

1991

# Layton City v. Robert Joseph Watson : Petition for Rehearing

Utah Supreme Court

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Mark Arnold; Layton City Attorney; Attorney for Respondent.

David Bert Havas; David Bert Havas and Associates; Attorney for Appellant.

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## Recommended Citation

Petition for Rehearing, *Layton City v. Watson*, No. 919793.00 (Utah Supreme Court, 1991).  
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UTAH SUPREME COURT  
BRIEF

UTAH  
DOCUMENT

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DOCKET NO. 919793

IN THE SUPREME COURT OF THE STATE OF UTAH

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LAYTON CITY,	:	
	:	
Plaintiff/	:	
Respondent,	:	
	:	
vs.	:	
	:	
ROBERT JOSEPH WATSON,	:	
	:	
Defendant /	:	Case No. 19793
Appellant.	:	

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PETITION FOR REHEARING

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APPEAL FROM SECOND JUDICIAL DISTRICT COURT OF  
DAVIS COUNTY'S AFFIRMANCE OF CONVICTION  
IN LOWER COURT  
HONORABLE DOUGLAS L. CORNABY

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Attorney for Defendant/  
Appellant

**FILED**

FEB 23 1987

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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LAYTON CITY,	:	
Plaintiff/	:	
Respondent,	:	
vs.	:	
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Attorney for Defendant/  
Appellant

2. The Court's analysis of the third Point, that Defendant was denied a fair trial by the city's failure to

preserve evidence, was decided by the Court based solely on federal constitutional grounds. Appellant, however, argued this matter on both state and federal constitutional grounds.

3. Defendant's second, third and fourth Points of his brief all refer to the inadequate testing procedures currently being used by the Utah Highway Patrol. Point II referred specifically to the testing of the machine, Point III referred specifically to the preservation of evidence, and Point IV referred specifically to what sanctions were appropriate when evidence was not preserved. All three Points had the due process clause as their basis. The only place where the due process clause is referred to is in the heading to Point II and on page 15 of Appellant's brief where both the Fourth Amendment to the Federal Constitution, and Article I Section 7 of the Utah Constitution are cited. Thereafter the arguments refer only to Appellant's due process rights and the due process clause, since prior reference set forth that both federal and state constitutions were being referred to.

4. The Supreme Court decision, p. 4, states that "[D]efendant urges this Court to require, on federal due process grounds, that a separate breath sample be obtained from persons taking a breath test and that the sample then be preserved by the prosecution." (Emphasis supplied). The Court recognized that the argument was based upon due process grounds, although

restricting it to federal due process grounds. Appellant never referred to the due process clause of the federal constitution in his brief without also specifically referring to the Utah Constitution due process clause.

5. In oral argument on this matter, Appellant's counsel brought to the Court's attention that California v. Trombetta, 467 U.S. 479 (1984) had been decided since the time that briefs were submitted, and that Trombetta arguably decided the question of whether breath samples must be preserved by law enforcement on federal due process grounds. That the United States Supreme Court specifically set forth that states were free to require more stringent standards under their state constitutions and that this case had been submitted to this Court on both federal and state due process grounds, allowing this Court to decide the issue on state constitutional basis.

6. Appellant's brief not only states that the cases of Brady v. Maryland, 373 U.S. 83 (1963) and People v. Hitch, 527 P.2d 361 (Cal. 1974) support his contention that sanctions, i.e. suppression of the evidence, were appropriate in this case due to the city's failure to preserve a breath sample for subsequent testing, Appellant's Brief, p.16, but Appellant also refers to the Utah Supreme Court cases of State v. Stewart, 544 P.2d 477 (1977); Butt v. Graham, 6 Utah 2d 133, 307 P.2d 892 (1957); State v. Jarrell, 608 P.2d 218 (1980). Appellant's Brief, pp. 21-22.

Appellant's Brief paraphrases State v. Stewart which states that this Court "has recognized that a deliberate suppression by the prosecution of evidence which is material to the guilt or innocence of a defendant in a criminal case is a denial of due process." 544 P.2d at 479. This Point was not only argued by Appellant on state constitutional grounds, but it was further briefed on state due process grounds.

7. Appellant's conclusion again sets forth that his argument in favor of preserving a breath sample was based on due process grounds, when he stated "the failure to preserve the breath sample or obtain a separate breath sample for Appellant's use violated his due process right to challenge physical evidence." Appellant's Brief, p. 30. Again, the only place that Appellant refers to the due process clause in his brief, he cites both the federal and state constitutional provisions.

8. The Court's decision incorrectly states Appellant's position when it states that he "concedes that there are disputes within the scientific community regarding the feasibility of retesting an ampoule." Decision, p.4.

The issue presented to the Court did not involve the retesting of an ampoule, but instead dealt with the City's failure to obtain and/or preserve a breath sample for independent testing by the Appellant. The procedures available to collect a breath sample for future testing are both simple and inexpensive.

Both the indium crimper method as well as the silica gel method have been proven scientifically reliable and failure on the part of the City to preserve the breath evidence is a denial of state due process.

Respondent argued the preservation of and retesting of ampules, which was clearly not what Appellant relied on in his appeal and which erroneous reliance by Respondent was brought out in Appellant's Reply Brief. Breath is the issue not the ampoule.

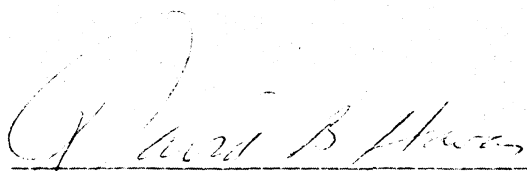
9. Appellant's brief at Points III and IV, and Reply Brief at Points II and III, set forth that portion of his requested relief which has not been addressed by the court. The requirement for a sample of breath to be kept would impose a small burden on the State and would have many positive benefits. States which require preservation of breath samples provide the Defendant with the ability to examine the prima piece of evidence that the prosecution has, protecting his due process rights. Further, numerous jurisdictions have found that an accused is less likely to challenge a test when he can independently verify the results, resulting in benefits to the state. Finally, society benefits from such a procedure with the knowledge that charges for driving under the influence will be processed with all rights to due process guaranteed.

10. Counsel for Appellant certifies that this petition for rehearing is presented in good faith and is not posed for delay.



WHEREFORE, Appellant prays that this Honorable Court review Point III and Point IV of Appellant's Brief, and Appellant's Reply Brief, based on state constitutional grounds, and grant the relief requested therein.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of February, 1987.

  
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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Petition For Rehearing to Mark Arnold, Attorney for Plaintiff/Respondent, 437 Wasatch Drive, Layton, Utah 84041, postage prepaid this 23rd day of February, 1987.

  
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REBECCA LASILOO, Secretary