Case № 20160646-CA

In the Utah Court of Appeals

South Salt Lake City,
Plaintiff *and* Appellee,

-v-

S. Steven Maese,
Defendant *and* Appellant.

Brief *of* Appellant

Appeal from convictions of Failure to Signal for Two Seconds, a class C misdemeanor under Utah Code § 41-6a-804(1) (2013), and Failure to Obey a Traffic Control Device, a class C misdemeanor under Utah Code § 41-6a-304 (2013), both reduced to infractions upon the City's motion.

This judgment was entered in the Third Judicial District Court, Salt Lake Department, the Honorable Randall Skanchy presiding.

The Appellant is not incarcerated.

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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 from convictions of Failure to Signal for Two Seconds, a class C misdemeanor under Utah Code § 41-6a-804(1) (2013), and Failure to Obey a Traffic Control Device, a class C misdemeanor under Utah Code § 41-6a-304 (2013).

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.[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]

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

[2] R. at 42-45.

[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 115-151.

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 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 December 11, 2013, South Salt Lake City charged Santiago Steven Maese with Failure to Signal for Two Seconds, a class C misdemeanor under Utah Code § 41-6a-804(1) (2013), and Failure to Obey a Traffic Control Device, a class C misdemeanor under Utah Code § 41-6a-304 (2013).[6] On January 29, 2014, the City

[6] R. at 2.

amended the charges to infractions.[7] On February 19, 2014 and on constitutional grounds, Maese moved for a jury trial.[8] The Justice Court denied the motion.[9]

Following a bench trial on January 6, 2015, Judge Catherine M. Johnson convicted Maese of both charges.[10] Judge Johnson sentenced Maese to a $240 fine.[11]

On January 20, 2015 Maese sought a trial *de novo* and the justice court sent the case to district court.[12] On June 22, 2016, Maese moved for a jury trial.[13] The court denied the motion. The District Court convicted Maese of both charges.[14]

STATEMENT OF FACTS

On December 10, 2013, Utah Highway Patrol Trooper Roger Griffiths saw Santiago Steven Maese cross the HOV lane's double white line on I-15 and change lanes across several lanes while signaling for less than two seconds.[15]

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[7] R. at 2.

[8] R. at 20.

[9] R. at 33.

[10] R. at 6.

[11] *Ibid*.

[12] R. at 38-39.

[13] R. at 115-151.

[14] R. at 178-179.

[15] R. at 32.

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.[16] 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."[17] 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, South Salt Lake 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

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

[17] *Hurricane City v. Barlow*, 2009 UT App 115.

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. As applied to Maese, the Traffic Offenses Charged Violate 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."[18] By charging and adjudicating legislatively-designated misdemeanors as infractions, prosecutors and courts unconstitutionally usurp 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

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

> one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.[19]

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."[20]

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.[21] 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.[22] 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.[23]
>
> …

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[19] Utah Const. Art. V, § 1.

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

[21] *Id*. at 685.

[22] *Id*. at 689.

[23] *Id*. at 690.

> The Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested.[24]
>
> …
>
> 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.[25]

Similarly, the United States Supreme Court elucidated this bedrock principle nearly a century ago in *Ex parte United States*.[26] 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.[27] 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

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

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

[26] *Ex parte United States*, 242 U.S. 27 (1916).

[27] *See id.* at 38-39.

> 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 enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.[28]

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 the offenses charged against Maese as misdemeanors, 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 circumstances warrant 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 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.[29] It

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[28] *Id.* at 42.

[29] *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.

stressed that "the classic 'prosecutorial discretion' question is *which* law to apply to an offender rather than how to apply the *same* law to different offenders."[30] 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."[31]

By accepting an amendment of statutory misdemeanors to infractions, the trial court improperly permitted South Salt Lake to assume the essential legislative function of fixing the penalty for the offenses charged against Maese. 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."[32]

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

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[30] *Id*. at 1004 (citation omitted) (emphasis by the Court).

[31] *Ibid*.

[32] Utah Const. art. V, § 1.

B. Utah Code designates the offenses misdemeanors 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.

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."[33] The Code designates offenses as "felonies, misdemeanors, or infractions."[34] And the Legislature determined "[a]ny offense which is an infraction within this code is expressly designated …"[35] 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."[36] 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."[37]

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

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[33] Utah Code § 76-1-105.

[34] Utah Code § 76-3-102 (2013).

[35] Utah Code § 76-3-105.

[36] Utah Code § 41-6a-202(2) (2013).

[37] Utah Code § 76-1-103(1) (emphasis added).

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.

Some courts question whether Maese's interpretation would prohibit prosecutorial discretion to plea bargain. 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 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 Maese with infraction offenses designated as misdemeanors by the Legislature is equally impossible.

Although the Legislature prescribes a precise process to reduce the level of an offense *after* conviction,[38] it prescribes no such process for reducing an offense's designation *before* conviction.

In this case, the trial court allowed South Salt Lake to charge failure to signal and failure to obey a traffic control device as infractions, despite Utah Code designating them Class C Misdemeanors. 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.[39] *Barrett* 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.[40]

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[38] *See* Utah Code § 76-3-402 "Conviction of lower degree of offense – Procedure and limitations"

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

[40] *Id*. at ¶ 46.

The processes prescribed for reducing offenses after conviction, or through the prosecution of inchoate offenses, [41] 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."[42] No provision of Utah Code permits reducing the level of an 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 designation. Rule 4 never provides that the traffic offenses charged against Maese are infractions, nor does it provide or so much as imply the authority to reduce the level of an offense.

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[41] *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).).

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

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."[43] 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*.[44]

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.

Also, the trial court's reliance on *West Valley City v. McDonald* is misplaced.[45] 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 chal-

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

[44] *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)).

[45] *See* R. 62, ¶ 2 (*citing McDonald*, 948 P.2d 371, 373-74 (Utah Ct. App. 1997)).

lenges 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*."[46] 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"),[47] the Legislature prohibits the prosecutorial and judicial authority claimed here. That is, the Legislature 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

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

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

certain conditions—meaning it cannot be done otherwise.[48] 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.…"[49] 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."[50] "If a court acts beyond its authority those acts are null and void."[51] In *State v. Todd* it stated subject matter jurisdiction "is derived from the law."[52] "It can neither be waived nor conferred by consent of the accused."[53] In criminal

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[48] *See* Utah Code § 76-3-402.

[49] Utah R. Crim. P. 25(b)(4).

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

[51] *Ibid*.

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

[53] *Ibid*.

cases, "[t]he trial court simply would lack the judicial power to convict the defendant of a nonexistent crime."[54] "Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action."[55]

Failure to signal and failure to obey a traffic control device did not exist as infractions when Maese was charged. 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.[56]

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

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

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

[56] *See* Utah Code § 77-1-6(2)(e); Utah R. Crim. P. 17(d).

so-called "petty" offenses which was well established in the Utah territory long before, and in the state long after, the Constitution was adopted.

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." [57] 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."[58]

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

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

[58] *Ibid.*

the constitutional text."[59] 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."[60]

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

> 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.[61]

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 …[62]

In 1996, a ballot measure amended Article I, § 10 to accommodate the consolidation of circuit courts into the district court system.[63] The original provision stated:

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

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

[61] Utah Const. Art. I, § 10.

[62] Utah Const. Art. I, § 12.

[63] *Minutes of the Utah Constitutional Revision Commission*, pp. 12-13, December 8, 1995, attached as Exhibit A.

> 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.[64]

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 jury 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.

[64] Utah Const. Art. I, § 10 (1896).

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."[65]

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:

> 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.

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

…

> 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.[66]

Thus, whether infractions are criminal or civil in nature, there is no question that Maese was entitled to a jury trial where no language—let alone the "clearest language"—suggests the framers intended to restrict the right in prosecutions for infractions.

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 non-capital felonies and "other cases," delegate John Rutledge Bowdle said:

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

> 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 … [67]

The 1996 article I, section 10 amendment explicitly intended a technical rather than substantive change. Members of the Constitutional Revision Committee proposing 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 (they could not have altered the right by this amendment alone, since it remained unchanged under the more specific article I, section 12 provision). The amendment addressed 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.[68]

The Utah Constitutional Revision Commission understood that Utah courts have not determined if Utah's constitutional jury right extends to those charged

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[67] Official Report of The Proceedings and Debates of The Convention Assembled to Adopt a Constitution for The State of Utah, 291-92 (1898), attached as Exhibit B.

[68] *Minutes of the Utah Constitutional Revision Commission*, pp. 12-13, December 8, 1995, Exhibit A; *Proposition No. 3: Jury Trial Resolution*, Utah Voter Information Pamphlet, p. 27, 1996, attached as Exhibit C.

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.[69]

Then-Chief Justice Michael Zimmerman stated the Commission's "express intention is not to change anything and not to affect existing case law."[70] Zimmerman'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."[71] Yet the article I, § 10, amendment drafters could have easily restricted the right to offenses carrying the possibility of incarceration, but consciously refrained.

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[69] *Minutes of the Utah Constitutional Revision Commission*, pp. 14-15, December 8, 1995, Exhibit A.

[70] *Id.*, p. 13.

[71] *Id.*, p. 15.

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."[72] 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.

At the adoption of the Utah Constitution, defendants charged with any criminal offense, included those not punishable by incarceration, were entitled to jury trials and routinely received them upon demand. Thus, the law and the traditions around the time of the framing confirm that article I, sections 10 and 12 guarantee jury trials to defendants charged with infractions.

Very recently, in *Simler v. Chilel*, the Utah Supreme Court unanimously held that article I, section 10 "guarantees the right to a jury trial in small claims cases in a trial *de novo* in district court."[73] In *Simler*, the court reiterated that the "right

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[72] *See* Jury Trial Resolution, 1996 General Session, November 27, 1995 Draft, 1996FL-0689/003, attached as Exhibit D.

[73] *Simler v. Chilel*, 2016 UT 23, ¶ 2.

to a jury trial … extends only to cases that would have been cognizable at law at the time the constitution was adopted."[74] The court the reviewed the territorial laws and the revised statutes from immediately before and after adoption of the Utah Constitution, respectively, to conclude that parties in small claims actions were entitled to trials by jury in justice courts at the time of the framing.[75] Accordingly, the court held that the legislature's subsequent elimination of juries in small claims cases nearly a century later in 1992 violated article I, section 10.[76]

The same reasoning yields the same conclusion here. That is, immediately before and after the framing, territorial and state law guaranteed jury trials to those charged with petty offenses and offenses that Utah Code now designates as infractions. Indeed, the Complied Laws of Utah (pre-statehood) and the Revised Statutes of Utah (post-statehood) defined crimes identically as follows:

> 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***:

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[74] *Id.* at ¶ 12 (quoting *Zions First National Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 661 (Utah 1990)).

[75] *See id.* at ¶¶ 13-17.

[76] *Id.* at ¶ 17. *See also State v. Hernandez*, 2011 UT 70, ¶¶ 11-21, 268 P.3d 822, wherein the Utah Supreme Court held that defendants charged with class A misdemeanors are entitled to preliminary hearings under article I, section 13, despite Utah Code to the contrary, based on the understanding of the term "indictable offenses" at the time of the framing.

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.[77]

Critically, criminal offenses were not limited to those punishable by death or imprisonment, but also included those punishable by *fine, removal from office, or disqualification*. Infractions under current Utah Code are materially no different, carrying punishments of fine, forfeiture, or disqualification.[78] The legislature merely gave misdemeanors not punishable by imprisonment a different name with its repeal and reenactment of the Criminal Code in 1973.[79]

The Utah Code of Criminal Procedure from the time of the 1973 overhaul of the Criminal Code continued to permit jury trials for all offenses, stating that criminal defendants are entitled "[t]o have a speedy public trial by an impartial

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[77] UTAH COMP. LAWS § 4378 (1888) (emphasis added); UTAH REV. STAT. § 4061 (1898), attached as Exhibit E.

[78] Utah Code § 76-3-201(2).

[79] *See* Utah Code § 76-3-102, designating offenses as "felonies, misdemeanors, or infractions," as enacted by Chapter 196, Laws of Utah 1973, Gen. Sess. Since before statehood, and until the 1973 repeal and reenactment, offenses were designated as felonies and misdemeanors. *See* UTAH COMP. LAWS § 4379 (1888) and UTAH REV. STAT. § 4062 (1898), attached as Exhibit E; Utah Code Ann. § 76-1-12 (1953).

jury of the county in which the offense is alleged to have been committed . . . ."[80] It was not until 1980, when the legislature repealed and reenacted the Utah Code of Criminal Procedure, that the statutory right to a jury trial was eliminated for infraction prosecutions.[81] At that, the legislature would have had no cause to eliminate jury trials for infractions unless then-existing law at least implicitly permitted them.

[80] Utah Code Ann. § 77-1-8(6) (1978). This the precise language from article I, section 12.

[81] Utah Code § 77-1-6(2)(e) (enacted in its current form by Chapter 15, Laws of Utah 1980, Gen. Sess.): "No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived *or, in case of an infraction, upon a judgment of a magistrate*." (Emphasis added).

The Penal Code before[82] and after[83] statehood defined numerous crimes not punishable by imprisonment, or punishable by imprisonment of six months or

[82] *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); § 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 60 days jail); § 4526 (Furnishing liquor to a minor, punishable by $100 fine and 90 days jail).

[83] UTAH REV. STAT. § 4186 (1898) (officer fails to prevent a duel, punishable by $500 fine); § 4144 (refusal to aid officer, punishable by $100 fine); § 4085 (selling official appointment, punishable by $1,000 fine); § 4234 (keeping business open Sunday, punishable by $100 fine); § 4241 (selling liquor near camp meeting, punishable by $500 fine); § 4243 (procuring female to dance, punishable by one month jail and $100 fine); § 4244 (procuring female to play music, punishable by one month jail and $100 fine); § 4310 (disturbing the peace, punishable by $200 fine and two months jail); § 4341 (unlawful entry of railroad car, punishable by $50 fine and 50 days jail).

less, which is the benchmark for "petty offenses" under federal constitutional jurisprudence beyond which a jury trial is guaranteed.[84] Yet territorial law governing criminal procedure in justice courts did not distinguish the right according to the potential penalty, stating without qualification: "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."[85] After statehood, the relevant provision governing criminal procedure in justice courts was equally unequivocal, stating, "A trial by jury shall be deemed to be waived unless a jury is demanded by either party."[86]

Finally, defendants charged with offenses not punishable by imprisonment, or with so-called "petty offenses" punishable by six months incarceration or less, routinely demanded and received jury trials around the time of the framing.[87]

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[84] *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).

[85] UTAH COMP. LAWS § 5318 (1888), attached as Exhibit F.

[86] UTAH REV. STAT. § 5139 (1898), attached as Exhibit F.

[87] *See* e.g., Provo Daily Enquirer, "Sabbath-Breaking," April 18, 1891 (defendant demanded and received jury trial in justice court found guilty and fined $1 for violating ordinance prohibiting labor on Sunday, punishable by fine only); 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 jury trial in justice court, resulting in a hung jury); Provo Daily Enquirer, "Whisky on

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.[88]

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

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Top," February 27, 1891 (defendant demanded and received jury trial for selling alcohol to a minor, punishable by 90 days jail). Articles attached as Exhibit G.

[88] *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."[89]

Accordingly, Utah's legal traditions and widespread practice at the time the Constitution was adopted entitled defendants to juries even for petty offenses, including infractions. Taken with the unambiguous plain text of article I, sections 10 and 12, and the framers' implicit and explicit refusals to condition the right on the possibility of incarceration, there is no doubt that the Utah Constitution guarantees the right to trial by jury for infractions.

CONCLUSION

Maese respectfully asks this Court to declare the misdemeanor traffic offenses unconstitutional as applied to Maese because arbitrarily reducing misdemeanors to infractions violates article V, section 1; declare Utah Code subsection 77-1-6(2)(e) and Rule 17(d) of Criminal Procedure unconstitutional under article I, sections 10 and 12; and order Judge Randall Skanchy to dismiss the Amended Information against Maese for lack of subject matter jurisdiction, or remand the case and empanel a jury. Maese urges the Court to rule on all fully briefed issues as

[89] Utah Code § 76-3-102.

they are likely to recur upon retrial of this matter.[90] Maese also requests costs and, under the Court's equitable powers, attorney's fees given the benefit bestowed upon tens of thousands of Utah criminal defendants by vindicating the constitutional rights at issue in this appeal.

RESPECTFULLY SUBMITTED on this 22nd day of November, 2016.

R. Shane Johnson
Attorney for Appellant

CERTIFICATE *of* COMPLIANCE

I, R. Shane Johnson, on this 22nd day of November, 2016, certify this brief complies with rule 24(f)(1) of the Utah Rules of Appellate Procedure.

This Brief of Appellant contains 6339 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, and a 13-point font.

R. Shane Johnson
Attorney for Appellant

[90] *State v. Low*, 2008 UT 58, ¶ 61, 192 P.3d 867.

CERTIFICATE *of* SERVICE

This is to certify that on the 22nd day of November, 2016, two true and correct copies of the foregoing were served by the method indicated below, and addressed to the following:

Hannah Vickery (14826)
South Salt Lake City Attorney's Office
220 E Morris Ave 2 FL
South Salt Lake, Utah 84115

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☒ U.S. Mail
☐ Overnight Mail

Utah Attorney General
P.O. Box 140811
Salt Lake City, UT 84114

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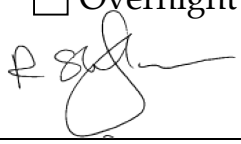

R. Shane Johnson
Attorney for Appellant

ADDENDUM A

(RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS)

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

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.

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.

§ 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.

§ 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.

Exhibit A

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. Watts 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 Dewsnup, 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. Dewsnup 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. Dewsnup'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. Dewsnup'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. Dewsnup'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.

Exhibit B

Mr. EVANS (Weber). If you wlll 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

Exhibit C

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.

Exhibit D

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:~~ AMENDS;

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.

Exhibit E

sentence, to determine and impose the punishment prescribed.

Punishments how determined.

§ 4376. (881) 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' testimony may be read against him on prosecution for perjury.

§ 4377. (882) 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.

Crime and public offence defined.

§ 4378. (883) 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. (884) Crimes are divided into:

1. Felonies; and,
2. Misdemeanors.

Felony and misdemeanor defined.

§ 4380. (885) 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 when not otherwise prescribed.

§ 4381. (886) 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. (887) Except in cases where a different punish-

any proceedings founded upon a charge of perjury committed in such examination. [C. L. § 4377.

Cal. Pen. C. § 14. Perjury, §§ 4122–4130.

4061. Crime defined. 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, any of the following punishments:

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office.
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state. [C. L. § 4378.

Cal. Pen. C. § 15. Removal from office by impeachment, Con. art. 6, secs. 17–21; §§ 4546–4564. Removal from office by judicial proceedings, Con. art. 6, sec. 21; §§ 4565–4580.

4062. Crimes, how divided. Crimes are divided into:

1. Felonies.
2. Misdemeanors. [C. L. § 4379.

Cal. Pen. C. § 16.

4063. Felony defined. Misdemeanor defined. A felony is a crime which is or may be punishable with death, or by imprisonment in the state prison. Every other crime is a misdemeanor. [C. L. § 4380.

Cal. Pen. C. § 17*. Prohibited acts for which no penalty is imposed are misdemeanors, § 4154. Wilful omission to perform a duty prescribed by law, a misdemeanor, § 4153.

4064. Penalty for felony when not prescribed. Corporations. Except in cases where a different punishment is prescribed by law, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a felony, and there is no other punishment prescribed by law, such corporation is punishable by a fine of not less than five hundred and not more than ten thousand dollars. [C. L. § 4381*.

N. Dak. (1895) § 6811; Cal. Pen. C. § 18*.
Court to determine and impose penalty, §§ 4058, 4059. Criminal action against corporation, §§ 5071–5078.

4065. Penalty for misdemeanor when not prescribed. Corporations. Except in cases where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine in any sum less than three hundred dollars, or by both. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a misdemeanor, and there is no other punishment prescribed by law, such corporation is punishable by a fine not exceeding one thousand dollars. [C. L. § 4382*.

Cal. Pen. C. § 19*.
Court to determine and impose penalty, §§ 4058, 4059.

4066. Felonious misconduct in office. Forfeiture. Disqualification. The conviction of any state, county, city, town, or precinct officer of a felony involving misconduct in office, involves as a consequence, in addition to the punishment prescribed by law, a forfeiture of his office, and disqualifies him ever afterwards from holding any public office in this state.

Mont. Pen. C. § 198*. Disqualification by crime, §§ 4111, 4317.

4067. Who deemed habitual criminal. Penalty. Whoever has been previously twice convicted of crime, sentenced, and committed to prison, in this or any other state, or once in this or once at least in any other state, for terms of not less than three years each, shall upon conviction of a felony committed in this state other than murder in the first or second degree, be deemed to be an habitual

Exhibit F

Chapter II.

Formation of the Jury.

When trial by jury deemed to be waived.

§ 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.

Jury to consist of six persons. Qualifications of.

§ 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

FORMATION OF THE JURY.

5138. Trial in defendant's absence forbidden. Exception. The trial must not proceed in the absence of the defendant, unless he voluntarily absents himself with full knowledge that the trial is being had. [C. L. § 5314*.

Cal. Pen. C. § 1434*.

5139. Jury waived unless demanded. A trial by jury shall be deemed to be waived unless a jury is demanded by either party. [C. L. § 5318.

Cal. Pen. C. § 1435*.
When defendant not entitled to jury for offense against city ordinance, § 241. Trial must be by jury unless the same is waived, §§ 4516, 4810.

5140. Jurors: summoning, qualifications, challenges. The qualifications of, and manner of summoning jurors to serve in justices' courts are prescribed under the title of "Jurors" title thirty-five of the Revised Statutes. The provisions of chapter thirty-two of the code of criminal procedure, relative to challenging jurors, shall govern, as far as the same shall be applicable. [C. L. §§ 5318*, 5319*, and 5329*.

Cal. Pen. C. § 1435*.
Jurors, §§ 1291–1323. Challenging jurors, §§ 4816–4844.

THE TRIAL.

5141. Oath administered to jury. The jury having been impaneled the court must administer to them the following oath: "You do swear that you will well and truly try this issue between the state of Utah and A B, the defendant, and a true verdict render according to the evidence." [C. L. § 5330*.

Cal. Pen. C. § 1437*.

5142. Duty of jury. Public trial, etc. After the jury shall be sworn they must sit together and hear the proofs and allegations of the parties which must be delivered in public and in the presence of the defendant. [C. L. § 5331.

Cal. Pen. C. § 1438. When sittings public, § 695; when not, § 696.

5143. Court to decide questions of law; cannot charge as to facts. The court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact. [C. L. § 5332.

Cal. Pen. C. § 1439.

5144. Jury may decide in court or retire. Oath of officer. After hearing the proofs and allegations, the jury may decide in court or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear that you will keep this jury together in some quiet and convenient place, that you will not permit any person to speak to them, nor speak to them yourself, unless by order of the court, or to ask them whether they have agreed upon a verdict; and that you will return them into court when they shall have so agreed, or when ordered by the court." [C. L. § 5333.

Cal. Pen. C. § 1440.

5145. Verdict delivered in public. Entry of. When the jury shall have agreed on their verdict, they must deliver it publicly to the court, who must enter it, or cause it to be entered, upon the minutes. [C. L. § 5334.

Cal. Pen. C. § 1441*.
Verdict of jury must be unanimous, Con. art. 1, sec. 10.

5146. Verdict as to one or more of defendants. Retrial of others. When several defendants shall be tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury. [C. L. § 5335.

Cal. Pen. C. § 1442.

Exhibit G

SABBATH BREAKING,

We have a fair example of what the Liberals would do for Provo, in case they gained control, by the action of Judge HOMER, the Liberal justice of the peace, imposed upon the people at the last municipal election through a technicality in the law, in trying a case of Sabbath-breaking. A man was brought before His Honor, charged with desecrating the Sabbath by well-digging. He was tried by a jury and found guilty, and Justice HOMER's party instincts or pure ignorance led him to impose a fine of ONE DOLLAR! The Ordinance says the fine shall not be less than five dollars. We will quote for His Honor's enlightenment Section 185 of the Ordinance of Provo city,

Any person who shall fish, hunt or indulge in any secular out-door amusements, or conspicuous or noisy secular labor, on the day of the week commonly called Sunday, or who shall keep open any house of trade, shop or place of business or amusements on said day, is guilty of an offense, and is liable to a fine of not less than 5 or more than 50 dollars.

Aside from the offense being in its nature a grave one, the case has cost the city more than twenty-five dollars, for which our Liberal Justice of the Peace HOMER turns over into the treasury vaults the magnificent sum of ONE DOLLAR! Well, he is a daisy for justice of the peace.

While we are treating the case of Sabbath-breaking and the ordinance relating to the same, it might not be amiss to call the attention of the police to the fact that along the Mill race, in the very heart of the city, may be seen almost every Sunday a lot of boys and men fishing. This is contrary to the ordinance, is an eye-sore to all citizens of religious sentiments and ought to be stopped.

There may be work which it is absolutely necessary to attend to on the Sabbath day, but a man has no more justification to go about his usual manual work of well-digging, etc., than a merchant has to open his store and invite customers to trade with him, which latter case is generally conceded to be wrong. If the law restricts the business man it should likewise restrict the laborer from doing work on Sunday. We believe, in fact, that the enforcement of the Sabbath-breaking ordiance, with moderation, would be a good thing for the Garden city.

JURY DISAGREES

On Monday of this week, Messrs D. A. Buchannon, Charles Robinette 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.

WHISKY ON TOP.

Frank Knight Wins the Case.

JURYMEN ARE TREATED

They Take Oysters and Beer with the Defendant---A Strange Verdict.

The case of Provo city vs. Frank Knight, for selling liquor to minors came before Justice Noon yesterday at 2 p. m. King & Houtz prosecuted and Jones & Wood appeared for defence.

Defendant plead not guilty and asked for a jury trial. Venire was issued and six jurors summoned. By right of preemptory challenge two were excused and other two summoned, when all were sworn and the case begun.

Jesse Knight was called to the witness stand, and testified that he formed a part of the business referred to under the name of Knight Bros.

Walter Lott (minor) was called—Said he lived in the Fifth ward with his parents. Never knew Frank Knight until Tuesday the 23rd of this month. Met him in Knight's saloon between four and five o'clock and I saw Frank Knight playing pool. Played pool with Ferry (Pierce) James, Lewis James, and Alva Terry. Am sixteen years old. played about twenty minutes. We paid Salisburg fifty cents for the game. Got copper chips and went into bar room and called for drinks.