they had the privilege of selling fruit.

The case went to the jury in the forenoon on Monday and the jury got "hung" shortly after retiring. They deliberated until night fall and then notified the Court that it was impossible to agree on a verdict. One held out for the enforcement of the city ordinance and the other three stood against the city. The Justice, upon being advised of the condition discharged the jury and then discharged the defendants and so the case ended.

No little discussion has been caused by the proceedings and the turn of affairs and sentiment can be found favoring both sides.

Police Court.

The following business was done in Justice Laney's court on Saturday last:

James Flemming, for sleeping in a G. W. box car, was fined \$25, which he will pay in labor.

Wm. C. Marsh was fined \$10 for being drunk, which he will work out.

Today the following business was done:

The case of John Waterman, arrested on a charge of disturbing the peace, and who took an appeal July 9, perfected it today.

Thomas Ryan pleaded guilty to a charge of vagrancy, and his sentence is under advisement.

Garret Maxey was required to answer this evening to a charge of drunkenness. He was convicted and fined \$5.

John Guthrie was fined \$5 for drunkenness, and \$5 left by Geo. Rock, to secure his answer to a like charge, was forfeited.

Clas Smith, James Green and Walter Empey are held to answer to a charge of petit larceny.

The following were fined \$5 each for drunkenness: A. Hudson, S. H. Peterson, Wm. Barratt, James Smith and James Mallin.

James Murphy was put on trial for vagrancy, but the case was not concluded until this afternoon.

Police Court.

Yesterday afternoon the hearing of the case against Lou Zolner, the plumber, charged with violating the ordinance relating to sewer connections, was heard up Justice Clauson. A jury of six men was impaneled and heard the matter pro and con but was unable to agree on a verdict. The case will come up at some future time.

Five Days Each for Vagrancy.

A worthless trio of tramps were committed in the police court today to five days imprisonment each. They have the names of Williams, Stewart and Ferguson.

Convicted of Vagrancy.

At a late hour yesterday afternoon Leslie Higgins, of Mill Creek, who has been a source of so much trouble to her parents of late, was arraigned on the charge of vagrancy. The defendant pleaded not guilty.

The complaint was the girl's stepmother, Mary Jane Higgins, who set forth in the complaint that the defendant is an idle, dissolute and unmanageable person, that she is in the habit of wandering about the streets at all hours of the night without any lawful business and that she is a common prostitute. The father of the girl affirmed the allegations set forth in the complaint. The defendant was sentenced to twenty days imprisonment.

The father says he has done all that lies in his power to reform her from her fallen condition, and must now appeal to the law for assistance. Application was made to have defendant committed to the Reform School, but an investigation revealed the fact that she was twenty-two years of age, and not seventeen, as represented, and therefore not entitled to admission in that institution.

Demand a Jury Trial.

James Griffin promised to turn the tables, as it were, on Justice Wenger, Griffin a habituated loiterer and was arrested Saturday evening by Officer Hemple, charged with the old offense. Hereafter, when in the police court, he has readily accented to the jurisdiction and gone to jail without any fuss, but late morning when arraigned, he created no little surprise by demanding a jury trial, thus taking full advantage of the law in such cases. In jail he declared to his colleagues that he would "fool Wenger this time," and this is how he did it. He also has it in for Officer Hemple and proposes to show him a thing or two whenever he gets a chance. He will be tried in the morning. The officers estimate a bad man.

Police Court.

F. J. Hart is under arrest charged with gambling.

Herbert Bullen, accused of disturbing the peace, left \$15 for his appearance this afternoon.

John F. Lee and Joseph N. Bush were fined \$5 each for being drunk. Thomas Bywater is held to answer a charge of trespass.

John Hayes this morning denied having been drunk and left \$5 for his appearance for trial this afternoon.

Edward and Alfred Ray and Wm. Thompson and Richard Haines are to be tried at 2 p. m. on a charge of disturbing the peace.

Police Court Notes.

Ralph Amorse an Italian saloon keeper has been arrested for allowing females to loiter in his place of business after 9 p. m. He will have a jury trial at 2 o'clock tomorrow.

Lois Cain, a Chinese gambler, forfeited \$20 for keeping a house while Willie Wilson and Fannie Higgins were found guilty of prostitution and fined \$20 each.

John Paine, the man who a few days ago expressed his readiness to be hanged, was committed to the county jail today, there is await pending a hearing as to his sanity.

Police Court.

Business was very light in the police court today. The charge of vagrancy against Harry Raymond was dismissed, while George C. Goodfield forfeited \$5 for drunkenness and W. L. Kemp was fined \$5 for the same offense to which he plead guilty. At present time John Edwards was having a jury trial for vagrancy.

Today's Police Court.

Henry Hall pleaded guilty to being drunk and was fined \$7.50.

C. F. Kimball and J. Jacobs were found guilty on the sidewalk and John Doe was charged with it without a lump last evening and the city has consequently \$5 more in its treasury.

The case against J. C. Bowring, W. C. Bowring and John H. White, Market street grocer, for obstructing the sidewalk, was continued until July 15.

Walter Brockendridge, a soldier, was fined \$5 for drunkenness.

The case of the City vs John Morrison was tried this afternoon before a jury. The charge was the destruction of a service building inside the fire district. Attorneys John M. Kane and John W. Horton were counsel for defense and J. E. Ditzner and John James for the prosecution. J. H. H. taxman, a cigar dealer, was the complaining witness. He stated that about last September a wooden building was placed in position on East Temple street south of Golden-Pine drug store, and used as a cigar stand in competition with his own.

John Morrison took the stand for the defense and stated that his stand was a box and not a building. W. H. Virtue testified that persons had offered a certain amount to buy one who would bring a charge against Morrison. When the News went to press the jury had not given its verdict.

Police Court Items.

Riley Newcomb and Clara Smith were tried in the police court this morning on the charge of burglary and were held in bonds of \$1,000 each to await the action of the grand jury.

George Lutz was arraigned on the charge of committing a nuisance. He pleaded guilty and was sentenced to ten days' labor.

Lois Lee, an Italian merchant, and Mrs. E. H. Becker, were arrested this morning on the charge of drunkenness and disturbing the peace. The trial was set for 10 a. m. tomorrow.

John Joe Ferguson, a Dutchman, was arrested by Officer Halden this morning on the charge of battery. He was found guilty in the police court this afternoon, and fined \$10.

A Jury Trial.

Charles Chapman, whose hearing on a charge of vagrancy was set for this afternoon, demanded a jury trial. The jury was accordingly impaneled, but the hearing did not take place, as counsel for the defendant argued that he had not been a thief of the nature of the complaint. The case was therefore continued until tomorrow.

BUSY DAY IN OGDEN POLICE COURT

Continuous Session of Eight Hours—
Jury Failed to Agree on Walter
Smith's Case.

OGDEN, March 2.—One of the busiest days ever recorded in the history of the local municipal court was Thursday, when court was continuously in session from 10 a. m. to 6 p. m. and the case was still on trial at the time of adjournment.

John McDonald admitted being guilty of begging and was given a sentence of 10 days.

James Saunders had been drunk and got five days or \$5.

John Humphries, while serving a 30 days' sentence for drunkenness, was used as a trustee around the jail and he eventually wandered over to the nearest saloon and finished two forty's. When brought into court he protested that he was already serving a sentence and did not see how he could be guilty again. His memory was refreshed and he was sentenced to another 30 days.

The man of crank fancies, amounting to \$5, was declared forfeited by reason of his failure to appear on a charge of drunkenness.

Earl Manner was given till Friday morning to plead to the charge of vagrancy.

Harry Cotten admitted that he was a "common, ordinary knave" but the court decided that he was not so common after all by passing a sentence of 30 days or \$10. Harry is known as an "undesirable."

H. C. Packard was arraigned on the charge of obtaining money under false pretenses and was given till Friday morning to enter a plea. He is charged with endorsing a check on a Twin Falls, Idaho bank for \$5 when he had no money in that institution.

The case of the state of Utah against Walter Smith's charge with disturbing the peace was next called. This offense is alleged to have been committed at Roy on the night of Feb. 2, at a public dance, when the defendant is charged with having caused a disturbance by his actions and by the use of profane language. That the case has created considerable interest in the little farming community was shown by the large attendance at Roy citizens, who filled the courtroom to overflowing. A large number of witnesses, something in the neighborhood of 50, were sworn and following an order of the court, were admitted to the room one by one to give their testimony. The evidence showed that there had been considerable feeling and much bad blood on both sides and some of the more prominent citizens felt that the affair was made unnecessarily prominent and they very much regret that the matter has been dragged into court. The matter was given to the jury at a short time after 4 o'clock and at 5:30 they returned to the courtroom with the statement that they were unable to reach a unanimous conclusion. They were charged to again take the matter under advisement, as the court felt that the state was being put to considerable expense in the matter, but at 6 o'clock they again returned without having reached a verdict and were discharged by the court. Just what action will now be taken in the matter is not known. The jury was composed of the following: H. Jenkins, J. H. Merrett, J. W. Brown and A. W. Rankin.

JURY IN VAGRANCY CASE.

A jury was secured in Justice Stanley A. Hanks' court yesterday in the case of Mrs. D. Donaldson who is charged with vagrancy, having been arrested in a house within the walls of the West Side stockade. Dan R. Evans, a cab driver, testified that he and a companion had spent several minutes in a house there with M. A. Donaldson, during which time the inmates drank beer and smoked cigarettes.

Mrs. Martin Price, who lived near the stockade, testified to the general condition of the place. The case will be continued today.

THOSE VAGRANCY CASES.

Sentences in Six of Them Were Corrected With the City System.

In Judge Timmony's court this morning, the cases of Victor Pinet, Victor Lagrette, Edmond Ternon and Julius Patron, four of the Frenchmen convicted of vagrancy, came up before the court for a reconsideration of the former sentence of \$100 fine and 90 days' imprisonment.

Attorney Truman, counsel for the defendants, objected to the court making any change in the sentences whatever, but his motion to allow the order of the court to remain as it was, was denied. Judge Timmony said that having passed inadvertent sentence in the four particular cases, the sentences would be corrected by striking out that part relating to a fine of \$100, so that now the sentence stands, 90 days in the city jail at labor. Attorney Truman noted an exception to the ruling of the court, and the cases are to be appealed.

Late Saturday afternoon, in the cases of Leon Servis and Daniel Pinet, Judge Hall found that the sentence was in excess of the jurisdiction of Judge Timmony, and they were sent back to that court for resentencing. They were then sentenced to 50 days at hard labor. Their cases are also to be appealed.

The new trial granted to Adrain Pintre is on today.

Pintre was convicted on the vagrancy charge by a jury, but a new trial was granted because Officer Milner locked himself up with the jury which tried the case. The bond of Julius Patron was forfeited, and he will be brought in to undergo the sentence imposed.

