Supreme Court No. 89836-7
COA No. 44267-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

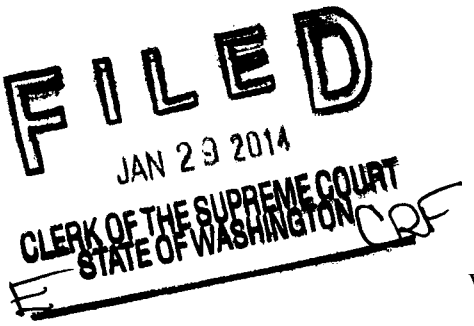
Respondent,

v.

MIKHAIL M. MIKERIN,

Petitioner.

PETITION FOR REVIEW



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A. IDENTITY OF PETITIONER/DECISION BELOW

Mikhail M. Mikerin requests this Court grant review pursuant to RAP 13.4 of the Court of Appeals commissioner's ruling affirming the judgment and sentence (filed November 5, 2013), and the order denying motion to modify (filed December 27, 2013), in State v. Mikerin, No. 44267-1-II. A copy of the commissioner's ruling is attached as Appendix A and a copy of the order denying the motion to modify is attached as Appendix B.

B. ISSUE PRESENTED FOR REVIEW

In a criminal trial, does a "to-convict" instruction that informs the jury that it has a duty to return a verdict of guilty if it finds the elements have been proved beyond a reasonable doubt, violate a defendant's right to a jury trial when there is no such duty under the state and federal constitutions? Does the case present a significant question of constitutional law?

C. STATEMENT OF THE CASE

In February 2012, Jeffrey Leever was living in a house in a rural area of Olympia with his wife and 21-year-old son. RP 11, 39, 44. Mr. Leever is a painting contractor. RP 14. One morning, he left home at around 7:30 or 8 a.m. to go to a job. RP 11-12. His son was still at

home when he left. RP 39. Mr. Leever returned home at around 10:15 because he had forgotten something. RP 12. As he drove up the driveway to the garage, he noticed a 1989 Cadillac de Ville blocking the garage doors. RP 14, 112. Mr. Leever parked and got out of his car and walked toward the back door of the house. RP 15. As he did so, he saw two men walking from around the front of the house toward him. RP 15. One of the men was Mr. Mikerin and the other was Mr. Mikerin's friend, Stefan Godilo. RP 28, 112.

Mr. Mikerin had recently bought the Cadillac, which needed new engine mounts. RP 112. He contacted a man who advertised engine mounts on Craigslist. RP 112. The man's address was close to Mr. Leever's. RP 113. Mr. Mikerin and Mr. Godilo thought Mr. Leever's house might be the one they were looking for. RP 115. They had knocked on the door and, when no one answered, they walked back to their car. RP 118. At that point, Mr. Leever arrived. RP 118.

Mr. Leever approached the men and asked what "was up." RP 26. Mr. Mikerin said they were looking for car parts. RP 119. He said they were lost and needed directions to I-5. RP 26, 120. Mr. Leever gave them directions to I-5 and they drove away. RP 30.

Mr. Leever said he went into the house through the back door and saw that the front door was open. RP 31. Mr. Mikerin said the front door was closed when he and Mr. Godilo left and that they had not gone in the house. RP 123-24. Mr. Leever noticed that the television, which was usually found in his son's room upstairs, was on the floor at the bottom of the stairs. RP 31, 34. He also noticed that the doors to a cabinet were open. RP 31. Nothing else in the house was out of place or disturbed. RP 48.

Mr. Leever ran back outside and noted the license plate number of the Cadillac. RP 31-34. He called 911 and gave them the license plate number and a description of the car. RP 34-35. Soon afterward, police stopped the Cadillac on I-5 and arrested Mr. Mikerin and Mr. Godilo. RP 63-64. Police dusted Mr. Leever's house for fingerprints but did not find any. RP 55.

Mr. Mikerin was charged with one count of residential burglary, RCW 9A.52.025(1). CP 6.

At trial, the jury was instructed:

> It is your duty to decide the facts of this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide

have been proved, and in this way decide the case.

CP 40. In addition, the "to-convict" jury instruction stated:

> To convict the defendant, MIKHAIL M. MIKERIN, of the crime of residential burglary, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 23, 2012, the defendant, or an accomplice, entered or remained unlawfully in a dwelling;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, *then it will be your duty to return a verdict of guilty.*
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 55 (emphasis added).

The jury found Mr. Mikerin guilty of residential burglary as charged. CP 61, 63.

Relying on earlier decisions, but without further discussion, the Court of Appeals affirmed. Appendix A.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

WHETHER MR. MIKERIN WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BECAUSE THE "TO-CONVICT" INSTRUCTION TOLD THE JURY THAT IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY" IF IT FOUND EACH ELEMENT PROVED BEYOND A REASONABLE DOUBT PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

The right to a jury trial in a criminal case is one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It is the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, ¶ 3; U.S. Const. amends. VI, VII.

In criminal trials, the right to a jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of a crime, but was also an allocation of political power to the citizenry:

> the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked

> power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156.

In Washington, citizens enjoy an even stronger guarantee to a jury trial. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). Because this Court has already determined that the state constitution provides greater protection for jury trials than the federal constitution in some circumstances, a full Gunwall[1] analysis is no longer necessary to determine whether a claim under article I, section 21 warrants an inquiry on independent state grounds. Id. at 896 n.2. The question instead is "whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result" under the circumstances of the case. State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009). To answer the question, the Court "examine[s] the constitutional text, the historical treatment of the interest at stake as disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." Id.

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[1] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

The text of Washington's constitution is different from the federal constitution, suggesting the drafters meant something different from the Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984). Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001).

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." In comparison, the drafters of our state constitution not only granted the right to a jury trial, in article I, section 22 ("In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . ."), they expressly declared it "shall remain inviolate." Const. art. I, § 21. The term "inviolate" has been interpreted to mean:

> deserving of the highest protection. . . . Applied to the right to trial by jury, this language indicates that the right

> must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

Article I, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). As such, the right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

Additionally, the framers added other constitutional protections to this right. The right to jury trial is protected by the Due Process Clause of article I, section 3. Also, a court is not permitted to convey to the jury its own impressions of the evidence. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

In State v. Meggyesy, 90 Wn. App. 693, 701, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), Division One concluded there is no constitutional language that specifically addresses

how the jury must be instructed. But the language that is present indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

State common law history also supports the conclusion that the jury instruction was unconstitutional. Article I, section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Sofie, 112 Wn.2d at 645; Pasco, 98 Wn.2d at 96. Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (Wash. Terr. 1885). In Leonard, the trial court had instructed the jurors that they "should" convict and "may find [the defendant] guilty" if the prosecution proved its case, but that they "must" acquit in the absence of such proof. Leonard, 2 Wash. Terr. at 398-99. The word "should" in jury instructions is permissive, while the word "must" indicates a mandatory duty. State v. Smith, 174 Wn. App. 359, 366-67, 298 P.3d 785 (2013). Thus, the common law practice was to instruct the jury that they were *required* to acquit upon a failure of proof, and were *permitted* to acquit even if the proof was sufficient. Leonard, 2 Wash. Terr. at 398-99.

Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction." Meggyesy, 90 Wn. App. at 703. But Leonard shows that, at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The current practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

An accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103 (1986), aff'd, 110 Wn.2d 403, 736 P.2d 105 (1988) ("In a jury trial the determination of guilt or innocence is solely within the province of the jury under proper instructions."); see also State v. Christiansen, 161 Wash. 530, 534, 297 P. 151 (1931) ("In our opinion the denial to a jury of the right and power to bring in a verdict of acquittal in a criminal case is to effectually deny to the one being tried the right of trial by jury."); State v. Holmes, 68 Wash. 7, 13, 122 P. 345 (1912) (trial court may not, directly or indirectly, direct verdict of guilty in criminal case). This rule applies even if the jury ignores applicable law. See, e.g., Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) ("the jury may find a general verdict compounded of law and fact, and if it is

for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy").[2]

The jury's power to acquit is substantial and the jury has no duty to return a verdict of guilty. As shown below, there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, so there can be no "duty to return a verdict of guilty."

A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to a fair trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

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[2] This is likewise true in the federal system. See, e.g., United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) ("We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence.").

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. V; Const. art. I, § 9. A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally, Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874). A judge cannot direct a verdict for the State because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the

jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982); see also State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror and is therefore erroneous. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

This is not to say there is a right to instruct the jury that it may disregard the law in reaching its verdict. That was the concern of this Court in affirming the jury instructions at issue in State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005) ("The power of jury nullification is not an applicable law to be applied in a second degree burglary case."). But although a court may not affirmatively tell a jury that it may disregard the law, it also may not instruct the jury that it *must* return a verdict of guilty if it finds certain facts to be proved.

Moreover, if such a "duty" to convict exists, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge is dismissed, and there is no further review. In contrast, if a jury convicts

when the evidence is insufficient, the court has a legally enforceable obligation to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; but it *may* return a verdict of guilty even if it finds every element proven beyond a reasonable doubt.

The duty to acquit and permission to convict is well-reflected in the instruction given to the jury in Leonard:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you *must* acquit.

Leonard, 2 Wash. Terr. at 399 (emphases added). This was the law as given to the jury in this murder trial in 1885, just four years before the adoption of the Washington Constitution. This practice of allocating power to the jury "shall remain inviolate." Const. art. I, § 21.

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict:

> In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

WPIC 160.00. The due process requirements to return a special verdict—that the jury must find each element of the special verdict proven beyond a reasonable doubt—are exactly the same as for the elements of the general verdict. This language in no way instructs the jury on "jury nullification." But at the same time, it does not impose a "duty to return a verdict of guilty."

In contrast, the "to-convict" instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. It provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, 2 Wash. Terr. at 398-99; State v. Boogard, 90 Wn.2d 733, 737-38, 585 P.2d 789 (1978) (holding questioning of individual jurors in presence of other jurors, with respect to each juror's opinion

regarding jury's ability to reach verdict within a half hour, unavoidably tended to suggest to minority jurors that they should "give in" for sake of goal of reaching verdict within a half hour, thus depriving defendant of his constitutional right to fair and impartial jury trial).

"The right to a fair and impartial jury trial demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury." Boogard, 90 Wn.2d at 736-37. The judge may not pressure the jury into making a decision. If there is no ability to review a verdict of acquittal, no authority to direct a verdict of guilty or coerce a jury in its decision, there can be no "duty to return a verdict of guilty."

Although the jury may not strictly determine what the law is, nonetheless it has a role in applying the law of the case that goes beyond mere fact-finding. In United States v. Gaudin, the Court rejected limiting the jury's role to merely finding facts. Historically, the jury's role has never been so limited.

> Juries at the time of the framing [of the Constitution] could not be forced to produce mere "factual findings," but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence.

515 U.S. at 513. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." Id. at 514.

Meggyesy does not analyze the issue presented here. In Meggyesy, Division One held the federal and state constitutions did not "preclude" this language and so it affirmed. Meggyesy, 90 Wn. App. at 696. In its analysis, the Court characterized the alternative language proposed by the appellants—"you *may* return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699. The Court concluded there was no legal authority requiring the trial court to instruct a jury that it had the power to acquit against the evidence.

Meggyesy's analysis addressed a different aspect of the issue than is presented here. "Duty" is the challenged language here. By focusing on the proposed remedy, Meggyesy side-stepped the underlying issue raised by the appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

Portions of the Meggyesy decision are relevant, however. The opinion acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of

general verdicts. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (citations omitted). The Court also relied in part upon federal cases in which the approved "to-convict" instructions did *not* instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. Id. at 698-99 nn. 5, 6, 7. These concepts support Mr. Mikerin's position and do not contradict the arguments set forth here.

But Meggyesy ultimately looked at the issue through the wrong lens. The question is not whether the court is required to tell the jury it may acquit despite finding each element has been proved beyond a reasonable doubt. The question is whether the law ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury that it does. An instruction that says the jury has such a duty impermissibly directs a verdict. See Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (judge may not direct verdict for State, no matter how overwhelming the evidence).

Unlike the appellant in Meggyesy, Mr. Mikerin does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be

affirmatively misled. This question was not addressed in Meggyesy; thus the holding of Meggyesy should not govern here.

The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instructions did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to accept the law, and that it was their "duty" to return a verdict of guilty if they found the elements were proved beyond a reasonable doubt. CP 40, 55. The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury it could not acquit if the elements had been established. Smith, 174 Wn. App. at 366-67. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

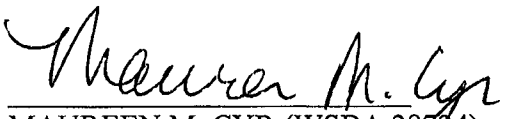
By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Mr.

Mikerin's state and federal constitutional right to a jury trial.[3] Accordingly, his conviction must be reversed and the case remanded for a new trial with proper instructions.[4]

E. CONCLUSION

Because Mr. Mikerin was denied his constitutional right to a jury trial when the jury was instructed it must convict if it found the elements beyond a reasonable doubt, the conviction must be reversed and remanded for a new trial with proper instructions.

Respectfully submitted this 27th day of January, 2014.



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[3] Mr. Mikerin may challenge this manifest constitutional error in the jury instructions for the first time on appeal. See State v. O'Hara, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009); RAP 2.5(a).

[4] Erroneously instructing the jury that it must convict if it finds the elements beyond a reasonable doubt is structural error. See Smith, 174 Wn. App. at 790-91; United States v. Gonzalez-Lopez, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (denial of right to trial by jury by giving defective reasonable doubt instruction is structural error); Sullivan, 508 U.S. at 277.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MIKHAIL M. MIKERIN,

Appellant.

No. 44267-1-II

RULING AFFIRMING JUDGMENT AND SENTENCE

Mikhail Mikerin appeals from his conviction for residential burglary. CP 61. He argues that the trial court violated his constitutional right to a jury trial when it instructed the jury that if it found all of elements of the crime had been proved beyond a reasonable doubt, "then it will be your duty to return a verdict of guilty." Clerk's Papers (CP) at 55. He contends that no such duty exists and to give such an instruction misleads the jury into thinking it has such a duty. This court set his appeal as a motion on the merits to affirm under RAP 18.14. Division Three of this court recently rejected the arguments made by Mikerin. *State v. Wilson*, 2013 WL 4176077 *2 (Aug. 15, 2013) (citing *State v. Meggyesy*, 90 Wn. App. 693, 701, 958 P.2d 319 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn. 2d 156, 110 P.3d 188 (2005) (Division One), and *State v. Brown*, 130 Wn. App. 767, 771, 124 P.3d 663 (2005) (Division Two)) and *State v. Gonzalez*, 2013 WL 4400105 (Aug. 15, 2013) (citing *Meggyesy* and *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998) (Division Two)).

An appeal is clearly without merit when the issue on review is clearly controlled by settled law. RAP 18.14(e)(1)(a). Because *Wilson* and *Gonzalez* clearly control Mikerin's argument, his appeal is clearly without merit. Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Mikerin's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 5th day of November, 2013.

E B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Maureen M. Cyr
Carol La Verne
Hon. Lisa L. Sutton
Mikhail M. Mikerin

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

MIKHAIL M. MIKERIN,
Appellant.

No. 44267-1-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated November 5, 2013, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 27th day of December, 2013.

PANEL: Jj. Hunt, Bjorgen, Maxa

FOR THE COURT:

Maxa, J.
PRESIDING JUDGE

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44267-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Carol La Verne, DPA [Lavernc@co.thurston.wa.us]
Thurston County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 27, 2014

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Court of Appeals Case Number: 44267-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: **maria@washapp.org**

A copy of this document has been emailed to the following addresses:

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