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In The Supre[illegible]
of the Sta[illegible]

[illegible]TATE OF UTAH,

Pl[illegible]

-vs-

[illegible]D SAMUEL P[illegible]

D[illegible]

BRIEF [illegible]

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[illegible]trict Court [illegible]
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[illegible]torney General, State o[illegible]

[illegible]te Capitol
[illegible]t Lake City, Utah

[illegible]ttorney for Respon[illegible]

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,

-vs-

TED SAMUEL PACHECO, JR.,
Defendant-Appellant.

Case No. 12589

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is a criminal proceeding in which the defendant was charged with the crime of grand larcency by an Information filed in the District Court for the Third Judicial District in and for Salt Lake County.

DISPOSITION IN THE LOWER COURT

The appellant, Ted Samuel Pacheco, Jr., was found guilty by a jury of grand larcency on February 16, 1971, and was thereafter sentenced to the Utah State Prison on February 19, 1971, for the term prescribed by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and a new trial.

STATEMENT OF FACTS

On January 26, 1971, Cameron Peterson had a rifle stolen from his apartment in Salt Lake City. (R-113) He testified that he saw the gun when he left for work in the morning and that it was gone when he came home. (R-113) His wife, Tonya Peterson, testified that she was home all day except for the period of about 30-45 minutes when she went next door for coffee with Ardith Smith. (R. 95) She left the door unlocked because she just went next door to the adjoining apartment in the duplex unit in which she lived. (R. 95) The Petersons owned a dog that barked at everyone, but Mrs. Peterson testified that she did not hear the dog bark while she was with Ardith Smith. (R. 96) Ardith Smith was the fiancee of appellant (R. 145), who was at her apartment on January 26, 1970. (R. 95) He was working around the place, was in and out, and was working and pounding down the basement. (R. 95, 146) Appellant sold a rifle to one Bill Brown on January 26, 1970. (R. 129, 135) Bill Brown then sold it to Wayne Busey (R. 130), who later turned it over to the Salt Lake County Sheriff's Office (R. 133) in early February, 1970. This rifle was the same rifle that was stolen

from Cameron Peterson on January 26, 1970 (Exhibit 1, R. 111, 158) Appellant denied stealing the gun from the Petersons (R. 160) but said that his brother, Bob Pacheco, gave it to him on January 29, 1970, to dispose of. (R. 158) Appellant did this by selling it to Bill Brown and then turning the money over to his brother Bob. (R. 158) Appellant testified that he did not know the gun was stolen when he disposed of it. (R. 164), but that he knew Mr. Peterson had had a gun stolen on January 26, 1970, because Mr. Peterson asked him that night if he had seen anyone snooping around that day. (R. 113) Appellant told Mr. Peterson that he hadn't and that if he had the serial number of the gun, he should call the police. (R. 115, 155)

Appellant and Ardith Smith testified that on January 26, 1970 they went shopping after Mrs. Peterson left, at about 3-3:30 or 4 p.m. (R. 146, 155) Upon returning home shortly before 6:00 p.m., they saw appellant's brother Bob walking in the neighborhood. (R. 147, 155)

Upon being arrested, appellant told Officer Boswell that he sold the gun for another, and while no name was mentioned, Officer Boswell inferred that the other person was his brother Bob Pacheco. (R. 138, 139) No follow-up investigation was ever made of Bob Pacheco, even though Officer Boswell had arrested him several times for house burglaries. (R. 140, 143)

Appellant denied, upon cross-examination, that he

had told his brother about the guns in the Peterson home. (R. 167)

ARGUMENT

POINT I.

THE COURT BELOW COMMITTED PREJUDICIAL ERROR WHEN IT INSTRUCTED THE JURY ON AIDING AND ABETTING BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH AN INSTRUCTION.

It is clear that a court is not to give instructions on abstract principle of law not supported by the evidence. *State v. Chealey,* 100 Utah 423, 116 P. 2d 377 (1941); *State v. Rivenburgh,* 11 Utah 2d 95, 355 P. 2d 689 (1960); *State v. BeBee,* 110 Utah 484, 175 P. 2d 428 (1946). In *State v. Thompson,* 110 Utah 113, 170 P. 2d 153 (1946), this court stated the rule above and went on to say, 170 P.2d at 162:

> [The court is not] to instruct on any question which is not involved in the case under the evidence. We think that it cannot be too strongly emphasized that the court should apply the law to the facts as they appear from the evidence, and should instruct only on the law which has a bearing on the facts. . . .

Appellant contends that Instruction No. 20 (**R. 73**) which was excepted to by appellant (**R. 169**) should not have been given because there was no evidence to support that instruction. The instruction was given as follows:

> Under the law of this state, all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, although not present, have advised or encouraged its commission, are principals in such crime and equally liable under the law; and where two or more persons, acting with a common intent, jointly engage in the same undertaking and jointly commit an unlawful act, each is chargeable with liability and responsibility for the acts of the other, and each is guilty of the offense committed to which he has contributed to the same effect as if he were the sole offender. (**R. 73**)

The record is devoid entirely of any evidence showing, or even indicating, that appellant acted with another. The nearest thing to "evidence" that supports this theory was a question by the prosecutor: (**R. 167**)

> Q. Now assuming that, Ted, that Bob did enter the Peterson home, didn't you tell him about the guns in there?
>
> A. No.

The state's theory was clearly that appellant entered the Peterson home and took the rifle. The information as read to the jury, (R. 67) alleges appellant stole property from Mr. Peterson. The Bill of Particulars (R. 8, 11) indicates nothing other then that appellant is the one who took the rifle from Mr. Peterson. The opening statement by the prosecutor (R. 89-91) indicated nothing other than that it was appellant who took the rifle. The entire record is devoid of any evidence that appellant aided or abetted anyone, except for the challenged instruction No. 20 that was given.

In *People v. Moore,* 43 Cal. 2d 513, 275 P.2d 485 (1954), the California Supreme Court held that "an instruction which finds no support in the record, even though a correct statement of an abstract proposition of law, is improper when it finds no support in the evidence, and it is ground for reversal if it is calculated to mislead the jury." 275 P. 2d at 494. Appellant contends that in light of the circumstances, the giving of this instruction misled the jury and was prejudicial and reversable error. In *State v. Baum,* 47 Utah, 151 P. 518 (1915), the following instruction was given:

> All persons concerned in the commission of a crime whether it be a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet its commission, or not being present have advised and

> encouraged its commission, are principals in any crime so committed.

The charge there was burglary and larceny. This court pointed out that neither the pleadings nor the evidence supported the instruction. The state charged the defendant there with directly entering the building with others and taking the goods. The state claimed in its evidence that the defendant with others directly took the goods. "There was no evidence to show and no one claimed, that defendant aided or abetted in the commission of the offense, or, not being present, advised or encouraged its commission. There, hence, was no occasion to give them [the jury] that kind of a charge. Under the circumstances we think it was *misleading* and *harmful.*" 151 P. at 519 (Emphasis added). The same is true in appellant's case. This court in *Baum* dealt with other issues there, including instructions on accomplice testimony and prosecutorial misconduct, and reversed the case for the "reasons stated," not pinpointing which required reversal. In *State v. Evans,* 107 Utah 1, 151 P. 2d 196 (1944), substantially the same instruction was given as in *Baum, supra,* and as given in appellant's case. However, in *Evans,* this court pointed out that the jury had been adequately instructed as to the elements of the crime (grand larceny) and said that "In view of the instructions it seems reasonably certain that the jury believed that the defendant himself took the money. There was ample evidence to justify such a be-

lief." The jury was said not to have been confused or misled.

The circumstances of appellant's case made the instruction given prejudicial. There was no evidence directly showing that appellant entered the Peterson home, as no one was seen entering the home. Therefore, an instruction on possession of recently stolen property was warranted and was given. (R. 70) Appellant gave a satisfactory explanation of how he had possession of the stolen rifle. It is not possible to tell from the record whether the jury accepted his story as true or not; whether they found it satisfactory or not. If they did, then the jury possibly convicted on the basis of the challenged instruction No. 20. This could be based on the fact that appellant's brother was seen in the neighborhood by appellant on the day of the theft, and the jury could have been misled by this and by the challenged instruction and by the one question by the prosecutor referred to above. This is not a case like *State v. Evans, supra,* where there is "ample evidence" to justify a belief that appellant actually took the rifle. The only way appellant really could have been found guilty was on the basis of the recent possession statute and instruction or on the basis of the aiding and abetting instruction. As there is no way this court can say that the jury did not find appellant's story to be a satisfactory explanation of the recent possession, it is a distinct possibility that appellant was convicted on the basis of the chal-

lenged instruction. As such, the giving of the challenged instruction was prejudicial error and appellant is entitled to a new trial.

CONCLUSION

For the reasons above stated, that the court erred in giving an instruction not supported by the evidence, appellant respectfully submits that the case should be reversed and remanded for a new trial.

Respectfully submitted,

D. GILBERT ATHAY,

Attorney for Appellant