

1992

# State of Utah v. C. Dean Larsen : Reply to Brief in Opposition

Utah Supreme Court

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UTAH SUPREME COURT  
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IN THE UTAH SUPREME COURT

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STATE OF UTAH, :  
Plaintiff/Respondent, : Supreme Court No. 920114  
v. : Court of Appeals No. 900473-CA  
C. DEAN LARSEN, : Priority No. 13  
Defendant/Petitioner. :

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REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REVIEW FROM A DECISION AND JUDGMENT  
OF THE UTAH COURT OF APPEALS

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UTAH

IN THE UTAH SUPREME COURT

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## ARGUMENT

A. Section 61-1-1 Must Be Construed in Accordance with Rule 10b-5 and not with "Similar" Securities Statutes

The State makes a fundamental error which demonstrates the need for this Court to grant certiorari. The State now apparently concedes that § 61-1-1 should be read in connection with the related federal law but incorrectly implies that § 17(a) of the Securities Act of 1933 is the "related federal regulation" referred to in § 61-1-27. State's Brief pp. 2, 5-6. In so doing, the State chides Mr. Larsen for quoting only a portion of the official comment to § 101 of the Uniform Act (State's Brief p. 2), then the State omits a critical phrase of the same official comment which correctly states: "Section 101 is substantially the Securities and Exchange Commission's Rule X-10B-5, 17 Code Fed. Regs. §240.10b-5, which in turn was modeled upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), except that the rule was expanded to cover the purchase as well as the sale of any security." Uniform Securities Act § 101, official comment ("Official Comment")(emphasis supplied).<sup>1</sup> The

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<sup>1</sup> The Draftsmen's Commentary explains that "SEC Rule 240.10b-5 seems to be the logical model for a uniform state fraud provision, both because of the language disparities in the existing state statutes and because of the substantial body of judicial precedent which has been developed under the federal provisions." L. Loss, Commentary on the Uniform Securities Act 7 (1976). This is another indication that Rule 10b-5, and not § 17(a), is "the related federal regulation." This is the same  
(continued...)

comment recognizes (and the State does not dispute) that Rule 10b-5 and § 17(a) are construed differently. The Utah Legislature specifically intended the Utah act to be construed in accordance with "the related federal regulation." Utah Code Ann. § 61-1-27 (emphasis supplied). The federal regulation related to § 61-1-1 is Rule 10b-5. Official Comment § 101. Legislative intent underlying Rule 10b-5 requires scienter. Ernst & Ernst v. Hochfelder, 425 U.S. 184, 212-13, 96 S. Ct. 1375, 1390-91, 47 L. Ed. 2d 668 (1976).<sup>2</sup>

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<sup>1</sup>(...continued)  
plain meaning evidenced in the portion of the official comment Mr. Larsen originally cited. Petitioner's Brief p. 6. (State's Brief p. 4).

<sup>2</sup> The State avoided directly confronting this point by seizing upon one incorrect and one ambiguous citation in the Petitioner's brief. State's Brief p. 4 n. 3. Counsel for the Petitioner readily acknowledges that they incorrectly, though inadvertently, characterized Dirks v. SEC, 463 U.S. 646, 103 S. Ct. 3255, 77 L. Ed. 2d 911 (1983) as a criminal action. (Petitioner's Brief p. 8-9). The proceedings in Dirks plainly were civil. Counsel also acknowledges that its use of dashes rather than ellipsis in citing Hochfelder, 425 U.S. at 193 n. 12, 205, 96 S. Ct. at 318 n. 12 1387, resulted in ambiguity (however, contrary to the State's representation, the language cited by the Petitioner on p. 205 of the Hochfelder opinion refers to legislative reports reviewed by the Hochfelder Court in analyzing the intent of § 10(b); the Hochfelder Court cited §§ 9(a)(6) and (c) only to demonstrate that a variety of business practices had been left to regulation by the Commission. 425 U.S. at 205). Petitioner's Brief p. 8.

What the State can do with these mistakes now is a separate question. The State cannot (and does not) question that Hochfelder held that Rule 10b-5 requires scienter. 425 U.S. at 212-13, 96 S. Ct. at 1390-91. The State also is careful not to suggest that the scienter requirement of § 10(b) -- enacted as a  
(continued...)

The State cites cases from several jurisdictions, arguing that "numerous courts have held that intent to defraud is not an element of the crime of securities fraud under statutes similar to section 61-1-1(2)." State's Brief p. 6 (emphasis supplied). The State neglects to note that of the seven jurisdictions it cites, four appear not to have the specific legislative directive found in Utah to construe these laws in accordance with the related federal regulation.<sup>3</sup> Only Michigan, Wisconsin and Nebraska have statutory provisions similar to § 61-1-27. The cited decisions from two of these three jurisdictions make no mention of federal law, apparently unaware of federal precedent and the legislative intent. The third jurisdiction, Wisconsin, ignores the Aaron holding that Rule 10b-5, the model

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<sup>2</sup>(...continued)

criminal statute -- and a Rule 10b-5 -- promulgated pursuant to § 10(b) -- would not apply in criminal proceedings. See 425 U.S. at 195-96, 96 S. Ct. at 1382. See also Aaron v. SEC, 446 U.S. 680, 713, 100 S. Ct. 1945, 1964, 64 L. Ed. 2d. 611 (1980) (Blackman concurring and dissenting) (noting the pattern of the 1933 Act and 1934 Act to grant the Commission broad enforcement authority without regard to scienter "unless criminal punishments are contemplated.") Recognizing this, the unintentional citation errors made by Petitioner's counsel, while no less important to counsel, do not misstate the principals enunciated by the Supreme Court decisions.

<sup>3</sup> See Ariz. Rev. Stat. Ann. § 44-1800 et seq., Cal. Corp. Code § 25000 et seq., Ill. Rev. Stat. § 121½-137.1 et seq., N.M. Stat. Ann. § 58-13B-1 et seq. Moreover, cases from these jurisdictions are deficient in other ways. For example, State v. Ross, 104 N.M. 23, 715 P.2d 471, 474 (Ct. App. 1986), relied in part on pre-Hochfelder federal cases which, to the extent they did not require scienter, were effectively overruled by Hochfelder, 425 U.S. at 212-13, 96 S. Ct. at 1390-91.



for the provision at issue, requires scienter. 446 U.S. at 690-91, 100 S. Ct. at 1952-53. In summary, opinions cited by the State cannot be reconciled with Utah's legislative mandate.

B. Mr. Larsen Has Stated a Substantial Basis for Granting Certiorari

The State refuses to grapple with the Court of Appeals decision concerning the expert testimony of Sherwood Cook. Instead, citing no precedent, the State asserts that Mr. Larsen has shown no "substantial basis" for certiorari. The State recharacterizes Mr. Larsen's arguments as a challenge just to the trial court's ruling and not the Court of Appeals decision.

Mr. Larsen clearly challenges the Court of Appeals decision which found no error in permitting expert testimony by a so-called securities expert. Petitioner's Brief p. 14. The gravamen of his argument is that the Court of Appeals committed reversible error by misapplying Rule 702 and relevant caselaw to reach an erroneous conclusion, all in the context of a substantial issue regarding the appropriate scope of expert testimony.<sup>4</sup> Of course, because the issue underlying this

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<sup>4</sup> The problem is highlighted by the State's citation (out of context) of dicta in a footnote in State v. Span, 819 P.2d 329, 322 n.1 (Utah 1991), seemingly to suggest that an expert could in effect state that he/she knows more about the crime charged than the judge or the jury and render an opinion that the defendant was guilty of the crime charged. State's Brief p. 9. If this were the law, then there is no reason for a judge and jury. Such a theory should not be accepted. Of course, a close reading of Span and the cases it cites as examples in footnote 1 would not  
(continued...)

challenge relates to a trial court ruling, it is impossible, contrary to the State's suggestion, to separate the admission of the evidence at trial from the Court of Appeals decision; the error in the latter arose from its characterization and treatment of the former.

Rule 46 does not limit the kinds of cases for which certiorari will be granted to the categories set forth as examples: "The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered . . . ." Rule 46, Utah R. App. P. While this matter arguably implicates issues expressly within the scope of Rule 46(c) and (d), this Petition raises a matter of "special and important" concern regarding the proper scope and use of expert testimony in securities cases plainly of the "character of reasons" warranting exercise of the Court's power to grant certiorari. Rule 46, Utah R. App. P.

#### CONCLUSION

For the above reasons, the Court should grant certiorari to resolve these two important issues.

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<sup>4</sup>(...continued)  
permit an opinion by an expert that goes this far. The cases cited in Span permit expert testimony concerning classification of a substance under federal controlled substance laws, classification of firearms and similar kinds of testimony which, although addressed to ultimate issues, would be helpful. These characterizations do not include legal conclusions as to guilt or innocence, nor do they include the kind of legal conclusion embodied in the evidence at issue here. See Span, 819 P.2d at 322 n.1.

DATED this 17th day of April, 1992.

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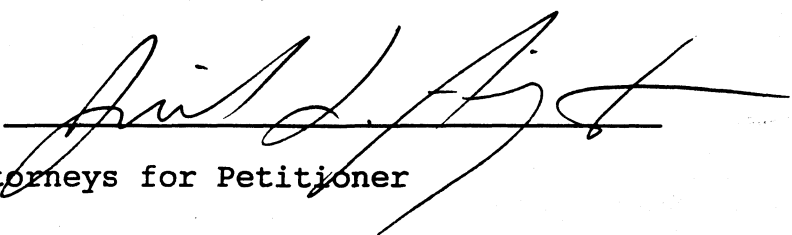
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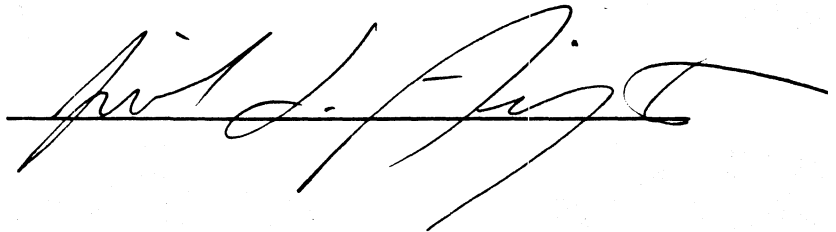
By

  
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to be mailed, postage prepaid, this 17th day of April, 1992, to the following:

R. PAUL VAN DAM  
Attorney General  
DAVID B. THOMPSON  
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236 State Capitol  
Salt Lake City, Utah 84114

A handwritten signature in cursive script, appearing to read "David B. Thompson", is written over a horizontal line.

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