1996

State of Utah v. Jindall : Brief of Appellant

Utah Court of Appeals

Janet Graham; Utah Attorney General; Attorney for Appellee.
David Jindall; Apellant .

In the Utah Court of Appeals

Case No. 960587-CA

The State of Utah
Plaintiff Appellee

v.

David Darnell Tindall
Defendant Appellant

= Brief of Appellant =

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In the Utah Court of Appeals

The State of Utah
Plaintiff-Appellee

v.

David Darnell Tindall
Defendant-Appellee

CASE NO. 960587-CA

Brief of Appellant

Appeal from the convictions and sentences of the Second Judicial District Court, County of Weber, State of Utah, the Honorable Michael D. Lyon, Presiding.

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= Table of Authorities =

= Page =

= Constitutional Provisions =

Page:

United States Constitution:

= The Constitution of the State of Utah: =

= Utah State Statutory Provisions: =

= Table of Contents =

=Point I.= 1.

When considering the fact that the appellant allegedly "Kidnapped" a woman Complied on February 9, 1996 and was charged with the offense of "aggravated Kidnapping" (as defined at U.C.A. 76-5-302) and Senate Bill #26 on April 29, 1996:

(1) DELETED ... the "5 years to life" penalty that was prescribed for the commission of "aggravated Kidnapping" from May 1, 1995 ... TO ... April 29, 1996 by Senate Bill #287 ...

=AND=

(2) Senate Bill #26 - on April 29, 1996 additionally substituted a "minimum mandatory" penalty of 6, 10, or 15 years to life for the former "5 years to life" penalty for "aggravated Kidnapping" and by the said two (2)

actions of Senate Bill #26, two crucial jurisdictional questions are thereby irrationally raised and those two jurisdictional DEFECTS remained:

1. When the April 29, 1996 SENATE Bill DELETED the "5 years to LIFE" penalty for "aggravated Kidnapping" did the DELETION OF SUCH ONLY prescribed penalty for "aggravated Kidnapping" render the provisions of 76-5-302 U.C.A. "inoperative" and "unenforceable" consistent with the majority decisions of the Utah Supreme in the cases of:

Roe v. Lundstrom, 89 Utah 520 (Utah 1936)

following... Moorehouse v. Hammond, 60 Utah 593 (Utah 1922)

2. When the April 29, 1996 SENATE BILL #26 substituted an INCREASED "minimum mandatory" penalty of 6, 10, or 15 years to life" for the "5 years to life" penalty that was attached to "aggravated Kidnapping" at 76-5-302 U.C.A. Was such April 29, 1996 INCREASED "minimum mandatory" penalty over two (2) months... AFTER THE FACT of the February 9, 1996 alleged "aggravated Kidnapping constitute an unconstitutionally enacted EX POST FACTO LAW

and therefore FATAL to the validity of the appellant's conviction?

Such are the two jurisdictional issues along with others which go to the HEART of the instant appeal.

= Point II. =

With full acceptance of the trial court's very own verbatim assertion that his "ELEMENTS jury instruction" consisted of . . . "tracked the statutory wording of the Statute"

(i.e. the provisions of 76-5-302 U.C.A. (defining "aggravated kidnapping") and thereby raised the indispensable question of how such "Statute tracking is distinguishable from the "information jury instruction" that the Utah Supreme Court expressly REJECTED as an unacceptable substitute for an ELEMENTS instruction (SEE: State v. Jones, 823 P.2d 1059 (1991) and when the judicial "statute tracking" included the addition of the "CONJUNCTIVE":

→ "AND" ←

to the statutory "DISJUNCTIVE" → "OR" and thereby judicially "AMENDING THE" aggravated kidnapping provisions at 76-5-302 U.C.A. to NO LONGER contain ONLY the DISJUNCTIVE → "OR" but both: (a) THE DISJUNCTIVE → "OR" and CONJUNCTIVE → "AND"

and such apparent Judicial ENCROACHMENT into the EXCLUSIVE PROVINCE of the Legislative Branch of STATE GOVERNMENT would appear to be violative of the "DOCTRINE OF SEPERATION OF POWERS OF GOVERNMENT" AS SPELLED OUT under the following provisions of ARTICLE V, SECTION 1, constitution of Utah:

ARTICLE V

DISTRIBUTION OF POWERS

Section
1. [Three departments of government.]

Section 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.

= Point III. =

Inasmuch as . . . there are two (2) degrees of the crime of "Kidnapping" which are designated and coded: "Kidnapping" at 76-5-301 U.C.A. and "Aggravated Kidnapping" at 76-5-302 U.C.A. and it would appear to have been Reversible ERROR to have inherently diverted attention away from the following LESSER DEGREE of "KIDNAPPING":

76-5-301. Kidnaping.

(1) A person commits kidnaping when he intentionally or knowingly and without authority of law and against the will of the victim:

(a) Detains or restrains another for any substantial period; or

(b) Detains or restrains another in circumstances exposing him to risk of serious bodily injury; or

(c) Holds another in involuntary servitude; or

(d) Detains or restrains a minor without consent of its parent or guardian.

(2) Kidnaping is a felony of the second degree. 1983

especially when the Utah legislature itself contemplated the potential DOUBT as to Greater and Lesser degrees of the same conduct under the following provisions of TITLE 76, chapter 17, Section 1 Utah Code Annotated 1953:

77-17-1, Doubt as to degree - Convicted only on lowest.

When it appears the defendant has committed a public offense and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower degree.. 1980

However, instead of the prosecution being required to distinguish between the ... "Second degree felony" form of "Kidnapping" on preceding Page 4 and the "aggravated Kidnapping - a "First degree felony" that LOST its LAWFUL EXISTENCE on April 29, 1996 when Senate Bill #26 stripped the provisions of 76-5-302 U.C.A. of its "5 years to life" penalty and then and there rendered such provisions of 76-5-302 U.C.A. "INOPERATIVE" and "unenforceable" under the majority decisions of Utah Supreme Court in the cases of:

Roe v. Lundstrom, 89 Utah 520 (Utah 1936)
following Moorehouse v. Hammond, 60 Utah 593 (Utah 1922)

and such obvious FATAL DEFECT was NOT cured by the April 29, 1996 Senate Bill 26.

substitution of the former "aggravated Kidnapping" penalty of:

"5 years to life"

with an April 29, 1996 increased "minimum mandatory" penalties of:

"6, 10, or 15 years to life"

because such April 29, 1996 being over two (2) months AFTER-THE-FACT of the alleged February 9, 1996 "aggravated Kidnapping" by the Appellant and therefore unconstitutionally violative of Utah constitutional prohibition against the PASSAGE OF AN "EX POST FACTO LAW" (SEE: Article I, Section 18, constitution of Utah).

= Point IV =

The apparent fact that NO RATIONAL distinction can be made between the instant case and STATE V. MARSHALL ALEN TONEE, 823 P.2d 1059 (Utah, December 31, 1991) which the Utah Supreme "Reversed and Remanded" because the TRIAL COURT failed to give an "ELEMENTS JURY INSTRUCTION" on the alleged offense of - "aggravated Kidnapping" such Reversible ERROR should have a "UNIFORM

"OPERATION" as Guaranteed at article I, Section 24, Constitution of Utah and EXTENT to the Instant case consistent with the Federal Constitutional Guarantee of:

"EQUAL PROTECTION OF THE LAWS" under the 14th. amendment to the United States Constitution.

=Point V.=

The outrageous Prosecutorial conduct of William F. Daines, Deputy Weber County Attorney in the Instant case and Identical Documented Reckless Disregard for the Federal Constitutional Guarantee of a "Fair Trial" under the 6th. and 14th. to the United States constitution and Article I, Section 12, Constitution of Utah and inter alia, the said William F. Daines allowed Defendant Richard Lynn Wright to go to trial under the EX POST FACTO provisions of 76-5-302 U.C.A. (defining "aggravated Kidnapping") which provisions were rendered EX POST FACTO in 1983 when "Minimum mandatory" penalties of 5, 10, or 15 years to life were initially attached to the "aggravated Kidnapping" provisions of 76-5-302 U.C.A. and such 1983 "minimum mandatory"

were indisputably EX-POST-FACTO in their being over five (5) years ... AFTER-THE-FACT of the alleged "Aggravated Kidnapping" by the said Richard Lynn Wright in 1977 and hence NOT subject to prosecution pursuant to the 1983 "Minimum mandatory" EX POST FACT penalties. Applied to the Instant case, the said William F. Daines allowed the appellant to be taken to trial and prosecuted by Daines on still another "Aggravated Kidnapping" where AGAIN, EX POST FACTO "minimum mandatory" penalties (6, 10, 15 years to life) that substituted the May 1, 1995 Senate Bill #287 penalty of "5 years to life" with "Minimum Mandatory" penalties of 6 to 15 years to life by Senate Bill #26 on April 29, 1996 and hence some eighty (80) dates AFTER-THE-FACT of the alleged February 9, 1996 alleged "Aggravated Kidnapping" in the Instant case and HENCE unconstitutionally violative of the following provisions of Article I, Section 18, constitution of state:

> **Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]**
> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

laws

additional immediate unprofessional conduct by the said William F. Daines will be later argued.

= Point VI. =

the obvious failure of the prosecution to prove "each ELEMENT of the offense charged" as required by the Utah legislature under the provisions of TITLE 76, Chapter 1, section 501 Utah code Annotated 1953 is definitely indisputable when each page of the "certified copy" of the trial transcript (460 total pages) are carefully checked, there is no attempt whatsoever to prove several of the "ELEMENTS" beyond a reasonable doubt, neither was "jurisdiction" ever legally established by a preponderance of the evidence.

= Point VII. =

the Appellant was "counsel in form only and hence no counsel at all" (Powell v. State of Alabama, 287 U.S. 45 (1932)) failed to provide "EFFECTIVE ASSISTANCE" at "critical stages of the proceedings" (e.g. at "preliminary hearing" - White v. Maryland; at "arraignment" - Hamilton v. Alabama, 368 U.S. 52 (1961) "trial" - Gideon v. Wainwright, 372 U.S. 335 (1963); at SENTENCING - Townsend v. Burr, and when the "effective assistance of counsel" is denied at a "critical stage" the Supreme Court has declared that it "will reverse" and will NOT LISTEN to "nice calculations as to the amount of prejudice therefrom" Glasser v. U.S. 315 U.S. 60 (1942)

=Conclusion= . . . . . =50.=

Constitutional Provisions Relied Upon:

United States Constitution:

Article I, Section 10:

Sec. 10. [Powers denied the states.]

[1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3.] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreements or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

The Fourteenth (14th.) Amendment:

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Utah:

Article I, Section 7:

Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law. 189

Article I, Section 11:

Sec. 11. [Courts open — Redress of injuries.] All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. 1890

Article I, Section 12:

Sec. 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.

Article I, Section 18:

Section 18. [Attainder — Ex post facto laws — Impairing contracts.] No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. 1896

Article I, Section 24:

Section 24. [Uniform operation of laws.] All laws of a general nature shall have uniform operation. 1896

Statutory Provisions

76-1-501 U.C.A.

BURDEN OF PROOF

76-1-501. Presumption of innocence — "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence. 1973

76-5-301 U.C.A.

KIDNAPING

76-5-301. Kidnaping.

(1) A person commits kidnaping when he intentionally or knowingly and without authority of law and against the will of the victim:

(a) Detains or restrains another for any substantial period; or

(b) Detains or restrains another in circumstances exposing him to risk of serious bodily injury; or

(c) Holds another in involuntary servitude; or

(d) Detains or restrains a minor without consent of its parent or guardian.

(2) Kidnaping is a felony of the second degree. 1983

76-5-302 U.C.A.

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) To inflict bodily injury on or to terrorize the victim or another; or

(d) To interfere with the performance of any governmental or political function; or

(e) To commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years and which may be for life. 1983

Statement of Jurisdiction

The appellant respectfully submits that the captioned Court is invested with jurisdiction to entertain the instant appeal and to grant the relief that is being respectfully sought consistent with the following provisions of 78-2a-3 (2) (f) U.C.A.:

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

Statement of the Facts

The appellant respectfully submits that on February 9, 1996 his flagging down the truck of a VERNON campbell and telling Campbell that "someone was trying to "kill him" and he needed a ride out of such danger and such specific conduct on the part of the appellant was given inapplicable name of

"Aggravated Kidnapping" despite the fact that the said Vernon Campbell only drove about a BLOCK before having police cars around him and immediately stopped his TRUCK and "Got out of his truck with his hands in the air." reported the said VERNON CAMPBELL.

The appellant was "HIT BY A POLICE CAR" and was subsequently "Rushed to a hospital".

The appellant was later formerly charged with the following offenses:

1. "Aggravated Kidnapping" (76-5-302 U.C.A.)
2. "Possession of a controlled substance"
3. "Assault on a police officer"
4. "RESISTING ARREST"

The "Information" containing the above charges, allege that such above offenses occurred "on or about February 9, 1996... and hence some eighty (80) days BEFORE the said SENATE BILL #26 DELETED the May 1, 1995 Senate Bill #287 Removal of the 1983 installed "minimum mandatory" penalties of "5, 10, or 15 years to life" (at 76-5-302 U.C.A. Defining "aggravated Kidnapping") and Senate Bill #287 substituted a penalty of "5 years to life" for the foremented "minimum mandatory" penalties of "5, 10, or 15 years to life" and such SUBSTITUTED "5 years to life" penalty remained from May 1, 1995 until April 29, 1996 when Senate Bill 26 DELETED the aforesaid Senate Bill 287 (May 1, 1995) penalty of "5 years to life" on April 29, 1996 and substituted such

"5 years to life" penalty with the following "minimum mandatory penalties of "6, 10, 15 years to life" on April 29, 1986 and would appear have thereby divested the trial court of subject-matter jurisdiction... of the unconstitutionally passed "minimum mandatory" penalties (i.e. the 6, 10, 15 years to life penalty that remained).

Additionally, the trial court would appear to have unconstitutionally ENCROACHED into the EXCLUSIVE Branch LEGISLATIVE Branch of State Government by adding the "conjunctive ↔ "AND" to the ELEMENTS of "aggravated Kidnapping" at 76-5-302 U.C.A. in violation of Article V, Section 1, Constitution of Utah.

Also, when viewed in conjunction with STATE V. JONES, 823 F.2d 1059 and State v. Laine, 618 P.2d 93 (Utah 1980) it would appear that the trial court failed to give an ELEMENTS JURY INSTRUCTION.

The trial court's "Lesser Included offense" Jury Instruction should have related to the LESSER DEGREE of "Kidnapping" that is coded 76-5-301 U.C.A. rather than the erroneous "unlawful detention" when there was NO ascertainable TIME EXCEPT for any DETENTION AT ALL.

Outrageous conduct on the part of William F. Daines, Prosecutor should be declared to a mockery of the Article I, section 7, Utah Constitutional Guarantee of "DUE Process of Law".

the false and prejudicial four articles that were published by the "Ogden Standard Examiner" and admittedly read by most of jurors (in the instant case) would appear to have sufficed deny the appellant a constitutionally guaranteed "Fair Trial".

=Statement of the case=

As aforesaid, the instant case had it beginning on February 9, 1996 when the appellant is alleged to have committed the offenses of: 1. "aggravated Kidnapping" 2. "unlawful possession of a controlled substance" 3. "assault on a peace officer" 4. "RESISTING arrest" . . . In said charges, the appellant entered pleas of "NOT GUILTY" to all charges, and requested and received a Jury trial.

The jury trial was conducted on May 13, 14 and 15, 1996 and the appellant was found "GUILTY AS CHARGED" on all counts and was sentenced and committed to the Utah State Prison on June 13, 1996. with all sentences ordered to "run consecutive to each other and also "consecutive to the sentence being served on which the appellant was "on parole" (SEE: Trial transcript page 460).

=Summary of Argument=

The Appellant respectfully submits that at the heart of the instant appeal, are four (4) crucial jurisdictional questions which are:

(1.) when considering that the alleged "aggravated Kidnapping" allegedly occurred "on or about February 9, 1996, and on "February 9, 1996 the penalty prescribed for "aggravated Kidnapping" was: "5 years to Life" at 76-5-302 U.C.A. In light of the Utah Supreme court's Rulings in Roe v Lundstrom, 89 Utah 520 (Utah 1936) following Moorehouse v. Hammond, 60 UTAH 593 (Utah 1922) (Addendum E and F) could the Utah Legislature use Senate Bill #26 (April 29, 1996 to Strip the provisions on "aggravated Kidnapping" (i.e, 76-5-302 U.C.A.) of their only penalty of "5 years to Life" that could be lawfully applied to an alleged "aggravated Kidnapping" that allegedly occurred "on or about February 9, 1996) and Not render the "aggravated Kidnapping" provisions of 76-5-302 U.C.A. "Inoperative" and "unenforceable" contrary to the Utah Supreme Court's Rulings in Roe v. Lundstrom, supra., and Moorehouse v. Hammond, supra.,

(2.) when Senate Bill #26, on April 29, 1996 and hence some 80 days after the alleged February 9, 1996 "aggravated Kidnapping" substituted a new and INCREASED "minimum mandatory" penalty of "6, 10, 15 years to Life" did such obviously EX POST FACTO increased penalty DIVEST THE TRIAL COURT of SUBJECT-matter Jurisdiction ?

(3.) when the "ELEMENTS JURY INSTRUCTION" given in the instant

case is viewed in conjunction with the Utah Supreme Court's "Reversals and Remands" in State v. Marshall Felon Jones, 823 P.2d 1059 (Utah 1991) and State v. Laine, 618 P.2d 33 (Utah 1980) can a different Result be reached in the Instant case than was accorded in those cases and the Utah constitutional Guarantee of a "uniform operation" of "All laws of a General nature" under Article I, Section 24 and the Federal Constitutional Guarantee of "EQUAL PROTECTION OF THE LAWS" under the Fourteenth Amendment?

(4.) Should the Judicial encroachment into the EXCLUSIVE PROVINCE OF THE LEGISLATIVE BRANCH OF STATE GOVERNMENT by the trial court AMENDING the DISJUNCTIVE nature of the ELEMENTS of "Aggravated Kidnapping" to include the CONJUNCTIVE... "AND"... and thereby delete the OBVIOUS OPTION that the Legislature ENACTED at 76-5-302 U.C.A. as amended by the word: "OR" and REWORD the former optional "OR" to read "AND/OR" and all in violation of "the Doctrine of Separation of Powers of Government as clearly asserted under the following provisions of Article V, Section 1, Constitution of Utah:

ARTICLE V

DISTRIBUTION OF POWERS

Section
1. [Three departments of government.]

Section 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.

Additionally, the Appellant will argue the DENIAL of a constitutionally Guaranteed "Fair Trial" (Murphy v. State of Florida, 421 U.S. 794 (1975)) on the following specific Regards:

A. Several occasions of outrageous and Incredible conduct on the part of Prosecution (William F. Daines) should be declared FATAL to the validity of the Appellant's convictions because Prosecutorial Misconduct Sufficed to effect the DENIAL of a "Fair Trial".

B. The Orlando Sentinel Examiner subjected the Appellant to a "Trial by ordeal" filled with false and prejudicial reckless DISREGARD FOR THE TRUTH... by its VICIOUS LIE that the Appellant's APPEAL "HAS BEEN DENIED" when, IN TRUTH, NO APPEAL YET BEEN perfected (completed).

C. The collusive like SILENCE of Defense counsel which caused the Appellant's Law-Student-Daughter to severely fight against the constantly pressing urge to scream as she painfully watched Ineffectiveness of Defense counsel through cold indifference to the Incredible and unprofessional conduct prosecution William F. Daines Sufficed to effect a constitutionally impermissible conviction of an "Aggravated Kidnapping" that was rendered non-existent on April 29, 1996 when SENATE BILL 96 DELETED the ONLY "5 years to life Penalty" that enforced the

Provisions of 76-5-302 U.C.A. from May 1, 1995 (when Senate #287 installed said "5 years to life" penalty that Senate Bill 26 DELETED on April 29, 1996 and then and there replaced said "5 years to life" penalty with increased and hence EX POST FACTO "minimum mandatory penalties" of: "6, 10, 15 years to life" but for the conscientious defense counsel such "unenforceable" offense of "aggravated Kidnapping" being stripped of the applicable and April 29, 1996 Senate Bill 26 DELETED "5 years to life" aforesaid penalty should have caused the "aggravated kidnapping" charge from contaminating the fairness of the appellant's trial on all other charges. aside from the fatally defective charge of "aggravated Kidnapping".

Argument

Point I.

Preliminary to the appellant's argument, it is respectfully submitted that this Honorable Court has ruled that:

"the parties cannot waive a lack of subject matter jurisdiction"
Thompson v. Jackson, 743 P.2d 1230 (Utah ct. app., 1987)
and the Utah Supreme Court has also ruled:
"the court's lack of jurisdiction can be raised at any time"
Olson v. Salt Lake City School District, 724 P.2d 960 (Utah 1986)

The Appellant respectfully submits that it would appear that the Trial Court was divested of subject-matter jurisdiction of the offense of "aggravated Kidnapping" as follows:

The "Minimum mandatory" Penalties of:

"5, 10, 15 years to life"

were the enforcement Provisions of TITLE 76, chapter 5, Section 302 Utah Code Annotated 1953 (Defining the offense of "aggravated kidnapped") From 1983... TO May 1, 1995,

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) To inflict bodily injury on or to terrorize the victim or another; or

(d) To interfere with the performance of any governmental or political function; or

(e) To commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years and which may be for life. 1983

← Enforcement (Penalty) Provisions.

However, on May 1, 1995, the Utah Legislature DELETED the above "Minimum mandatory" penalties of "5, 10, 15 years to LIFE" with

with Senate Bill #287 as follows:

S.B. 287

Passed 3/1/95, (Governor did not sign.)
Effective 5/1/95
Laws of Utah 1995, Chapter 337

Amendments to Sentencing Provisions

Sponsor: Lane Beattie

AN ACT Relating to the Code of Criminal Procedure; Requiring the Court to Consider Home Confinement As a Condition of Probation; Requiring the Department of Corrections to Establish Procedures and Standards for Home Confinement and Electronic Monitoring; Providing Exemptions; Amending Sentencing Provisions On Sexual Offenses Against Children and Related Offenses; Amending Related Provisions On Probation and Parole; and Making Technical Changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:
76-3-201, as last amended by Chapter 13, Laws of Utah 1994
76-3-406, as last amended by Chapter 64, Laws of Utah 1994
76-5-301.1, as last amended by Chapter 18, Laws of Utah 1984
76-5-302, as last amended by Chapter 88, Laws of Utah 1983
76-5-402.1, as enacted by Chapter 88, Laws of Utah 1983
76-5-402.3, as enacted by Chapter 88, Laws of Utah 1983
76-5-403.1, as last amended by Chapter 156, Laws of Utah 1988
76-5-404.1, as last amended by Chapter 170, Laws of Utah 1989
76-5-405, as last amended by Chapter 170, Laws of Utah 1989
76-5-406.5, as last amended by Chapter 64, Laws of Utah 1994
77-18-1, as last amended by Chapters 13, 198, and 230, Laws of Utah 1994
77-27-9, as last amended by Chapter 13, Laws of Utah 1994

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-3-201 is amended to read:

76-3-201. Sentences or combination of sentences allowed - Civil penalties - Restitution - Hearing - Definitions - Resentencing - Aggravation or mitigation of crimes with mandatory sentences.

(1) As used in this section:
(a) "Conviction" includes a:
(i) judgment of guilt; and
(ii) plea of guilty.
(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.
(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including insured damages, and payment for expenses to a governmental entity for extradition or transportation.
(e) (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.
(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.
(2) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of them:
(a) to pay a fine;
(b) to removal from or disqualification of public or private office;
(c) to probation unless otherwise specifically provided by law;
(d) to imprisonment;
(e) to life imprisonment;
(f) on or after April 27, 1992, to life in prison without parole; or
(g) on or after May 1, 1995, to imprisonment at not less than 5 years and which may be for life for an offense under Title 76, Chapter 5, Part 4, and Sections 76-5-301.1 and 76-5-302; or
[(g)] (h) to death.
(3) (a) This chapter does not deprive a court of authority conferred by law to:
(i) forfeit property;
(ii) dissolve a corporation;
(iii) suspend or cancel a license;
(iv) permit removal of a person from office;
(v) cite for contempt; or
(vi) impose any other civil penalty.
(b) A civil penalty may be included in a sentence.
(4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution up to double the amount of pecuniary damages to the victim or victims of the offense of which the defendant has been convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court.
(ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).
(b) (i) When a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.
(ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).
(c) In determining whether or not to order restitution, or restitution that is complete, partial, or

PENALTY

The above "5 years to Life" penalty remained in effect from May 1, 1995 through February 9, 1996 . . . when the Appellant . . .

allegedly "Kidnapped" a Vernon Campell and was charged with "aggravated Kidnapping" . . . and said 5 years to life penalty remained until April 29, 1996.

But on April 29, 1996 senate Bill #26 - Deleted "5 to life" penalty &

S.B. 26

Passed 2/8/96, Approved 2/23/96
Effective 4-29-96
Laws of Utah 1996, Chapter 40

Criminal Penalty Adjustments

Sponsor: Lyle W. Hillyard, Craig L. Taylor, Mike Dmitrich, Robert F. Montgomery, Robert C. Steiner, L. Alma Mansell, Eldon A. Money, Lane Beattie, Craig A. Peterson, Scott N. Howell, Millie M. Peterson, Alarik Myrin, Stephen J. Rees, Charles H. Stewart, Wilford R. Black Jr, David L. Watson, David H. Steele, Leonard M. Blackham

An Act Relating to the Criminal Code and the Code of Criminal Procedure; Amending Sentencing Provisions On Aggravated Murder, Murder, and Sexual Offenses Against Children; Making Nonmandatory the Minimum Sentences; Providing for Mandatory Imprisonment; Amending Related Provisions On Probation and Parole; and Making Technical Changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:
76-3-201 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-3-406 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-4-102, as last amended by Chapter 88, Laws of Utah 1983
76-4-202, as last amended by Chapter 88, Laws of Utah 1983
76-5-301.1 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-302 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-402.1 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-402.3 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-403.1 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-404.1 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-405 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First Special Session
76-5-406.5 (Effective 04/29/96), as last amended by Chapter 10, Laws of Utah 1995, First

REPEALS:
76-3-201.3, as enacted by Chapter 10, Laws of Utah 1995, First Special Session

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-3-201 (Effective 04/29/96) is amended to read:

76-3-201 (Effective 04/29/96). Sentences or combination of sentences allowed - Civil penalties - Restitution - Hearing - Definitions.

(1) As used in this section:
(a) "Conviction" includes a:
(i) judgment of guilt; and
(ii) plea of guilty.
(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.
(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c).
(e) (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.
(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.
(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:
(a) to pay a fine;
(b) to removal from or disqualification of public or private office;
(c) to probation unless otherwise specifically provided by law;
(d) to imprisonment;
(e) to life imprisonment;
(f) on or after April 27, 1992, to life in prison without parole; or
[~~(g) on or after April 29, 1996, to imprisonment at not less than five years and which may~~] [~~be for life for an offense under Title 76, Chapter 5, Part 4, and Sections 76-5-301.1 and 76-5-302;~~] [~~or~~]
[~~(h)~~] (g) to death.
(3) (a) This chapter does not deprive a court of authority conferred by law to:

Tape - Defendant's Exhibit D - State v. Tindall - CASE NO. 960587-CA -

The Appellant respectfully submits that when the former penalty of "5 years to LIFE" was so DELETED by Senate Bill #26 on April 29, 1996 the Provisions of 76-5-302 U.C.A. Defining the offense of..."AGGRAVATED KIDNAPPING" was then and there rendered..."INOPERATIVE" and "unenforceable" under the following applicable Rulings of the Utah Supreme Court and other Concurring courts as follows:

UNDER ROE V. LUNDSTROM, 89 UTAH at 525:

If the ordinance fails to fix a penalty for its violation, it is unenforceable. This principle is aptly stated in the case of *Moorehouse* v. *Hammond*, 60 Utah 593, 209 P. 883, 885:

"There are in this state no crimes or offenses, except such as are created by statute or ordinance, and a court is powerless to impose a penalty not prescribed by a statute or an ordinance; and hence a statute or ordinance making it a crime or offense to do a certain act, without attaching a penalty to the doing of such act, is inoperative, and incapable of being given any effect by the courts."

Following Moorehouse v. Hammond:

598 SUPREME COURT OF UTAH [Sept.

Moorehouse v. Hammond, 60 Utah 593

"A description or definition of an act necessary to constitute a crime does not make the commission of such acts a crime, unless there is a punishment annexed. Punishment is as necessary to constitute a crime as definition. • • •"

It was accordingly held in that case that a statute which does not impose a penalty is unenforceable. The same question was before the same court again in *Matter of Ellsworth*, 165 Cal. 677, 133 Pac. 272, where an ordinance relating to the regulation of the sale of intoxicating liquors was in question. The ordinance in that case, as in the case at bar, failed to impose any penalty or punishment for its violation, and it was again held that the ordinance was without force or effect.

In *New Orleans* v. *Stein*, 137 La. 652, 69 South. 43, the defendant was convicted of violating the provisions of a certain ordinance relating to the public health. The defendant appealed from the conviction, contending that, in view that the ordinance under which he was convicted failed to impose a penalty or punishment, the sentence imposed by the court was illegal and void. The court sustained the contention. The law is clearly stated in the headnote as follows:

"There are in this state no crimes or offenses except such as are created by statute or ordinance, and a court is powerless to impose a penalty not prescribed by a statute or an ordinance; and hence a statute or ordinance making it a crime or offense to do a certain act, without attaching a penalty to the doing of such act, is inoperative, and incapable of being given any effect by the courts."

The same question was before the Supreme Court of Florida in the case of *Cribb* v. *State*, 9 Fla., where, at page 418, after referring to the statute under which the conviction was had, the court said:

"But the difficulty of sustaining the conviction and judgment under this count is that, although it [the statute] enjoins or forbids the resident from holding the license, no penalty or remedy by indictment is prescribed. • • • The statute that creates the offense has not prescribed the penalty."

It was accordingly held that the judgment of conviction was illegal. It is not necessary to pursue the question or the authorities further. It must be manifest to every lawyer that crimes can only be created by the Legislature or by its express authority, and that, unless a criminal statute or ordinance prescribes a penalty for its violation, the courts are powerless to enforce the same. The judgment of the justice's court, which was produced in evidence at the hearing before the defendant and the committee of physicians, was therefore without force or effect, and the recommendation or report of the physicians to the defendant, being based thereon, was likewise without any legal force or effect. In view, therefore,

the Appellant respectfully submits that in light of the foregoing WEIGHT of AUTHORITY it would appear that as of April 29, 1986 when the Legislature REPEALED the only penalty that "clearly covered"

the offense of "aggravated Kidnapping" (76-5-302 U.C.A.) as it was punished on February 9, 1996 (with a "5 years to life" penalty as verified at preceding page 3 of the instant "Supplement" and WITH NO LONGER A PENALTY of "5 years to life" to enforce the offense of "aggravated Kidnapping" under the provisions of 76-5-302 U.C.A. such provisions of 76-5-302 U.C.A. were then and there rendered "INOPERATIVE" and "UNENFORCEABLE" consistent with the foregoing Rulings of the Utah Supreme Court in:

Roe v. Lundstrom, 89 Utah 525
Moorehouse v. Hammond, 60 Utah 593

SEE ALSO:

New Orleans v. State, Supra.,
Matter of Ellsworth, Supra.,
Brill v. State, Supra.,

and from the fact that the provisions of 76-5-302 U.C.A. were stripped of their "5 to life" penalty on April 29, 1996 by Senate Bill #26 it rationally follows therefrom that additionally, such DELETED Penalty for "aggravated Kidnapping" not only rendered such provisions of 76-5-302 U.C.A. "Inoperative" and "unenforceable" (accord: Roe v. Lundstrom, Supra., following Moorehouse v. Hammond, Supra.,) But Also then and there DIVESTED THE TRIAL Court of subject-matter Jurisdiction and in such specific regard, an abundance of authority has subscribed to the same position taken by this Court in the case of:

Thompson v. Jackson, 743 P.2d 1230 (Utah Ct. App. 1987)

(As immediately follows on Page 27...

Lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a court by consent, inaction or stipulation. *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968). "If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter *sua sponte*." *Basso v. Utah Power and Light Company*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking. *Mitchell v. Maurer*, 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed. 338 (1934):

Consequently, the murdered "Imperative" and "unenforceable" status of the provisions of 76-5-302 U.C.A. by Senate Bill #26 (as verified at preceding Page 5) of this "Supplement" DOES NOT appear to have left REMAINING any determinable BASIS pursuant to which the Defendant-Appellant could be VALIDLY tried, convicted and imprisoned . . . for "aggravated Kidnapping" when Senate Bill #26 stripped the provisions of 76-5-302 U.C.A. of its ONLY PENALTY of "5 years to life" on April 29, 1996 and thereby rendered the provisions of 76-5-302 U.C.A. (on "aggravated Kidnapping") "IMPERATIVE" and "unenforceable" under RAE v. LUNSTROM, *supra*, following Morehouse v. Thurman, *supra*, above all, when 76-5-302 U.C.A. was "amended" and the "5 years to life" penalty was DELETED therefrom, such deleted PENALTY constituted a REPEAL that additionally Repealed 76-5-302 U.C.A. as to the appellants alleged "aggravated Kidnapping" . . . ESPECIALLY when considering that the former penalty for "aggravated Kidnapping" (i.e., "5 years to life") was NOT ONLY DELETED as shown at preceding Page 5, of this Supplement . . . By SENATE BILL #26 on April 29, 1996 BUT . . . more importantly, the VERY SAME

SENATE BILL #26 substituted the "5 years to life" with an April 29, 1996 INCREASED PENALTY ("minimum mandatory") penalty of: "6, 10, 15 years to life" and such April 29, 1996 INCREASED penalty being AFTER-THE-FACT of the ... February 9, 1996 alleged "aggravated Kidnapping" and therefore unconstitutionally EX POST FACTO and violative of the following provisions of Article I, Section 18 constitution of Utah:

> **Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]**
> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.
> 1896

Wherefore, the Appellant says that because the provisions of 76-5-302 U.C.A. (defining "aggravated kidnapping") were rendered without its "5 years to life" penalty, it acquired through Senate #287 (on May 1, 1995) and without a penalty, the provisions of 76-5-302 U.C.A. were then and there "inoperative" and "unenforceable" SEE: Box v. Lundstrom, Supra., following Moorehouse v. Hammond, Supra., (at preceding pages 6 and 7 of this "Supplement")... the trial court would appear to have been DIVESTED OF SUBJECT-MATTER JURISDICTION - on April 29, 1996 when SENATE BILL #26 removed "amended" (DELETED) the May 1, 1995 penalty of "5 years to life" that SENATE BILL #287 substituted for the prior "minimum mandatory" penalties of "5, 10, 15 years to life" that were prescribed for the offense of "aggravated kidnapping" (as verified at preceding page 4 of this "Supplement") and for such specific reason, there DOES NOT APPEAR to EXIST any discernable FOUNDATION upon which the Appellant's conviction for "aggravated Kidnapping" can be allowed to STAND.

= Point II. =

Despite article VI, Section 1, Constitution of Utah clearly expressing the EXCLUSIVE PROVINCE of the Legislative Branch of State Government as follows:

ARTICLE VI

LEGISLATIVE DEPARTMENT

Section 1. [Power vested in Senate, House and People.]

The Legislative power of the State shall be vested:

1. In a Senate and House of Representatives which shall be designated the Legislature of the State of Utah.

2. In the people of the State of Utah. as hereinafter stated:

It DOES NOT appear to rationally follow therefrom that the LEGISLATIVELY ENACTED provisions of 76-5-302 U.C.A. AS follows:

Section 4. Section 76-5-302 is amended to read:

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) to hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is *mentally incompetent or younger than* [sixteen] 16 years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a felony of the first degree punishable on or after May 1, 1995, by [a] an indeterminate term [~~which is a minimum mandatory term~~] of imprisonment [~~of 5, 10, or 15~~ years and which may be for] at not less than 5 years to life.

could Be Amended by the Judicial Branch of State Government

(Specifically, the trial court in the instant case) elected to amend the preceding provisions of 76-5-302 U.C.A. to also include the "conjunctive" → "AND" whenever the "disjunctive" → "OR" appears as follows in the trial court's Jury Instruction #12 as follows:

→ INSTRUCTION NO. 12 ←.

Before you can convict the defendant of the crime of aggravated kidnapping, a first degree felony, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

1) Said defendant, David Darnell Tindall

2) intentionally or knowingly, without authority of law and against the will of the victim (V. Campbell),

3) by any means and in any manner, seized, confined, detained or transported a person (V. Campbell) with intent:

a) to facilitate the commission, attempted commission or flight after commission or attempted commission of a felony

and/or ←

b) to inflict bodily injury on or to terrorize a person (V. Campbell)

and/or ←

c) to hold as a shield or hostage or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct

and/or ←

d) to interfere with performance of any governmental or political function.

If you believe that the evidence establishes each and all of the essential elements of that offense beyond a reasonable doubt, it is your duty to convict the defendant of aggravated kidnapping, a first degree felony.

(In part, pertinent)

And by such judicial encroachment into the exclusive province of the legislative branch of State Government, it would logically appear that the judicial "EXERCISE" of a "FUNCTION" that "appertains" exclusively to the legislative branch of State Government is clearly violative of the following provisions of Article V, Section 1, constitution of Utah:

ARTICLE V

DISTRIBUTION OF POWERS

Section
1. [Three departments of government.]

Section 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. 1896

The petitioner respectfully submits that the specific aspect of the above provisions of Article V, Section 1 that were violated by the trial court is worded as follows:

, 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. 1896

The Appellant respectfully submits the trial courts preceding legislative like EMENDMENT of the substance of the provisions of 76-5-302 U.C.A. when viewed in light of the following definitions of the

"DISJUNCTIVE" → "OR" and the "CONSTRUCTIVE" → "AND" In the "6th. DELUXE" "centennial" 1891-1991" Edition of Black's Law Dictionary as follows:

From: Black's 6th Deluxe Law Dictionary – Page – 86 "AND"

86

And. A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first. Added to; together with; joined with; as well as; including. Sometimes construed as "or." Land & Lake Ass'n v. Conklin, 182 A.D. 546, 170 N.Y.S. 427, 428.

It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and after. In its conjunctive sense the word is used to conjoin words, clauses, or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds and its use implies that the connected elements must be grammatically co-ordinate, as where the elements preceding and succeeding the use of the words refer to the same subject matter. While it is said that there is no exact synonym of the word in English, it has been defined to mean "along with", "also", "and also", "as well as", "besides", "together with". Oliver v. Oliver, 286 Ky. 6, 149 S.W.2d 540, 542.

"And/or" means either or both of. Poucher v. State, 287 Ala. 731, 240 So.2d 695, 695. When expression "and/or" is used, that word may be taken as will best effect the purpose of the parties as gathered from the contract taken as a whole, or, in other words, as will best accord with the equity of the situation. Bobrow v. U. S. Casualty Co., 231 A.D. 91, 246 N.Y.S. 363, 367.

From: Black's 6th Deluxe Law Dictionary – Page – 1095 "OR"

Or, *n.* A term used in heraldry, and signifying gold; called "sol" by some heralds when it occurs in the arms of princes, and "topaz" or "carbuncle" when borne by peers. Engravers represent it by an indefinite number of small points.

Or, *conj.* A disjunctive particle used to express an alternative or to give a choice of one among two or more things. It is also used to clarify what has already been said, and in such cases, means "in other words," "to-wit," or "that is to say." The word "or" is to be used as a function word to indicate an alternative between different or unlike things. City of Toledo v. Lucas County Budget Commission, 33 Ohio St.2d 62, 294 N.E.2d 661, 663. In some usages, the word "or" creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, "or" may be construed to mean "and." Atchison v. City of Englewood, Colo., 568 P.2d 13, 18.

The appellant respectfully submits that the above enlightenment would appear to be indicative of the apparent fact that the "conjunctive" → "and" combined with the "DISJUNCTIVE" → "OR" . . . and thereby forming the trial courts UNCONSTITUTIONAL LEGISLATIVE-LIKE amendment of the provisions of 76-5-302 U.C.A. with the addition thereto of the word → "AND" and thereby accorded the prosecution the NON-REQUIRED of ONE OR BOTH

Of the forms of committing the offense of "aggravated kidnapping" and thus unlawfully minimized the "burden of proof" that is commanded under the following Directive of the Utah Legislature at 76-1-501 U.C.A. as follows:

BURDEN OF PROOF

76-1-501. Presumption of innocence — "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence. 1973

Accordingly, the unconstitutional role Court, should be declared to be FATAL to the validity of the Appellant's conviction.

= Point III. =

Because there are two (2) degrees of "Kidnapping" under the laws of State of Utah (i.e., a LESSER - "Second degree felony" at 76-5-301 U.C.A. and a GREATER "First degree felony" "aggravated Kidnapping" at 76-5-302 U.C.A.) which are worded as follows:

(THE LESSER DEGREE: =)

KIDNAPING

76-5-301. Kidnaping.

(1) A person commits kidnaping when he intentionally or knowingly and without authority of law and against the will of the victim:

(a) Detains or restrains another for any substantial period; or

(b) Detains or restrains another in circumstances exposing him to risk of serious bodily injury; or

(c) Holds another in involuntary servitude; or

(d) Detains or restrains a minor without consent of its parent or guardian.

(2) Kidnaping is a felony of the second degree. 1983

(THE GREATER DEGREE):

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) To inflict bodily injury on or to terrorize the victim or another; or

(d) To interfere with the performance of any governmental or political function; or

(e) To commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

And when the State's failure of Evidence led the trial court to consider a lesser-Included offense Jury Instruction the Utah Legislature would appear to have contemplated just such a problem arising during a trial where a GREATER DEGREE and LESSER DEGREE of the same offense existed and therefore made it mandatory connoted by the word "SHALL" is used in the provisions of 77-17-1 U.C.A. as follows:

77-17-1, ... as to degree - Convicted only on ... lowest.

When it appears the defendant has committed a public offense and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower degree. 1980

Thus inasmuch as "Simple Kidnapping" at 76-5-301 U.C.A. as opposed to the above "aggravated Kidnapping" above, "clearly covered" the instant case...

As repeatedly required by the Utah Supreme Court (in 1888 under Ogden City v. McLaughlin, 5 Utah 387 (Utah 1888))

No matter how reprehensible the conduct of a person may be, yet no punishment can be inflicted without a law authorizing it; and such law must clearly cover the case. We do not think that the sections referred to gave the plaintiff power to punish the defendants for the offense charged against them. The order of the district court, therefore, sustaining the demurrer, was proper.

The orders and judgment of the district court are affirmed.

(In State v. Hicken, 659 P.2d 1038 (Utah 1983))

Arranging for the distribution of a controlled substance.

The Controlled Substances Act expressly and specifically sanctions the offense of arranging for the distribution of a controlled substance; therefore, pursuant to §§ 58-37-1§ and 76-1-103, defendant was required to be charged with such offense under § 58-37-8(1)(a)(iv) of the Controlled Substances Act, and it was error to charge him under this section. State v. Hicken, 659 P.2d 1038 (Utah 1983).

(In State v. Hill, 688 P.2d 450 (Utah 1984))

STATE of Utah, Plaintiff and Respondent,

v.

Timmy HILL, Defendant and Appellant.

No. 19275.

Supreme Court of Utah.

April 26, 1984.

Defendant was convicted in the Fourth District Court, Utah County, John F. Walhquist, J., of theft by deception and he appealed. The Supreme Court, Howe, J., held that defendant should have been charged with distribution of an imitation controlled substance.

Reversed.

=And=

(In State v. Scott, 737 P.2d 177 (Utah 1987))

STATE of Utah, Plaintiff and Respondent.

v.

Leonard SCOTT, Defendant and Appellant.

No. 860284.

Supreme Court of Utah.

Jan. 15, 1987.

Defendant was convicted in the Sixth District Court, Sevier County, Louis G. Tervort, J., of distribution of controlled substance for value, and he appealed. The Supreme Court held that defendant, who was alleged to have committed acts within coverage of offense of arranging to distribute controlled substance, could not be charged with aiding and abetting another in distribution of controlled substance.

Reversed and remanded for new trial.

It is therefore readily apparent that Rowerville Burton was committed when the jury was erroneously informed that the following misdemeanor provisions on "unlawful detention was an "included offense" of "aggravated Kidnapping" (76-5-302 U.C.A.) when, in truth, "Simple Kidnapping at 76-5-301 U.C.A. is the correct LESSER INCLUDED offense of "aggravated Kidnapping"

= Point IV. =

Because no rational distinction between the instant case and the "Reversal and Remand" that the Utah Supreme Court granted in State v. Marshall Glen Jones, 823 p.2d 1059 (Utah 1991) wherein the trial court failed to give an adequate ELEMENTS Jury Instruction on the offense of "aggravated Kidnapping" (76-5-302 U.C.A.)

Inasmuch as the trial court also failed to

Give an adequate ELEMENTS JURY on the offense of "aggravated kidnapping" in the instant case, NO DIFFERENT RESULT should be reached in the instant case than was accorded in State v. Jones, Supra., especially when considering the fact the even in its attempt to give an ELEMENTS Jury Instruction (on "aggravated kidnapping") such attempt was FATALLY flawed by the trial court's EXERCISING "the EXCLUSIVE "FUNCTION" of RENDERING the statutory wording of the provisions of 76-5-302 U.C.A. to NOT only contain its Normal and Legislated..."DISJUNCTIVE" → "OR"... ← But Judicially ← AMENDED TO READ... → "AND OR" ← SEE: JURY INSTRUCTION #12 at preceding page 30 of this Appellant's Brief

Accordingly, the "uniform Operation" of Article I, Sec. 24 Constitution of Utah:

Section 24. [Uniform operation of laws.]
All laws of a general nature shall have uniform operation.

1896

=AS CONSTRUED AS FOLLOWS=

Article I, section 24 of the Utah Constitution states, "All laws of a general nature shall have uniform operation." The principle that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same," *Malan v. Lewis*, 693 P.2d 661, 699 (Utah 1984), is so fundamental to Utah law that Article I, section 2 of the Utah Constitution declares that an integral purpose of a free government is to ensure the equal protection of the law to the people.

The test for determining whether "laws of a general nature ... have uniform application" is twofold. "First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." *Id.* at 670 (citations omitted). Whether a law operates uniformly under Article I, section 24 is a judicial question.

= Point X. =

The Appellant respectfully submits that the following outrageous prosecutorial conduct of William F. Daines, (prosecutor in the instant case,) should be declared to be a mockery of the "Fair Play" that has been asserted to be:

"AT THE HEART OF THE PROCESS OF LAW"

cf. Galvan v. Press, 347 U.S. 522 (1954)

Rolling v. Sharpe, 347 U.S. 499 (1954)

In the following specific regards:

H. - (Inflaming the jury against Defendant)

The Appellant respectfully refers attention to the following RECENT prosecutions of the offense of:

"AGGRAVATED KIDNAPPING"

(76-5-302 U.C.A.)

In 1985 - In the case of State v. Richard Lynn Wright, prosecutor William F. Daines personally prosecuted the Defendant Wright in 1985 for an alleged 1977 "aggravated kidnapping" despite the 1983 "minimum mandatory" penalties of "5, 10, 15 - to life were EX post facto

(- - - Member and D State v. Tindall - Case No. 980587-CA -)

(after the fact) of the 1977 alleged "aggravated Kidnapping" and therefore facially unconstitutionally violative of the following provisions of Article I, Section 18, Constitution of Utah:

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]
No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.
1896

and additionally violative of the following provisions of Article I, Section 10, constitution constitution of the united States:

Sec. 10. [Powers denied the states.]
[1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.
[2.] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
[3.] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreements or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

and Prosecutor, William Daines KNEW or reasonably should have known that he was unlawfully contaminating the constitutionally guaranteed "FAIRNESS" of the trial of Richard Lynn Wright a trial that could NOT be lawfully conducted because of the EX post FACTO aspect of the case.

Also in 1991, Lois Brighton who works in the VERY same Weber County Prosecutor's office as William F. Daines ... ALSO PROSECUTED an "aggravated Kidnapping" charge against a woman Scott Reddish case NO. 311900264 - alleging occurring "on or about May 19, 1991".

and thus with William F. Daines having personally prosecuted the aforesaid Richard Lynn Wright for the offense of "aggravated Kidnapping" (TC-5-302 A.C.A.) in 1985 and with full knowledge of Ms. Kristine M. Knowlton, also works in the Weber County Prosecutor's office and who also Prosecuted the aforesaid Defendant - REDDISH in 1991... Now then could William F. Daines expressly attempt to Draw a parallel between the most notorious and most publicized "Baby Kidnapping" in the History of the United States of America and the instant so called "aggravated Kidnapping" and that world famous "Lindbergh Baby" was the SON of the world's most celebrated Pilot named Charles A. Lindbergh and the only rational explanation for William F. Daines by-passing his VERY OWN prosecution of Richard Lynn Wright for "aggravated Kidnapping" and diverting attention therefrom is as follows (at trial transcript - Page 24 lines 3-13):

I BETTER GET MY ALLEGATIONS. YOU HEARD FROM THE COURT CLERK, THE FIRST COUNT IN THIS CASE IS CALLED AGGRAVATED KIDNAPPING. SOME PEOPLE HAVE A THOUGHT IN THEIR MIND AS TO WHAT KIDNAPPING MIGHT BE. SOME OF US ARE OLD ENOUGH TO REMEMBER THE LINDBURG KIDNAPPING, FOR EXAMPLE. I'M GOING TO TELL YOU THAT IN A KIDNAPPING, IN AN AGGRAVATED KIDNAPPING, A VICTIM NEED NOT BE RESTRAINED FOR ANY PERIOD OF TIME. THERE IS NO MINIMUM PERIOD OF TIME BEFORE AN AGGRAVATED KIDNAPPING TAKES PLACE. DO ANY OF YOU HAVE A PROBLEM WITH THAT CONCEPT?

OKAY. I ASSUME BY THE FACT THAT NOBODY HAS RAISED HIS OR HER HAND THAT THERE IS NOT A PROBLEM WITH THAT.

the only rational explanation for such severely PREJUDICIAL EXCLAMATIONS of the most painfully remembered "WILLIE-KIDNAPPING" in AMERICA and WORLD HISTORY was OBVIOUSLY FOR THE EXCLUSIVE PURPOSE OF:

Inflaming the minds of the Jury

B. - DELIBERATE VIOLATION of RULE 609 with Rules of EVIDENCE).

The Appellant respectfully submits that RULE 609 U.R.E. is worded:

Rule 609. Impeachment by evidence of conviction of crime.

(a) **General rule.** For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

And Inasmuch as there was no testimony of Defendant-Appellant Tindall to "impeach", the following statement by Prosecutor William Raines was unethically made and highly prejudicial:

(TRIAL TRANSCRIPT - Lines 24-25)

RAINES: 24. "on or about the 5th. of January, 1996 this Defendant came
25. "out of the State Prison onto Parole. . .

And Rule 9 of the Rules of Lawyer Discipline and Disability should apply as follows:

Rule 9. Grounds for discipline.

It shall be a ground for discipline for a lawyer to:

(a) violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers;

AGAIN as Daines examines Parole Supervisor (Irma Allen), Daines emphasizes the appellant's "parole" from State Prison:

(Trial transcript - Page 86 lines 17-23

17. Daines: all right, now was he paroled to you on the 9th.
18. January, 1996
19. Allen: Yes he was released to be supervised by our region.
20. Daines: when he was released on that date, did he report to you?
21. Allen: He Reported to our office
22. Daines: where was that?
23. Allen: 2540 Washington Boulevard Eighth Floor

(Trial transcript - Page 87 lines 10-13)

10. Daines: Before he was taken to that program, did you make it
11. plain to him that was a term of his parole?
12. Allen: Yes, he was aware of that. we talked about the Program,
13. going down.

(Trial transcript - Page - 88 - lines 8-10)

8. Daines: After you became aware of the fact that the Defendant was
9. a parole fugitive, did you communicate this to anyone?
10. Allen: Yes, I notified several of the jurisdictions, N.W.C.C.

(Trial transcript - Page 89 lines 3-5)

3. Daines: and so you specifically told him that you had a parole
4. fugitive in David Tindall?
5. Allen: Yes, I did.

Accordingly, it would appear that Prosecutor, William E. Daines

Should said indifference to the command and limitations of Rule 609 Utah Rules of Evidence and consistent therewith, the following Ruling of the Utah Supreme Court would appear to be fatal to the validity of the Appellant's convictions:

STATE of Utah, Plaintiff and Appellee,

v.

James Devon LANIER, Defendant and Appellant.

No. 880101.

Supreme Court of Utah.

July 31, 1989.

Defendant was convicted in the Third District Court, Salt Lake County, Richard H. Moffat, J., of aggravated robbery, and he appealed. The Supreme Court, Durham, J., held that error in ruling that defendant's prior burglary and robbery convictions were admissible for impeachment purposes was prejudicial.

Reversed and remanded.

Finally at transcript - page 428 - lines 22-25 Prosecutor, William F. Daines expresses a reckless disregard for the truth relative to how the Jury should "Read" the trial Court's "Elements Jury Instruction #12 as follows:

22. Daines: now you will read instruction #12, it says you
23. have to find all of the following elements of the crime. Now
24. You have to be careful about all of them, you don't have to
25. find A. B. C. and D... It says and/or and you can read

= page 449 =

1. that. You only find one of A, B, C, or D.

Impossible ie!!

Surely, the well experienced William F. Daines, knows that well-knows that (it) it was his initial duty to E-L-E-C-T (elect) which one of the following ELEMENTS of "aggravated kidnapping" that the State of Utah intended to prove "beyond a reasonable doubt":

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

1-ELEMENT (a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

2-ELEMENTS (b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

3-ELEMENTS (c) To inflict bodily injury on or to terrorize the victim or another; or

4-ELEMENTS (d) To interfere with the performance of any governmental or political function; or

(e) To commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

And William F. Daines obviously cast the burden upon the State to prove EACH and EVERY one of the above ELEMENTS "beyond a reasonable doubt" as commanded by the Utah Legislature under the following provisions of 76-1-501 U.C.A.:

BURDEN OF PROOF

76-1-501. Presumption of innocence — "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence. 1973

NOTE: "Each element must be proved beyond a reasonable doubt".

Read the United States Supreme Court REQUIRES IDENTICAL PROOF in its majority decision in Sec. Re Winship, 3 U.S. 358 (1970)

= SEE ALSO: =

Miles v. United States, 103 U.S. 304 (1881)
Beffin v. United States, 156 U.S. 132 (1895)
Davis v. United States, 160 U.S. 469 (1895)
Holt v. United States, 218 U.S. 245 (1910)
Wilson v. United States, 232 U.S. 563 (1914)
Brinegar v. United States, 338 U.S. 160 (1949)
Leland v. State of Oregon, 343 U.S. 790 (1952)
Holland v. United States, 348 U.S. 121 (1954)
United States v. Bullock, 469 U.S. 57 (1984)
McMillan v. Pennsylvania, 477 U.S. 79 (1986)

The Appellant respectfully submit the relative to the alleged "possession of cocaine FOR USE," Prosecution, William F. Daines would appear to have employed a line of IMPERMISSIBLE LEADING questions which ELICITED clearly conflicting testimony that is AKIN TO, if not Synonymous with "SUBORNATION OF PERJURY" ... as follows:

(Trial TRANSCRIPT - Page 347 - Lines 7, 8, 15-18 and 25)

7. Daines: While you were doing this, did you see anything FALL OUT
8. of the Defendant's pockets?
15. Daines: (contradictory).. Did you see where it fell from?
16. Smith: Yes, I did.
17. Daines: where?
18. Smith: His LEFT front pocket area.
25. Daines: You saw it come out of the pocket?

(THE OBVIOUS LIE CONTINUES...)

= Page 348 = lines 1 to 3 and 8-11

1. Smith: Yes I did.
2. Daines: was officer Watnabe's hand in the pocket when it fell
3. out?
8. Daines: okay. Now, did you take custody of that at any time -
9. that rock that fell out of the pocket?

**THE LIE FINALLY EXPOSED... in the crucial question of how could Smith see some "FALL OUT OF A POCKET" that was BENEATH a BODY that Smith admits that he "FOUND" after "WE LIFTED HIM UP and found it

Please note the following Incredible! self-contradictory ANSWER!!

10. Smith: after it FELL OUT and we lifted him up and found it. (?)

In an analogous situation, the Utah Supreme Court "Reversed and Remanded" where the Prosecution failed to correct an obviously False Statement as William F. Daines III in the instant case. SEE: State v. Walker, 624 p.2d 687 (Utah 1981)

It is therefore readily apparent that the EVIDENCE DOES NOT show VALID "ACTUAL POSSESSION" and as to "constructive POSSESSION" the 10th. Circuit Court of Appeals has taken the following position:

"Generally, a person has constructive possession of narcotics if he knowingly has ownership, dominion or control over the narcotics and the premises where the narcotics are found." United States v. Hager, 969 F.2d 883, 888 (10th Cir.

Surely, the instant Record is TOTALLY DEVOID of any EVIDENCE

IF OWNERSHIP, dominion or control over both, (1) the narcotics AND (2) the premises where the narcotics were found." (accord: UNITED STATES V. HAGER, Supra., consequently there is no EVIDENCE of "guilt beyond a reasonable doubt" relative to the appellant's alleged "possession or use"..."beyond a reasonable doubt" as previously shown to be required at 76-1-501 U.C.A.; In Re Winship, Supra, and the abundance of additional authorities there cited.

= Point VI. =

The Record in the instant case is totally silent as to any ascertainable "preponderance" of "proof" as to the MANDATORY directive of the 20th Legislature as CONTAINED by the word:

"SHALL"

relative to PROOF of "VENUE" and "JURISDICTION" at 76-1-501 (3) U.C.A. as follows:

BURDEN OF PROOF

76-1-501. Presumption of innocence — "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence. 1973

Nor was the Jury instructed as to such Legislatively Required "Preponderance" of EVIDENCE that is made MANDATORY under the command of sub-section (3) of the above provisions and the convictions that were affected in the instant case without any Recorded reference to jurisdiction, should be declared to be "A nullity

under the RATIONALE of the Utah Supreme Courts decision in STATE V. TELFORD, 72 P.2d 626. OVERRULED: Albrecht v. United States, 273 U.S. 1 (Utah 1927); Bode v. Barrows, 268 U.S. 68 (1924).

Point VII.

But for...the ineffectiveness of Defense counsel in employing collusive-like silence in the face of the foregoing multiple instances of un-ethical, un-professional and indeed "outrageous conduct" of William F. Daines, Prosecutor in the instant case.

Above all, Defense counsel knew or reasonable should have known that over seventy-three (73) years have passed since the Utah Supreme court in Moorehouse v. Hammond 60 UTAH 593, (Utah October 4, 1922) followed other courts in Ruling that when a statute does not have A (valid) "penalty", it is "UNENFORCEABLE" as follows:

598 SUPREME COURT OF UTAH [Sept.

Moorehouse v. Hammond, 60 Utah 593

"A description or definition of an act necessary to constitute a crime does not make the commission of such acts a crime, unless there is a punishment annexed. Punishment is as necessary to constitute a crime as definition. • • •"

It was accordingly held in that case that a statute which does not impose a penalty is unenforceable. The same question was before the same court again in *Matter of Ellsworth*, 165 Cal. 677, 133 Pac. 272, where an ordinance relating to the regulation of the sale of intoxicating liquors was in question. The ordinance in that case, as in the case at bar, failed to impose any penalty or punishment for its violation, and it was again held that the ordinance was without force or effect.

Thus, when SENATE BILL #26 removed the "5 years to LIFE" penalty for "aggravated kidnapping" the provisions of 76-5-302 U.C.A. were then and there rendered "unenforceable" As of April 29, 1996 (when Senate Bill #26 went into effect.

The Appellant respectfully concedes that if SENATE BILL #26 had replaced the "5 to life sentence" with a LESSER penalty then the Appellant could have received the LESSER penalty at sentencing as authorized by this Court's recent May 23, 1996 decision in STATE V. YETES, 291 Utah Adv. Rep., 4 and the Utah Supreme Court's rulings in STATE V. EATON, 30 Utah (2d) 456 (Utah 1974)

However, Senate Bill #26 (April 29, 1996) replaced the former "5 years to life" sentence with an INCREASED "minimum mandatory" sentence of "6, 10, 15 years to life" for the offense of "Aggravated Kidnapping" but with the "5 years to life sentence" Repealed and the April 29, 1996 "Minimum Mandatory" penalties being EX POST FACTO as to the alleged "February 8, 1996 "Aggravated Kidnapping" against the Appellant, Defense Counsel KNEW, OR reasonably should have known that NO VALID PENALTY applicable to the Appellant under the following United States Supreme Court's Ruling in Bell v. State of Maryland, 376 U.S. 226 (1964):

> "It is well settled, that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the of-
> *[378 US 231]
> fence may have been *committed before the repeal.

Accordingly, But for the Inaction and Ineffectiveness of Counsel (Strickland v. State of Washington, 466 U.S. 668 (1984) the Appellant would not have been tried and convicted of an "UNENFORCEABLE" charge of "Aggravated Kidnapping" that was stripped of the only penalty applicable to the Appellant by the aforesaid Senate Bill #26 at preceding page 23 of this Brief... Thus, Art. I Section 7 Constitution of Utah's Guarantee of "Due Process of Law" has been Denied in the Instant case.

= Conclusion =

While the appellant was not entitled to "A Perfect Trial" (Lutwak v. United States, 344 U.S. 601 (1953)) he was indeed ENTITLED TO A "Fair Trial" (Murphy v. State of Florida, 421 U.S. 684 (1984)

Constitution... the outrageous prosecutorial conduct of William F. Daines DENIED ... a "Fair Trial" in the instant wherein "justice" did not "satisfy the appearance of justice" (Offutt v. United States, 348 U.S. 11 (1955); the Ineffectiveness and "deliberate ignorance" of Defense Counsel denied a "Fair Trial" and the Legislative Role that was unconstitutionally assumed by the trial court when it constructively AMENDED the provisions of 76-5-302 U.C.A. by adding the "conjunctive" → AND... to the "disjunctive" statutory "OR" and thereby AMENDING 76-5-302 U.C.A. to NO LONGER JUST contain the "DISJUNCTIVE" ↔ "OR" but both Legislature's... "OR" and the courts legislated... "AND" In violation article V, constitution and in the same unconstitutionality denied a valid "Elements Jury Instruction" "aggravated Kidnapping". Senate Bill 26 deprived the trial Court of Subject-Matter Jurisdiction of the subject of "aggravated Kidnapping".

Wherefore, the appellant prays for a "Reversal" of his convictions.

Dated this 15th. day of October, 1996

Respectfully Submitted,

DAVID DARNELL TINDALL, Appellant

** Certificate of Mailing **

I, David Darnell Tindall, certified that an exact copy of the appellants Brief was mailed to Janet C. Graham, Utah Attorney General, 236 State capitol Bldg., Salt Lake city, Utah 84114, this ___ day of October, 1996

DAVID DARNELL TINDALL, APPELLANT

Re: State of Utah
Plaintiff-Appellee
v.
David Darnell Tindall
Defendant-Appellant

Addendum-A: A copy of the Utah Supreme Court's "Reversal" in Moorehouse v. Hammond, 60 Utah 593 (Utah, 1936) because NO PENAL was attached to the provisions that were allegedly violated and the ABSENCE OF A PENALTY rendered such allegedly violated provisions... "Imperative" and "UNENFORCEABLE".

Addendum-B: A copy of the Utah Supreme Court's "Reversal" in Coe v. Lundstrom, 89 Utah 520 (Utah 1936)

Appellant's - Addendum - H. =)

the case, he, nevertheless, could not prevail, since, in the judgment of this court, his construction of the statute is clearly untenable.

There is therefore no merit in counsel's contention, and hence the petition for a rehearing should be, and it accordingly is, denied.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

MOOREHOUSE v. HAMMOND, Director of Registration.

No. 3860. Decided October 4, 1922. (209 Pac. 883.)

1. PHYSICIANS AND SURGEONS—ORDINANCE REQUIRING GREATER DUTIES THAN STATUTE RELATING TO REVOCATION OF PHYSICIAN'S LICENSE HELD INVALID. Where Comp. Laws 1917, § 4448, as amended by Laws 1921, c. 91, defines the acts or omissions on the part of a physician which would authorize the revocation of his license, an ordinance, in the absence of statutory authority, cannot impose greater or different duties in that respect.[1]

2. MUNICIPAL CORPORATIONS—ORDINANCE FOR WHICH NO PENALTY PROVIDED WITHOUT FORCE. Where an ordinance does not prescribe a penalty for its violation, the courts are powerless to enforce it.

3. INDICTMENT AND INFORMATION—FAILURE OF PHYSICIAN TO REPORT INFECTIOUS DISEASE "IN WRITING" NOT AN OFFENSE. Where the complaint alleged that accused, a physician, in violation of an ordinance, willfully failed to report in writing a case of infectious disease, defendant could not be convicted under Comp. Laws 1917, § 4448, as amended by Laws 1921, c. 91, merely requiring a physician to report the existence of such a case.

Original application for a writ of certiorari by Charles V. Moorehouse to be directed to James T. Hammond, Director of Registration.

WRIT ISSUED.

[1] *Tooele City* v. *Hoffman*, 42 Utah, 596.

(Appellants - Addendum A-1 =)

A. W. Agee, of Ogden, for plaintiff.

Harvey H. Cluff, Atty. Gen., and *L. A. Miner*, Asst. Atty. Gen., for defendant.

FRICK, J.

On August 30, 1922, the plaintiff made application in due form to this court for a writ of certiorari to be directed to the defendant as director of registration requiring the latter to certify up the proceedings in a certain matter in which the defendant, as director of registration, made and entered an order in which he revoked and annulled the license theretofore granted and issued to the plaintiff to practice medicine and surgery in this state, which order the plaintiff alleged to be in excess of the defendant's jurisdiction, and for that reason should be set aside. The writ was duly issued and served upon the defendant, and in compliance therewith he has certified the record of the proceedings had before him in the matter aforesaid to this court.

Upon the record being certified to this court the plaintiff moved for judgment in his favor upon the proceedings certified as aforesaid. The cause was duly argued and submitted to this court by counsel for the respective parties upon the motion aforesaid.

From the record of the proceedings had before the defendant it appears that a complaint in writing was duly filed in the office of the defendant as director of registration, in which it was charged that the plaintiff—

"while practicing under said license, has been guilty of 'unprofessional conduct' * * * in the following particulars: That the said Chas. V. Moorehouse willfully failed to report in writing to the health officer the existence of a case of infectious disease which he was treating at Junction, Piute county, on the 14th day of February, 1920. In further support of this allegation the complainant alleges that a complaint was made before the justice of the peace of the town of Junction, in Piute county, state of Utah, charging him with the said offense, and that he, the said Chas. V. Moorehouse, was duly arrested under a warrant issued on the said complaint and brought into court on the 31st day of March, 1920, and

he then and there pleaded guilty to the said charge and was adjudged guilty by the court and ordered to pay a fine of $25. The complainant therefore requests that a citation be issued requiring the said defendant to show why his license to practice medicine and surgery should not be revoked."

Upon the foregoing complaint a hearing was had before the defendant and a committee of physicians, as provided by our statute. The committee, after hearing the evidence, made their report or recommendation to the defendant in the following words:

"We, the committee designated by the director for that purpose, report that we have heard the evidence submitted in the proceedings in this department to revoke the license of Charles V. Moorehouse, and from such evidence we find that the said Charles V. Moorehouse is guilty of unprofessional conduct as charged in the complaint filed herein, and we recommend that his license to practice medicine and surgery be revoked by the department."

The defendant, in pursuance of such recommendation, entered the following order:

"Under the findings and recommendation of the committee and under the provisions of the statute it is hereby ordered that the license to practice medicine and surgery in the state of Utah issued to Dr. Charles V. Moorehouse on the 6th day of July, 1911, by the State Board of Medical Examiners and numbered 689, be, and the same is hereby, revoked and canceled."

Considerable evidence was produced at the hearing before the defendant, which it is not necessary to set forth. We shall, however, in the course of this opinion, refer to such portions thereof as are deemed material.

From the original complaint filed against the plaintiff before the defendant it is made to appear that the plaintiff had been charged with the same offense before a justice of the peace and had pleaded guilty to such charge, and, in pursuance of such plea, the justice adjudged that he pay a fine of $25. The judgment of conviction entered in such justice's court was produced before the defendant and said committee as evidence that the plaintiff had been charged in said justice's court with the offense of unprofessional conduct, and that by entering a plea of guilty he had confessed or admitted his guilt.

E Appellant's - Addendum - A-2 =)

It will be observed that the real charge preferred against the plaintiff both in the justice's court and before the defendant is that he had "willfully failed to report in writing to the health officer," etc. In view that the plaintiff was charged with the violation of a certain ordinance, it becomes important to consider the language of the same. The ordinance reads as follows:

"It shall be the duty of every physician in this town to report to the president, in writing, every person who is affected with any contagious or infectious disease, such as cholera, diphtheria, yellow fever, scarlet fever, typhoid fever, whooping cough, measles, mumps, smallpox, varioloid, or any of the grades of such diseases immediately after he shall be satisfied of the nature of the disease, and to report to the same officer every case of death from any of said diseases immediately after it occurs."

In this connection it also becomes important to keep in mind our statute upon which the aforesaid ordinance was predicated and upon which the defendant relies to sustain his order revoking plaintiff's license to practice medicine and surgery in this state. Comp. Laws Utah 1917, § 4448, as amended by chapter 91, Laws Utah 1921, so far as material here, defines what shall constitute "unprofessional conduct" authorizing the revocation of a physician's license as follows:

"Willful violation of the law in regard to the registration of births and deaths and the reporting of infectious diseases."

In another section (2726) the duty imposed upon physicians and surgeons respecting contagious diseases is stated thus:

"All physicians and other persons having knowledge of the existence of any contagious or infectious disease, or having reason to believe that any such disease exists, are hereby required to report the same forthwith to the local board of health."

It will thus be seen that, while the statute merely requires a physician to report "the existence of any contagious or infectious diseases * * * to the local board of health," the ordinance to which reference has been made, and which was the basis of the charge against the plaintiff both before the justice of the peace and the defendant, required that a report be made "in writing." The ordinance therefore required more from the physician than did the statute. While the

cities and towns, including boards of health, in this state are given ample power to pass and enforce ordinances and to promulgate and enforce rules and regulations respecting the public health and to require certain things to be done in case of contagious and infectious diseases, yet where, as here, the statute specifically defines what act or acts of commission or omission on the part of a physician shall constitute "unprofessional conduct" authorizing the revocation of his license to practice medicine, an ordinance, in the absence of express statutory authority, cannot impose greater or different duties in that regard than the statute imposes. This court, in *Tooele City* v. *Hoffman*, 42 Utah, 596, 134 Pac. 558, held that, where the statute merely authorized the imposition of a fine for a particular offense, an ordinance might not impose a fine and imprisonment as punishment for the same offense, but must be restricted to the penalty authorized by statute. 1

However, if it were held that the ordinance in question here and upon which the charge against the plaintiff was predicated could impose the duty of reporting contagious and infectious diseases in writing, yet the ordinance, for other reasons, is wholly without force or effect. By reference to the ordinance it will be seen that it does not declare a refusal or omission to make a report unlawful; nor does it impose any penalty or punishment for such refusal or omission. The ordinance therefore merely amounts to a direction to the physician to make a report. In view that it does not denounce the omission or failure to report as unlawful nor impose any penalty or punishment for a failure to make a report the ordinance is clearly unenforceable. The imposition of the fine by the justice was therefore clearly beyond his power and constituted manifest usurpation. 2

Courts cannot impose penalties unless authorized by statute. Neither can they impose other or different penalties than those authorized by statute. The courts have had frequent occasion to pass upon such matters. The Supreme Court of California, in *People* v. *McNulty*, 93 Cal. 427, 26 Pac. 597, states the law thus:

"A description or definition of an act necessary to constitute a crime does not make the commission of such acts a crime, unless there is a punishment annexed. Punishment is as necessary to constitute a crime as definition. * * *"

It was accordingly held in that case that a statute which does not impose a penalty is unenforceable. The same question was before the same court again in *Matter of Ellsworth*, 165 Cal. 677, 133 Pac. 272, where an ordinance relating to the regulation of the sale of intoxicating liquors was in question. The ordinance in that case, as in the case at bar, failed to impose any penalty or punishment for its violation, and it was again held that the ordinance was without force or effect.

In *New Orleans* v. *Stein*, 137 La. 652, 69 South. 43, the defendant was convicted of violating the provisions of a certain ordinance relating to the public health. The defendant appealed from the conviction, contending that, in view that the ordinance under which he was convicted failed to impose a penalty or punishment, the sentence imposed by the court was illegal and void. The court sustained the contention. The law is clearly stated in the headnote as follows:

"There are in this state no crimes or offenses except such as are created by statute or ordinance, and a court is powerless to impose a penalty not prescribed by a statute or an ordinance; and hence a statute or ordinance making it a crime or offense to do a certain act, without attaching a penalty to the doing of such act, is inoperative, and incapable of being given any effect by the courts."

The same question was before the Supreme Court of Florida in the case of *Cribb* v. *State*, 9 Fla., where, at page 418, after referring to the statute under which the conviction was had, the court said:

"But the difficulty of sustaining the conviction and judgment under this count is that, although it [the statute] enjoins or forbids the resident from holding the license, no penalty or remedy by indictment is prescribed. * * * The statute that creates the offense has not prescribed the penalty."

It was accordingly held that the judgment of conviction was illegal It is not necessary to pursue the question or the authorities further. It must be manifest to every lawyer that crimes can only be created by the Legislature or by its express authority, and that, unless a criminal statute or ordinance

prescribes a penalty for its violation, the courts are powerless to enforce the same. The judgment of the justice's court, which was produced in evidence at the hearing before the defendant and the committee of physicians, was therefore without force or effect, and the recommendation or report of the physicians to the defendant, being based thereon, was likewise without any legal force or effect. In view, therefore, that the recommendation or report of the physicians fails, it follows as a necessary corollary that the order of the defendant based thereon revoking the license of the physician must likewise fail and must be held without legal force or effect.

It is contended by counsel for the defendant, however, that although the conviction under the ordinance fails, the order of the defendant revoking the plaintiff's license should nevertheless be upheld for the reason that the plaintiff has failed to comply with the provisions of the statute in that he failed to make a report "to the local board of health." The record of the proceedings certified up shows that a member of the board of trustees of the town in which plaintiff practiced, who was a witness at the hearing, testified that he was the authorized quarantine officer of the town aforesaid; that he was present at the house of the afflicted person, and that the plaintiff informed the witness as the quarantine officer of the town and a member of the board of trustees that the patient was afflicted with small pox; that immediately upon receiving such information the witness put up a sign quarantining the house in which the patient was confined. There is neither dispute nor conflict respecting the facts thus testified to by the witness aforesaid. No doubt the principal purpose of the statute requiring that a report of contagious and infectious diseases be forthwith made to the local boards of health is that the afflicted person may be properly quarantined and the public warned so that contact with the diseased person may be avoided and the spread of the contagion or infection prevented. All this was clearly accomplished in this case by plaintiff's report to the member of the town board who was the quarantine officer, and whose duty it was to act, w

Appellant's Addendum #4

he did by quarantining the house in which the afflicted person was.

But, quite apart from all this, what the plaintiff in fact was charged with was that he had "willfully failed to report in writing to the health officer the existence of a case of infectious disease, which he was treating," etc. The statute does not require a report in writing, but merely requires that a report be made. We have already pointed out that the evidence is without conflict that a report was in fact made to a member of the town board who was then 3 quarantine officer. The provisions of the statute were thus substantially complied with, and that is all that the law requires. Under our system of jurisprudence the penalties prescribed in criminal statutes can be imposed and the privileges of the accused can be forfeited only in cases where it is clear that the provisions of the law have been violated. Courts cannot add terms or conditions, much less impose penalties not expressly authorized by the statute. Nor can an accused person be convicted of an offense other than the one stated in the complaint filed against him. In view, therefore, that in this case it appears that the plaintiff was charged with having failed to report in writing, he cannot be convicted unless he failed to so report. Moreover, inasmuch as the statute required him to report the existence of the disease only, and the evidence being conclusive that he did report the same to the quarantine officer, who was also a member of the town board, and that the patient was quarantined and the principal purposes of the statute thus accomplished, the order revoking the license finds no support in the law, and therefore cannot be permitted to stand.

In concluding this opinion we desire to add that we are very reluctant to interfere with the orders of the boards of health in carrying into effect the rules, regulations, and ordinances relating to the prevention of disease and the protection of the public health. In enforcing such rules, regulations, and ordinances the boards of health are exercising the highest functions of government, and they should not be interfered with unless it is clear that they have exceeded the

bounds of their authority. Where, however, as here, the rights of a citizen have been invaded and he has been condemned without authority of law and has had his license to practice his profession revoked, we have no alternative save to correct the wrong by annulling and setting aside the order by which his privileges have been denied him. It is therefore ordered that the order of the director of registration, the defendant herein, by which the license of the plaintiff was attempted to be revoked and annulled be, and the same is hereby, vacated and set aside and the license of the plaintiff is reinstated and adjudged to be in full force and effect until revoked in accordance with law.

It appearing to this court, however, in acting as a public official, that the defendant proceeded in good faith in making the order aforesaid, neither party is allowed costs.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

BANKERS' COMMERCIAL SECURITY CO. v. DISTRICT COURT OF BOX ELDER COUNTY.

No. 3836. Decided October 4, 1922. Rehearing denied January 3, 1923. (211 Pac. 187.)

1. MANDAMUS—ON DEMURRER, ALLEGATIONS OF PETITION MUST BE ACCEPTED AS TRUE. In mandamus proceedings, where defendant has demurred to the petition and the matter is submitted on that state of the record, the allegations of the petition must be accepted as true.

2. MANDAMUS—COURT WILL NOT BE COERCED UNLESS RIGHT OF AGGRIEVED PARTY FREE FROM DOUBT AND DUTY OF COURT CLEAR. On mandamus proceedings directed against a court, the court will not be coerced to act, unless the right of the aggrieved party is free from doubt and the duty of the court clear and free from substantial question.[1]

[1] *Kyrimes* v. *Kyrimes*, 45 Utah, 168, 143 Pac. 328

(= Appellant's - addendum - B =)

not delegate responsibility to independent contractor and latter's admissions as to physical facts evidence against defendant); Nos. 8 to 23, inclusive, 26 to 31, inclusive, 34 to 41, inclusive (42 and 43 as aids), 44 to 46 and 49 to 55, inclusive, 57, 59, 61, 62, 63 (double question—calls for a conclusion), 64 to 75, inclusive (the latter as to agreement in reference to angle irons), 76, 78, 80 (no evidence to support), 81, 83, 84, 86 (except as to fronts or lines theory of damages incorrect), 87, 88, 89, 90 (because of finding of acquiescence), 91, 92, 94, 96, 97, 99, (101 to 104, inclusive, should all be encompassed in 105), 107, 108. Respondent's assignments Nos. 1 and 2 (on ground of improper mode of assessing damages), 3 (but not on ground mentioned). Not well taken: Nos. 24, 25, 32, 33, 47, 48 (to show knowledge), 56, 58, 60, 77, 79, 82, 85, 93 (conflict of evidence), 95 (conflict in evidence), 98 (conflict in evidence), 100 (conflict in evidence), 106. Question assigned as error in No. 60 was abandoned. Respondent's assignments Nos. 4, 5, and 6.

The judgment is reversed, with directions to grant a new trial in accordance with the principles herein announced. Costs to appellant.

ELIAS HANSEN, C. J., FOLLAND and EPHRAIM HANSON, JJ., and H. M. SCHILLER, District Judge, concur.

MOFFAT, J., being disqualified, did not participate herein.

ROE et al. v. LUNDSTROM et al.

No. 5622. Decided May 11, 1936. (57 P. [2d] 1128.)

1. APPEAL AND ERROR. Appeal *held* not subject to dismissal on ground that appeal was not taken in time in that it was not taken within six months from date when court rendered decision, where appeal was taken within six months from date of filing of findings, conclusions, and judgment (Rev. St. 1933, 104-31-2).

2. APPEAL AND ERROR. Bill of exceptions would not be stricken on ground that it was not prepared and served in time, where no notice of entry of judgment was given, and time in which to prepare and serve bill of exceptions was extended for two months on date when appeal was taken, and proposed bill was served within that time (Rev. St. Utah 1933, 104-39-4 (2).

3. APPEAL AND ERROR. Assignment of error in overruling plaintiffs' demurrer would be considered as abandoned where not argued.

4. APPEAL AND ERROR. In action for damages for unlawful and malicious interference with plaintiffs' business, overruling of special demurrer to defendants' answer *held* not reversible error in view of conclusion reached on appeal that defendants would be liable as joint tort-feasors (Rev. St. 1933, 15-6-5, 15-6-13, 15-6-65, 15-6-66, 15-7-64, 15-9-9, 15-9-21, 105-3-1).

5. MUNICIPAL CORPORATIONS. Municipal ordinance failing to fix penalty for violation thereof is unenforceable.[1]

6. MUNICIPAL CORPORATIONS. City commissioners and police officers of city *held* without power to prevent violation of ordinance which failed to fix penalty for its violation.

7. ARREST. Police officer is protected only when armed with a warrant except in emergencies where prohibited offense or breach of peace is committed or threatened.

8. MUNICIPAL CORPORATIONS. Police officer preventing customers from entering place of business which had refused to pay license fee required by ordinance for person to engage in business as transient merchant *held* guilty of trespass so as to be liable to owner of business, in absence of exigency contemplated by statute to justify preventive measures (Rev. St. 1933, 15-6-66, 105-3-1).

9. MUNICIPAL CORPORATIONS. Generally, municipal officer is immune from liability in private suit for his acts in discharging corporate duties in absence of willful negligence, malice, or corruption constituting misfeasance (Rev. St. 1933, 15-6-5, 15-6-13, 15-6-65, 15-7-2, 15-7-64).

10. OFFICERS. Public officer vested with discretionary ministerial power and acting within scope of his authority is not liable in damages for error in judgment unless guilty of corruption or willful violation of law, but may not claim immunity for commission

[1] *Moorehouse* v. *Hammond*, 60 Utah 593, 209 P. 883

(= Appellant's Addendum-No 2)

of act entirely outside scope of his official duties (Rev. St. 1933, 15-6-5, 15-6-13, 15-6-65, 15-7-2, 15-7-64).[2]

11. MUNICIPAL CORPORATIONS. In exercise of power to see that ordinances are faithfully executed, city commissioners would be required to act as board and not informally and independently as individuals, and informal personal interference by commissioners with operation of police department or directions to its officers would be unauthorized (Rev. St. 1933, 15-6-5, 15-6-13, 15-6-65, 15-7-2, 15-7-64, 15-9-9, 15-9-21).

12. MUNICIPAL CORPORATIONS. Police officer is responsible only to head of his department to whom has been given power of his appointment and removal from office (Rev. St. 1933, 15-9-9, 15-9-21).

13. MUNICIPAL CORPORATIONS. City commissioners directing, encouraging, advising, and co-operating with police officer in commission of trespass by excluding customers from place of business of persons who refused to pay tax imposed by ordinance on transient businesses *held* jointly liable with police officer for trespass, irrespective of good faith on part of police officer (Rev. St. 1933, 15-6-5, 15-6-13, 15-6-65, 15-6-66, 15-7-2, 15-7-64, 15-9-9, 15-9-21, 105-3-1).

14. TRESPASS. Motive of trespasser is not material element to be considered in determining whether or not legal right has been invaded, although motive may be material where conduct is of such character as to be qualifiedly privileged, or as involving right to recover punitive damages.

Appeal from District Court, First District, Cache County; *Oscar W. McConkie*, Judge.

Action by H. H. Roe and another against A. G. Lundstrom and others. Judgment for defendants, and plaintiffs appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Henry D. Moyle, of Salt Lake City, and *George D. Preston*, of Logan, for appellants.

Leon Fonnesbeck, of Logan, for respondents.

[2] *Lowry* v. *Carbon County*, 64 Utah 555, 232 P. 908.

EVANS, District Judge.

This is an action in tort to recover damages for an alleged unlawful and malicious interference with plaintiffs' business. Plaintiffs allege that the defendants Lundstrom, Merkeley, and Pederson, as city commissioners of Logan City, through Smith, a police officer, prevented the public from entering the plaintiffs' place of business where the plaintiffs proposed to conduct a sale of seasonable merchandise recently purchased by them in receivership proceedings, and for which interference they seek actual and punitive damages.

The defendants seek to justify their conduct by setting up a failure on the part of the plaintiffs to procure a license as required by the ordinances of Logan City.

The defendants move to dismiss the appeal upon the ground that it was not taken in time. It is contended that the appeal should have been taken within six months from the time when the court rendered its decision, January 27, 1934. Findings, conclusions, and judgment were filed and entered on February 15, 1934. The appeal was taken on August 10, 1934. The motion to dismiss the appeal is accordingly denied. R. S. Utah 1933, 104-41-2. 1

Defendants move to strike the bill of exceptions upon the ground that it was not prepared and served in time. No notice of the entry of judgment was given. On August 10, 1934, the time in which to prepare and serve the bill of exceptions was extended to October 10, 1934. The proposed bill was served on the 14th day of September, 1934. The motion to strike the bill of exceptions is, therefore, denied. R. S. Utah 1933, 104-39-4, subd. 2. 2

The plaintiffs demurred generally to the answer and assign error in overruling the demurrer. This assignment, not being argued, is abandoned. They also interposed a special demurrer, upon the overruling of which error is assigned and argued in the brief. In view of the conclusions reached by us, the overruling of the special demurrer does not constitute reversible error. 3, 4

The defense alleged is that the plaintiffs were not licensed to do business, as required by the ordinances of Logan City; that the interference complained of was in good faith to prevent a violation of law. In reply, plaintiffs allege that prior to advertising the fact that they were going to conduct a sale of merchandise, they tendered to the city clerk the fee required for carrying on a merchandising business, which tender was refused by the clerk. The plaintiffs did not deny that they proposed to conduct their business without a license, but claim that they had nevertheless qualified by filing an application and tendering the required fee for doing business as merchants. They contend that the ordinance defining transient merchants is void.

The essential facts as disclosed by the record are substantially as follows: One W. F. Mau, operating a business under the name of Mau's Department Store, made an assignment for the benefit of creditors. Plaintiffs ultimately acquired the stock of merchandise so assigned, and announced by advertisements that they intended to conduct a sale to open on July 16th and continue for seven days, to dispose of the entire stock and fixtures. On the 16th day of July, the day set for the opening, the sum of $8.25 was tendered as a license fee, together with an application for a retail merchant's license. The tender was refused and the application denied, notwithstanding which the plaintiffs announced that they would proceed to conduct the sale as advertised. Acting under instructions from the defendant commissioners, the chief of police posted the defendant Smith at the entrance of the store to prevent the plaintiffs from conducting the sale. An ordinance of Logan City provides that it shall be unlawful for any person to engage in business as a transsient merchant without first obtaining a license, the fee for which is fixed at $25 per day. No penalty is provided for its violation, nor any procedure for its enforcement.

The trial court found that the ordinance defining transient merchants, the validity of which was challenged by the plaintiffs, was in full force and effect. Upon this finding

the appellants assign error. The provision requiring the payment of $25 per day would not necessarily render the entire ordinance invalid. In appropriate proceedings, the fee required to be paid might be held to be discriminatory. It is however, in view of the conclusion reached, unnecessary to determine this question. In order that the ordinance may be valid, for the purpose of instituting a criminal proceeding, the procedure for its enforcement should be provided. It is not sufficient merely to declare an act unlawful. If the ordinance fails to fix a penalty for its violation, it is unenforceable. This principle is aptly stated in the case of *Moorehouse* v. *Hammond*, 60 Utah 593, 209 P. 883, 885: 5-8

"There are in this state no crimes or offenses, except such as are created by statute or ordinance, and a court is powerless to impose a penalty not prescribed by a statute or an ordinance; and hence a statute or ordinance making it a crime or offense to do a certain act, without attaching a penalty to the doing of such act, is inoperative, and incapable of being given any effect by the courts."

If then the courts are without power to enforce an ordinance, it necessarily follows that the defendants would be powerless to prevent its violation, but even though the ordinance were valid and enforceable, there still remains the question as to whether or not the offense of selling without a license is one which may be prevented. R. S. Utah 1933, 105-3-1, provides that:

"Public offenses may be prevented by the intervention of the officers of justice: (1) By requiring security to keep the peace. (2) By forming a police in cities, towns or counties, and by requiring their attendance in exposed places. (3) By suppressing riots."

Here there existed no exigency such as is contemplated by the statute to require or justify preventive measures. Peace officers no longer stand as the symbol and embodiment of the law, except in film, fiction, and the lands of traffic. Except in emergencies where a prohibited offense or breach of the peace is committed or threatened, a police

officer is protected only when armed with a warrant. In this case there was neither a warrant nor an arrest. The power conferred upon police officers to "preserve the public peace, prevent crime, detect and arrest offenders," etc. (R. S. Utah 1933, 15-6-66), was not regularly pursued. It is impossible to escape the conclusion that officer Smith was guilty of a trespass.

With respect to the liability of the defendant commissioners, the situation is different and not altogether clear. They allege in their separate answers that they advised the plaintiffs that if they did not desire to take out an auctioneer's license, that they would be deemed to be transient merchants and would be required to pay the license as required by the ordinance relating to transient merchants. They deny, among other things, that Smith was their employee or agent or that they directed him to prohibit persons from entering plaintiffs' building. Lundstrom testified that he instructed the city marshal to have the ordinance complied with; that he intended the marshal to post a policeman, who was kept all day upon the plaintiffs' premises with his consent and approval; that the marshal could not have carried out his orders in any other way; and that the policeman had done only what he had ordered him to do. It does not appear that either Merkeley or Pederson gave any directions to the chief of police, but it was stipulated that whatever the officer did was directed by the chief of police, who was directed by the commissioners and in pursuance of their orders.

It is pertinent to inquire by what right the defendant commissioners assumed to give directions as to the enforcement of an ordinance, or as to the method of its enforcement. The statute provides that all actions brought to recover any fine or to enforce any penalty under an ordinance of a city or town shall be brought in the corporate name of the city or town as plaintiff. R. S. Utah 1933, 15-7-64. It is further provided that when power is conferred upon the board of commissioners to perform any act and the method of exercising such power is not specifically pointed out, the board of commissioners may provide by ordinance the manner and details necessary for the full exercise of such powers. R. S. Utah 1933, 15-7-2. It is further provided that the chief of police shall enforce all ordinances and regulations of the city for the preservation of peace, good order, and the protection of the rights and property of all persons. R. S. Utah 1933, 15-6-65. Such powers as are conferred upon city Commissioners must be exercised through formal motion, resolution, or ordinance which must be reduced to writing and read before a vote is taken thereon, and no act of the board shall be valid or binding unless two members concur therein. R. S. Utah 1933, 15-6-13. The boards of commissioners are legislative and governing bodies. R. S. Utah 1933, 15-6-5. Executive and administrative powers in cities of the first and second class are distributed among five departments, each of which is assigned to one of the commissioners.

If the defendant commissioners are to be charged with liability, it must be upon the theory that they are joint tortfeasors. It is a general rule that a municipal officer is immune from liability in a private suit for his acts in the discharge of corporate duties in the absence of willful negligence, malice, or corruption constituting misfeasance. *Smith* v. *Stephan*, 66 Md. 381, 7 A. 561, 10 A. 671; *Worley* v. *Inhabitants of Columbia*, 88 Mo. 106; *Roerig* v. *Houghton*, 144 Minn. 231, 175 N. W. 542; 2 Cooley on Torts (4th Ed.) § 300 et seq.; 2 McQuillin on Municipal Corporations (2d Ed.) § 556, and it is often asserted that where a public officer is by law vested with discretionary ministerial powers, and acts within the scope of his authority, he is not liable in damages for an error in judgment unless guilty of corruption or willful violation of the law. He may not, however, claim immunity for the commission of an act entirely outside of the scope of his official duties. *Lowry* v. *Carbon County*, 64 Utah 555, 232 P. 908; *Mock* v. *Santa Rosa*, 126 Cal. 330, 58 P. 826; *Bolton* v. *Vellines*, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737; *Burch* v. *Hardwicke*, 30 Grat. 9, 10

(71 Va.) 24, 32 Am. Rep. 640; *Craig* v. *Burnett*, 32 Ala. 728; 2 McQuillin on Municipal Corporations (2d Ed.) § 556.

Now let us assume that the defendant commissioners are charged with the duty of seeing that the ordinances are faithfully executed. In the exercise of this power, they would necessarily have to act as a board and not informally and independently as individuals. If we are 11, 12
to give effect to the provision that when power is conferred upon the board of commissioners to perform any act, they may provide by ordinance the manner and details necessary to the full exercise of such powers, then any informal personal interference with the operation of the police department or any directions to its officers would appear to be wholly unjustified and entirely beyond the powers conferred upon the board, or upon the individual commissioners, as such, except possibly the commissioner of public safety. The duties of police officers are very definitely prescribed and fixed by law. A police officer is responsible only to the head of his department, to whom has been given the power of his appointment and removal from office. R. S. Utah 1933, 15-9-9 and 15-9-21.

Whether we view this case as one in which the commissioners acted beyond the scope of their powers or as a failure on their part to regularly pursue powers con- 13, 14
ferred, the result would be the same, for under this record the commissioners admittedly directed, encouraged, advised, and co-operated in the commission of a trespass and hence are liable as joint tort-feasors.

"All persons who command, instigate, encourage, advise, countenance, co-operate in, aid or abet the commission of a trespass by another are cotrespassers with the person committing trespass and are each liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves."

26 R. C. L. § 15, p. 766-768; *Bailey* v. *Idaho Irrigation Co.*, 39 Idaho 354, 227 P. 1055.

The law is well settled that those who aid in the commission of a wrongful act by another are liable for the resulting damages, although they expected no benefits from the wrongful act and, in fact, received none. *Brumley* v. *Chattanooga Speedway, etc., Co.*, 138 Tenn. 534, 198 S. W. 775. *Breedlove* v. *Bundy*, 96 Ind. 319; *Felsenthal* v. *Thieben*, 23 Ill. App. 569; *Revert* v. *Hesse*, supra [184 Cal. 295, 193 P. 943]; *Mox, Inc.*, v. *Woods*, supra [202 Cal. 675, 262 P. 302.] *Blair* v. *Guarantee Title Co.*, 103 Cal. App. 260, 284 P. 719, 724; 62 C. J. 1129.

The plaintiffs allege that Officer Smith was actuated by malice. The defendants allege, on the other hand, that whatever they did was done in good faith and in the exercise of their best judgment as officers in the enforcement of the ordinances of Logan City. There is nothing in the record which would tend even remotely to justify the inference that the defendants were actuated by malice or any improper motives. The question of motive may be material in some cases as where the conduct is of such a character as to be qualifiedly privileged, or as involving the right to recover punitive damages. It is not as a general rule a material element to be considered in determining whether or not a legal right has been invaded. The absence of malice or the presence of a good motive does not render it any the less a tort. *Sidney Blumenthal & Co.* v. *U. S.* (C. C. A.) 30 F. (2d) 247; *Lavender* v. *Hall*, 60 Ala. 214; *McCarroll* v. *Stafford*, 24 Ark. 224; *Polar Wave, etc., Co.* v. *Alton Branch, etc., Society*, 155 Ill. App. 310; *Amick* v. *O'Hara*, 6 Blackf. (Ind.) 258; *Cumberland Glass Mfg. Co.* v. *De Witt*, 120 Md. 381, 87 A. 927, Ann. Cas. 1915A, 702; *Berry* v. *Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738; *Hoehle* v. *Allegheny Heating Co.*, 5 Pa. Super. 21; *In re Grout*, 88 Vt. 318, 92 A. 646, Ann. Cas. 1917A, 210; *Gebhardt* v. *Holmes*, 149 Wis. 428, 135 N. W. 860; 62 C. J. 1105.

The judgment of the district court is reversed and the cause remanded with instructions to grant a new trial, with costs to appellants.

ELIAS HANSEN, C. J., and FOLLAND, EPHRAIM HANSON, and MOFFAT, JJ., concur.

WOLFE, J., did not participate herein.

JOHNSON et ux. v. BRINKERHOFF et al.

No. 5640. Decided May 11, 1936. (57 P. [2d] 1132.)

1. PLEADING. More liberality will be shown in permitting amendments to pleadings filed before trial than when offered during or after trial, where parties may be taken by surprise.

2. PLEADING. Liberality should be shown in allowance of amendments to pleadings for purpose of permitting complete adjudication of matters in controversy and in furtherance of justice.[1]

3. PLEADING. Where original complaint in action for damages for deprivation of use of water was based on contract with defendants, allowance of amended complaint by which plaintiffs claimed under deed from common grantor *held* not reversible error on ground that new cause of action was introduced where both pleadings related to same subject-matter, same transaction, and damages for same wrong (Rev. St. 1933, 104-14-4).[2]

4. PLEADING. Trial court has broad discretion in matter of amendments to pleadings (Rev. St. 1933, 104-14-4).[3]

5. WATERS AND WATER COURSES. In action for damages for deprivation of use of water in which plaintiffs relied on deed and defendants on contract, insufficiency of evidence to enable reviewing court to determine meaning of contract or whether contract and deed should be considered together and failure of judgment to dispose of all of water involved required cause to be remanded for introduction of additional evidence.[4]

6. APPEAL AND ERROR. Assignment of error with respect to damages which merely stated that there was no competent evidence to justify decree *held* insufficient to authorize review.[5]

7. ARBITRATION AND AWARD. Statute providing for arbitration of disputes existing at time of making of arbitration agreements *held* not to apply to agreements to arbitrate future disputes (Rev. St. 1933, 104-36-1).

8. CONTRACTS. Where contract relating to water rights provided for arbitration of future disagreements, resort to arbitration *held* not condition precedent to right to maintain suit for damages for deprivation of use of water involved (Rev. St. 1933, 104-36-1).

Appeal from District Court, Fifth District, Millard County; *Dilworth Woolley*, Judge.

Action by Francis W. Johnson and wife against David A. Brinkerhoff and others, wherein John Hansen and wife filed a cross-complaint. Decree and judgment in favor of plaintiffs and cross-complainants, and named defendant appeals.

REVERSED AND REMANDED.

D. N. Straup and *Willard Hanson*, both of Salt Lake City, and *E. Vance Wilson*, of Fillmore, for appellant.

Skeen & Skeen, of Salt Lake City, for respondents Johnson.

W. B. Higgins, of Fillmore, for respondents Hansen.

Sam Cline, of Milford, for respondent State Bank of Millard County.

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[1] *Peterson* v. *Union Pac. R. Co.*, 79 Utah 213, 8 P. (2d) 627.

[2] *Stevens & Wallis* v. *Golden Porphyry Mines Co.*, 81 Utah 414, 18 P. (2d) 903.

[3] *Mackay* v. *Breeze*, 72 Utah 305, 269 P. 1026; *Peterson* v. *Union Pac. R. Co.*, 79 Utah 213, 8 P. (2d) 627; *Larsen* v. *Gasberg*, 43 Utah 203, 134 P. 885; *Newton* v. *Tracy Loan & Trust Co.*, 88 Utah 547, 40 P. (2d) 204; *Gibson* v. *Equitable Life Assurance Soc.*, 84 Utah 452, 36 P. (2d) 105.

[4] *Fox Film Corporation* v. *Ogden Theatre Co.*, 82 Utah 279, 17 P. (2d) 294, 90 A. L. R. 1299; *Egelund* v. *Fayter*, 51 Utah 579, 172 P. 313, 10 R. C. L. 1065.

[5] *Townsend* v. *Holbrook*, 89 Utah 147, 56 P. (2d) 610.