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EVIDENCE—Abrogating the Cautionary Instruction in Criminal Prosecutions Relying Substantially on Circumstantial Evidence. *Blakeley v. State*, 542 P.2d 857 (Wyo. 1975).

The general rule that whatever may be established by direct or testimonial evidence in a criminal case may also be established by indirect or circumstantial evidence has achieved nearly universal recognition in American courts.¹ The rule is founded upon principles of necessity. Crimes frequently occur in areas where no observers are present, and the difficulty encountered in obtaining a confession from an accused often leaves circumstantial evidence as the sole mechanism by which a conviction may be obtained.² Substantial disagreement has surfaced on the issue of how to instruct the jury in terms of circumstantial evidence and the reasonable doubt standard, the goal being to protect the criminally accused from jury speculation and conjecture.³ The disagreement centers upon the necessity for a "cautionary instruction" regarding indirect or circumstantial evidence.⁴

In 1954, the United States Supreme Court held in *Holland v. United States*⁵ that in criminal prosecutions relying substantially on circumstantial evidence the jury instructions should equate the probative value of circumstantial evidence with that of direct evidence.⁶ Courts adopting the *Holland* doctrine have generally expressed concern as to the unrestricted application of the rule and to that end have adopted safeguard instructions to protect the accused.⁷

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1. *Brumley v. State*, 96 Okl. Cr. 91, 249 P.2d 471, 473 (1952); *Corbett v. People*, 153 Colo. 457, 387 P.2d 409, 411, cert. denied 377 U.S. 939 (1963). See 1 WIGMORE, EVIDENCE §§ 24-25, at 396-401 (3d. ed. 1970), equating the probative value of direct and circumstantial evidence.
2. *Corbett v. People*, supra note 1, at 411.
3. *Dill v. State*, 437 P.2d 459, 461 (Okl. Cr. 1968).
4. In a number of courts, it is held that in a criminal case where conviction must rest substantially on circumstantial evidence the court must instruct the jury that the proven facts and circumstances must not only be consistent with the theory of guilt but also must be inconsistent with any other rational conclusion. See *State v. Davis*, 69 Idaho 270, 206 P.2d 271, 274 (1949); *Brumley v. State*, supra note 1, at 473; *People v. Kolb*, 174 C.A.2d 102, 344 P.2d 316, 319 (1959). The instruction is properly termed a "cautionary" instruction. *State v. Norton*, 17 Ore. 296, 133 P.2d 252, 262 (1943).
5. 348 U.S. 121 (1954).
6. *Id.* at 140.
7. Within this Note four instructions will be discussed in terms of practice under *Holland v. United States*. For purposes of clarity, the instructions are briefly explained at this point:

Blakeley v. State

Howard Blakeley was charged with feloniously misbranding livestock, in violation of Section 11-564 of the Wyoming Statutes.⁸ Upon trial Blakeley was found guilty by a jury and sentenced. The conviction was founded substantially upon circumstantial evidence.⁹

Defendant charged three errors of the trial court on appeal to the Wyoming Supreme Court, two of which are material to the discussion in this Note: (1) the trial court erred in refusing to give defendant's instruction cautioning the jury not to utilize evidence giving rise to mere suspicion or conjecture; and (2) the trial court erred in refusing to include with the cautionary instruction on circumstantial evidence the words "to the exclusion of all others".¹⁰

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- a. The "burden of proof instruction": this instruction is uniformly given in criminal cases. The instruction merely informs the jury as to legal presumptions and as to the party upon whom falls the burden of proving certain facts in the case.
 - b. The "reasonable doubt" instruction: this instruction is used to guide the jury in its evaluation of the evidence produced at trial. The instruction indicates the standard of proof under which a conviction may be returned. This instruction is either given by a full, definitional explanation of the term "reasonable doubt", or by merely establishing the standard without elaboration on its meaning.
 - c. The "cautionary instruction" regarding circumstantial evidence: typical of this instruction is the one used by the trial court in the principal case: In this case the State is relying solely on circumstantial evidence and you are instructed it is a well-established rule of law that, where circumstantial evidence alone is relied upon, the circumstances when considered together must point clearly and conclusively to the guilt of Howard Blakeley and exclude every reasonable hypothesis other than that of guilt.

Blakeley v. State, 542 P.2d 857, 861 (Wyo. 1975).

- d. The *Holland* instruction: on the basis of *Holland v. United States*, *supra* note 5, a number of courts now use an instruction similar to the following:

There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial evidence. . . . 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. . . . After 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.

1 DEVITT AND BLACKMAR, FEDERAL JURY INSTRUCTIONS § 11.02 (Supp. 1975).

8. WYO. STAT. § 11-564 (Supp. 1975).
9. Although the Wyoming court does not indicate substantial reliance on circumstantial evidence explicitly, the conclusion is inferred from the court's treatment of the defendant's assignments of error. *Blakeley v. State*, *supra* note 7, at 861.
10. The trial court gave the instruction regarding circumstantial evidence quoted in paragraph c of note 7, *supra*.

The Wyoming court affirmed the conviction, indicating that the instruction regarding circumstantial evidence was consistent with prior standards established by the court. However, the court further held that in a criminal case the cautionary instruction regarding circumstantial evidence is unnecessary, tends to confuse the jury, and is no longer to be used in Wyoming, thereby overruling a long series of Wyoming cases sanctioning the instruction.¹¹

THE *Blakeley* COURT'S REASONING

The court had very little difficulty in affirming the conviction on the basis of the traditional treatment of circumstantial evidence in Wyoming. As for the circumstantial evidence instruction given by the trial court, the Wyoming court held the language to be consistent with the holding of *Mulligan v. State*.¹² The court indicated that the proposed instruction warning the jury against using evidence giving rise to suspicion or conjecture would have been an attempt to define reasonable doubt, a practice prohibited by *Cosco v. State*.¹³ The court also found that an instruction imploring the jury to "exclude all reasonable doubt of the Defendant"¹⁴ adequately barred the jury from suspicion and conjecture.¹⁵

The pivotal reasoning of the opinion concerns the court's repudiation of *Mulligan* and earlier decisions sanctioning the use of the cautionary instruction regarding circumstantial evidence. Without hearing arguments on the issue, the majority adopted a rule that is gaining popularity in both federal and state courts. Relying on the *Holland* rule, the court held that a cautionary instruction regarding circumstantial evidence is not to be given where a proper instruction on reasonable doubt is utilized.¹⁶

11. *Id.* at 863. In a vigorous dissent, McClintock, J., indicated that no argument was heard by the court as to the need for repudiating prior Wyoming decisions concerning the circumstantial evidence instruction. *Id.* at 867 (McClintock, J., dissenting).

12. 513 P.2d 180, 181 (Wyo. 1973). *Mulligan* and the treatment of circumstantial evidence in a narcotics prosecution are discussed in Note, *Can You Be Busted For Your Roommate's Pot?* 9 LAND & WATER L. REV. 237 (1974).

13. 521 P.2d 1345, 1346 (Wyo. 1974).

14. See the reasonable doubt instruction discussed *supra* note 7.

15. *Blakeley v. State*, *supra* note 7, at 861.

16. *Id.* at 862.

Holding that circumstantial evidence must not be measured upon a different basis than direct evidence, the court reasoned that circumstantial evidence must not be given inferior status in a criminal prosecution.¹⁷ Inferentially the court indicates that the cautionary instruction tends to unnecessarily isolate circumstantial evidence with the result that such evidence is relegated to an inferior evidential status.

The theoretical basis for the new Wyoming rule is that it is the function of the reasonable doubt instruction to define the parameters by which evidence, both circumstantial and direct, is to be evaluated by the jury.¹⁸ The conclusion of the court was that the reasonable doubt instruction makes the cautionary instruction on circumstantial evidence unnecessary and, furthermore, giving only the former tends to mitigate much jury confusion in the evaluation of circumstantial evidence. Expressly overruling the inconsistent position taken in *Mulligan*, the Wyoming court sanctioned the federal pattern instruction that embodies the *Holland* rule.¹⁹

PRE-*Blakeley* TREATMENT OF CIRCUMSTANTIAL EVIDENCE

Prior to the *Blakeley* decision Wyoming courts, operating under the proposition that in a criminal prosecution evidence creating a mere probability of guilt is insufficient to sustain a conviction,²⁰ uniformly held that proof of a criminal charge by circumstantial evidence must be consistent with any theory of the defendant's guilt and inconsistent with any other reasonable conclusion.²¹

The acceptance of circumstantial evidence in Wyoming was reflected in a series of standard instructions that were given regarding such evidence. Three instructions were utilized as the burden of proof instruction, and the instruction setting forth the reasonable doubt standard was augmented by an instruction indicating that circumstantial evidence

17. *Id.* at 861-62.

18. *Id.* at 861.

19. See the *Holland* instruction, *supra* note 7.

20. *State v. Rideout*, 450 P.2d 452, 454-55 (Wyo. 1969).

21. *Mulligan v. State*, *supra* note 12, at 181.

must be inconsistent with any reasonable hypothesis of innocence.²² It was held to be reversible error for the trial court to refuse the cautionary instruction when a prosecution was founded wholly or substantially on circumstantial evidence.²³

Use of all three instructions prior to *Blakeley* was internally consistent. The burden of proof instruction served to indicate to the jury what presumptions were to be considered during deliberation. The reasonable doubt instruction served to guide the jury's evaluation of the evidence. This instruction, however, was severely proscribed by *Cosco*, holding that the term "reasonable doubt" is self-explanatory and that any attempt to elaborate on the meaning of the term is likely to produce jury confusion, resulting in reversible error.²⁴ *Cosco*, in effect, prohibited the trial court from giving a "definitional" instruction as to the meaning of reasonable doubt. Finally, the cautionary instruction on circumstantial evidence served to protect the accused from jury speculation, in effect supplementing the reasonable doubt instruction. The pre-*Blakeley* treatment of circumstantial evidence and instructions regarding such evidence was consistent with the practice of a majority of the state courts.²⁵

Holland v. United States

In the past two decades a number of state courts and all federal courts have abandoned the pre-*Blakeley* practice of instructing the jury with regard to circumstantial evidence under the doctrinal justification of *Holland v. United States*. The essence of the *Holland* doctrine is that the probative value of direct and circumstantial evidence is not to be distinguished. Specifically, the United States Supreme Court held that

22. *Gardner v. State*, 27 Wyo. 316, 196 P. 750, 751 (1921); *Mares v. State*, 500 P.2d 530, 538 (Wyo. 1972).

23. *Thompson v. State*, 41 Wyo. 72, 283 P. 151, 157 (1929); *State v. Paulas*, 74 Wyo. 269, 286 P.2d 1041, 1046 (1955); *Ballinger v. State*, 437 P.2d 305, 309 (Wyo. 1968).

24. *Bentley v. State*, 502 P.2d 203, 206 (Wyo. 1972); *Cosco v. State*, *supra* note 13, at 1346.

25. *State v. Norton*, *supra* note 4, at 262; *People v. Kolb*, *supra* note 4, at 319; *Dill v. State*, *supra* note 3, at 461.

when an adequate instruction on reasonable doubt is given,²⁶ the cautionary instruction on circumstantial evidence must be abandoned. The presumption underlying the *Holland* doctrine is that an adequate instruction on reasonable doubt fulfills the function of the cautionary instruction and results in much less jury confusion in evaluating direct and circumstantial evidence.²⁷

The *Holland* Court specifically approved the use of three instructions. The burden of proof instruction is used to fulfill the same policy as it promoted in the pre-*Blakeley* era in Wyoming. The Court approved a reasonable doubt instruction that not only set the standard of evaluation for purposes of conviction, but also elaborated on the meaning of the term "reasonable doubt".²⁸ The function of this instruction was both to guide the jury's evaluation of the evidence and to provide an insight into the meaning of the standard, the goal being to limit jury speculation.²⁹ Finally, the Court provided the groundwork for an instruction specifically equating the probative value of direct and circumstantial evidence.³⁰ The function of this new *Holland* instruction was to ensure that circumstantial evidence was not relegated to an inferior status.

CIRCUMSTANTIAL EVIDENCE UNDER *Blakeley*

By way of *Blakeley v. State* the Wyoming court has adopted the *Holland* doctrine and, thus, has abandoned the use of the cautionary instruction regarding circumstantial evidence. The impact of Wyoming's adoption of *Holland* can best be found by way of examination of how other jurisdictions practice under *Holland*.

A jurisdiction adopting the *Holland* doctrine ought to heed the Supreme Court's expressed concern for the unre-

26. Elaboration of what will suffice as an "adequate instruction on reasonable doubt" has caused substantial disagreement among the courts. See cases cited note 33 *infra*.

27. *Holland v. United States*, *supra* note 5, at 140.

28. *Id.* at 140. The reasonable doubt instruction was as follows: "... the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon."

29. *Id.* at 140.

30. See the *Holland* instruction, *supra* note 7.

stricted application of the *Holland* rule. The Court recognized that the dangers inherent in criminal prosecutions founded solely on circumstantial evidence are not to be lightly considered.³¹ The Court suggested a number of safeguard instructions to be used in conjunction with the *Holland* instruction as alternatives to the cautionary instruction.³² The practice of other jurisdictions that have adopted *Holland* is essentially a function of how these safeguards are utilized at the trial level.

One practice under the *Holland* standard allows full definitional explanation of the reasonable doubt standard. State courts practicing under *Holland* have expressed nearly universal concern as to the adequacy of the reasonable doubt instruction which is used to replace the cautionary instruction on circumstantial evidence.³³ Upon abrogating the cautionary instruction, both federal and state courts have been very careful to ensure that the reasonable doubt standard is fully developed within the context of instructions.³⁴ This practice, using the burden of proof instruction, the *Holland* instruction, and a fully definitional reasonable doubt instruction, is consistent with the recognized policy under *Holland* of providing maximum protection of an accused from potential jury speculation and conjecture, since the reasonable doubt instruction is expanded to fulfill the function of the cautionary instruction.

The alternative of expanding the reasonable doubt instruction to replace the cautionary instruction is presently unavailable in Wyoming, as *Cosco* clearly prevents any elaboration of the meaning of "reasonable doubt" in Wyoming courts.³⁵ The accused must look elsewhere for protection against jury speculation.³⁶

31. *Holland v. United States*, *supra* note 5, at 129.

32. *Id.* at 140.

33. *Vince v. State*, 86 Nev. 546, 472 P.2d 936, 937 (1970); *State v. Wilkins*, 215 Kan. 145, 523 P.2d 728, 737 (1974); *State v. Murphy*, 323 A.2d 561, 565 (R.I. 1974); *State v. Jackson*, 331 A.2d 361, 365 (Me. 1975).

34. See cases cited note 33 *supra*.

35. *Cosco v. State*, *supra* note 13.

36. Admittedly, the Wyoming court argues that the term "reasonable doubt" serves without further explanation, to establish the standard so clearly as to limit the potential for jury speculation. However, the fact that numerous other jurisdictions require a definitional instruction in terms of reasonable doubt in the effort to supplant the cautionary instruction would appear to cast serious doubt as to this position.

The second option under the *Holland* doctrine is to simply hold that the *Holland* rationale as to the equality of direct and circumstantial evidence in terms of probative value is not inconsistent with the giving of the cautionary instruction on circumstantial evidence. Under this practice, the court would use four instructions: the burden of proof instruction, the nondefinitional reasonable doubt instruction, the cautionary instruction on circumstantial evidence, and the *Holland* instruction. This approach has been adopted in California.³⁷

The practice of maintaining the cautionary instruction after accepting the *Holland* rule has substantial appeal for a jurisdiction that disallows a definitional reasonable doubt instruction. Once the policy of protecting the accused from speculation is accepted, the recognition of the need to warn the jury against such speculation is not illogical. The difficulty focuses upon the issue of whether the *Holland* doctrine is inconsistent with the cautionary instruction. Allowing both instructions serves to stress the lack of distinction in the probative value of direct and circumstantial evidence and further serves to mitigate the fears of the *Holland* Court by supplementing the reasonable doubt instruction with the cautionary instruction. The experience of California furthers the position that the *Holland* doctrine and the cautionary instruction are not necessarily incompatible.

The practice of using the cautionary instruction in conjunction with the *Holland* instruction is, however, expressly rejected in the *Blakeley* decision. The Wyoming court adopted the view that the two instructions are inconsistent and precluded the use of the cautionary instruction.³⁸

37. CALIFORNIA JURY INSTRUCTIONS—CRIMINAL §§ 2.00-2.01 (1970). The instructions appear to sanction an instruction similar to the federal instruction discussed *supra* note 17, in conjunction with a cautionary instruction that is indistinguishable from the Wyoming circumstantial evidence instruction.

38. *Blakeley v. State*, *supra* note 7, at 863. The concurring opinion argues that the cautionary instruction is inconsistent with the *Cosco* limitation on reasonable doubt instructions, thus sacrificing the policy of protecting the accused from jury speculation from the outset. *Blakeley v. State*, *supra* note 7, at 864 (Thomas, J., concurring).

Wyoming is precluded from either alternative that is open to jurisdictions adopting the *Holland* rule. The course to be followed in the post-*Blakeley* era is clear: the Wyoming court has sanctioned the *Holland* instruction at the sacrifice of both the cautionary instruction regarding circumstantial evidence and a definitional instruction regarding the reasonable doubt standard. The result is that the Wyoming trial courts must give only the *Holland* instruction, the burden of proof instruction, and the nondefinitional reasonable doubt instruction. In effect, the *Holland* instruction must stand alone, unaided by the cautionary instruction or the definitional reasonable doubt instruction.³⁹

POST-*Blakeley* PROTECTION AGAINST SPECULATION

The impact of *Blakeley* follows as a matter of course from the position taken by the Wyoming court in terms of instructing on circumstantial evidence. The Wyoming court rejected the view that express instructions are needed to protect the defendant from jury speculation and conjecture. Wyoming has joined a procession of jurisdictions in expressly recognizing the equality of the probative values of direct and circumstantial evidence. *Blakeley*, however, leaves little room to doubt that the second policy consideration of protecting the accused from speculation has been entrusted to the silence of the reasonable doubt instruction.

The potential effect of entrusting the protection from speculation and conjecture to an instruction that is silent on the meaning of reasonable doubt is great. Certainly the jury will no longer hear the court's admonition in terms of speculation. The potential of conviction on evidence that requires a certain degree of speculation cannot be overlooked in the post-*Blakeley* era. The Wyoming court expresses the thought that *Blakeley* does not alter the standard of appellate review in criminal cases.⁴⁰ It is submitted that the reasonable doubt instruction presently utilized in the state and the standard

39. *Id.* at 863.

40. *Id.*

of review defined in *Harris v. State*⁴¹ are insufficient to foreclose the potential for conviction upon evidence that would not have convicted before *Blakeley*.

CONCLUSION

Although circumstantial evidence has long been recognized as a necessary and valuable tool in obtaining criminal convictions, the courts have also recognized the need to protect a criminally accused from jury speculation. *Holland* indicates the need to equate the probative value of circumstantial evidence with that of direct evidence. Courts adopting *Holland* have generally expressed concern as to the unrestricted application of the rule and to that end have adopted safeguard instructions to protect the accused.

The Wyoming court adopted *Holland* without hearing arguments as to the desirability of adopting the rule or as to adequate safeguards that should accompany its adoption. *Blakeley* represents the Wyoming court's adoption of *Holland* without provision for safeguards expressly approved by the United States Supreme Court. The decision represents a major departure from traditional Wyoming practice regarding circumstantial evidence. The controls on jury speculation and conjecture that had previously been utilized in Wyoming have largely been abrogated in the *Blakeley* decision. The *Cosco* reasonable doubt instruction and the *Harris* standard of appellate review are the sole safeguards available to a criminally accused whose conviction rests substantially on circumstantial evidence. The adoption of *Holland* in other jurisdictions indicates that these safeguards are insufficient to accommodate the interests of the accused under the *Holland* decision.

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41. 487 P.2d 800, 801 (Wyo. 1971). The standard given by the Wyoming court is as follows:

In passing upon the sufficiency of the evidence to support a verdict of guilty an appellate court will not weigh conflicting evidence nor consider the credibility of the witness; and it must view the evidence in a light most favorable to the prosecution and determine questions of law as to whether there is substantial evidence, direct or circumstantial, or both, which, with the reasonable inferences that may be drawn therefrom, will sustain the verdict.