

1969

## The State of Utah v. John Richard Mark Miller : Supplemental Brief of Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

JOHN RICHARD MARK MILLER,

*Defendant-Appellant.*

Case No.

11723

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SUPPLEMENTAL BRIEF OF APPELLANT

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Appeal from Jury Verdict of Guilty in the Third  
District Court in and for Salt Lake County,  
The Honorable Merrill C. Faux, Judge Presiding.

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JAY V. BARNEY

231 East 4th South

Salt Lake City, Utah

*Attorney for Appellant*

VERNON ROMNEY

Attorney General

State Capitol

Salt Lake City, Utah

*Attorney for Respondent*

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## TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	1
STATEMENT OF FACTS .....	2
ARGUMENT .....	2
POINT III. BECAUSE OF A CHANGE IN THE LAW BY THE UTAH LEGISLATURE OF 1969, THE PENALTY AND SENTENCE AGAINST THE DEFENDANT SHOULD BE MODIFIED TO CON- STITUTE A MISDEMEANOR. ....	2
CONCLUSION .....	6

### CASES CITED

Bell v. Maryland, 376 U.S. 226, 230 (1964) .....	3
Pleasant Grove City v. Lindsay, 41 Utah 154, 125 Pac. 389 (1912) .....	3
State v. Addington, 2 Bailey 516, 23 Am. Dec. 150 (1831) .....	5
Yeaton v. United States, 5 Cranch 281 (1809) .....	5

### CONSTITUTIONAL PROVISIONS CITED

Art. VIII § 9 Utah Const. ....	5
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## TABLE OF CONTENTS—(Continued)

	<i>Page</i>
STATUTES CITED	
§68-2-8 Utah Code Ann. (1953) .....	6
§68-3-1 Utah Code Ann. (1953) .....	3
§76-20-11 Utah Code Ann. (1953 as amended) .....	2
§76-20-11 Utah Code Ann. (as amended 1969) .....	2
§77-39-3(1) Utah Code Ann. (1953) .....	5

### TREATISES CITED

16 Am. Jur. 2d 742 §403 .....	5
1 Lewis Sutherland Stat. Const. (2Ed.) §286 .....	4
8 RCL 259-260 .....	5
Wharton's Criminal Law and Procedure Vol. I 43-46 §20 .....	5

# IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

JOHN RICHARD MARK MILLER,

*Defendant-Appellant.*

Case No.

11723

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## SUPPLEMENTAL BRIEF OF APPELLANT

---

### STATEMENT OF NATURE OF CASE

Same as in original brief.

### DISPOSITION IN LOWER COURT

Same as in original brief.

### RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction, a setting aside of the sentence and an order awarding a new trial. Alternatively, appellant seeks an order to remand his case for sentencing in conformity with the penalty provisions of the law enacted by the 1969 Legislature.

## STATEMENT OF FACTS

Same as in original brief.

## ARGUMENT

## POINT III

BECAUSE OF A CHANGE IN THE LAW BY THE UTAH LEGISLATURE OF 1969, THE PENALTY AND SENTENCE AGAINST THE DEFENDANT SHOULD BE MODIFIED TO CONSTITUTE A MISDEMEANOR.

During the 1969 session of the Utah State Legislature, House Bill No. 10 was past and became law on May 13, 1969, during which time defendant's case was on appeal in the Supreme Court. § 76-20-11 Utah Code Ann. (as amended 1969) By the provisions of such law, it is unlawful for any person to utter a check, with intent to defraud, when the person knows that he has not adequate funds to pay for the same. The penalty prescribed for the issuing of such checks, when the amount involved over a period of six months is not more than \$100, is a six month period of imprisonment and/or a \$299 fine. However, under §76-2-11 Utah Code Ann. 1953, the offense with which the defendant was charged was a felony regardless of the amount of the check in-

volved. The defendant allegedly uttered a check for \$95. (T-52) Therefore, if the law recognizes that the benefits of the penalty provisions as enacted by the 1969 Legislature apply to Mr. Miller, the maximum penalty which could be imposed would be six months.

Under the common law of the United States, which has been adopted by Utah (§68-3-1 Utah Code Ann. 1953), legislation which repeals or otherwise removes the State's condemnation from conduct formally deemed criminal, requires a dismissal of prosecutions pending under such laws, and the rule applies to any proceeding which has not, at the time of the supervening legislation, reached final disposition in the highest court authorized to review it. *Bell v. Maryland*, 378 U.S. 226, 230 (1964). Such a position has been adopted by the Utah Supreme Court. *Pleasant Grove City v. Lindsay*, 41 Utah 154, 125 Pac. 389 (1912).

In the *Lindsay* case, *supra*, defendant was convicted in a Justice Court of a city liquor ordinance violation and appealed his conviction to the District Court. While the appeal to the District Court was pending the State Legislature enacted a statute which superseded all laws involving liquor in the State. Over defendant's objection, the District Judge allowed the prosecution to proceed under the city ordinance, and following a conviction, defendant appealed to the Supreme Court of Utah. In reversing and remanding the case for dismissal, the

Utah Supreme Court in *Lindsay* adopted the rule of 1 Lewis Sutherland Stat. Const. (2 Ed.) §286, which read as follows:

If a penal statute is repealed pending an appeal and before the final action of the appellate court, it will prevent an affirmance of the conviction, and the prosecution must be dismissed or the judgment reversed. A final judgment before repeal is not affected by it.

The court in *Lindsay* found the District Court to be the court of last resort in the case and also that the legislation by the State superseded the city ordinance and was in effect at the time defendant was tried in the District Court. Therefore, the case was remanded for dismissal.

In *Bell, supra*, defendants were convicted of trespassing in violation of Maryland law and such convictions were upheld on appeal to the Maryland Court of Appeals. While appeal to the United States Supreme Court was pending, the ordinance under which petitioners were convicted was abolished. After recognizing the principles previously raised in this brief by petitioner, the United States Supreme Court reversed and remanded the case to the Maryland courts to determine the case in conformity with the laws on the issue of repeal of statutes in Maryland. The court did, however, go to some length to point out the possibility for dismissal.

notwithstanding the fact the convictions were affirmed by the Maryland Court of Appeals, indicating, that because the matter was on review by the Supreme Court of the United States the judgment was not final. *Bell v. Maryland, supra* at 232.

In the instant case the Legislature enacted new penalties for no-account check writers, thus repealing the old penalties. Therefore, because the penalty was the major change in the check law, a dismissal of the proceedings would not be necessary; rather a modification of the sentence should be made. It is recognized that where prior to finalization of sentence, a new law is enacted repealing the law creating the offense or substituting a mitigating punishment, the offender should be punished under the new, and not the former, law. *State v. Addington*, 2 Bailey 516, 23 Am. Dec. 150 (1831) (dicta); see *Yeaton v. United States*, 5 Cranch 281 (1809); 16 Am. Jur., 2d 742, §403; Wharton's Criminal Law and Procedure Vol. I §20, pp. 43-56; 8 RCL 259-260.

The pending appeal in this case renders the judgment as non-final in that the defendant may appeal his judgment of conviction as a matter of right (Utah Const. Art. VIII §9) and law (§77-39-3 (1) Utah Code Ann. (1953)). See also *Bell v. Maryland, supra* at 232 Because of the change in the penalties by the Legislature for the offense charged against the defendant in this case, the judgment and sentence should be vacated, set aside, and

the case remanded for sentence in conformity with the present law. The Legislature has indicated such an intent by the provisions of §68-2-8 Utah Code Ann. 1953:

No offense committed, and no penalty or forfeiture incurred, under any statute hereby repealed before the repeal takes effect shall be affected by the repeal, except that when a punishment, penalty or forfeiture is mitigated by the provisions herein contained such provision shall be applied to a judgment pronounced after the repeal.

For the reasons stated above the case should be remanded for sentencing in conformity with the penalty prescribed by the 1969 Legislature of the State of Utah, to wit: six months.

### CONCLUSION

For the foregoing reasons appellant's conviction should be reversed, the sentence set aside, and a new trial awarded. Alternatively, appellant seeks an order remanding his case for sentence in conformity with the penalty enacted by the 1969 Legislature for the offense involved in this case.

Respectfully submitted,

JAY V. BARNEY

231 East 4th South

Salt Lake City, Utah

*Attorney for Appellant*