

2015

**State of Utah, Plaintiff and Appellee v. Wyatt Jeff Outzen
Defendant and Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee

Appellate No. 20150953-CA

v.

WYATT JEFF OUTZEN

Defendant and Appellant

On appeal from the Fourth Judicial District Court, Utah County, Hon. Claudia Laycock, District Court No. 145400088

BRIEF OF APPELLANT

Jeffery Buhman
Lance Bastian
Utah County Attorney's Office
100 East Center Street
Provo, UT 84603
(801) 851-8526
lanceb@utahcounty.gov

Michael J. Petro
Dallas B. Young
PETRO & ASSOCIATES
1215 N. 500 W.
Provo, UT 84604
(801) 373-0019
mpetro.law@gmail.com
dallasyounglegal@gmail.com

ORAL ARGUMENT REQUESTED

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Statement of Appellate Jurisdiction

This case originated in the Utah County Justice Court. Ordinarily, the defendant's right to appeal would have been exhausted by exercising his right to trial de novo pursuant to Utah Code Ann. § 78A-7-118(8). However, the district court ruled on the constitutionality of Utah Code Ann. § 41-6a-517 as applied to Defendant. Thus, this court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-7-118(8) and Utah Code Ann. § 78A-4-103(e).

Statement of the Issues Presented for Review and Standards of Review

Issue #1: Did the trial court err when it concluded that Utah Code Ann. § 41-6a-517(2) criminalizes operating a motor vehicle with non-impairing metabolites in the driver's body?

Standard of Review: The trial court's ruling that § 41-6a-517(2) criminalizes driving with any metabolite of a controlled substance, regardless of whether that metabolite could impair the driver or not, is a question of statutory interpretation. Questions of statutory interpretation are reviewed de novo, giving the trial court no particular deference. *E.g., Becker v. Sunset City*, 2013 UT 51, ¶ 11, 309 P.3d 223.

Preservation of the Issue: This issue was preserved by Defendant's motion to dismiss where Defendant argued that under a set of stipulated facts, Defendant had not committed the offense charged. R. 51-72; 159-175¹

Issue #2: Did the trial court interpret § 41-6a-517(2) in a manner that creates an

¹ Hereinafter, "R." shall be understood to be a citation to the Record on Appeal.

unconstitutional status offense as discussed in *State v. Robinson*, 2010 UT 30, ¶ 31, 254 P.3d 183 by interpreting the statute to criminalize driving after having previously consumed controlled substances?

Standard of Review: This portion of the trial court’s ruling involves both statutory interpretation and constitutional interpretation, both of which are questions of law. *Becker*, 2010 UT 50 at ¶ 11; *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519.

Preservation of the Issue: This issue was preserved by Defendant’s motion to dismiss. R. 51-72; 159-175.

Issue #3: Did the trial court err by concluding that § 41-6a-517(2) did not violate Article I, § 24 of the Utah Constitution by creating disparate treatment without a rational basis between a driver who has non-impairing tetra-hydro-cannabinol (“THC”) metabolites in her body as a result of legal or involuntary consumption of THC and a driver with non-impairing metabolites in her body as a result of illegal consumption of THC?

Standard of Review: This issue poses a question of constitutional interpretation. Questions of constitutional interpretation are questions of law, reviewed for correctness. *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519.

Preservation of the Issue: This issue was preserved by Defendant’s motion to dismiss. R. 51-72; 159-175.

Determinative Statutes and Constitutional Provisions

Utah Code Ann. § 41-6a-517. Definitions - Driving with any measurable controlled substance in the body - Penalties - Arrest without warrant²

- (1) As used in this section:
 - (a) “Controlled substance” has the same meaning as in Section 58-37-2.
 - (b) “Practitioner” has the same meaning as in Section 58-37-2.
 - (c) “Prescribe” has the same meaning as in Section 58-37-2.
 - (d) “Prescription” has the same meaning as in Section 58-37-2.
- (2) In cases not amounting to a violation of Section 41-6a-502, a person may not operate or be in actual physical control of a motor vehicle within this state if the person has any measurable controlled substance or metabolite of a controlled substance in the person’s body.
- (3) It is an affirmative defense to prosecution under this section that the controlled substance was:
 - (a) Involuntarily ingested by the accused;
 - (b) Prescribed by a practitioner for use by the accused; or
 - (c) Otherwise legally ingested.

Utah Constitution: Article I, § 24 – Uniform operation of law

All laws of general nature shall have uniform operation.

² Defendant reproduces only the pertinent portion of § 41-6a-517 here. The entire statute is voluminous, and therefore produced as Addendum 1.

STATEMENT OF THE CASE

The case comes to the court following Defendant's plea entered pursuant to *State v. Sery*, 758 P.2d 935 (Utah 1988) and sentencing. The case was originally filed in Utah County Justice Court as Case number 145107472, where defendant was charged with driving with a measurable amount of controlled substances, a violation of Utah Code Ann. § 41-6a-517 ("the Metabolite Statute"). See R. 1. Defendant later plead guilty to an amended charge of impaired driving, and was sentenced by the justice court. R. 41-43. A timely notice of appeal to the district court was filed with the justice court. R. 4-5.

De novo proceedings were instituted in the Fourth District Court, Judge Claudia Laycock presiding in case number 145400088. R. 44. A motion to dismiss was filed on January 28, 2015. R. 51-72. The motion was based on facts that were stipulated for purposes of the motion. R. 52-53. Specifically, those facts were that Defendant was involved in an automobile accident and responding officers suspected him of driving under the influence of marijuana. R. 52. Field sobriety tests revealed that Defendant was not too impaired by any substance to drive safely. R. 52. Subsequent blood tests revealed that Defendant had a non-impairing metabolite of THC, 11-nor-9-carboxy-tetrahydrocannabinol, and no active THC in his system. R. 52.

The motion to dismiss asserted that the plain language of the Metabolite Statute did not criminalize the act of driving with a non-impairing metabolite in the driver's system. R. 54-76. The motion also asserted that the legislative history indicated an intent to criminalize driving with impairing metabolites, and not non-impairing metabolites. R. 56-60. The motion further asserted that if the court disagreed with Defendant's

construction of the Metabolite Statute, the plain language of the statute as applied to this case constitutes an unconstitutional status offense under the constitutional principles articulated in *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) as interpreted by the court in *State v. Robinson*, 2011 UT 30, ¶ 31, 254 P.3d 183. R. 61-62. Finally, the motion also asserted that the Metabolite Statute violates the Utah Constitution's uniform operation of law clause found in Article I, § 24. R. 63-66.

After the motion was filed, the parties stipulated to an evidentiary hearing on the issues asserted in the motion. R. 88. An evidentiary hearing was held on March 17, 2015, where the State offered testimony from Trooper James Wright, the arresting officer, and Dr. Glen Hanson, an expert in the field of toxicology. R. 93. Dr. Hanson agreed that the THC metabolite found in Defendant's blood is incapable of causing symptoms of impairment. R. 132:25-134:10. Dr. Hanson further testified that he did not believe the individual from whom the blood was taken would exhibit any signs of impairment from having previously consumed THC. 136:22-137:2.

Following the evidentiary hearing, a briefing schedule was set. The State filed an opposition on May 20, 2015, and Defendant filed a reply memorandum on June 2, 2015. R. 249-270; 271-285. Oral argument was held on June 10, 2015 and the matter was taken under advisement. R. 288-289. On July 1, 2015, the parties returned to court for announcement of the decision. R. 290-291.

The trial court first ruled that the plain language of the statute criminalizes driving with any metabolite of a controlled substance, irrespective of whether that metabolite could impair the driver, and denied the portion of the motion based on a plain language

statutory analysis. R. 301. The trial court then conducted a constitutional analysis, concluding that the statute does not arise to an impermissible status offense as defined in *State v. Robinson* because the status penalized under the Metabolite Status is that of a driver, and not of a drug addict. R. 302.

The trial court also concluded that the Metabolite Statute does not violate the uniform operation of law clause because, despite acknowledging that the statute does create disparate treatment between two classes of people, those classes are not similarly situated. R. 302. Specifically, the trial court concluded that because the two respective classes of people receive disparate treatment under the law, they are not similarly situated. R. 302. The trial court therefore ruled that Defendant had failed to make a threshold showing of disparate treatment of persons similarly situated, and that the Metabolite Statute passes uniform operation of law scrutiny. R. 303.

The trial court further concluded that even if there was a threshold showing of disparate treatment of persons similarly situated, the legislature had a reasonable purpose for enacting the classification, such as discouraging illegal drug use or public safety. R. 303. The trial court did not explain the nexus between the governmental purpose and the classification at issue, but stated in conclusory terms that “the relationship between the statute’s classification and the conceivable legislative objectives is also reasonable.” R. 303.

As a result of these holdings, Defendant’s motion to dismiss was denied. R. 303. On the date set for bench trial, Defendant entered a plea pursuant to *State v. Sery*, 758 P.2d 935 (Utah 1988), preserving his right to appeal the trial court’s ruling on his motion

to dismiss. R. 331. This appeal followed. R. 341.

Statement of Facts Relevant to the Issues Presented

The essential facts upon which the trial court's ruling rested are essentially undisputed, and consist of the following:

1. On or about June 26, 2014, defendant was involved in a two-vehicle accident on I-15 in Utah County, State of Utah. R. 160.
2. Utah Highway Patrol Trooper James Wright responded to the accident site, and believed he saw and smelled signs of marijuana in Mr. Outzen's vehicle. R. 160.
3. Based on the smell, Trooper Wright searched the vehicle, but did not find any contraband. R. 160.
4. Trooper Wright had Defendant stick out his tongue, which the Trooper noticed was covered with green mucus. R. 160.
5. Trooper Wright administered field sobriety tests, and concluded that Defendant was not too impaired to drive. R. 160.
6. Defendant admitted, however, that he had smoked marijuana some time the night prior. R. 177. Defendant was arrested for violation of the Metabolite Statute and consented to give a blood sample. R. 178. Subsequent blood testing revealed that Defendant's blood contained an inactive THC metabolite, but no THC. R.160-161, 180.
7. At an evidentiary hearing in support of the motion to dismiss, the State called Dr. Glen Hanson, who conceded that the driver's ability to perceive, process information, and respond physically to the perception are the functions with which

the question of impairment to drive a motor vehicle is concerned. R. 127:25-128:19.

8. Dr. Hanson also conceded that the THC metabolite in question in this case has no ability to impair an individual's ability to perceive, process information, and respond physically to the perception at any known detectable level. R. 133:7-134:10.

9. Dr. Hanson further conceded that the person from whom the blood was drawn in this case would not exhibit any signs of impairment by virtue of having previously consumed THC. R. 136:22-137:2.

SUMMARY OF THE ARGUMENTS

In the present case, Defendant requests that this court reverse the trial court's ruling on one of three points of law, any one of which requires reversal. First, Defendant requests that this court reverse the trial court's ruling that the Metabolite Statute criminalizes driving with any metabolite in the driver's system, whether that metabolite can impair the driver or not. Contrary to the trial court's construction of the Metabolite Statute, the use of the clause, "in cases not amounting to a violation of Utah Code Ann. § 41-6a-502 ("DUI Statute") signals that the Metabolite Statute and DUI Statute have similar scopes of prohibited conduct. And because the DUI Statute acknowledges that impairment occurs on a spectrum, and that one only violates the DUI Statute if one passes a certain point on that spectrum, the Metabolite Statute also occupies space on the impairment continuum, but only in "cases not amounting to a violation of" the DUI

Statute. That is, the Metabolite Statute only contemplates impairing metabolites.

Moreover, legislative history behind the Metabolite Statute supports this construction. Similarly, language substantially similar to the “in cases not amounting to” clause is found in other places in the criminal code, each of which is for the manifest purpose of establishing that the scope of prohibited conduct of the two statutes is similar, and not disparate. This construction is further supported by court of appeals precedent, which has interpreted substantially similar language to mean that the two statutes, while separate and distinct from each other, have related scopes of prohibited conduct. Thus, the trial court’s interpretation of the statute to the contrary was in error. And because the stipulated facts are that Defendant was not driving with an impairing metabolite in his system, was not too impaired to drive, and could not have exhibited any signs of impairment by virtue of his prior THC consumption, the trial court erred by denying the motion to dismiss. A ruling from this court reversing the trial court’s decision on this point would moot both points that follow.

However, should this court rule against Defendant on the meaning of the statute, Defendant maintains that the statute is unconstitutional as applied to him, by way of imposing an unconstitutional status offense under *Robinson v. California* as interpreted by *State v. Robinson*. If the Metabolite Statute punishes a driver who has previously consumed, but is no longer under the influence of, THC, it is an unconstitutional status offense under *Robinson v. California*. Under such an interpretation, the Metabolite Statute would, under the facts of this case, punish Defendant because he might have

been³ previously under the influence of THC

Additionally, if the statute criminalizes driving with a non-impairing metabolite in the driver's system, it violates the uniform operation of law clause of the Utah Constitution because it imposes disparate treatment upon persons similarly situated without a rational basis to support the classification. Specifically, it classifies between legal consumers of controlled substances and illegal consumers of controlled substances. The trial court held that this classification does not impose disparate treatment upon persons similarly situated because people whose conduct is illegal are not similarly situated to people whose conduct is legal. This reasoning is in error because if the fact of different treatment to different persons means that they are not similarly situated, it would empty the uniform operation of law clause of meaning. The trial court's ruling and order was in error in this regard and the statute creates a distinction between similarly situated persons who have consumed marijuana some time prior to driving.

The legislative purpose of the Metabolite Statute is to promote public safety, which Defendant concedes is a proper legislative purpose. However, there is no rational basis supporting the classification in view of that legislative purpose. Under the facts of this case, Defendant posed no public safety risk by virtue of his prior THC consumption. More importantly, there is no principled reason to believe that Defendant posed a greater

³ While Defendant did admit to having smoked marijuana the night before, there was nothing before the trial court and nothing before this court to indicate how much he consumed, the extent of his impairment, or if he was ever impaired at all. The only facts before the court are that he had consumed an unspecified amount the night prior to the motor vehicle accident, and that he was not under its influence when field sobriety tests were administered, or when his blood was drawn.

public safety risk than would one who had consumed marijuana legally or involuntarily. Neither class of driver could be impaired by the prior consumption, and the legality or involuntariness of prior consumption cannot, from any reasonable vantage point, diminish the public safety risk --which is non-existent in the first instance. There is therefore no principled rationale to support the classification.

As a result, the Defendant's rights to uniform operation of law were violated when the trial court denied his motion to dismiss. The trial court should be reversed and the matter remanded with instructions to vacate the conviction and sentence, and dismiss the Metabolite Statute charge with prejudice.

ARGUMENT

I. The Trial Court Erred When it Concluded that the Metabolite Statute Criminalizes Driving with any Metabolite in the Driver's System, Irrespective of the Metabolite's Ability to Impair the Driver.

A. The Statute's Plain Language Includes Impairment as an Essential Element of The Metabolite Statute.

The trial court's first ruling was that the Metabolite Statute criminalizes driving with any metabolite of a controlled substance, whether that metabolite has the potential to impair the driver or not. However, a closer analysis of the plain language reveals that this ruling was in error. In conducting this analysis, this court's job is to interpret the statute according to the intent of the legislature. *E.g.*, *State v. Bluff*, 2002 UT 66, ¶ 34, 52 P.3d 1210. The first place to look for the legislature's intent is the plain language of the statute itself. *Id.* While interpreting the plain language, the court assumes that the legislature used each term of the statute advisedly. *Id.* Similarly, the court interprets statutes in a manner that avoids surplus language and gives every word of the statute meaning. *Heaps v. Nuriche, LLC*, 2015 UT 26, ¶ 24 FN 6, 345 P.3d 655, *see also State v. Nguyen*, 2012 UT 80, ¶ 18, 293 P.3d 236 (referencing the "cardinal rule of statutory interpretation that we interpret statutes so that no part or provision will be inoperative or superfluous, void or insignificant, and that one section will not destroy another."). The context of a statute is also a factor to be considered, so the court interprets the statute as a whole, and not in piecemeal fashion. *Board of Educ. of Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 14, 94 P.3d 234; *State v. Hunt*, 906 P.2d 311, 313 (Utah 1995). Furthermore, when confronted with a statute with more than one potential interpretation, the court should

avoid an unconstitutional interpretation. *E.g., LKL Associates*, 2004 UT 51, ¶ 9, 94 P.3d 279.

The trial court erroneously interpreted that plain language in this case. The dispositive statutory language in this case is as follows:

In cases not amounting to a violation of Section 41-6a-502, a person may not operate or be in actual physical control of a motor vehicle within this state if the person has any measurable controlled substance or metabolite of a controlled substance in the person's body.

Utah Code Ann. § 41-6a-517(2) (emphasis added). The trial court interpreted the portion of the Metabolite Statute emphasized above to negate any obligation to prove impairment. Put another way, the trial court interpreted the prefatory clause “[i]n cases not amounting to a violation of Section 41-6a-502” to mean that the Metabolite Statute does not distinguish between metabolites with the capacity to impair and metabolites without capacity to impair. Thus, the trial court interpreted the “[i]n cases not amounting to” clause to mean that the scope of prohibited conduct of the respective statutes is disparate.

The trial court's construction of that clause is incorrect because the only reasonable reading of the “[i]n cases not amounting to” clause is that the scope of prohibited conduct under the Metabolite Statute is necessarily similar to the scope of prohibited conduct under the DUI Statute. To read the “[i]n cases not amounting to” clause as the trial court did would be to leave that clause surplus verbiage. Utah long ago abolished common law crimes, which means that the scope of any crime must be defined strictly by the statute creating it. Utah Code Ann. § 76-1-105 (“no conduct is a crime

unless made so by this code. . .”). The default rule, therefore, is that the scope of prohibited conduct can only be found in the statute itself. *Id.*

Against that backdrop, if the purpose of the clause “in cases not amounting to a violation” of the DUI Statute is to signal that the scope of prohibited conduct under the Metabolite Statute is not related to the scope of prohibited conduct under the DUI Statute, that language is superfluous because it accomplishes nothing that Section 76-1-105 does not accomplish. To illustrate the point, there is no need to specify that the Metabolite Statute’s scope of prohibited conduct includes cases not amounting to a violation of, for example, domestic violence or voyeurism because the criminal code is structured to preclude that necessity. *See* Utah Code Ann. § 76-1-105. As a result, the trial court’s interpretation left the clause “[i]n cases not amounting to a violation. . .” surplus verbiage because it accomplishes nothing that Section 76-1-105 does not already accomplish. Interpreting statutes in a redundant and superfluous manner is a disfavored result under the canons of statutory construction. *See e.g., Nguyen*, 2012 UT 80 at ¶ 18. Thus, the trial court’s interpretation of that language is not consistent with well-established rules of statutory interpretation.

The proper use of this canon of statutory interpretation leads to the conclusion that the Metabolite Statute can only be read to contemplate driving with impairing metabolites in the driver’s system. But to understand why, one must first understand the scope of prohibited conduct under the DUI Statute, which also requires an understanding of the principle that impairment is not a binary proposition, but occurs on a spectrum. Indeed, the law expressly acknowledges this reality because the DUI Statute allows a person to

drive with impairing substances in his or her system, provided that the influence of the substance(s) is/are not “*to a degree* that renders the person *incapable* of safely operating a vehicle. . . .” Utah Code Ann. § 41-6a-502(1)(b) (emphasis added).⁴ The plain language of the DUI Statute, therefore, acknowledges that impairment occurs by degree, and that a person only violates that statute when his or her impairment rises to a level that the person is *incapable* of safe operation of a vehicle. *Id.* Prior to the point of incapacity of safe operation of a vehicle, the person has not violated the statute. *See id.*

The Metabolite Statute also acknowledges that impairment occurs on a continuum because it applies only in cases “not amounting to a violation of Section 41-6a-502. . . .” This phrase, by its reference to the DUI Statute, sets the scope of prohibited conduct under the Metabolite Statute on the same spectrum identified in the DUI Statute. The DUI Statute’s scope begins at the point the driver becomes incapable of safe operation of a vehicle, but does not include impairment that does not render the driver incapable of operating a vehicle safely. Utah Code Ann. § 41-6a-502(1)(b). The Metabolite Statute covers those ranges of impairment because it applies in cases “not amounting to a violation of” the DUI Statute. *Compare* Utah Code Ann. § 41-6a-502(1)(b)(“A person may not operate or be in actual physical control of a vehicle within this state if the person: is under the influence of . . . any drug. . . to a degree that renders the person incapable of safely operating a vehicle. . . .” *with* Utah Code Ann. § 41-6a-517(2)(“In

⁴ The DUI Statute also prohibits driving with a blood alcohol content greater than 0.08. However, because this case does not involve alcohol, only the portions of the DUI Statute related to controlled substances will be discussed.

cases not amounting to a violation of Section 41-6a-502. . . .”). This construction of the statute gives meaning to every portion of both statutes, and does not leave language hollow or superfluous.

B. Substantially Similar Language Exists Elsewhere in the Code, Always Signaling Similarity in the Scope of Prohibited Conduct.

Further support of this construction is found throughout the criminal code, where verbiage substantially similar to “in cases not amounting to a violation of . . .” is found. Tellingly, when substantially similar verbiage is used in other portions of the code, it is used for the manifest purpose of establishing that the scope of the crime in question is similar to, and not different from, the statute being referenced. *See e.g.*, Utah Code Ann. § 76-10-506(2) (“a person who, in the presence of two or more persons, and not amounting to a violation of [the aggravated assault statute], draws or exhibits a dangerous weapon in an angry and threatening manner or unlawfully uses a dangerous weapon in a fight or quarrel is guilty of a class A misdemeanor.”), Utah Code Ann. § 76-9-702.7(4)(establishing that voyeurism “under circumstances not amounting to a violation of Subsection (1)” is a class B misdemeanor and not a class A misdemeanor), Utah Code Ann. § 76-5-111.1(5)(criminalizing threatening or intimidating a vulnerable adult, a witness, or a reporting party in response to a report of abuse of a vulnerable adult, under circumstances not amounting to witness tampering), Utah Code Ann. § 76-5-109.1(2)(c)(establishing that commission of domestic violence in the presence of a child “under circumstances not amounting to” homicide, attempted homicide of a cohabitant, or causing serious bodily injury or using a dangerous weapon against a cohabitant is a

class B misdemeanor”), Utah Code Ann. § 76-5-103.5 (“Any prisoner who commits aggravated assault not amounting to a violation of Section 76-3-203.6 is guilty of: (1) a second degree felony if no serious bodily injury was intentionally caused; or (2) a first degree felony if serious bodily injury was caused.”). In each of these examples, the “not amounting to a violation of. . .” language is used to signal that the scope of the two statutes is similar, and not disparate.

C. The Analytical Approach in *State v. Ainsworth*, 2016 UT App 2 Supports Defendant’s Construction.

Even further support for this construction is found in *State v. Ainsworth*, 2016 UT App 2. *Ainsworth* involved a uniform operation of law challenge to Utah Code Ann. § 58-37-8(2)(a)(i) (the Measurable Amount Statute), which criminalizes negligently driving a vehicle with any measurable amount of a Schedule I or II controlled substance in the driver’s system while causing death or serious bodily injury to another. A violation of the Measurable Amount Statute is a second degree felony. The basis of the challenge was that the blameworthiness of a violation of the Measurable Amount Statute is lower than the blameworthiness of a violation of Utah Code Ann. § 76-5-207(2)(a) (the Automobile Homicide Statute), and Utah Code Ann. § 41-6a-502(1)(b) (DUI with Serious Bodily Injury). Notwithstanding, a violation of the Measurable Amount Statute was punished as a second degree felony, while the more blameworthy offenses of Automobile Homicide and DUI with Serious Bodily Injury were listed as third degree felonies. Defendant challenged the Measurable Amount Statute, arguing that there was no reasonable basis to impose a greater punishment for committing a crime that is less blameworthy under the

code. *Id.* at ¶ 13.

The State’s defense to this challenge was an argument that the Measurable Amount Statute only applies only when the controlled substance was consumed illegally, such as without a prescription. *Id.* at ¶ 14. According to the State, Automobile Homicide and DUI with Serious Injury are only implicated when the intoxicant was consumed legally. *Id.* Thus, when the intoxicant was consumed illegally, the State contended that the only crime that could apply was the Measurable Amount Statute. *Id.* The court rejected that argument, and in doing so made an observation that is directly germane to the point presently *sub judice*:

the Measurable Amount Statute implicitly identifies the Automobile Homicide Statute as defining an offense that could apply to users of illegal drugs by specifically distinguishing it from the Measurable Amount Statute, stating that “[a] person is subject to the penalties” of the Measurable Amount Statute when the person violates the statute “*in an offense not amounting to a violation of [the Automobile Homicide Statute].*” This indicates that the legislature anticipated that the Automobile Homicide Statute would apply to nonprescription users of controlled substances under certain circumstances.

Id. at ¶ 15 (emphasis and alterations in original). In other words, the State’s argument failed because the clause “in an offense not amounting to a violation of” establishes that the Measurable Amount Statute and Automobile Statutes are related, and are not disparate. *Id.*

Thus, the holding in *Ainsworth* implicitly relies on interpreting a clause substantially similar to the dispositive clause here to mean that both statutes occupy similar real estate in terms of the scope of prohibited conduct. The trial court was therefore in error when it ruled that the “not amounting to” language removed the concept

of impairment from the Metabolite Statute's scope. To the contrary, while the "not amounting to" clause creates a distinction between statutes, as the *Ainsworth* court recognized, the distinction only sets the line of demarcation between the otherwise similar criminal offenses.

In the end, the trial court's conclusion that the Metabolite Statute criminalizes driving with any metabolite of a controlled substance, irrespective of the metabolite's ability to impair, is not consistent with canons of statutory interpretation, is not consistent with other uses of substantially similar language found throughout the criminal code, and is not consistent with the *Ainsworth* court's analysis of substantially similar language. And because the State's witness testified that the person from whom the blood toxicology results he reviewed was drawn would not show any impairment to his ability to drive as a result of the THC metabolite, Mr. Outzen's conduct did not violate Section 41-6a-517, the trial court's ruling and order was in error and should be reversed and the matter remanded with instructions to dismiss the charge pursuant to Utah Code Ann. § 41-6a-517 against Defendant.

II. Legislative History Shows an Intent to Criminalize the Presence of "Illicit Drugs in the System."

Defendant maintains that the language of the Metabolite Statute is unambiguous because his is the only interpretation consistent with the plain language, context, and substantially identical language found elsewhere in the criminal code. However, should the court determine that the language is ambiguous, the legislative history discloses an intent to criminalize driving with impairing metabolites only.

The Metabolite Statute was passed as Senate Bill 101 in the 1994 legislative session, with Senator Craig Peterson as its sponsor. When introducing the bill on February 14, 1994, Senator Peterson discussed the presence of “illicit drugs in the system” and the difficulty of establishing a level of impairment for drugs, as distinguished from the well-known 0.08 blood alcohol concentration per se threshold. 1994 General Legislative Session SB0101 (Feb. 14, 1994) at approximately 01:41:30 (accessed at http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=15647&meta_id=480717). Senator Peterson also noted that his “original intent” with the bill was to address the problem that in a large number of cases in which individuals had a blood alcohol content between 0.04 and 0.08, the individuals were also found to have other drugs “in their system” that caused “erratic behavior” or “inappropriate driving skills,” but that those individuals could not be prosecuted for the drug use under the statute criminalizing possession. *Id.* at appx. 01:44:30. The fact that Senator Peterson repeatedly referred to having “illicit drugs in the system” and erratic behavior attributable to the impairing effects of the drugs supports an intent to criminalize the presence of impairing metabolites in a person’s body, but not the presence of non-impairing metabolites.

The legislative history therefore underscores that the conclusion that the Metabolite Statute can only be construed to contemplate impairing metabolites, to the exclusion of non-impairing metabolites.

Furthermore, defendant notes that his position is consistent with the public policy that drives the rule of lenity. That rule requires that once traditional statutory

interpretation tools have been consulted, if the statute remains ambiguous, the statute should be strictly construed against the State. *See State v. Watkins*, 2013 UT 28, ¶ 38 FN 3, 309 P.3d 209 (citing the rule of lenity with approval). So if, after this review of the statute, the court still concludes that it is ambiguous, lenity requires that the statute be construed against the State.

III. The Metabolite Statute is an Unconstitutional Status Offense.

As explained in Points I and II above, the proper interpretation of the Metabolite Statute is that it contemplates only impairing metabolites, and not non-impairing metabolites. However, should the court find plausible the construction of the statute that the State advanced below and that the trial court adopted, before considering the constitutionality of that statute, it bears remembering the maxim that when faced with more than one plausible construction of a statute, courts should avoid a construction that suffers from constitutional infirmity. *LKL Associates, Inc.*, 2004 UT 51 at ¶ 9. So the constitutional analysis that follows in Points III and IV lends further support to Defendant's construction of the Metabolite Statute advanced in Points I and II above.

The trial court concluded that the Metabolite Statute is not an unconstitutional status offense pursuant to *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) as interpreted by the court in *State v. Robinson*, 2011 UT 30, ¶ 31, 254 P.3d 183 because the status in question is the status of a driver, and not one who has previously consumed controlled substances. On that basis, the trial court concluded that the Metabolite Statute does not constitute an impermissible status offense. R. 302. The

trial court further reasoned:

As the Supreme Court of Utah stated in *State v. Robinson*, 2011 UT 30, the defendant in that case “could have complied with the measurable amount provision by choosing to remain outside Utah’s borders until the methamphetamine was no longer present in his body.” *Id.* Similarly, Defendant could have complied with the metabolite statute by not getting behind the wheel until the THC metabolite was no longer present in her body.

R. 302.

The trial court’s ruling misapprehends the nature of the challenge below and the rule as stated in both *State v. Robinson* and *Robinson v. California* because it addresses a constitutional challenge that was not at issue here. This portion of the trial court’s analysis comes from paragraph 16 of *State v. Robinson*, which addresses the appellant’s due process challenge. *State v. Robinson*, 2011 UT 30 at ¶¶ 11-16. However, a review of the record discloses that Mr. Outzen did not raise a due process challenge. This portion of the trial court’s conclusion therefore followed the trail of a red herring.

The portion of *State v. Robinson* that Defendant actually relied on begins at paragraph 28, where the court analyzed the constitutional principles articulated in *Robinson v. California*, where the Court ruled that a statute criminalizing the status of being a drug addict was a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Id.* at ¶ 29. Ultimately, the *State v. Robinson* court concluded that, based on the facts before it, there was no violation of the principles articulated in *Robinson v. California*. *Id.* at ¶ 33.

There is a critical distinction between the facts of *State v. Robinson* and *Robinson v. California*: the defendant in *State v. Robinson* had active controlled substances in his

system, whereas the defendant in *Robinson v. California* had only inactive metabolites in his system. Compare *State v. Robinson*, 2011 UT 30 at ¶ 33 with *Robinson v. California*, 370 U.S. at 662. That distinction drove the result in *Robinson v. California* because the challenged statute could not constitutionally criminalize the status of being a drug user. *Id.* at ¶ 31. It also drove the result in *State v. Robinson* because the statute at issue punished the possession of controlled substances, and not the status of having previously consumed them. *Id.*

Much like the defendant in *Robinson v. California*, Defendant in this case did not have controlled substances in his system; he only had indicators that he previously had controlled substances in his system. Moreover, after evaluation by way of field sobriety tests, officers concluded that he was *not* too impaired to drive. Thus, the trial court's interpretation of the statute criminalized the status of having previously used drugs. Such an interpretation violates the mandate of *Robinson v. California*.

Furthermore, the trial court relied on a conclusion that the status punished by the Metabolite Statute was that of being a driver, and not that of having previously used controlled substances. R. 302. That analysis, however, reflects a misapprehension of the issue before the court. Defendant never challenged the application of the statute to him on the basis of him being a driver because there was never a contention that he should not have been driving. He was properly licensed and was not too impaired to drive safely.

The real issue before the court, therefore, is whether the State can constitutionally punish Defendant for the fact that he was driving after having consumed a controlled substance, and after he was no longer under the influence of that controlled substance.

The rule under *Robinson v. California* as construed by the *State v. Robinson* court is that the State cannot. Thus, the trial court construed the statute in a manner that conflicts with the rule enunciated in *Robinson v. California*. Because the statute as applied to this case violates those constitutional principles, the trial court should be reversed.

IV. The Trial Court’s Interpretation of the Metabolite Statute Violates Article I, § 14 of the Utah Constitution.

The trial court’s reasoning rejecting Defendant’s uniform operation of law challenge can fairly be broken into two components. First, the trial court ruled that the Metabolite Statute does not create disparate treatment amongst persons similarly situated. R. 302, ¶ 13. Second, the trial court ruled that even if the statute did create disparate treatment amongst persons similarly situated, there is a rational basis to do so. Both conclusions are defective for reasons explained below.

A. Article I, § 24 Legal Standards

The supreme court has previously described Article I, § 24 of the Utah Constitution as “Utah’s analogue to equal protection under federal law,” but noted that the Utah provision may be more rigorous than its federal counterpart because it requires similar treatment of persons similarly situated.” *State v. Drej*, 2010 UT 35, ¶ 33, 233 P.3d 476. Statutes found to treat similarly situated individuals in an unreasonably different manner will not pass uniform operation of law scrutiny. *State v. Mohi*, 901 P.2d 991, 997-98 (Utah 1995)(holding that a statute authorizing prosecutors to charge juvenile defendants as adults on an “arbitrary and standardless” basis violates the uniform operation of law Clause of the Utah Constitution).

At the outset of uniform operation of law analysis, the court must identify whether the challenged classification implicates fundamental or critical rights, or classifications considered impermissible or suspect in the abstract. *Gallivan v. Walker*, 2002 UT 89, ¶ 41, 54 P.3d 1069 (noting that the right to vote is a fundamental right), *Ryan v. Gold Cross Services, Inc.*, 903 P.2d 423, 426 (Utah 1995)(noting that the strict scrutiny/rational basis standard of review terminology is not helpful because it comes from equal protection analysis under the Fourteenth Amendment, but also noting that a statute declaring that the act of not wearing a seatbelt is not an act of negligence did not implicate fundamental rights), *Malan v. Lewis*, 693 P.2d 661, 670 (noting that Fourteenth Amendment jurisprudence is not binding “so long as we do not reach a result that violates the *Equal Protection Clause*.”)(emphasis in original). Cases that involve fundamental rights are subject to heightened scrutiny, as compared to cases that do not. *Gallivan*, 2002 UT 89 at ¶ 40.

“To determine whether a statute violates the uniform operations of laws, [the court] appl[ies] a three-step analysis: (1) whether the statute creates any classifications; (2) whether the classifications impose any disparate treatment on persons similarly situated; and (3) if there is disparate treatment, whether ‘the legislature had any reasonable objective that warrants the disparity.’” *State v. Robinson*, 2011 UT 30 at ¶ 17 (citations omitted).

Regarding the third prong of the model, the court noted that “[t]his question involves a subsidiary three-part inquiry: (1) whether the classification is reasonable, (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a

reasonable relationship between the classification and the legislative purpose.” *Id.* at ¶ 22 (citing *Merrill v. Utah Labor Comm’n*, 2009 UT 26, ¶ 9, 223 P.3d 1089; *Drej*, 2010 UT 35, ¶ 34, 233 P.3d 476). And while the legislature enjoys considerable discretion in designating the classes to which the statute applies, it is the province of the judiciary to decide if the classification operates equally on all persons similarly situated in a manner consistent with Article I, § 24. *Gallivan*, 2002 UT 89 at ¶ 38.

With respect to the purpose of the challenged statute, courts “will sustain a classification if [they] can reasonably conceive of facts which would justify the distinctions or differences in state policy [expressed by the challenged legislation] as between different persons.” *Blue Cross & Blue Shield of Utah v. Utah State Tax Comm’n*, 779 P.2d 634, 641 (Utah 1989)(latter alteration in original)(internal citations omitted). However, courts are not to accept any conceivable reason for the legislation; they are to judge the challenged statute based on reasonable or actual legislative purposes. *Id.* No exact proof of those purposes is required, however, but only purposes that may be reasonably imputed to the legislature should be used. *Id.*

B. The Trial Court’s Reasoning that the Metabolite Statute Does Not Create Disparate Treatment Amongst Persons Similarly Situated Misconstrues the Meaning of “Similarly Situated.”

At the outset, Defendant concedes that this case does not involve a fundamental right or a suspect classification. The classification in question concerns persons who consume controlled substances and drive vehicles, which does not invoke any fundamental rights or suspect classifications. Thus, Defendant concedes that the analysis proceeds under a more deferential approach. *See Ryan*, 903 P.2d at 426(“[O]ur

determination of whether the challenged statute is reasonably related to legitimate legislative objectives does not require a high threshold.”). However, it should be noted that this more deferential approach does not relieve the court of its obligation to scrutinize the classification for a reasonable basis. *Id.* Under this approach, it remains the court’s duty “to examine the reasonableness of the classification in light of legislative objectives.” *Id.*

Turning to whether the statute imposes disparate treatment to persons similarly situated, the trial court’s rationale was as follows:

12. The statute does classify, and disparately treat, individuals on the basis of the legality or illegality of their underlying drug use; those whose underlying use was illegal are subject to the sanctions of the statute, while those whose use was lawful are not.
13. However, the statute does not create disparate treatment between persons similarly situated because those whose underlying use was illegal are not similarly situated to those whose underlying use was legal.

R. 302.

The most glaring problem with this line of logic is that, if accepted, no statute could possibly disparately impact persons similarly situated. All laws create distinctions, amongst classes of people and things. Indeed, that is the very thing laws do. *See Lee v. Gaufin*, 867 P.2d 572, 577 FN. 6 (Utah 1993)(“[E]very legislative act is in one sense discriminatory.”). Because laws create these distinctions, there will always be disparate impact upon persons. *See id.* If the upshot of disparate impact is that the disparately impacted persons cannot be similarly situated, then Article I, § 24 is reduced to a hollow tautology that guarantees that the law must apply “equally to all those whom it applies.”

Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 345 (1949). Given the importance of constitutional guarantees to our system of government, a constitutional provision should not be construed to be a hollow promise.

Moreover, this approach is not consistent with supreme court precedent. For example, under this analytical approach the statute at issue in *Lee* could not have been stricken on equal protection grounds. *Lee* involved a provision in the medical malpractice act that treated minor malpractice claimants the same as adult malpractice claimants by purporting to exempt the statute of limitations and statute of repose for a medical malpractice claim from tolling as a result of the minority of the claimant. *Id.* at 574. Because of that provision, some claimants were never afforded the opportunity to pursue their claim because either the statute of limitations and/or statute of repose had run by the time the claimant reached the age of majority. Thus, the statute created disparate treatment between tort claimants who were either adults or close enough to legal majority to assert a claim timely, and minors who would not reach majority prior to their malpractice claim becoming time-barred. The *Lee* court concluded that this violated Article I, § 24 because the minors who would not reach majority prior to the statute of limitations or repose would never be afforded the opportunity of pursuing their claim. *Id.* at 578.

Had the *Lee* court followed the trial court's approach, it would have concluded that minor claimants are not similarly situated because they never had the opportunity to bring their suit. The same could be said of the court in *Dodge Town Inc. v. Romney*, 480 P.2d 461 (1971), where the court struck a Sunday closing law requiring licensed

automobile dealers to close on Sundays, but allowing other businesses to remain open. Had the court followed the trial court's model, the auto dealer would not have been similarly situated because it was not allowed to open on Sundays as the other businesses were. The end result of this analysis is that, if accepted, no statute could ever exert disparate impact over persons similarly situated because no persons disparately impact are, as a matter of law, similarly situated. *See* R. 302 (“the statute does not create disparate treatment between persons similarly situated because those whose underlying use was illegal are not similarly situated to those whose underlying use was legal.”).

C. Proper Application of the Uniform Operation of Law Standard Reveals that the Metabolite Statute Creates Disparate Treatment Amongst Persons Similarly Situated.

Proper application of the standards explained above leads to the conclusion that the Metabolite Statute creates disparate treatment between persons similarly situated. The Metabolite Statute creates a classification between those who have a metabolite in their bodies as a result of illegal, voluntarily use and those who do through legal or involuntary use. Utah Code Ann. § 41-6a-517(3). The classification imposes disparate treatment on persons similarly situated because both groups are driving after having consumed a controlled substance with metabolites remaining in their system, but only those who consumed the controlled substance illegally and voluntarily are subject to sanctions. *Id.* Having cleared the first two hurdles as explained by the *Robinson* court, the remaining question is whether the legislature had a reasonable objective that warrants the disparity. *State v. Robinson*, 2011 UT 30 at ¶ 17.

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D. There is No Rational Nexus Between the Legislative Objective of Public Safety and the Chosen Classification.

As explained above, the third inquiry under the uniform operation of law analytical framework as explained in *State v. Robinson* involves three subsidiary areas of inquiry: (1) whether the classification is reasonable, (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a reasonable relationship between the classification and the legislative purpose.” *Id.* at ¶ 22. It should also be remembered that courts are not at liberty to imagine a legislative objective; they are constrained by “reasonable or actual legislative purpose.” *Blue Cross*, 779 P.2d at 641. And while exacting proof of purpose is not required, this court should only use a purpose that can reasonably be imputed to the legislature. *Id.* Defendant therefore respectfully submits that the best source for the legislative purpose is in the plain language, supported by legislative history. As explained in Points I and II *supra*, that purpose is public safety.

i. Analysis of Deterrence of Illegal Drug Use as a Purpose of the Metabolite Statute is Improper Under the Facts of This Case.

With respect to the first inquiry, under the facts before the trial court, the trial court misconstrued the nature of the classification. The trial court reasoned that “[d]istinguishing between legal and illegal drug use is a reasonable classification.” This is statement represents a subtle shift away from the issue before the court because it does not consider legislative purpose. The purpose of the Metabolite Statute is not to deter illegal drug use. Its central purpose is protecting citizens on or near the roadways of the state from drivers operating vehicles while under the influence of impairing substances. *See generally* Utah Code Ann. § 41-6a-517; Points I and II, *supra*. As a result, its purpose

is no more to discourage illegal drug use than it is to generate revenue through the assessment of fines,⁵ or compelling people who have used drugs to go to drug treatment.⁶ Those can all be fairly labeled collateral impacts of the statute. But it does not follow that those collateral impacts can be imputed as the legislative aims for uniform operation of law purposes. Courts are not at liberty to manufacture legislative objectives that are not reasonable or manifest purposes of the statute. *Blue Cross*, 779 P.2d at 641. To the extent the trial court relied on deterrence of illegal drug use as a legislative goal for uniform operation of law purposes, it disregarded the mandate of *Blue Cross* and is in error.

Furthermore, including deterrence of illegal drug use as a legislative goal for purposes of uniform operation of law analysis took the trial court into constitutionally forbidden grounds pursuant to the holding in *Robinson v. California*. There, the Court held that a state cannot constitutionally punish a person for having previously been under the influence of controlled substances. *See State v. Robinson*, 2011 UT 30 at ¶ 33. So if a purpose of the Metabolite Statute is to deter illegal drug use, under the facts of this case it does so by punishing drivers who have previously consumed marijuana but were not

⁵ The current Uniform Fine/Bail Forfeiture Schedule assesses a fine of \$680 plus a 90% surcharge per violation of § 41-6a-517. *Available at* https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf (last visited May 5, 2016).

⁶ Utah Code Ann. § 41-6a-517(11) (allowing a court to shorten a mandatory driver license suspension period if the driver, *inter alia*, completes substance abuse treatment if found appropriate). Furthermore, in defense counsel's experience, courts imposing sentence for a violation of the Metabolite Statute or driving under the influence related crimes uniformly require as a term of probation that the defendant undergo a substance abuse evaluation and comply with all treatment recommendations.

under its influence while driving. The trial court's reliance on deterrence of illegal drug use as a purpose of the Metabolite Statute was therefore inconsistent with both *Robinson v. California* and *State v. Robinson*, 2011 UT 30 at ¶ 32:

Our conclusion is reinforced by the fact that the measurable amount provision does not make it a crime for a person to have the metabolite of a controlled substance in his body. A metabolite of a controlled substance is a byproduct created when the controlled substance is metabolized by the body; thus, having the metabolite of a controlled substance in the body only indicates that the controlled substance was ingested at some prior point in time. In other words, simply having the metabolite of a controlled substance in the body is similar to a 'status' of having previously ingested the controlled substance.

Thus, the only purpose to the statute that can be properly analyzed under the uniform operation of law framework is the purpose of public safety. Specifically, the purpose of promoting safety on or near the roadways of the state. With this purpose in mind, Defendant will acknowledge that public safety on or near the roadways is a legitimate governmental purpose. The other two prongs, however, cannot be satisfied under the facts of this case.

ii. There Is No Reasonable Relationship Between Public Safety and the Classification in This Case.

Under the facts of this case, the classification at issue is patently unreasonable and cannot be sustained even under the deferential rational basis standard in view of the legislative goal. The classification criminalizes driving with pharmacologically inactive THC metabolites in one's system, but only if the THC was consumed voluntarily and illegally. The classification does absolutely nothing to promote public safety.

To illustrate, consider the following hypothetical: suppose Driver A consumed

marijuana recreationally in Colorado, where recreational consumption of marijuana is legal,⁷ and operated a vehicle in Utah 5 days later with inactive THC metabolites in her system. Suppose also that Driver B voluntarily consumed marijuana in Utah, where consumption of marijuana is illegal, and operated a vehicle in Utah 5 days later with inactive THC metabolites in his system.

Driver A would not be subject to punishment under the Metabolite Statute because the “controlled substance was . . . otherwise legally ingested.” Utah Code Ann. § 41-6a-517(3)(c). Driver B, by contrast, would be subject to punishment under the Metabolite Statute because the controlled substance was not legally ingested, by prescription or otherwise.

The question to which the State must provide a reasonable answer under these circumstances is this: What about Driver B makes him/her a greater public safety risk than Driver A? One will search in vain for a principled, reasonable answer to that question; both Driver A and Driver B pose the same level of public safety risk by virtue of having the inactive THC metabolite in his/her system: zero. The only distinction between the two is the legality of consumption. But the legal/illegal distinction means nothing vis-à-vis public safety. Driver A’s ability to drive safely is unaffected by the presence of non-active metabolites in his/her system, and Driver B’s ability to drive

⁷ Defendant also notes that the same problem would arise if Driver A had consumed marijuana involuntarily, or pursuant to a prescription from a provider, both of which are also complete defenses under the Metabolite Statute. Furthermore, the same problem would arise if a Utah resident were travelling abroad in a country where marijuana consumption is legal, and returned to Utah and began driving before the THC metabolite had been fully eliminated from his or her system.

safely is unaffected by the presence of non-active metabolites in his/her system. The legislature has thus created a distinction that has no rational relationship to the purpose for which the classification was enacted. The statute violates uniform operation of law, and its application to Defendant represents a violation of his uniform operation of law rights. The trial court's ruling and order that the Metabolite Statute did not violate uniform operation of law should therefore be reversed.

Conclusion

Because the trial court's construction of the "in cases not amounting to" verbiage in the Metabolite Statute is inconsistent with its plain language, its legislative history, the manifest purpose of comparable language found elsewhere in the criminal code, and inconsistent with how the court of appeals has previously treated that language, the denial of the motion to dismiss was in error. This court should reverse the trial court and remand the matter with instructions to dismiss the charges against Defendant with prejudice.

However, should this court agree with the trial court's construction of the statute, then the statute violates constitutional principles discussed in *State v. Robinson* because the Metabolite Statute, under the circumstances in the present case, punishes drivers who were previously under the influence of a controlled substance. This is an impermissible status offense under *Robinson v. California*.

Furthermore, the Metabolite Statute violates the uniform operation of law clause of the Utah Constitution because there is no reasonable basis to support the distinction in this case. Given the purpose of the statute, *viz.*, public safety, it is patently unreasonable to distinguish between unimpaired drivers who voluntarily and illegally consumed a

controlled substance from drivers who involuntarily or legally consumed the same controlled substance. There is no rational basis to support the apparent belief that illegal and voluntary consumers pose a greater public safety risk than involuntary or legal consumers, particularly when one considers that the facts of this case involve a non-impairing metabolite. To put a finer point on it, even the State's expert conceded that he would not anticipate that the subject from whom the blood sample was taken would show any signs of impairment due to his or her recent THC consumption. Thus, there is no rational basis to support the distinction created to for the putative purpose of promoting public safety.

The trial court should therefore be reversed and the matter remanded with instructions to vacate his conviction and sentence, and dismiss the charges against Defendant with prejudice.

Respectfully submitted on this, the ___ day of May, 2016.

Dallas B. Young
PETRO & ASSOCIATES

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

I do hereby certify that the foregoing Brief of Appellant is compliant with Utah R. App. Pro. 24(f)(1)(A) because it contains 9,450 words and 802 lines of text, as calculated using the word count utility on my word processing software.

Certificate of Service

I do hereby certify that on the ____ day of May, 2016, I did cause to be mailed 2 true and correct copies of the foregoing Brief of Appellant, as well as a CD containing the foregoing Brief of Appellant in searchable PDF format to the following, postage prepaid, addressed as follows:

Lance Bastian
Utah County Attorney's Office
100 East Center Street
Provo, UT 84606
