1985

# State of Utah v. James D. Chambers, Stanley Ned Jacobsen and J.D. (Last Name Unknown) : Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Petitioner, | : | |
| -v- | : | Case No. 19151<br>Case No. 19152 |
| JAMES D. CHAMBERS, STANLEY NED JACOBSEN, and J.D. (last name unknown), | : | |
| Defendants-Respondents. | : | |

PETITION FOR REHEARING

PETITION FOR REHEARING IN AN APPEAL FROM CONVICTIONS OF BURGLARY AND THEFT, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, JUDGE, PRESIDING.

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## STATEMENT OF ISSUES PRESENTED IN PETITION FOR REHEARING

The sole issue presented in this petition for rehearing is whether the Court incorrectly concluded that "the statutory language [of UTAH CODE ANN. § 76-6-402(1) (1978)] should not be used in any form in instructing juries in criminal cases." State v. Chambers, Utah, ___ P.2d ___, Nos. 19151 and 19152, slip op. at 9 (filed October 21, 1985) (emphasis added) (a copy of the entire opinion is contained in the Addendum).

## STATEMENT OF THE CASE

Defendants, James D. Chambers and Stanley Ned Jacobsen, were charged with burglary, a second degree felony, under UTAH CODE ANN. § 76-6-202 (1978), and theft, a second degree felony, under UTAH CODE ANN. § 76-6-404 (1978). After a jury trial, both defendants were found guilty as charged. Each was sentenced to the Utah State Prison for a term of one to fifteen years for burglary and for a term of one to fifteen years for theft, the sentences to run consecutively.

## STATEMENTS OF FACTS

The State agrees with the fact statement set forth in the Court's opinion in State v. Chambers, slip op. at 1-2.

## SUMMARY OF ARGUMENT

In stating that the language of § 76-6-402(1) should not be used "in any form" in instructing juries, the Court appears to have concluded that a permissive inference instruction, which is not merely a verbatim recitation of the statutory language but which uses a "form" of that language, is improper. Such a conclusion is contrary to established law.

If the State is misinterpreting the Court's statement, and the Court did not intend to prohibit a permissive inference instruction regarding unexplained or unsatisfactorily explained possession of recently stolen property, perhaps the Court's opinion could be modified so as to clarify this point.

## INTRODUCTION

In Brown v. Pickard, denying reh'g, 4 Utah 292, 11 P. 512 (1886), this Court set forth the standard for determining whether a petition for rehearing should be granted:

> To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing.

4 Utah at 294, 11 P. at 512 (citation omitted). In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), the Court stated:

> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided

> all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result . . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

42 Utah at 172-73, 129 P. at 624. The argument portion of this brief will demonstrate that, based on these standards, the State's petition for rehearing is properly before the Court and should be granted.

## ARGUMENT

### POINT I

> THE COURT'S CONCLUSION THAT "THE STATUTORY LANGUAGE [OF § 76-6-402(1)] SHOULD NOT BE USED IN ANY FORM IN INSTRUCTING JURIES IN CRIMINAL CASES" APPEARS TO BE CONTRARY TO ESTABLISHED LAW.

After fully analyzing the United States Supreme Court's recent decision in Francis v. Franklin, ___ U.S. ___, 105 S. Ct. 1965 (1985), the Court in Chambers reached the inescapable conclusion that certain jury instructions that were given were unconstitutional because they either created a mandatory rebuttable presumption in violation of Franklin or could reasonably have been understood to relieve the State of its burden of proof in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). Chambers, slip op. at 4-7. However, the Court further concluded that "the statutory language [of UTAH CODE ANN.

§ 76-6-402(1) (1978)] should not be used in any form in instructing juries in criminal cases." Id. at 9 (emphasis added). This conclusion appears to be contrary to established law.

By stating that the language of § 76-6-402(1)[1] should not be used "in any form" in jury instructions, the Court appears to have decided that the following instruction, for example, even though embodying a permissive inference, rather than a mandatory or mandatory rebuttable presumption, would be unconstitutional:

> You are further instructed that one who is found to be in possession of property recently stolen, may be found to be the guilty person unless he gives a satisfactory explanation of his possession thereof.[2]

That this is what the Court actually concluded is further supported by its application of Chambers in a companion case, State v. Pacheco, Utah, ___ P.2d ___, No. 20047 (filed October 21, 1985),[3] where the Court makes quite clear that the "inference set out in section 76-6-402(1)" is not one for jury consideration, but is only applicable to the court's determination of whether a "prima facie" case has been

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[1] Section 76-6-402(1), which is simply a codification of a "traditional common-law inference deeply rooted in our law," Barnes v. United States, 412 U.S. 837, 843 (1973), reads:

> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

[2] This particular instruction was upheld in State v. Asay, 631 P.2d 861 (Utah 1981).

[3] The State is also petitioning for rehearing in Pacheco.

established. Pacheco, slip op. at 3-4. The Court apparently believed that Franklin and Sandstrom dictated such a conclusion. However, this is not consistent with Franklin, Sandstrom, or related Supreme Court decisions. See Sandstrom, 442 U.S. at 519 n. 9. Nor is it consistent with Barnes v. United States, 412 U.S. 837 (1973), which expressly held that a jury instruction permitting the inference of guilty knowledge from unexplained possession of recently stolen property, whether given pursuant to a statute or based upon the common-law inference, satisfies the requirements of due process and does not violate a defendant's privilege against self-incrimination. 412 U.S. at 846-47. Cf. State v. Sessions, 583 P.2d 44, 45-6 (Utah 1978); State v. Kirkham, 20 Utah 2d 44, 432 P.2d 638 (1967) (cases implicitly recognizing the validity of this common-law inference in the context of approving its use in burglary cases). The inference regarding possession of recently stolen property, which is often critical to the government's case, is widely accepted in both federal and state courts. See generally, Annot., 88 A.L.R.3d 1178 (1978 and Supp. 1985). Thus, it appears the Court either overlooked or misapprehended significant case law in determining that the statutory language of § 76-6-402(1) should not be used in "any form" in jury instructions.[4]

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[4] It is somewhat confusing that the Court in Chambers seemingly did not disapprove of the jury instruction upheld in State v. Asay (quoted above). Chambers, slip op. at 7. Despite the Court's observation to the contrary, the Asay instruction clearly employed the language of § 76-6-402(1). See Asay, 631 P.2d at 863. Although the words "shall be deemed prima facie evidence" were not used, a "form" of the language contained in § 76-6-402(1) obviously was used in the instruction.

If the State is misinterpreting the Court's statement that "the statutory language should not be used in any form," perhaps the Chambers opinion could be clarified. It may be that the Court did not intend for that language to be read so as to preclude the giving of an instruction similar to that given in Asay--i.e., an instruction that is not merely a verbatim recitation of § 76-6-402(1), but one that avoids the use of the term "prima facie" (or defines that term appropriately) and sets out an inference that may be drawn by the jury from the unexplained or unsatisfactorily explained possession of recently stolen property. If this is so, the current language probably should be modified in order to make that point clear. Such a clarification would, of course, cure the apparent inconsistency of the Court's statement with United States Supreme Court case law holding that this inference regarding possession of recently stolen property is constitutionally valid.

## CONCLUSION

Based upon the foregoing discussion, it appears that the Court in State v. Chambers either overlooked or misapprehended significant case law in concluding that the language of § 76-6-402(1) should not be used "in any form" in instructing juries in criminal cases. Therefore, the State's petition for rehearing should be granted and the case should be restored to the calendar for reargument or resubmission. See Utah R. App. P. 35(c) (1985).

Alternatively, if the State is misinterpreting the Court's opinion in this regard, perhaps the opinion can be

modified so as to make clear that a permissive inference instruction like that upheld in Asay is still viable under Chambers.

The State certifies that this petition is presented in good faith and not for purposes of delay.

RESPECTFULLY submitted this 4th day of November, 1985.

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CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Petition for Rehearing were mailed to the following counsel for defendants this 4th day of November, 1985:

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# ADDENDUM

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Respondent,

v.

James D. Chambers, Stanley Ned Jacobsen, and J.D. (last name unknown),
Defendants and Appellant.

No. 19151

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State of Utah,
Plaintiff and Respondent,

v.

James D. Chambers, Stanley Ned Jacobsen, and J. D. (last name unknown),
Defendants and Appellant.

No. 19152

F I L E D
October 21, 1985

Geoffrey J. Butler, Clerk

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DURHAM, Justice:

Defendants James Chambers and Stanley Jacobsen appeal from a conviction of burglary, a second degree felony under U.C.A., 1953, § 76-6-202, and theft, a second degree felony under U.C.A., 1953, § 76-6-404. We reverse the convictions and remand for a new trial.

On January 6, 1983, an informant contacted officers of the Park City Police Department and told them that a burglary had taken place in the vicinity of Park City. The informant stated that he knew who had committed the crime. Police officers met with the informant, who offered to take the officers to the residence where the stolen items were being held. At that meeting, the informant said that some of the items involved in the burglary were stereos with speakers, video cassettes, televisions, and clothing. The informant then took the officers to the residence of James Chambers. The informant also arranged a meeting between defendants and a Park City Police officer operating under cover; the purpose of the meeting was to have the undercover officer make a "buy" of some of the stolen property from defendants. On January 7, the officer, the informant, and defendants met at the informant's apartment. After some conversation in which defendants expressed concern about the possible presence of police in the area, defendants took the officer outside to a car and showed him a video cassette recorder which the officer bought for $200.

Also on January 7, a burglary was reported by a Summit Park resident, Richard Thompson. Mr. Thompson had returned home that day after a business trip and discovered that his home had been burglarized. He reported missing a Sony video cassette recorder, a cassette deck, stereo equipment, a pistol, a leather coat, and a pair of Tony Lama cowboy boots. Mr. Thompson later identified the video cassette recorder purchased from defendants as the one missing from his home.

On January 10, 1983, an officer of the Park City Police Department obtained a search warrant for defendant Chambers' residence. Defendant Jacobsen was also living in the residence at the time. Pursuant to the warrant, officers searched the home and seized one pair of Tony Lama boots and a .22 caliber pistol. At trial, Mr. Thompson identified the pistol and the boots as those stolen from his home.

Prior to trial, defendants filed a motion to suppress the evidence seized pursuant to the search warrant. They also filed a motion to require the State to disclose the identity of the confidential informant. Both motions were argued before the trial court and were subsequently denied.

At trial, defendants presented testimony which sought to establish their whereabouts at the time of the crime. Defendants also presented evidence in explanation of their possession of the video cassette recorder, the pistol, and the cowboy boots.

On appeal defendants raise five issues: invalidity of the search warrant, denial of due process by the court's failure to require the State to disclose the identity of the confidential informant, two constitutional errors in connection with jury instructions, and insufficiency of the evidence.

Defendants' first argument is that the trial court erred by not suppressing the evidence seized pursuant to the search warrant; defendants claim that the underlying affidavit was not sufficient based on the two-pronged test established in Aguilar v. State of Texas, 378 U.S. 108 (1964), and followed in Spinelli v. United States, 393 U.S. 410 (1969). Defendants concede that under the "totality of the circumstances" test articulated by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213 (1983), the affidavit would have been sufficient. However, defendants contend that the Gates test is not the appropriate test to be applied in this case, because the Gates test was prospective only. In particular, defendants rely on the following language:

> For all of these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place, we reaffirm the totality of the circumstances analysis that traditionally has formed probable cause determinations.

462 U.S. at 238 (footnote and citations omitted). It is this very language, however, that indicates that the totality of the circumstances test is the traditional analysis and that the two-pronged test was a supplementary standard which was superimposed on the traditional test. By "reaffirming" the traditional analysis, in effect, Gates stripped away certain refinements and retained the simpler totality of the circumstances test, thereby returning probable cause analysis to its traditional basis. Further, in Massachusetts v. Upton, 104 S. Ct. 2085 (1984), the Supreme Court retroactively applied the Gates test to determine the validity of a search warrant issued in September 1980, almost three years prior to the announcement of the Gates decision. We find, therefore, that the application of the totality of the circumstances test was proper here.

Defendants next contend that they were denied due process of law because the trial court failed to require the State to disclose the identity of the confidential informant. Rule 36 of the Utah Rules of Evidence, which was applicable at the time of trial, provides:

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

Utah R. Evid., Vol. 9B, U.C.A., 1953 (1977).

In State v. Forshee, Utah, 611 P.2d 1222 (1980), we said, "There are two exceptions to the general privilege of nondisclosure of an informer's identity. Disclosure is required (1) when the informer's identity is already known, and (2) when disclosure is essential 'to assure a fair determination of the issues.'" Id. at 1224 (citing from Rule 36, Utah R. Evid.). Because it was evident that the defendant in that case knew the identity of the informant, we further said:

> However, it is defendant's very knowledge of the informer's identity that further served to vitiate any prejudice that may have otherwise resulted from the lower court's failure to require disclosure. Thus, the court's failure to require disclosure of the informer's identity, in any event, is at best harmless error.

Id. at 1225 (citation omitted). From our review of the record it is equally evident that defendants in this case were aware of the identity of the confidential informant.[1] Therefore, we conclude that Forshee is dispositive and that defendants' claim is without merit.

Defendants raise two issues concerning the jury instructions that were given at trial. Defendants' claims focus on jury instruction No. 18 which contained the following:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof.
>
> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

This instruction is in part based on U.C.A., 1953, § 76-6-402(1). Defendants first contend that instruction No. 18 improperly comments upon a defendant's failure to testify and that it penalizes the accused for exercising the constitutional right to remain silent. On that basis, defendants argue that the jury instruction was improper and that the underlying statute is unconstitutional. Defendants' second claim is that the instruction shifts the burden of proof to defendants and is therefore inconsistent with defendants' rights to be presumed innocent.

Defendants' first argument, that the instruction infringes on federal Fifth Amendment rights, is not persuasive. Nothing in the instruction required testimony by defendants, because an explanation of possession could have been made by the testimony of other witnesses or by other evidence. In a similar situation, the United States Supreme Court found this argument to be without merit: "Petitioner also argues that the permissive inference in question infringes his privilege against self-incrimination. The Court has twice rejected this argument." Barnes v. United States, 412 U.S. 837, 846 (1973).[2] Therefore,

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1. The testimony of the officers about this circumstance of their introduction to the defendants, and the events in which the informant participated, make it clear that the informant was known to the defendants, and readily identifiable by them once his part in the proceedings was disclosed.

2. In Barnes, the disputed instruction included a statement that the petitioner had a right not to take the witness stand and also that evidence other than defendant's testimony could explain possession. In the instant case, the jury was only instructed on defendants' privilege to not testify. There was, however, testimony by defendant Chambers' wife which attempted to explain possession of some of the items involved in this case. Thus, the possibility of explanation provided by evidence other than defendants' testimony should have been obvious to the jury.

we conclude that defendants' argument on this point is not compelling. See also Annot., 88 A.L.R. 3d 1178 (1978) (indicating the trend established in recent cases that instructions such as the one in question do not constitute an improper comment by the court on the defendant's failure to testify, and do not violate the privilege against self-incrimination).

Defendants' second claim regarding the jury instructions is more problematic. Defendants argue that instruction No. 18 violates their rights to a presumption of innocence and improperly shifts the burden of proving innocence to defendants. Instruction No. 18 refers to a statutory presumption which links the basic fact of possession of recently stolen property, in the absence of a satisfactory explanation of possession, to the ultimate fact or conclusion that the person in possession stole the property. The presumption does not mandate a finding of guilt; it merely provides that proof of the basic fact is sufficient to serve as prima facie evidence of the ultimate fact. Inferences and presumptions are common factfinding devices whereby one fact is used to determine the existence of another fact. County Court of Ulster County v. Allen, 442 U.S. 140, 156 (1979); State v. Robichaux, Utah, 639 P.2d 207, 208 (1981). "[I]n criminal cases, the ultimate test of any [evidentiary] device's constitutional validity in a given case remains constant: the device must not undermine the fact-finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Allen, 442 U.S. at 156 (citations omitted). In their argument, defendants rely on State v. Walton, Utah, 646 P.2d 689 (1982), where this Court found reversible error based on an instruction which read, "[T]he law presumes that a person intends the reasonable and ordinary consequences of his own acts." In Walton, we followed Sandstrom v. Montana, 442 U.S. 510 (1979), which held that an identical instruction violated due process. In Sandstrom, the Supreme Court reasoned that the jury could have interpreted the presumption as irrebuttable or alternatively as requiring a high level of proof in order to rebut the presumption, thereby "effectively shifting the burden of persuasion . . . ." Id. at 517. The standard established in Sandstrom is "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in [In re] Winship [397 U.S. 358 (1970)] . . . ." Id. at 521. As the Court noted in Sandstrom, Id. at 520, In re Winship held that the due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." 397 U.S. at 364.

The United States Supreme Court has recently once again addressed the constitutionality of presumptions used in jury instructions. In Francis v. Franklin, 105 S. Ct. 1965 (1985), the Court dealt with an instruction quite similar to that held unconstitutional in Sandstrom. Using the same "threshold inquiry" as to the nature of the presumption as was used in Sandstrom, 442 U.S. at 514, the Franklin Court established that the instruction included a mandatory

presumption, i.e., a presumption which "instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." 105 S. Ct. at 1971. The Court then applied the Sandstrom standard of relief of burden of proof on an element of the crime charged. Id. On the basis of that analysis, however, Franklin extended the Sandstrom decision and found that use of any mandatory rebuttable presumption in a jury instruction is unconstitutional.

> A mandatory rebuttable presumption . . . relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous [than an irrebuttable or conclusive presumption] from the defendant's perspective, but it is no less unconstitutional.

Id. at 1972-73.

The instruction given in this case is different from the instructions found to be unconstitutional in Sandstrom and Franklin. In this case the trial court instructed the jury that possession of recently stolen property, in the absence of a satisfactory explanation, is "prima facie" evidence of theft by the person in possession of the property. Such an instruction, nevertheless, fits within the Franklin definition of a mandatory rebuttable presumption: "A [mandatory] rebuttable presumption . . . requires the jury to find the element unless the defendant persuades the jury that such a finding is unwarranted." 105 S. Ct. at 1971, n. 2.

We therefore hold that the instruction given in this case was unconstitutional. Further, although there was another instruction given, instruction No. 25, which restated the presumption in permissive form, the additional instruction failed to cure the defect. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." 105 S. Ct. at 1975 (footnote omitted). Thus, because the mandatory presumption in question directly related to the determination of defendants' guilt, we hold that defendants are entitled to a new trial.

In reaching this decision, we further note that instruction No. 18 was accompanied by another instruction which defined "prima facie." Instruction No. 19 read as follows:

> The term "Prima Facie" as used herein means, at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

(Emphasis added.) The use of the word "disproved" could well have indicated to a juror that the defendants were required to disprove guilt. An instruction which could reasonably be understood to relieve the State of its burden of proof is constitutionally defective. See Sandstrom, 442 U.S. 510, 524. Thus, the use of this instruction would itself have required reversal based on principles dictated by Sandstrom and without reference to the stricter application prescribed by Franklin.

Finally, we address the continued viability of the language of U.C.A., 1953, § 76-6-402(1). Although a jury instruction which uses the statutory language verbatim is, as we have stated, unconstitutional, we find no similar infirmity in the statute itself as the statute, properly construed, is directed to the court. In State v. Asay, Utah, 631 P.2d 861 (1981), this Court construed the function of section 76-6-402(1) and upheld an instruction which, unlike the instant case, did not use the statutory language. The Court pointed out that the statute does not affect the jury's weighing of the evidence; rather, the statute provides a standard by which to determine the sufficiency of the evidence for submitting the case to the jury. The statute may properly be used to defeat a claim by a defendant that the State has, as a matter of law, failed to establish a prima facie case against the defendant. Id. at 864; State v. Gellatly, 22 Utah 2d 149, 151, 449 P.2d 993, 994-95 (1969). This construction of the statute is consistent with our early decisions which found that giving an instruction using the term prima facie was improper, although not prejudicial where the court further instructed the jury that the State must prove guilt beyond a reasonable doubt. State v. Crowder, 114 Utah 202, 210, 197 P.2d 917, 921-22 (1948); State v. Hall, 105 Utah 162, 175-76, 145 P.2d 494, 500 (1944). In State v. Crowder, the Court said, "what constitutes a prima facie case is one for the court to determine and the jury does not pass on nor is it concerned at all with that question. . . . This statute is addressed only to the court . . . ." 114 Utah at 209-10, 197 P.2d at 921, (referring to U.C.A., 1943, § 103-36-1, unsatisfactory explanation of recently stolen property is prima facie evidence of guilt). Similarly, in State v. Hall, 105 Utah at 175, 197 P.2d at 500, the Court noted:

> The jury is not concerned with a determination of when the State has made out a prima facie case; its duty is to determine the issue of ultimate guilt.

> An instruction . . . which concerns the evidence necessary to make out a prima facie case for the State would only be confusing and might lead the jury to conclude the State had met its burden of proving ultimate guilt beyond a reasonable doubt by making out a prima facie case.

(Citations omitted.) The Court then concluded that the prima facie instruction was improper but not prejudicial in light of other instructions regarding the State's burden of proof.

In State v. Baretta, 47 Utah 479, 155 P. 343 (1916), the Court indicated that only in cases where the burden of proof shifts may juries properly be concerned with questions of what constitutes a prima facie case (i.e., civil cases). In criminal cases, however, where the burden remains on the State throughout the case, the jury should not be involved in such considerations.

> Undoubtedly, the court has to do with questions of a prima facie case whenever it withholds from, or submits a case to, the jury. But that determination . . . is one of law and not of fact . . . . So, when a case as this is submitted to a jury, they have nothing to do with questions of what is or what is not, a prima facie case . . . . They, to convict, are required to find an accused guilty beyond a reasonable doubt . . . . We think a charge, that recent possession of stolen property when the party in possession failed to make a satisfactory explanation was prima facie evidence of guilt, may do harm by singling out and emphasizing particular evidence in a cause to the exclusion of other evidence which may be of equal or greater importance, and, without further explanation or direction, may tend to convey a meaning to the jury that when such enumerated particulars are shown the burden of proof is shifted to the accused, which, if not sustained by him, requires the verdict to be cast against him . . . . So we do not see what the question of a prima facie case has to do with the jury and think the charge ought not to have been given.

47 Utah at 489-90, 155 P.2d at 346-47. (Citations omitted).

We therefore conclude that a jury instruction using the language of U.C.A., 1953, § 76-6-402(1) is unconstitutional because it directly relates to the issue of guilt and relieves the State of its burden of proof. The statute itself, however, is addressed to the court and merely provides a standard by which

to determine whether the evidence presented warrants submission to the jury. Thus, the statutory language should not be used in any form in instructing juries in criminal cases, and we expressly disavow the language and holdings of our earlier cases to the contrary.
On that basis, the statute is not constitutionally defective.

Defendants also claim that the evidence in this case was insufficient to support their convictions. Because we are remanding for a new trial, we do not treat this issue.

The judgment of conviction is reversed and the case is remanded for a new trial.

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WE CONCUR:

Gordon R. Hall, Chief Justice

I. Daniel Stewart, Justice

Richard C. Howe, Justice

Michael D. Zimmerman, Justice