

JUDICIAL REVIEW OF CRIMINAL CONVICTIONS BASED ON CIRCUMSTANTIAL EVIDENCE

INTRODUCTION

Circumstantial evidence is evidence which requires the trier of fact to make inferences to establish a certain fact in dispute.¹ The Vermont Supreme Court requires that a special additional jury instruction be given if the state's evidence in a criminal prosecution is entirely circumstantial.² If the prosecution has presented no direct evidence, the trial judge must instruct the jury to acquit the defendant unless the evidence "excludes every reasonable theory consistent with the defendant's innocence."³

In addition to requiring this special instruction, the Vermont Supreme Court subjects convictions based solely on circumstantial evidence to a heightened standard of review by examining the inferences that can be drawn from the evidence presented at trial.⁴ If the court determines that a reasonable theory of innocence can be constructed from the evidence it will reverse the conviction.⁵

Part one of this note will examine the need for a separate circumstantial evidence instruction in criminal cases. Part two will discuss the consequences of using a heightened standard of judicial review of circumstantial evidence convictions if the special instruction is retained.

I. IS THE INSTRUCTION NEEDED OR DESIRABLE?

A. *Protecting the Defendant or Confusing the Jury?*

Circumstantial evidence is defined in Vermont as "that proof offered of certain facts and circumstances from which the trier of fact may, by way of a process of rational inference, conclude that

1. *State v. Angelucci*, 135 Vt. 43, 45, 373 A.2d 834, 835 (1977).

2. *See State v. Dragon*, 135 Vt. 35, 37, 370 A.2d 218, 220 (1977); note 9 *infra*.

3. *State v. Bushey*, 137 Vt. 155, 156, 400 A.2d 993, 995 (1979). The words of the instruction may vary, but it must contain the negative-exclusion concept. *See* note 9 and accompanying text *infra*.

4. *State v. Angelucci*, 137 Vt. 43, 45, 373 A.2d 834, 835 (1977).

5. *Id.* at 45-46, 373 A.2d at 834-35.

the ultimate facts in dispute existed or did not exist."⁶ Direct evidence, on the other hand, is evidence which, if believed, proves the ultimate fact in dispute or an element of the crime without inference of any other facts.⁷ Depending on the proposition to be proved, evidence may be direct evidence of one fact yet circumstantial of another.⁸

When only circumstantial evidence is presented in a criminal prosecution, Vermont common law requires that the jury be instructed to return a verdict of guilty only if the evidence excludes "every reasonable hypothesis except that the defendant is guilty."⁹

6. *Id.* at 45, 373 A.2d at 835.

7. *State v. Larose*, 138 Vt. 281, 286, 415 A.2d 210, 213 (1980). See generally C. McCORMICK, *McCORMICK ON EVIDENCE* § 185, at 435 (2d ed. 1972).

8. *State v. Larose*, 138 Vt. 281, 286, 415 A.2d 210, 213 (1980). For example, testimony that the defendant owned a murder weapon is direct evidence of ownership but is circumstantial evidence that he committed the crime.

9. *State v. Bourassa*, 137 Vt. 62, 68, 399 A.2d 507, 512 (1979) (emphasis added). Although Vermont does not currently have uniform jury instructions, the following is a circumstantial evidence instruction which will be proposed by a committee preparing such instructions for acceptance by the Vermont Supreme Court:

CIRCUMSTANTIAL EVIDENCE

All of the evidence presented here against [the defendant] has been what is termed circumstantial evidence. This means evidence of fact from which the principal fact may be inferred, the principal fact here being whether the [defendant committed the offense charged]. Circumstantial evidence is common in criminal cases, and it is common to rely upon such evidence; if it were not that the triers of fact were able to judge of the truth from surrounding circumstances, many crimes would go unpunished.

And so here, circumstantial evidence is legal and proper for you to consider, and you may convict upon this class of evidence alone, if by it you are persuaded beyond a reasonable doubt of the [defendant's] guilt. But the circumstances must be proved beyond a reasonable doubt, and must be such as will lead the guarded discretion of just and reasonable men to the conclusion that the crime was in fact committed and that the [defendant] is guilty of its commission or of participation therein. You must be careful, therefore, not to indulge in any inference that does not in your mind necessarily arise from the facts established by the evidence.

Circumstantial evidence is entitled to the same weight as direct evidence, provided it is of such a character as to exclude every reasonable hypothesis other than that the [defendant] is guilty. Therefore, if you can reconcile the evidence in this case upon any reasonable basis consistent with the innocence of the [defendant], it is your duty to do so. To convict on circumstantial evidence, the chain of evidence should be complete; it must exclude every reasonable theory consistent with the [defendant's] innocence, and mere sus-

This instruction is in addition to that required in all criminal cases that the state prove the defendant's guilt beyond a reasonable doubt.¹⁰ If direct evidence of the defendant's participation in the crime is presented only the latter instruction is required.¹¹

The primary justification for the additional circumstantial evidence instruction in Vermont is that it protects against convictions based on mere conjecture or speculation¹² because circumstantial

picion, however strong, will not take the place of evidence.

PROPOSED VERMONT PATTERN JURY INSTRUCTIONS, CRIMINAL (1980).

10. See *State v. Benoit*, 136 Vt. 431, 435, 392 A.2d 406, 408 (1978).

11. *State v. Dragon*, 135 Vt. 35, 37, 370 A.2d 218, 220 (1977). See also *State v. Bruce*, 126 Vt. 367, 231 A.2d 107 (1967); *State v. Crosby*, 124 Vt. 294, 204 A.2d 123 (1964); *State v. Gignac*, 119 Vt. 471, 129 A.2d 499 (1957). The Vermont Supreme Court recently avoided perpetuating a doctrine which would have made classification of evidence as direct or circumstantial unpredictable. The problem arose because the court had classified evidence as direct in *State v. Burclaff*, 137 Vt. 354, 359, 404 A.2d 512, 515 (1979). *Burclaff* was found guilty of attempting to break and enter a residence with intent to commit larceny. State troopers, answering a call from the residence, observed the defendant and another man standing under a street lamp approximately a mile away. At the residence the troopers found sufficient evidence to establish that someone had attempted to break in. The lock on the back door had been removed, and the troopers found a sack containing household objects taken from another residence on the back porch. They then followed footprints in the fresh snow from the residence to the street lamp where the defendant had been seen. No other tracks were observed in the area of the street lamp. In sustaining the conviction, the Vermont Supreme Court classified the footprints as direct evidence of the defendant's presence at the scene of the crime, and therefore his participation. *Id.* at 355-58, 404 A.2d at 513-15.

This classification was expressly overruled in *State v. Larose*, 138 Vt. 281, 286-87, 415 A.2d 210, 213 (1980). In *Larose*, the court cited the rule that mere presence near the scene of a crime is not direct evidence of participation in the crime. *Id.* Had the court not overruled the classification in *Burclaff*, it would have blurred the already grey line between circumstantial and direct evidence by classifying circumstantial evidence which leads to only one reasonable conclusion as direct evidence. This could have led to confusion among trial judges about whether to include the circumstantial evidence instruction, even if evidence was, in its strict sense, circumstantial. See text accompanying notes 6-8 *supra*.

The only jurisdiction which follows the *Burclaff* logic is Texas. In criminal cases in Texas, if "the facts proved are in such *close juxtaposition*, or in such close relation to [the offense charged] as to be equivalent to direct evidence . . . a charge on circumstantial evidence [is] not required." *Riggins v. State*, 468 S.W.2d 841, 843 (Tex. Crim. App. 1971) (emphasis added). For criticism of the close juxtaposition doctrine and an idea of the quagmire the Vermont Supreme Court sidestepped by overruling the *Burclaff* classification, see *Coleman v. State*, 530 S.W.2d 823, 826-27 (Tex. Crim. App. 1975) (Roberts, J., dissenting); 4 AM. J. CRIM. LAW 227 (1976).

12. *State v. Bushey*, 137 Vt. 155, 156, 400 A.2d 993, 995 (1979).

evidence cases¹³ require the jury to undertake a more complex reasoning process than is necessary in cases involving direct evidence.¹⁴ This instruction is more helpful than an instruction on reasonable doubt because it gives the jury a more specific test with which to evaluate the evidentiary inferences.¹⁵ The instruction cautions the jury "to apply the reasonable doubt standard to each phase of the inferential process involved in drawing conclusions from circumstantial evidence."¹⁶ A jury which is not given a circumstantial evidence instruction might not examine the inferential process as closely and might, therefore, return a verdict of guilty even though an equally plausible conclusion consistent with the defendant's innocence was presented by the evidence.¹⁷ A majority of state jurisdictions follows this reasoning and require circumstantial evidence instructions similar to Vermont's.¹⁸

Prevention of prejudice and partiality has also been cited as a reason for requiring the instruction. In all criminal cases, the jury must weigh the evidence presented in order to determine whether to believe it. With circumstantial evidence, it must further decide

13. The term "circumstantial evidence case" will be used in this note to refer to criminal cases in which the prosecution has not presented any direct evidence of the defendant's guilt.

14. *People v. Kennedy*, 47 N.Y.2d 201-02, 417 N.Y.S.2d 452, 454-55, 391 N.E.2d 288, 290-91 (1979).

15. The instruction may be the only safeguard in jurisdictions which do not allow the trial judge to define reasonable doubt. *E.g.*, *State v. Lasley*, 583 S.W.2d 511, 516-17 (Mo. 1979). Vermont case law does not forbid defining reasonable doubt, but the term is considered self-explanatory and nothing further is required. *State v. Marston*, 82 Vt. 250, 251, 71 A. 1075, 1076 (1909). The current practice, however, is to give an explanatory instruction. See note 53 *infra*.

16. *State v. Lasley*, 583 S.W.2d 511, 516-17 (Mo. 1979).

17. See *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 312 (1850). This theory finds support from the fictional detective, Sherlock Holmes:

"I could hardly imagine a more damning case," [Watson] remarked. "If ever circumstantial evidence pointed to a criminal it does so here."

"Circumstantial evidence is a very tricky thing," answered Holmes thoughtfully: "It may point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different."

2 A. CONAN DOYLE, THE ANNOTATED SHERLOCK HOLMES, *The Boscombe Valley Mystery* 134, 136 (2d ed. 1967).

18. See cases cited in notes 57 and 61 *infra*.

what conclusions should be drawn from the evidence it believes. By cautioning the jury, the circumstantial evidence instruction reduces the possibility that prejudice, partiality, or false deductions may influence its conclusion.¹⁹

In spite of the above reasoning, the modern trend is toward eliminating a separate circumstantial evidence instruction. All the federal circuit courts of appeals²⁰ and numerous state courts²¹ have questioned the effectiveness of a circumstantial evidence instruction and rejected its necessity. Many of these courts have relied on the leading case of *Holland v. United States*,²² wherein the United States Supreme Court dismissed the need for such an instruction. In *Holland* the court stated:

[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.

. . . Admittedly, circumstantial evidence may in some

19. *E.g.*, *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 312 (1850).

20. *United States v. Warren*, 453 F.2d 738, 745 (2d Cir. 1972); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971); *Davis v. United States*, 433 F.2d 1222, 1226 n.5 (D.C. Cir. 1970); *United States v. Francisco*, 410 F.2d 1283, 1286 (8th Cir. 1969); *Taglianetti v. United States*, 398 F.2d 558, 568 (1st Cir. 1968); *United States v. Atnip*, 374 F.2d 720, 722 (7th Cir. 1967); *United States v. Johnson*, 377 F.2d 180, 204 (4th Cir. 1964); *United States v. Nardiello*, 303 F.2d 876, 878 (3d Cir. 1962); *Continental Baking Co. v. United States*, 281 F.2d 137, 146 (6th Cir. 1960); *Sowers v. United States*, 244 F.2d 239, 239-40 (5th Cir. 1958); *Urban v. United States*, 237 F.2d 379, 380 (9th Cir. 1956).

21. *Allen v. State*, 420 P.2d 465, 467-68 (Alaska 1966); *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970); *People v. Bennett*, 183 Colo. 125, 131, 515 P.2d 466, 469-70 (1973); *Henry v. State*, 298 A.2d 327, 330 (Del. 1972); *State v. Bush*, 58 Hawaii 340, 342, 569 P.2d 349, 351-52 (1977); *State v. Wilkins*, 215 Kan. 145, 156, 523 P.2d 728, 736-37 (1974); *State v. Cowperthwaite*, 354 A.2d 173, 179 (Me. 1976); *Commonwealth v. Montecalvo*, 367 Mass. 46, 55-56, 323 N.E.2d 888, 894 (1975); *Vincze v. State*, 86 Nev. 546, 548, 472 P.2d 936, 937-38 (1970); *State v. Canney*, 112 N.H. 301, 302, 294 A.2d 382, 383 (1972); *State v. Mayberry*, 52 N.J. 413, 436, 245 A.2d 481, 493 (1968); *State v. Roddy*, — R.I. —, —, 401 A.2d 23, 34-35 (1979); *State v. Gosby*, 85 Wash. 2d 758, 767, 539 P.2d 680, 685-86 (1975); *Blakely v. State*, 542 P.2d 857, 861-62 (Wyo. 1975).

22. 348 U.S. 121 (1954). Petitioners in *Holland* challenged convictions for tax evasion based on determinations of their income through the "net worth" method. Among the challenges to the convictions was a contention that the trial court should have included a circumstantial evidence instruction because the net worth method involved only circumstantial evidence. *Id.* at 139-40.

cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.²³

Justice Hill of the Vermont Supreme Court has cited *Holland* in his dissent to a recent circumstantial evidence case, *State v. La-rose*,²⁴ in which he advocates abandoning the circumstantial evidence instruction.²⁵ Justice Hill bases a portion of his reasoning on the premise that circumstantial evidence is not intrinsically "less reliable or cogent than direct evidence."²⁶ This view is shared by many commentators who consistently oppose the proposition that circumstantial evidence is more suspect than direct evidence.²⁷ Some courts have noted that circumstantial evidence may have equal or greater weight than direct evidence.²⁸ If use of the circumstantial evidence instruction is premised on the assumption that circumstantial evidence is less reliable, the Vermont Supreme Court should reexamine the need for such an instruction.²⁹

The Court in *Holland* stated that giving a separate circumstantial evidence instruction is "confusing."³⁰ The possibility of confusing the jury by giving them two instructions on the degree of guilt required for conviction has been the primary reason given by most of the courts which have eliminated the separate circumstantial evidence instruction.³¹ Juries are instructed to determine

23. *Id.* at 139-40 (citations omitted).

24. 138 Vt. 281, 415 A.2d 210 (1980).

25. *Id.* at 289, 415 A.2d at 215 (Hill, J., dissenting).

26. *Id.* at 290, 415 A.2d at 215.

27. See, e.g., 1 F. WHARTON, CRIMINAL EVIDENCE § 6 (13th ed. 1972); 1 J. WIGMORE, WIGMORE ON EVIDENCE § 26, at 401-02 (3d ed. 1940 & Supp. 1980).

28. E.g., *Corbett v. People*, 153 Colo. 457, 460, 387 P.2d 409, 411 (1963); *People v. Eckert*, 2 N.Y.2d 126, 129, 157 N.Y.S.2d 551, 554, 138 N.E.2d 794, 796 (1956).

29. This assumption does not conform with Vermont's proposed instruction which is now widely used. See note 9 *supra*.

30. *United States v. Holland*, 348 U.S. 121, 139-40 (1954).

31. See, e.g., *State v. Cowperthwaite*, 354 A.2d 173 (Me. 1976), where the court stated: "[T]he refusal . . . to focus upon circumstantial evidence as uniquely subject to a 'negative-

whether they believe the defendant is guilty beyond a reasonable doubt and then to determine whether the evidence excludes every reasonable theory consistent with the defendant's innocence.³² Although these instructions represent the same degree of certainty,³³ the circumstantial evidence instruction may be worded so obliquely as to confuse the average juror³⁴ who may believe that a different degree of certainty is required in circumstantial evidence cases.

Justice Hill's dissent in *Larose* cites Professor Wigmore's statement that "[w]hen anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension."³⁵ This view is shared by other commentators who agree that the simpler a jury instruction is worded, the more consistently it is applied.³⁶

exclusion' evaluation may well be an avoidance, rather than the commission, of reversible error." *Id.* at 179 (citing *State v. Pike*, 306 A.2d 145, 150 (Me. 1973)).

32. *State v. Lasley*, 583, S.W.2d 511, 516-17 (Mo. 1979).

33. *Id.* See also 1 F. WHARTON, CRIMINAL EVIDENCE § 12 (13th ed. 1972).

34. For example, consider the problems a juror would encounter attempting to thread his way through the following instruction:

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE—GENERALLY

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence (as to any particular count) is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

1 CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 2.01 (4th ed. 1979).

35. *State v. Larose*, 138 Vt. 281, 290, 415 A.2d 210, 215 (1930) (Hill, J., dissenting) (citing 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2497, at 318-20 (3d ed. 1940)).

36. *E.g.*, 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTION § 8.01

Although no empirical evidence supports the theory that the circumstantial evidence instruction confuses the jury, a Florida study of veniremen supports the view that it does not aid the jury.³⁷ This study involved over one hundred persons who were summoned but not selected for jury duty.³⁸ Half of the subjects, the experimental group, was shown a videotaped jury instruction which included a circumstantial evidence instruction based on the Florida Standard Jury Instructions.³⁹ The other participants, the control group, were not given any jury instructions.⁴⁰ Both groups were then tested on the legal concepts covered in the videotaped instructions.⁴¹ Although the experimental group scored substantially higher than the control group in most aspects of the test,⁴² they showed no significant gain in comprehension regarding the treatment of circumstantial evidence.⁴³

The videotaped instructions given to the experimental group contained the same elements as the Vermont instructions.⁴⁴ The study covered two aspects of circumstantial evidence. First, it was emphasized that circumstantial evidence could be given the same weight as direct evidence.⁴⁵ Forty-three percent of the experimental group either did not understand this instruction or thought that a jury should flatly refuse to accept circumstantial evidence, view it with "extreme suspicion," or not seriously consider it when deliberating.⁴⁶ Second, the videotaped instructions stated that in a circumstantial evidence case, a verdict of not guilty should be returned if a reasonable hypothesis consistent with innocence was

(3d ed. 1977); Head, *Confessions of a Juror*, 44 F.R.D. 330, 336 (1967).

37. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976) [hereinafter cited as *Jury Confusion*].

38. *Id.* at 480.

39. *Id.*

40. *Id.*

41. *Id.*

42. Average increase in comprehension of the legal concepts by the experimental group was seventy percent. *Id.* at 480, 482.

43. *Id.* at 480-81.

44. Compare text accompanying notes 45 & 47 *infra* with text accompanying notes 6-9 *supra*.

45. Strawn & Buchanan, *Jury Confusion*, *supra* note 37, at 480.

46. *Id.* at 481.

presented.⁴⁷ Despite this instruction, twenty-three percent of the experimental group believed that if two reasonable theories were presented by the evidence, one indicating guilt and the other innocence, the defendant should be convicted.⁴⁸

The circumstantial evidence instruction has been justified not only as protecting defendants against unwarranted convictions but also as an aid to the jury.⁴⁹ The Florida study demonstrates, however, that this may not be true.⁵⁰ The study supports Justice Hill's position that the circumstantial evidence instruction "inhibits the jury from intelligibly determining what, based on their collective reasoning and experience, they believe to be a reasonable doubt."⁵¹ It is suggested that the Vermont Supreme Court follow the modern trend as reflected by Justice Hill's dissent in *Larose* and eliminate the separate circumstantial evidence instruction.

B. Alternate Instructions

The present jury instructions in circumstantial evidence cases in Vermont provide protection for defendants, but that protection is illusory. Similar protection can be given with simpler instructions. Justice Hill did not suggest an instruction which could be substituted for the present one. A possible alternative is the one given in federal jurisdictions in all criminal cases:

There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After

47. *Id.*

48. *Id.*

49. *E.g.*, *State v. Lasley*, 583 S.W.2d 511, 516-17 (Mo. 1979).

50. Strawn & Buchanan, *Jury Confusion*, *supra* note 37, at 481.

51. *State v. Larose*, 138 Vt. 281, 289, 415 A.2d 210, 215 (1980) (Hill, J., dissenting).

weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.⁵²

In addition,⁵³ a cautionary instruction similar to the following, taken from a recent Vermont Supreme Court direct evidence case,⁵⁴ could be included to warn the jury against considering improper factors:

[Y]ou are not to be influenced by suspicion, conjecture, sympathy, or an inference not warranted by facts proven to your satisfaction. . . . In reaching your decision, you should turn your common sense onto all the evidence you have heard, all the probabilities, all the inferences to be drawn from it, and decide the case.⁵⁵

These instructions will safeguard the defendant from unwarranted convictions since the jury would be required to weigh all the possible inferences and apply the reasonable doubt standard to those inferences before reaching a verdict. Accepting the theory

52. 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTION § 15.02 (3d ed. 1977).

53. This instruction would be in addition to that given on reasonable doubt. Although Vermont trial courts are not required to define reasonable doubt, see note 15 *supra*, it is customary to give an explanatory instruction on the limits of the term which warns the jury against considering improper factors:

Now, reasonable doubt does not mean a fancied doubt, but as the term implies, it means a doubt based on reason, and which is reasonable in view of all the evidence. A doubt to be reasonable must be such doubt as an honest, fairminded person might with reason entertain, consistent with the conscientious desire to figure out the truth. A vague conjecture or mere possibility of the innocence of the defendant is not enough. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. If after consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt, and you should find him not guilty.

But on the other hand, if after such impartial consideration of all the evidence you can candidly say you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt, and you should find him guilty.

PROPOSED VERMONT PATTERN JURY INSTRUCTION, CRIMINAL (1980).

54. *State v. Blakeney*, 137 Vt. 495, 408 A.2d 636 (1979).

55. *Id.* at 505, 408 A.2d at 642.

that juries apply simpler instructions more consistently,⁵⁶ the additional circumstantial evidence instruction is less desirable than an admonition against conjecture and speculation. Further, the possibility that the jury may not be aided by the circumstantial evidence instruction supports abandoning the separate treatment of direct and circumstantial evidence. It is suggested that the Vermont Supreme Court eliminate the circumstantial evidence instruction, as have the federal courts and some state courts, and substitute instructions similar to those discussed above.

II. LIMITING JUDICIAL REVIEW

A. Majority and Minority Rules

If the Vermont Supreme Court continues to require the special jury instruction, it should reexamine the scope of review it applies in circumstantial evidence cases. The majority of jurisdictions which require a circumstantial evidence instruction limit appellate review of both jury verdicts and denials of motions for acquittal.⁵⁷

56. See, e.g., Head, *Confessions of a Juror*, 44 F.R.D. 330, 336 (1967).

57. *Abbott v. State*, 256 Ark. 558, 561, 508 S.W.2d 733, 735 (1974); *People v. Atkins*, 53 Cal. App. 3d 348, 362, 125 Cal. Rptr. 855, 863 (1975); *State v. Brown*, 169 Conn. 692, 695, 364 A.2d 186, 189 (1975); *State v. Williams*, 239 Ga. 12, 13, 235 S.E.2d 504, 506 (1977); *State v. Stevens*, 93 Idaho 48, 50-51, 454 P.2d 945, 947-48 (1969); *People v. Foster*, 76 Ill. 2d 365, 373, 392 N.E.2d 6, 9 (1979); *Parks v. State*, ___ Ind. ___, ___, 389 N.E.2d 286, 290 (1979); *Carmen v. Commonwealth*, 490 S.W.2d 744, 747 (Ky. 1973); *State v. Victor*, 368 So.2d 711, 712 (La. 1979); *Streat v. State*, 11 Md. App. 543, 547, 275 A.2d 537, 539 (1971); *People v. Gonzales*, 86 Mich. App. 166, 172, 272 N.W.2d 227, 230-31 (1978); *Kitchens v. State*, 300 So. 2d 922, 926-27 (Miss. 1974); *State v. Franco*, 544 S.W.2d 533, 534-35 (Mo. 1977); *State v. Proctor*, 153 Mont. 90, 94, 454 P.2d 616, 618-19 (1969); *State v. Keeton*, 199 Neb. 405, 410, 259 N.W.2d 277, 280 (1977); *State v. Smith*, 92 N.M. 533, 538, 591 P.2d 664, 669 (1979); *State v. Schuler*, 243 N.W.2d 367, 371 (N.D. 1976); *State v. Graven*, 54 Ohio St. 2d 113, 119, 374 N.E.2d 1370, 1373-74 (1978); *Carter v. State*, 595 P.2d 1352, 1354 (Okla. Crim. App. 1979); *State v. Krummacher*, 269 Or. 125, 138-41, 523 P.2d 1009, 1014-16 (1974); *Commonwealth v. Sullivan*, 472 Pa. 129, 149, 371 A.2d 468, 478 (1977); *State v. Chandler*, 267 S.C. 138, 140, 226 S.E.2d 553, 554 (1976); *State v. Dietz*, ___ S.D. ___, ___, 264 N.W.2d 509, 510-11 (1978); *Gossett v. State*, 224 Tenn. 374, 382, 455 S.W.2d 585, 588 (1970); *State v. John*, 586 P.2d 410, 411-12 (Utah 1978); *Inge v. Commonwealth*, 217 Va. 360, 366, 228 S.E.2d 563, 567-68 (1976); *State v. Knotts*, 156 W. Va. 748, 753, 197 S.E.2d 93, 96 (1973); *Krueger v. State*, 84 Wis. 2d 272, 282-83, 267 N.W.2d 602, 607 (1978). Compare *Pittman v. State*, 360 So. 2d 1138, 1140 (Fla. Dist. Ct. App. 1978) (majority view), with *Chaudoin v. State*, 362 So. 2d 398, 399-400 (Fla. Dist. Ct. App. 1978) (minority view). Cf., *People v. Kennedy*, 47 N.Y.2d 196, 204-05, 417 N.Y.S.2d 452, 456-57, 391 N.E.2d 288, 292 (1979) (recital of the

These courts defer in all criminal cases to the jury's⁵⁸ or trial judge's⁵⁹ determination and will uphold a conviction if any reasonable theory consistent with guilt was presented at trial. The standard of appellate review under the majority rule is whether there was sufficient evidence from which the jury could have found the defendant *guilty*.⁶⁰

In contrast, a minority of the jurisdictions which require the special instruction will uphold a conviction based solely on circumstantial evidence only if the appellate court decides that no reasonable theory consistent with innocence was presented.⁶¹ Under the minority view, the appellate court determines whether sufficient evidence was presented from which the jury could have found the

minority standard although the court seems to hold according to the majority standard).

In addition to these states, the state courts cited in note 21, *supra*, will defer to the jury in all criminal cases because no distinction is made between direct and circumstantial evidence cases. See text accompanying notes 21-23 *supra*.

58. *E.g.*, *State v. Kaloustian*, 212 N.W.2d 843, 845 (N.D. 1973) (quoted in *State v. Schuler*, 243 N.W.2d 367, 371 (N.D. 1976)), where the court stated:

[T]he rule as to circumstantial evidence, at the trial level, is that such evidence must be conclusive and must exclude every reasonable hypothesis of innocence, but at the appellate level we do not substitute our judgement for that of the jury or trial court where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction.

59. *E.g.*, *State v. Chandler*, 267 S.C. 138, 140, 226 S.E.2d 553, 555 (1976) (quoting *State v. Wheeler*, 259 S.C. 571, 578, 193 S.E.2d 515, 518 (1972)):

"When a motion for a directed verdict is made, the trial judge is concerned with the existence or nonexistence of evidence, not with its weight, and although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there is evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced."

Accordingly, our review of the evidence is limited to whether it is susceptible of a reasonable inference that could have convinced a jury, properly charged on the burden of proof and the law relative to circumstantial evidence, that the appellant was [guilty of the offense as charged].

60. See note 59 *supra*.

61. See *Cox v. State*, 373 So. 2d 342, 346 (Ala. Crim. App. 1979); *State v. Simms*, 239 N.W.2d 550, 552 (Iowa 1976); *State v. Nelson*, 285 Minn. 304, 308, 173 N.W.2d 349, 352 (1969); *State v. Hill*, 41 N.C. App. 722, 726, 255 S.E.2d 757, 760-61 (1979); *Sewell v. State*, 578 S.W.2d 131, 135 (Tex. Crim. App. 1979).

defendant *innocent*.⁶² A court will examine all the inferences which can be drawn from the prosecution's evidence;⁶³ and if any of the inferences it considers reasonable are consistent with the defendant's innocence, the court will reverse the conviction.⁶⁴

The Vermont Supreme Court follows the minority rule, applying different standards of review to direct and circumstantial evidence cases.⁶⁵ The court's application of the minority standard of review is exemplified by *State v. Larose*.⁶⁶ In that case the Vermont Supreme Court reversed a conviction for burglary based solely on circumstantial evidence⁶⁷ by constructing a hypothesis consistent with the defendant's innocence which it considered reasonable.⁶⁸ Although guilt could have reasonably been inferred from the prosecution's evidence, the court outlined other inferences which could be drawn from the evidence presented at trial that were consistent with the defendant's innocence.⁶⁹

The minority rule as applied by the Vermont Supreme Court in *Larose* provides maximum protection for the defendant in a circumstantial evidence case. The justification for this approach is that circumstantial evidence requires the jury to use a more com-

62. See, e.g., *State v. Angelucci*, 135 Vt. 43, 45, 47, 373 A.2d 834, 835, 836 (1977).

63. The facts on appeal are examined "in the light most favorable to the State." *State v. Benoit*, 136 Vt. 431, 432-33, 392 A.2d 406, 407 (1978).

64. E.g., 136 Vt. at 435-36, 392 A.2d at 408.

65. E.g., *State v. Larose*, 138 Vt. 281, 285, 415 A.2d 210, 212-13 (1980).

66. 138 Vt. 281, 415 A.2d 210 (1980).

67. A woman heard a noise across the street and, looking out her window, saw someone break a store window, then enter through the break. On going outside to observe, she saw an individual leave the store through the window and join two people across the street. She identified one of the three and also stated that the person whom she had identified had not been in the store. She stated that first she had seen three people, but she was unable to account for the disappearance of one person, nor could she identify the defendant. The police went to the apartment of the identified individual. The police found that person and the defendant at the apartment, as well as a pair of sneakers belonging to the defendant which were identified as those worn by the burglar. The woman testified that the burglar was shorter than the identified person. Larose was shorter than the identified person. *Id.* at 283-85, 415 A.2d at 211-12.

68. The court hypothesized that perhaps the third individual may have been the person who broke in, while wearing the defendant's sneakers. *Id.* at 288, 415 A.2d at 214.

69. *Id.* Interestingly, this detailed explanation of alternative inferences was missing in most previous circumstantial evidence cases. See *State v. Bourassa*, 137 Vt. 62, 68-69, 399 A.2d 507, 511-12 (1979); *State v. Angelucci*, 135 Vt. 43, 47, 373 A.2d 834, 836 (1977).

plex reasoning process than does direct evidence.⁷⁰ It thus requires the appellate court to examine the inferential process the jury used to convict the defendant.⁷¹ If the court concludes that at least one theory consistent with innocence can be inferred from the record, it will reverse the conviction.⁷²

There is support for the proposition that juries may misapply the circumstantial evidence instruction. The Florida study previously discussed⁷³ indicates that a substantial percentage of jurors may not be applying the special instruction correctly.⁷⁴ Although it has been argued that the minority rule provides an effective check over this possible problem, it is unclear whether the problem results from use of unwarranted inferences or confusion which could be removed if the special instruction were abandoned.⁷⁵ Jurors may also have unwarranted prejudices against a defendant. Although prejudice may exist in any case, it has been stated that it may have a greater effect in circumstantial evidence cases because predisposition may unduly influence the inferences a juror draws from the evidence.⁷⁶ The minority approach arguably provides a check on this possible problem because the appellate court will overturn convictions based on unwarranted inferences.

There is a drawback, however, to affording the defendant maximum protection. The effect of the minority rule is to allow the Vermont Supreme Court to substitute its judgment for the jury's since it reexamines the record and the inferences to be drawn from the record. The court may then construct a hypothesis it considers reasonable and consistent with the defendant's innocence.⁷⁷ This represents an interference with the province of the jury.⁷⁸ In Ver-

70. See *People v. Kennedy*, 47 N.Y.2d 196, 201-02, 417 N.Y.S.2d 452, 455, 391 N.E.2d 288, 290-91 (1979).

71. *Id.* at 202, 417 N.Y.S.2d at 455, 391 N.E.2d at 291.

72. See, e.g., *State v. Angelucci*, 135 Vt. 43, 46-47, 373 A.2d 834, 835-36 (1977).

73. See text accompanying notes 37-50 *supra*.

74. See text accompanying notes 47-48 *supra*.

75. See notes 30-36 and accompanying text *supra*.

76. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 312 (1850).

77. *E.g.*, *State v. Benoit*, 136 Vt. 431, 435, 392 A.2d 406, 408 (1978).

78. "It is for the jury to determine whether the evidence is believable and, if believed, what weight to accord it." *State v. Ryan*, 135 Vt. 491, 493, 380 A.2d 525, 526 (1977).

mont the jury is given the duty to determine the credibility of a witness and the relative weight to give each piece of evidence in criminal prosecutions.⁷⁹ In direct evidence cases this determination is final if a reasonable theory of guilt was presented, even if a theory consistent with innocence could also be constructed from the evidence.⁸⁰

The majority rule is founded on the premise that the jury is in the best position to determine whether a hypothesis is reasonable. A theory reasonable on the face of the record may have been unreasonable when presented to the jury. Demeanor of witnesses and the manner in which evidence is presented may exclude some inferences from consideration by the jury. An appellate court may focus on these discarded inferences and construct a theory of innocence which might not have seemed reasonable to that court if it had seen the presentation of evidence. The Vermont Supreme Court should consider allowing the jury to decide what inferences may justifiably be drawn from the evidence because the jury has seen its presentation.

This would not remove judicial protection of defendants in circumstantial evidence cases. Defendants must move for a judgment of acquittal to preserve for appeal the issues involved in a circumstantial evidence prosecution.⁸¹ The trial judge must rule on this motion using the same standard applied by the jury and the Vermont Supreme Court.⁸² Trial judges are not as likely to be influenced by undue prejudice as jurors may be. Unlike the jury, the trial judge cannot be said to be confused by the complexities of the inferential process because it is his duty to know the proper application of circumstantial evidence. In addition, unlike the appellate court, he has observed the demeanor of witnesses and the presen-

79. See *id.* (direct evidence), and *State v. Bourassa*, 137 Vt. 62, 68, 399 A.2d 507, 512 (1979) (circumstantial evidence).

80. *E.g.*, *State v. Ryan*, 135 Vt. 491, 493, 380 A.2d 525, 526 (1977).

81. No question will be reviewed by the Vermont Supreme Court unless the trial court had the opportunity to rule on that question. *State v. Bressette*, 130 Vt. 321, 322, 292 A.2d 817, 818 (1972).

82. The motion must be granted if the judge believes a reasonable theory of innocence can be constructed from the state's evidence. See *State v. Larose*, 138 Vt. 281, 285, 415 A.2d 210, 212-13 (1980) (quoting *State v. Benoit*, 136 Vt. 431, 432-33, 392 A.2d 406, 407 (1978)).

tation of evidence. He is in a better position than an appellate judge to determine whether a reasonable theory of innocence has been presented and must grant an acquittal if he believes reasonable persons could construct a reasonable theory of innocence.⁸³ The Vermont Supreme Court should defer to the trial judge's decision because it provides protection against unwarranted convictions without interfering with the province of the jury at the appellate level.⁸⁴

Under the current standard of appellate review, jury convictions in circumstantial evidence cases will inevitably be appealed because the Vermont Supreme Court reviews and redecides the issue of reasonable doubt. Demeanor of witnesses decreases in importance because the court does not have another presentation of evidence. The chances for reversal thus increase because more possible hypotheses will appear reasonable when review is limited to the record.

The preferable approach is to discontinue use of a separate circumstantial evidence instruction and treat direct and circumstantial evidence cases identically at the trial level.⁸⁵ If, however, the instruction is perpetuated, the Vermont Supreme Court should adopt the approach used by a majority of jurisdictions and treat direct and circumstantial evidence cases identically on appeal. The Vermont Supreme Court would then review any criminal conviction to determine "whether all of the evidence—whatever its character—would fairly and reasonably support a finding of guilt beyond a reasonable doubt."⁸⁶

B. *The Scope of Limited Review*

Deference to the trial judge and the jury would not foreclose appellate review but rather limit reversals to cases where the state

83. See, e.g., *State v. Benoit*, 136 Vt. 431, 432-33, 392 A.2d 406, 407 (1978).

84. The Vermont Supreme Court would then apply the standard used in reviewing direct evidence cases: "We are bound to uphold the judgment of the court below unless we find that there was no credible evidence presented which would justify a guilty verdict." *State v. Ryan*, 135 Vt. 491, 493, 380 A.2d 525, 526 (1977).

85. See text accompanying notes 20-56 *supra*.

86. *State v. Burclaff*, 137 Vt. 354, 359, 404 A.2d 512, 515 (1979).

did not present a reasonable theory of guilt.⁸⁷ Recently, in *State v. Senner*,⁸⁸ the Vermont Supreme Court used the minority circumstantial evidence standards to overturn a conviction although the same result could have been reached under the deferential majority standard. The prosecution's theory in *Senner* was that the defendant had participated in the purchase of a large quantity of marijuana and planned to aid in its sale.⁸⁹ This theory was based on evidence that he had rented a house with another individual and had associated with persons who were in the house when the marijuana was found there.⁹⁰ The defendant, however, was not in the house when the marijuana was found, nor had he been for the previous twenty-four hours.⁹¹ The state did not present any direct evidence of actual or constructive possession of the marijuana.⁹²

Although the Vermont Supreme Court used the circumstantial evidence standard of review,⁹³ it relied on two previously established rules of law which, when applied to the facts of the case, would compel the conclusion that the state had not presented any reasonable theory of guilt.⁹⁴ In reversing *Senner's* conviction, the court first stated that "the mere finding of illegally possessed goods on a person's premises without a showing that that person consciously possessed them *will not justify an inference of guilt* where many others had free access to the goods."⁹⁵ Secondly, the court also noted that mere association with persons allegedly involved in criminal activity "*does not support an inference of involvement.*"⁹⁶

The prosecution's theory, that the defendant had constructive

87. See, e.g., *State v. Hotte*, 129 Vt. 260, 263-64, 276 A.2d 492, 494 (1971).

88. 137 Vt. 415, 406 A.2d 378 (1979).

89. *Id.* at 416-19, 406 A.2d at 379-80.

90. The persons in the house when the marijuana was found included the defendant's wife, his child, and the co-tenant. The defendant had previously rented motel rooms with the co-tenant. *Id.*

91. *Id.* at 420, 406 A.2d at 380-81.

92. *Id.* at 418, 406 A.2d at 379.

93. *Id.*

94. *Id.* at 420-21, 406 A.2d at 381.

95. *Id.* at 421, 406 A.2d at 381 (citations omitted) (emphasis added).

96. *Id.* (emphasis added).

possession of the marijuana and planned to aid in its sale, was plausible. The Vermont Supreme Court, however, has ruled as a matter of law that these and other factual situations do not support a reasonable theory of guilt.⁹⁷ Thus the inferences which the prosecution sought to establish were unreasonable. Under the majority standard of review the conviction would have been reversed because the prosecution did not offer any direct evidence to rebut the inference of innocence drawn as a matter of law.⁹⁸ An appellate court following the majority standard would have discarded the theory of guilt not because another theory consistent with innocence had been presented or could be inferred, but because the inferences underlying the prosecution's theory were unreasonable and therefore insufficient to support a conviction.

The majority approach provides adequate protection against convictions based on unwarranted inferences. Discarding the minority rule would not foreclose judicial review. If the distinction between circumstantial and direct evidence cases is maintained, the Vermont Supreme Court should adopt the majority view and defer to the trial judge and jury unless the state did not present a reasonable theory of guilt.

CONCLUSION

The requirement for a separate instruction in criminal cases based solely on circumstantial evidence is well established in Vermont. The current trend, however, is toward eliminating such an instruction. Although a majority of state jurisdictions still requires a separate circumstantial evidence instruction, a growing number of courts has eliminated it, questioning its necessity and citing the possibility of jury confusion in its application. Juries can be instructed against relying on unwarranted inferences without the separate circumstantial evidence instruction. The problem of jury confusion has been stated in commentaries and cited by Justice Hill of the Vermont Supreme Court as a reason for eliminating the

97. See *State v. Dupaw*, 134 Vt. 451, 455, 365 A.2d 967, 969 (1976); *State v. Boudreau*, 111 Vt. 351, 362, 16 A.2d 262, 266 (1940).

98. See, e.g., *Pryor v. State*, 239 So. 2d 911, 912-13 (Miss. 1970).

instruction. Eliminating the separate instruction in circumstantial evidence cases and requiring an instruction on reasonable doubt in all criminal cases is the preferable approach.

If the circumstantial evidence instruction is perpetuated, appellate review of the decisions of the trial judge and the jury should be limited. Deference should be given to the trial judge and the jury because they observe the presentation of the evidence and the demeanor of the witnesses. The Vermont Supreme Court should discard the minority rule of heightened appellate review. The majority approach of treating direct and circumstantial evidence identically on review provides adequate safeguards against convictions founded on unwarranted inferences. The Vermont Supreme Court should limit reversals of convictions to cases where the theory of guilt presented by the prosecution was unreasonable. This would provide a more defined structure for appellate review, yet ensure that unwarranted inferences are not the basis of convictions.

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