

1959

## State of Utah v. Jack Zimer : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Butler, Mills, Mitsunaga & Ross; A. Jerry Butler; Attorneys for Defendant and APpellant;

---

### Recommended Citation

Brief of Appellant, *State v. Zeimer*, No. 9013 (Utah Supreme Court, 1959).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3296](https://digitalcommons.law.byu.edu/uofu_sc1/3296)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

OCT 14 1959

IN THE SUPREME COURT OF THE  
STATE OF UTAH

W LIBRARY

STATE OF UTAH

Plaintiff and Respondent

vs.

JOHN ZEIMER

Defendant and Appellant

Case

No. 9013

BRIEF OF APPELLANT

Submitted by:

BUTLER, MILLS, MITSUNAGA, & ROSS

A. JERRY BUTLER

Attorneys for Defendant & Appellant

FILED  
MAY 18 1959

Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

|                            |   |
|----------------------------|---|
| PRELIMINARY STATEMENT..... | 1 |
| STATEMENT OF FACTS.....    | 1 |
| STATEMENT OF POINTS.....   | 3 |
| ARGUMENT.....              | 4 |

POINT I. The trial court committed prejudicial error in instructions numbers 2, 4, 5, 10, 12 and 13 by using such words in the instructions as would reasonably lead the jury to believe that being an habitual criminal is a crime, while as a matter of law it is a status.....4

POINT II. The trial court committed reversible error in granting a new trial as to the issue of being an habitual criminal and refusing to grant a new trial as to the primary offense resulting in a different jury trying the habitual criminal charge contrary to the procedure required by the Utah Statute.....12

|                 |    |
|-----------------|----|
| CONCLUSION..... | 26 |
|-----------------|----|

## AUTHORITIES CITED

### STATUTES

|                                         |    |
|-----------------------------------------|----|
| 76-1-18, Utah Code Annotated, 1953..... | 10 |
| 76-1-19, Utah Code Annotated, 1953..... | 14 |

|                                     |                  |
|-------------------------------------|------------------|
| Fry v Delmar,                       |                  |
| 47 Wash 2d 605, 233 P2d 850.....    | 13               |
| Jaynes v Lee, 306,                  | 12d 177.....     |
|                                     | 17               |
| People v Brown,                     |                  |
| 253 Mich 537, 235 NW 245.....       | 13               |
| People v Carver,                    |                  |
| 207 Cal 266, 273 P 357.....         | 25               |
| People v Shimovity,                 |                  |
| 237 Mich 247, 211 NW 650.....       | 3                |
| People v Collins,                   |                  |
| 117 Cal App 2d 337, 205 P2d 65 ..   | 20               |
| People v Foster,                    |                  |
| 3 Cal App 2d 35, 39 P2d 271.....    | 23               |
| People v Morton,                    |                  |
| Cal. 22, 253 P2d 100.....           | 21               |
| People v Morton,                    |                  |
| 24 Cal App 2d 531, 261 P2d 523....  | 21               |
| People v Nicholson,                 |                  |
| 34 Cal App 2d 327, 93 P2d 223,....  | 24               |
| People v William,                   | 145 P2d 366..... |
|                                     | 17               |
| People v Wilson,                    |                  |
| 116 Cal App 157, 2 P2d 543.....     | 23               |
| People v Ysabel,                    |                  |
| 28 Cal App 2d 259, 82 P2d 476....   | 24               |
| People v Hunter 1 K B 535, 30A..... | 21               |
| State v Christ,                     |                  |
| 331 Mo 605, 65 SW2d 70.....         | 12               |

|                                |    |
|--------------------------------|----|
| State v Ferrone,               |    |
| 96 Conn 140, 115 A 457.....    | 20 |
| State v [illegible],           |    |
| 320 Mo 205, 33 SW2d 210.....   | 12 |
| State v [illegible],           |    |
| 107 Utah 94, 152 P2d 33.....   | 5  |
| State v [illegible],           |    |
| 110 Utah 203, 171 P2d 333..... | 20 |
| State v Wood,                  |    |
| 2 Utah 2d 34, 268 P2d 300..... | 6  |
| Swift v Smith,                 |    |
| 119 Colo 120, 201 P2d 609..... | 16 |

#### TEXTS

|                                       |            |
|---------------------------------------|------------|
| American Jurisprudence,               |            |
| Vol. 25, part 2, 70.....              | 6, 13      |
| Corpus Juris, Vol. 16, page 1130..... | 12         |
| Corpus Juris Secundum,                |            |
| Vol. 24, pages 1143, 1167, 1168....   | 12, 13, 19 |
| Wharton's Criminal Procedure,         |            |
| Vol. 5, page 442.....                 | 13         |
| Words and Phrases,                    |            |
| Vol. 20, page 217.....                | 8          |

IN THE SUPREME COURT OF THE  
STATE OF UTAH

---

STATE OF UTAH,

Plaintiff and Respondent

vs.

No. 9013

JACK ZEIMER

Defendant and Appellant

---

---

BRIEF OF APPELLANT

---

PRELIMINARY STATEMENT

Capitalized words are ours.

STATEMENT OF FACTS

The information charging the appellant, Jack Zeimer, with the crime burglary in the second degree and with the crime of being an habitual criminal was filed in the District Court of the Second Judicial District, in and for the County of Weber, State of Utah, on July 31, 1958. The above action came on for trial on

the sixth day of November, 1958. A guilty verdict was brought back on the burglary charge. The same jury was then presented evidence of the habitual criminal charge for which they also brought back a verdict of guilty. Defense counsel then moved for a mistrial on both issues. A new trial was granted as to the habitual criminal charge but denied as to the burglary conviction. In consenting to a new trial on the limited issue of being an habitual criminal the defense attorney reserved the right to object to the severance of the issues in such a manner. Counsel quotes from page 229 of the transcript:

MR. NEWY: May the record show, though, Your Honor, before we go out there that the defendant objects to this whole hearing, that the court offered to the defendant a new trial on the last page and not upon the full trial and the defendant requested a new trial as to the entire matter including the burglary charge and the court denied the new trial as to the entire matter but did offer a new trial as to the last page which was consented to by the defendant but not waiving any of his rights later to object or waiving any of his rights as to his contention that it should be an entire new trial.

"THE COURT: It may show that the court considered the motion for a new trial on the entire case and granted a new trial only as to the second page of the information."

The habitual criminal charge was tried singly before the new jury on December 18, 1959. The jury was given instructions. Exceptions were duly taken to most of the instructions which we now cite as error. The jury brought back a guilty verdict.

### STATEMENT OF POINTS

#### POINT I

The trial court committed prejudicial error in instructions numbers 2, 4, 5, 10, 12 and 13 by using such words in the instructions as would reasonably lead the jury to believe that being an habitual criminal is a crime, while as a matter of law it is a status.

#### POINT II

The trial court committed reversible error in granting a new trial as to the issue of being an habitual criminal and refusing to grant a new trial as to the primary offense, resulting in a different jury trying the habitual criminal charge contrary to the



## ARGUMENT

## POINT I

The trial court committed prejudicial error in instructions numbers 2, 4, 5, 10, 12, and 13 by using such words in the instructions as would reasonably lead the jury to believe that being an habitual criminal is a crime, while as a matter of law it is a status.

It is elementary in this field of law that being an habitual criminal is not a crime for which you can be punished; but, it is only a status that a person assumes after committing a designated number of felonies. In Utah three felonies are required for such a status to attach. 76-1-18, Utah Code Annotated, 1953.

This concept was unequivocally established as a rule of law in *State v Russian*, 107 Utah 94, 152 P2d 86 (1944). In this case the defendant was charged in the same information with the crime of second degree burglary and with being an habitual criminal. The defendant was convicted of the burglary but not the habitual criminal charge. He appealed on the grounds that the

trial court refused to quash the information on the grounds that more than one offense was charged therein, and that there was no statutory authority permitting the joinder of the crimes of second degree burglary and habitual criminal. This court ruled that the trial court had not erred in refusing to quash the information on that grounds and effectively stated the law in the following quote taken from that case:

**"To be charged with being an habitual criminal is not to be charged with a crime. Being an habitual criminal is a status and subjects such person to a greater penalty than would otherwise be imposed for the crime with which he is charged."**

The above case also cited as authority for its contention American Jurisprudence, Vol 25, Page 260, which is quoted below:

**"The charge of being a second or subsequent offender does not involve accusation of a crime other than or separate from the offense principally charged. The statutes do not create a separate offense. The increased penalty for a second or subsequent conviction is intended to be held up as a warning to first offenders and to act as a deterrent to their criminal tendencies."**

This doctrine was reaffirmed in *State v Wood*, 2 Utah 2d 34, 268 P2d 996 (1954), in which this Court stated:

**"This court has held that being an habitual criminal is a status and not a crime."**

The controversy in the concept of status versus crime no longer prevails. It is well established that an habitual criminal has not committed a new crime but has assumed a new status. American and English authority supports this proposition. The foregoing discussion was necessary as preparatory remarks to point out the errors which were committed in the instructions and to point out the prejudicial effect of such instructions.

Counsel will now proceed to analyze each of the instructions which are contended as being prejudicial to the rights of the defendant-appellant.

In instructions numbers 2 and 10 the trial court used the word "offense" which implied to the jury that the defendant had committed a crime, when in law there is no such crime. The instructions referred to are quoted below: (R272) (R-275)

#### Instruction 2

"The mere fact that the defendant stands charged with an OFFENSE is not to be taken by you as any evidence of his guilt."

#### Instruction 10

"....Before any person may be convicted of this OFFENSE, there must be proof, independent of any such statement...."

It is generally understood that the word "offense" is interpreted as a crime. Also that "offense" is synonymous with crime. See 29 Words and Phrases 217; State v Rose, 89 Ohio St. 383, 106 NE 50; People v Chimovitz, 237 Mich 247, 211 NW 650. Thus by using the word "offense" the trial court disregarded the theory behind an habitual criminal charge and stated to the jury that the defendant stood charged with a crime.

The trial court in instructions numbers 2, 4, 10, 12 and 13 used the word "guilt" or guilty."

This was prejudicial for such words have no place in instructions on the status of being an habitual criminal. The following are the precise passages referred to:

#### Instruction 2 (R-272)

"....The mere fact that the defendant stands charged with an offense is not to be taken by you as any evidence of his GUILT."

#### Instruction 4 (R-273)

"You are instructed that you must now determine whether or not the defendant is GUILTY of being an habitual criminal. To this allegation, the defendant has entered a plea of not guilty which casts upon the state the burden of proving his GUILT beyond a reasonable doubt."

**Instruction 10 (R-275)**

**"The GUILT of a defendant may not be established alone by any confession...."**

**Instruction 12 (R-276)**

**".... It should not be considered as evidence of his GUILT or his innocence. The failure of the defendant to testify is not even a circumstance against him, and no presumption of GUILT can be indulged in by the jury...."**

**Instruction 13 (R-277)**

**"...and a man is presumed to be innocent until he is proved GUILTY beyond a reasonable doubt. And in case of a reasonable doubt as to whether his GUILT is satisfactorily shown, he is entitled to an acquittal."**

**"....you can candidly say that you are not satisfied of the defendant's GUILT, you have a reasonable doubt...."**

**"To warrant you in convicting the defendant, the evidence must, to you minds, exclude every reasonable hypotheses other than that of the GUILT of the defendant....you can reasonably explain the facts given in evidence on any reasonable ground other than the GUILT of the defendant, you should acquit him."**

**Counsel submit to the court that the word "status" should have been used in lieu of the word "guilt." That the use of the word "guilt" in the above instructions was ambiguous and uncertain and could have been reasonably construed by the jury that a crime was charged and thus was prejudicial. The statute**

in question, 76-1-18, Utah Code Annotated, 1953,  
reads to-wit:

Whoever has been previously twice convicted of felonies, sentenced and committed to any prison, shall upon conviction of a felony committed in this state, other than murder in the first and second degree, BE DEEMED TO BE AN HABITUAL CRIMINAL.

It used the words "be deemed to be an habitual criminal." It does not use the phrase "be guilty of being an habitual criminal." The word "guilt" has the connotation of being convicted of a criminal offense, thereby conveying the wrong impression to the jury.

Counsel concedes that most of the instructions referred to are the stock instructions which are usually given when a crime is being tried; but, because of the unusual nature of the habitual criminal charge the instructions should be carefully worded to fit the situation. The wording used was erroneous and prejudicial.

The trial court also erred in instructions numbers 5, 10 and 13 by using the word "convict". The use of this word again implies to the jury that this

is a criminal offense instead of a status.) In the following instructions the word "convict" was used:

**Instruction 5 (R-273)**

**"Before you may CONVICT the defendant of being an habitual criminal...."**

**"But if there is a reasonable doubt in your mind as to any of the foregoing enumerated allegations, you may not CONVICT the defendant of the status of being an habitual criminal."**

**Instruction 10 (R-275)**

**"....Before any person may be CONVICTED of this offense, there must be proof...."**

**Instruction 13 (R-277)**

**"....to warrant you in CONVICTING the defendant, the evidence must, to your minds, exclude every reasonable hypothesis...."**

The word "deem" should have been used in lieu of the word "convict". Habitual criminal statutes do not authorize any conviction on a charge of being an habitual criminal. The statutes merely prescribe punishment which is to be more severe. 16 Corpus Juris 1339. See also, Corpus Juris Secundum, Vol. 24, Page 1143, which reiterates that this type of statute does not authorize a conviction on a charge of being an habitual criminal, but merely prescribes punishment



for the subsequent offense which is to be more severe.

In *State v Cirius*, 333, Missouri 605, 56 SW2d 72, the court stated:

"These statutes do not create an offense nor authorize a conviction upon the charge of being an habitual criminal. They only provide that in case of a second conviction the penalty to be imposed upon the defendant shall be more severe because by his persistence in the preparation of crime he has evinced a depravity which merits a greater punishment."

See also *State v Hicks* 326 Missouri 885, 33 SW2d 919, which asserts the same proposition. Consequently, it is impossible to obtain a conviction under the habitual criminal statutes and it was prejudicial for the jury to be instructed that they were convicting the defendant when in law they were stigmatizing him as an habitual criminal.

In *Frye v Delmer*, 47 Wash 2d 605, 298 P2d 850, the defendant was charged with the crime of being an habitual criminal and sentenced to the Washington State Prison. A writ of habeas corpus was filed upon which the Supreme Court of Washington held that a conviction of the crime of being an habitual criminal



and judgment and sentence thereon are void for all purposes. The conviction of the crime of being an habitual criminal cannot furnish a foundation for determining that the accused has the status of an habitual criminal. A person's status cannot be founded upon a conviction of a non-existent crime.

This is precisely what happened in the present case. The jury was instructed that the defendant was charged with an offense (crime) for which he could be found guilty and for which the jury did find him guilty.

Having been convicted of a crime, the appellant's status cannot be determined except by a new trial.  
*Frye v Delmar, op cit.*

## POINT II

The trial court committed reversible error in granting a new trial as to the issue of being an habitual criminal and refusing to grant a new trial as to the primary offense resulting in a different jury trying the habitual criminal charge contrary to the procedure required by the Utah Statute.

When the trial court granted a new trial as to the habitual criminal charge, the judge failed to follow the procedure as mandatorily declared in 76-1-19, Utah Code Annotated, 1953, which reads as follows:

In charging a person with being an habitual criminal the complaint filed before the committing magistrate SHALL allege the felony committed within the state of Utah and SHALL allege the two or more convictions of felony relied upon by the state of Utah; if the defendant is bound over to the district court for trial, the district attorney SHALL set forth in the information the felony committed within the state of Utah and the two or more previous convictions of felony relied upon by the State of Utah; the jury SHALL not be told of the previous convictions of felony and the trial on the felony committed within the State of Utah SHALL proceed as in other cases; if the jury returns a verdict of guilty, then the defendant SHALL be tried forthwith by the SAME jury upon the issue of whether or not he has been previously twice convicted of felonies, unless the said defendant has entered or enters a plea of guilty to the information or indictment charging said prior convictions.

The crucial phrase counsel emphasizes is "SHALL be tried forthwith by the SAME jury." Counsel contends that this word "SHALL" is mandatory, leaving nothing to the discretion of the trial court. The trial court committed error by splitting the issues when a partial new trial was granted. When a mis-

trial is granted, the Utah statute does not make an exception to the procedure required in trying an habitual criminal. In such an instance it is clear that the trial judge would have no discretion. He must either overrule the motion for a new trial or grant a new trial to both pages of the information. In the present case the trial court disregarded the Utah statute by severing the issues, and this severance was in error. Counsel maintains that the concept of non-severability is supported by both statutory construction and case law.

Reference is first made to the statutory construction, particularly the word "shall." It will be noted that "shall" is employed six different places in the aforementioned procedural statute including the particular "shall" with which we are concerned.

It goes without saying that "shall" when used in statutory provisions is generally construed as mandatory. *People v William*, 145 P2d 366. In case of doubt, the presumption is that it is mandatory. *Swift v Smith*, 119 Cole 126, 201 P2d 609. There

seems to be little question that the other "shalls" are used in the mandatory sense and it would equally follow that the sixth "shall" with which we are particularly concerned was similarly to be construed as mandatory.

To arrive at this conclusion, one needs only to look into the context in which the other "shalls" are employed. It would be impossible to construe such words as being anything but mandatory, and it would be equally inconsistent to say that one legislature would use the word "shall" as mandatory five times in the statute and when used the sixth time it was only meant to be discretionary.

Thus, when the legislative intent is clearly indicated that the word "shall" as used in a statute or rule of procedure is intended to be mandatory, it is inconsistent with any idea of discretion and it is mandatory. *Jaynes v Lee*, 306 SW2d 182. Such intent is clearly shown in our statute.

The question might also arise that the legislature did not anticipate the problem which we now are dealing with; however, the legislature did consider it necessary to make one exception to the pre-

cedure required. This exception was that the same jury would not be required to ascertain the defendant's status if he had entered a plea of guilty. This exception appears so obvious that it would seem unnecessary to specifically state it; nevertheless, it becomes important in this case because it doubly emphasizes that the only exception to the procedure designated is in the case when the defendant pleads guilty and that no other exception of any kind was intended.

Consequently, when the procedure for charging one as an habitual criminal is proscribed by statute, it should be strictly pursued because of the serious consequences of a conviction of being an habitual criminal. *People v Brown*, 253 Mich 537, 235 NW 245. 24 Corpus Juris Secundum 1167; 25 American Jurisprudence 270; 5 Wharton's Criminal Procedure 440.

Also, a separate proceeding charging accused as an habitual criminal is criminal in nature, and in absence of waiver thereof there must be strict compliance with the statutory requirements relating to the supplementary proceedings. 24 Corpus Juris Secundum 1168.

A question might arise as to the fact that the defendant waived his right of having the same jury try both issues. In this connection reference is made to page 229 of the record which has heretofore been quoted on page 2 and 3 of this brief. Here the defendant expressly reserved all rights to object to the full procedure used by the trial court.

Consequently, taking the procedure as set forth in our statute and no waiver appearing, the action by the trial court was definitely erroneous; however, reference is made to case law to further impress this court that other jurisdiction, without the aid of such statute, has nevertheless held that trial by the same jury is necessary.

Before the present Utah statute was enacted in 1951, the Utah Supreme Court in a leading case before the court in 1956 set forth the exact procedure presently contained in 76-1-19, Utah Code Annotated, 1953, and stated that this was the only fair procedure to be used in such cases. The following is a direct quote taken from State v Stewart, 110

Utah 203, 171 P2d 383:

"If the jury renders a verdict of guilty, then the second phase of the trial should be conducted before the SAME jury unless the defendant waives a jury trial on such matters."

This rule comes from the English procedure which was endorsed by the American authorities in an early Connecticut case, *State v Ferrone*, 96 Conn 160, 113 A 457. This stands as a landmark case in the procedure field dealing with habitual criminal statutes.

It is necessary to go into another aspect of the theory behind the habitual criminal statutes to realize the importance and the necessity of such procedure. It is the defendant's insistent contention that the main offense and the habitual criminal charge are non-severable in Utah. As was announced in *People v Collins*, 117 Cal App 2d 237, 255 P2d 65:

"The whole spirit and intent of these statutes appear to be that a prior conviction charge is to be determined solely as one of the issues in the trial for the new offense."

In the English case, *Ex v Hunter*, 1 K B 555, CCA, the following was stated:



"The charge of being an habitual criminal is not a charge of a substantive offense; its only for the principal offense. It follows therefore, that there could not be separate juries trying the two issues, but that the same jury which tried the principle offense must also try the issue of the previous conviction."

The origin of the statute largely comes from our English counterparts.

A review of the authorities reveals that the cases on this point are in hopeless confusion. The diverse statutes, in effect at varying times and places, can partly explain this confusion. An example of this confusion is found in the State of California, in the case of *People v Morton*, 259 P2d 100, wherein the court delved fully into this problem and devoted a lengthy discussion on the orders which should be properly given. Although this case was subsequently modified in *People v Morton*, 41 Cal2d 636, 261 P2d 523, the discussion by the court is especially applicable to the question hereon appeal.

In the first *Morton* case the California District Court of Appeal found that the portion



of the judgement adjudicating the defendant to be an habitual criminal was based upon incompetent evidence and thus necessitated a reversal. The precise question confronting the court was:

"In view of this prejudicial error what order should be made by this court? On this question the cases are in hopeless conflict. The parties are agreed that at different times the courts of this state have solved the problem in at least four different ways."

This same question was presented to the trial court in the instant case when the trial court granted a new trial on the limited issue of being an habitual criminal. More precisely, when the defendant is convicted on the principal offense, but there is error in the conduct of the lower court concerning the habitual criminal charge, what order may be properly given. The California District Court of Appeal and also the California Supreme Court enumerated four different orders which could be given. These orders are now quoted for this court's convenience. The orders set forth were:

1. By an order setting aside the finding that the appellant has suffered the challenged prior conviction,

cating the determination that the appellant is an habitual criminal. This was done in *People v Foster*, 3 Cal App2d 35, 39 P2d 271.

The above order in effect repudiates the notion of granting a partial new trial on the limited issue of whether the appellant was an habitual criminal. This order follows the hypotheses which the appellant is advocating.

2. By an order similar to number one but adding that the cause be remanded for a partial new trial on the challenged prior conviction, and for re-sentencing in conformity with the outcome of that partial new trial. This was done in *People v Wilson*, 116 Cal App 157, 2 P2d 543, and in the second *People v Morton* case.

This solution is permissible if the issue of being an habitual criminal is severable from the main charge and can lawfully be retried by a separate and different jury other than that which tried the main issue. Whether such issues are severable would turn upon the procedural statute within the jurisdiction.

3. By an order reversing the entire former proceeding including the principal offense and the prior felonies which the habitual criminal charge was based upon. This was done in *People v Isabel*, 28 Cal App 2d 259, 82 P2d 476 and *People v Nicholson*,

This solution requires a new trial on issues not challenged by the appellant. It is predicated upon the theory of the absolute non-severability of the main guilt issue and the issue of being an habitual criminal. Although this solution would follow from what counsel is contending, counsel believes that a more equitable order can be given which would accomplish justice for both sides. In this regard, reference is made to either order number 1 or order number 4.

4. By an order reversing the finding of being an habitual criminal and remanding the cause to the trial court with instructions, to grant the District Attorney a period of time to determine whether he desires to dismiss the charge in reference to the habitual criminal in which event the trial court would resentence appellant upon the original felony of which he was convicted. Should the District Attorney not elect to dismiss the challenged prior felony or should he take no action at all within the time limited, then the trial court be directed to grant a new trial of the entire cause. This was done in *People v Chadwick* 4 Cal App 63, 87 P 384, *People v Carrow* 207 Cal 366, 278 P 857.

The above order follows the non-severability theory but lends itself to some flexibility in protecting the defendant's rights.

The court in the first Morton case then went on to state that the problem involves the precise question as to whether the habitual criminal charge is severable for trial purposes from the main charge. The court announced that there is no doubt as to the intimate relationship between the main charge and the habitual criminal charge. A discussion of the alternative orders was analyzed on the quiry as to which would logically apply. The court further stated in substance that the granting of a new trial as to the habitual criminal charge alone is a simple one and at first glance, appears fair to both parties; but, the court further emphasized that there is something logically incongruous in one jury passing upon the guilt and a different and separate jury passing upon the habitual criminal charge. Under what the court considered the best reasoned cases, the habitual criminal could not be treated as entirely separate and divisable from the charge of the main offense. The charge of being an habitual criminal cannot be made independant of the charge involving a present offense. The charge relating to the habitual

main offense. The court finally gave the order as stated in number four above.

On appeal to the California Supreme Court, the court modified the District Court of Appeal's decision in so far as stating that the issues of the main offense and the habitual criminal charge were severable and thus the Supreme Court ordered a new trial on the limited issue of the habitual criminal charge. However, this case can be distinguished from the Utah situation by virtue of the fact that California does not have a procedural statute similar to Utah. The California court pointed out that its procedure statute did not require that the same jury pass upon both issues. Counsel submits to the court that the proving of such prior conviction in Utah is a strictly statutory proceeding (76-1-19, Utah Code Annotated, 1953) and that there is no statutory authorization for passing upon the question as to whether such convictions have been suffered other than in connection with the new offense charged and by the same jury.

Under the Utah statute it is difficult to rationalize any theory except this "unity" theory

uniting the main offense and the habitual criminal charge. It is emphasized again that the other jurisdictions which ruled in favor of the "unity" theory did not have a statute similar to Utah requiring the same jury to pass upon both issues. It is difficult to conceive a more positive and mandatory language than that which is contained in the statute, 76-1-19, Utah Code Annotated, 1953. Once this "unity" theory is accepted, there can be no doubt that the trial court committed error by granting a new trial as to only one issue.

To separate the issues as was done in this case may be analogized to a trial of a person for murder before one jury, then impaneling a new one to try the mitigating or aggravating circumstances, which in turn would be the factor in deciding the sentence to be imposed. Everyone would agree that this would be improper and prejudicial. Counsel submits to the court that this is exactly what transpires when the main guilt issue is separated from the habitual criminal charge. The sole reason that a person is charged with being an habitual criminal is for the

limited purpose of enhancing the penalty to be given on the main guilt issue. It seems highly improbable that justice could be served by dividing the issues as was ordered in the present case.

### CONCLUSION

The trial court committed prejudicial error in instructing the jury that the appellant could be convicted of the crime of being an habitual criminal. The use of the words "offense" twice, "guilty" eleven times and "convict" four times in eighteen instructions was definitely prejudicial to the rights of the appellant. These words described a nonexistent crime for which the appellant was convicted.

Aside from the erroneous instructions, the entire new trial on the habitual criminal charge was erroneous for failure to follow the prescribed statutory procedure. The same jury out of necessity and practicality must try both the main offense and the habitual criminal charge. They cannot be severed without jeopardizing the defendant's rights secured by the Utah statute.



It is respectfully submitted that the faulty procedure at trial level and the erroneous instructions render the conviction erroneous, and counsel humbly requests an order by this court setting aside the finding that the defendant is an habitual criminal and remanding the case to the trial court for the proper sentencing on the second degree burglary charge.

In the alternative the appellant respectfully requests that the following order be given: That the habitual criminal charge be reversed and remanded to the trial court with instructions to grant the district attorney a period of time to determine whether he desires to dismiss the habitual criminal charge, in which event, the trial court would resentence appellant upon the second degree burglary charge or should no action be taken within the time limit (suggest 15 days), then the trial court should be directed to grant a new trial of the entire cause.

Respectfully submitted,

BUTLER, MILLS, MITSUNAGA & ROSS

A. JERRY BUTLER

Attorneys for Defendant & Appellant